



***From complex fragments to competitive
consumer-focused markets***

**Submission in response to Review of
Governance Arrangements for Australian
Energy Markets: Issues Paper**

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1. Executive Summary

1.1 Overarching remarks on the state of Australian Energy Markets

The creation of the National Electricity Market (NEM) was a major achievement in terms of enabling consumers in the eastern states to purchase electricity from a wholesale market via a large interconnected grid stretching from northern Queensland to southern Tasmania and west to South Australia. It made sense to balance supply and demand across this region, rather than having electricity largely confined to provision within state boundaries. It was a project focused on efficiency and lower costs for consumers and it was a nation-building project.

However, as a result of flaws (anticipated and not) in the legislative framework and institutional arrangements and changes made over subsequent years, the NEM now has systemic weaknesses in both regulatory and market outcomes that need careful consideration and significant amendment.

The Public Interest Advocacy Centre's (PIAC's) overarching conclusion is that *the governance of Australian Energy Markets is fragmented, overly complex, not sufficiently focused on competition and lacking in meaningful consumer representation*. We come to this conclusion based on both our many years of experience as consumer advocates and the research we have commissioned for this submission.¹

This submission will put the case for this statement both in general terms and in the detail of the role, operation and responsibilities of the Energy Council and three market bodies. It will also make the case that the guiding instruction in the NEM, the National Energy Objective (NEO) is no longer appropriate, and indeed is defective and in need for reform.

Over the last decade electricity and gas prices in Australia have gone from being some of the lowest in the developed world to being close to the highest, with little tangible improvements to service offerings for consumers. Due to regulatory and market failures, consumers are now effectively much paying more for the same service.

High energy prices have been destructive to the productivity of the Australian economy as well as having adverse consequences for residential consumers. They have also been one of the reasons for the rapid and continuing uptake of household solar pv systems (currently on 1.4 million Australian homes). PIAC is especially concerned about the consequences of high prices for low-income and vulnerable consumers, many of whom are now simply unable to afford continuous access to energy. Disconnection due to non-payment in NSW has doubled over five years to 33,000 households in 2014. This equates to around 130 families per weekday being cut-off by electricity retailers in NSW alone.

To put the case in general terms, the legislative framework and institutional arrangements are fragmented as a result of the way in which the creation of the NEM has only been a partial

¹ Dr Gabrielle Appleby, University of New South Wales, 'Accountability in the National Energy Market'
Penelope Crossley, University of Sydney, 'Review of Institutional Governance arrangements of the National Electricity Market'
Bruce Mountain, Carbon + Energy Markets, 'Bifurcation in the economic regulation of network service providers in the National Electricity Market'
Bruce Mountain, Carbon + Energy Markets, 'The inclusion of environmental protection in the National Electricity Objective'.

transition from energy being the domain of state governments. It is now an inconsistent mix of roles and responsibilities across state and Commonwealth governments, state and Commonwealth laws and regulations, public and private operators of generation, networks and retailers – with different levels of accountability and customer participation in each of these areas.

It is not simply that the arrangements are complex, but that they are so fragmented and lacking in coherence. This complexity does not serve the consumer (in theory, the ultimate beneficiary of the system). Indeed, it could be argued, as the Productivity Commission did, that the beneficiaries of the arrangements have primarily been state governments:

In many respects, the central deficiency in the governance of the NEM is parochialism. Notwithstanding that the creation of the NEM was intended to create a nationally coherent energy market, state and territory governments have exercised control over critical areas important to the efficiency of the network. These areas have included: licensing arrangements; transmission planning; network reliability and safety; retail pricing and other features of the retail market; and in Queensland, New South Wales and Tasmania, ownership of the network businesses. At times, jurisdictional arrangements have not been in the interest of consumers, nor met other desirable principles of governance, such as transparency.

Consumers are disenfranchised in almost every aspect of Australian energy markets. They are particularly disenfranchised in policy-making with no seat at the COAG Energy Council (COAG EC) table. This is compounded by the lack of transparency around COAG EC processes, including derogations to Standing Councils of Officials (SCO). At the next level down, consumers are disenfranchised in the Australian Energy Market Commission's (AEMC's) rule making processes, again, in particular because there is no representation of their interests at the decision-making table. PIAC endorses the Productivity Commission's view that, 'While the objective of the National Electricity Law is to meet the long-term interests of consumers, the involvement of consumers in the processes of the NEM has been partial and intermittent'² and the accompanying Crossley report details evidence on lack of consumer initiated rule changes as one example of this. In network determinations, consumer prioritisation is again limited by a lack of representation (the Australian Energy Regulator (AER) has appropriately made it clear its role is not to advocate for consumer interests) and also by the extraordinary complexity of the process. Similar lack of representation and complexity issues arise in the functioning of the Australian Energy Market Operator (AEMO).

Appleby found that '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.'³ In addition, Appleby found a lack of accountability and review mechanisms available to consumers in practice (even if they exist in theory).

In this submission PIAC outlines in detail what it sees as the multiple significant regulatory and market failures in Australian Energy Markets that have manifested in high prices for consumers. The most serious and well documented of these is the failure of network regulation since 2006 when regulation transferred to the new rules (under the AEMC) and revenue determinations

² Productivity Commission, 'Electricity Network Regulatory Frameworks', (Report No. 62, 2013).

³ See, eg, Visy submission to the Productivity Commission, extracted in the Productivity Commission, *Electricity Network Regulatory Frameworks*, Report No. 62 (2013) 786, see also extracts of submissions on page 789.

(under the AER). One significant result of this failure is the excessively high value of the Regulated Asset Bases (RABs) (particularly of government-owned networks) when compared with other jurisdictions internationally.

Supply-side infrastructure ‘investment conditions’ are shown to be the dominant criteria for rule making (also related to the dominance of state government interests) and in the processes of the market operator (AEMO). The supply-side bias is evidenced by, for example, the lack of Demand Management (DM) undertaken by network businesses and the lack of a Demand Response Mechanism (DRM) in the wholesale market.

There is some gaming of the wholesale market, as evidenced by the three rule changes attempting to ‘fix’ elements of these games.

There are significant and well-documented failures in accountability to consumers of the COAG Energy Council and the energy market institutions. Appleby’s report details these against the criteria of participation, transparency, review/appeal mechanisms, independent oversight, and democratic oversight. Crossley’s report highlights particular issues with the operation of the Energy Council, including in comparison with other COAG Councils.

Further, there is a major failure of national consistency in retail regulation, which barely exists given National Energy Consumer Framework (NECF) derogations and Victoria having separate retail laws. There is also the issue in regard to the concentration of gentraders in the market (i.e. reduced competition), and the specific case of competition in Victoria having increased the retail component of prices.

Given the scale and speed of the transformation currently underway, there is a need for a fresh streamlined approach, especially to setting market rules. There is a danger that otherwise Australia will miss out on productivity gains that would result from more rapid adoption of new technologies and services. PIAC’s concern is that the energy market institutions and the governance of Australian energy markets favour incumbents at the expense of competition from emerging players (and we outline some of the barriers to innovation and therefore competition).

PIAC believes that the Governance Review is timely and vital, given the transformation underway in the Australian energy markets. It provides an opportunity to make changes that enable future innovation and avoid lock in of out-dated systems and business models. As will be discussed in detail later in this submission, the consumers that PIAC represents are keen to see Australian Energy Markets evolve to meet the challenges of the current century and facilitate access to innovative energy services.

1.2 Ways forward for Australian Energy Markets

Given the systemic weaknesses of regulatory and market outcomes outlined above and the general features of arrangements that might be held to be defective, PIAC’s view is that there is an urgent need *to deregulate, consolidate and reduce complexity in order to enhance competition*, especially in given the transformation underway in Australian energy markets. PIAC believes partial changes are unlikely to address the systemic weaknesses, especially given that unbalanced nature of the rule making. These changes must be accompanied by *enhanced consumer representation, as well as generally making the governance arrangements more democratic, transparent and accountable*.

1.2.1 Re-examine the NEO

PIAC finds that the over-riding instruction in the NEM, the National Electricity Objective (NEO) (and its counterparts in the retail and gas markets) are narrow and out of date. The case is made here and in Mountain's report that economic objectives should include emissions reduction, as in all comparable international jurisdictions. PIAC's view is that the guiding instructions of Australian Energy Markets should reflect consumers' interests recognised broadly, including social and environmental objectives. As is clear from Crossley's research, it would be consistent with international practice to include social and environmental objectives like affordability and focus on total cost of energy services, not merely 'price' (treated as price per unit of energy) which is just one element of consumer benefit.

1.2.2 Give consumers a seat at the table

Across the COAG Energy Council and energy market institutions there is a need to enhance consumer representation. Consumers have access to consultation mechanisms, but (other than in the case of the recently established Energy Consumers Australia), no representation in decision-making in the NEM. PIAC's recommendations across the institutions to give consumers a seat at table where significant policy decisions are made include:

- establishing a Consumer Advisory Committee for COAG EC;
- requiring consumer representatives to sign off on rule changes (and if they cannot agree, for this function to revert to the COAG EC);
- requiring energy market institutions to have Commissioners and Directors who have knowledge of, or experience in, consumer protection and demand side participation, and
- considering approaches that enhance formal representation of consumers in network determinations such as negotiated settlements (as recommended by the Productivity Commission).

1.2.3 COAG Energy Council (COAG EC)

PIAC is very conscious of the challenges of federalism in energy policy. There is very little cooperative policy-making currently as in large part the COAG Energy Council has left the rule maker to make policy (as the Productivity Commission noted) and what policy-making there is has been extraordinarily slow. Another issue is that sometimes there are disconnected policy processes across COAG EC, AEMC and AER on the same or similar topics. PIAC agrees with the Productivity Commission that moving towards more conventional policy making is necessary and further, that it is urgent.

PIAC suggests the Governance Review Panel considers options for reforming the governance of the NEM, including which processes are most effectively the responsibility of state governments and which are most appropriately national responsibilities. PIAC cautiously agrees that, in the current circumstances, the COAG Energy Council is the appropriate body to make policy and take crucial decisions on behalf of consumers in the NEM, but only if consumer representation, democratic accountability and transparency are improved. A variety of transparency and accountability measures (including making agendas and work plans publicly available) are recommended. In order to speed up decision-making, the Council should not rely on consensus, but vote when required.

Further, the AEMC's policy-related work (including reviews) should be transferred back to the COAG Energy Council as the pre-eminent policy maker, consistent with the Productivity

Commission's recommendations. Also COAG EC has the remit and should issue Statements of Policy Principles to set directions and/or clarify priorities and positions on important issues.

1.2.4 Australian Energy Markets Commission (AEMC)

The AEMC's role as a quasi-policy maker is examined in detail with concerns raised about its unbalanced approach, focused on supply-side investment and its lack of accountability.

Additional and significant concerns relate to the speed of its processes with the Productivity Commission having described the AEMC as 'a graveyard for reform proposals'. While the rule maker and rule administrator operate under the same objective, these arrangements are highly complex, disconnected and inefficient. Examples are given, including how the AER has had to initiate rule changes after the 2009-14 network resets so it could regulate more effectively, but these took several years and may yet be shown to be insufficient.

The difficulties that arise as a result of having a rule maker and administrator under different legislation in different jurisdictions with different masters and accountabilities are also outlined.

PIAC's view is that having examined all available options, network rule making and implementation should be in the one institution. There is no international precedent for arrangements that successfully achieves effective and efficient arrangements between separate bodies.

As with Ofgem in the UK, PIAC believes that an organisation with the ability to make and implement network regulation (and generation regulation) would be more efficient, more effective and more likely to operate in consumers' interests. It would therefore ensure both more streamlined and accountable regulation. In practice, this would mean transferring the AEMC's rule-making functions to a Commonwealth Energy Regulator. As a Commonwealth body, it would have the benefits, for example, of making it subject to the *Legislative Instruments Act* (disallowance), subject to the Commonwealth Ombudsman and Freedom of Information – and would, in PIAC's view minimise the potential for an unbalanced approach in its operations.

As with AEMO and ECA, PIAC believes the Commonwealth Energy Regulator should be funded (at arms length) by market participants.

1.2.5 Retail/ energy services

PIAC believes, given the essential failure of the NECF to provide consistent consumer protections nationwide and the transforming nature of the energy market, that retail/energy services should be bought under the Australian Consumer Law, through the creation of a mandatory energy code.

1.2.6 Australian Energy Market Operator (AEMO)

AEMO should continue to operate the wholesale market, but with improvements in governance. These include at least two consumer representatives on the board and the requirement for knowledge of, or experience in, consumer protection and demand side participation be part of the necessary skillset for AEMO Board Directors.

1.2.7 Energy Consumers Australia (ECA)

Based on Crossley's research, PIAC suggests that one way for the ECA to facilitate better outcomes for consumers in energy markets would be to host an annual Consumer Forum (including more regular working groups) modelled on the European Commissions' Citizens' Energy Forum.

PIAC also suggests consideration be given to introducing a negotiated settlements process for network revenue determinations as one means of providing more meaningful consumer participation in the NEM.

1.3 Summary of recommendations

Recommendation 1

That the Governance Review Panel recommends that the National Electricity Objective (NEO) and associated objectives (the National Electricity Retail Objective (NERO) and National Gas Objective (NGO)) be reviewed and updated to meet the needs of existing and future consumers in a transforming electricity market.

And that this review focus on a broader interpretation of the 'long term consumer benefit', including appropriate weighting to emissions reduction and social objectives.

Recommendation 2

That the Governance Review Panel considers options for reforming the governance of the NEM, including which processes are most effectively the responsibility of state governments and which are most appropriately national responsibilities. This examination should be in the context of the transforming energy market – especially the importance of energy efficiency and demand management, distributed generation and storage to improve outcomes for consumers.

That the Governance Review considers the option of the COAG Energy Council reclaiming its role in setting the future direction of national energy policy. One means by which the Energy Council could do this would be to issue a Statement of Policy Principles on key issues to direct the work of the Energy Market Institutions.

Recommendation 3

That, recognising the declining costs that can be captured through economies of scale, institutional streamlining and on-going innovation, the objectives of regulation (including those set out in the Statement of Policy Principles) should be to maximise demand management, energy efficiency, distributed generation and storage to reduce costs and emissions and support the transition of distribution networks to energy service platform providers.

Recommendation 4

That consumers be given a role in decision-making processes in the NEM and that, therefore, a consumer advisory committee to the COAG Energy Council be established.

In accordance with the National Electricity Objective, this committee should be comprised of a majority of consumer representatives, selected in consultation with Energy Consumers Australia. Such a body should contain representatives from across the spectrum of consumers, including from large, medium and smaller consumer cohorts, from across different regions and from groups with different consumer focuses.

The Council should be required to consult with the consumer 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 energy market institutions' work;
- developing scopes for significant policy reviews;
- finalising recommendations on appointments to the AEMC and AER; and
- proposed legislative changes to the NEL.

Recommendation 5

That, given the importance of the its in setting the future direction of national energy policy, any future changes to the scope and annual work plan of the COAG Energy Council should be subject to consultation with consumers and industry.

That the COAG Energy Council finalise its terms of reference as a matter of priority. This will provide greater transparency in respect of its role and will enable it to be held accountable for its actions.

That in the interim period, prior to the finalisation of the Terms of Reference, that the Energy Council's draft Terms of Reference be made publicly available to enable consumers to assess how its role has changed since the shift from SCER.

Recommendation 6

That the Australian Energy Markets Agreement be amended to allow for majority voting on all matters, consistent with other COAG Ministerial Councils.

Recommendation 7

That the Energy Council consider how to create appropriate sanctions for non-compliance of the Energy Market Institutions against the accountability frameworks agreed at the December 2012 meeting.

Recommendation 8

That greater transparency be achieved within the COAG Energy Council by:

- requiring it to publicly release meeting agendas in addition to Communiqués;
- reinstating the requirement for the Energy Council to provide an annual status report to COAG, and making these publicly available on its website; and
- reinstating the requirement for the Energy Council to provide an annual work plan to COAG, and making these publicly available on its website.
- making the identity of the Senior Council of Officials (SCO), any delegations made to them, and their ultimate supervisor public so that these delegations are transparent and appropriate accountability mechanisms can be put in place.
- updating the COAG Energy Council website to provide up-to-date and meaningful information to the public, especially on the legislation that the Council is currently responsible for and its governance.

Recommendation 9

That, having examined all available options and consistent with international practice, in order to create substantial efficiencies and ensure more streamlined, effective and accountable

regulation, rule-making in the NEM be brought in under Commonwealth legislation and combined with rule administration.

In practice, this would mean transferring

- *the AEMC's rule-making functions to a Commonwealth Energy Regulator (currently the AER).*
- *the AEMC's review and energy market reform roles to the COAG Energy Council, consistent with its role as the lead policy maker in the NEM.*

In order to facilitate more effective regulation in a transforming energy market, two Commissioners of the Commonwealth Energy Regulator should be required to have knowledge of, or experience in, consumer protection and demand side participation.

Recommendation 10

That, consistent with the other energy market institutions AEMO and ECA, the new Commonwealth-based Energy Regulator should be funded by market participants through a levy administered by government.

Recommendation 11

That a range of minor amendments to accountability, transparency and participation measures of the Commonwealth-based Energy Regulator be considered, including:

- *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 (see discussion above in relation to the Energy Council, and Recommendation 4).*
- *Easily accessible information about the different ways that consumers may challenge the decisions of the AER must be provided.*
- *Consideration could be given to changing the standing rules in judicial review proceedings to make certain the standing of consumer groups to challenge or intervene in judicial review proceedings.*

Recommendation 12

That further minor changes to the Limited Merits Review Regime be considered:

- *Consideration should be given to amending the capacity to have costs awarded against consumers under the Limited Merits Review Regime.*
- *Consideration should be given to removing the availability of merits review if an application is sought for judicial review.*

Recommendation 13

That, in order to further deregulation in the transforming Australian energy markets, the upcoming review of the NECF consider creating a mandatory energy-related code (including dispute resolution provisions) to complement the Australian Consumer Law, rather than further amending the NECF.

Recommendation 14

That the AEMO Board include at least two consumer representatives (one representing residential consumers and one representing small business) and that the government and industry representation decrease proportionally.

That these AEMO Board members be selected in consultation with ECA.

Recommendation 15

That knowledge of, or experience in, consumer protection and demand side participation be part of the necessary skillset for AEMO Board Directors.

Recommendation 16

That the constitution of AEMO's Information Exchange Committee (IEC) and related working groups be changed to provide for direct representation by consumer advocates and providers of non-supply side products and services.

And that further measures are investigated to address the matters of representation, accountability and transparency with respect to AEMO and the IEC.

Recommendation 17

That ECA consider an annual Consumer Forum (including more regular working groups) modelled on the EU's Citizens' Energy Forum.

Recommendation 18

That consideration be given to introducing a negotiated settlements process for network revenue determinations as one means of providing more meaningful consumer participation in the NEM.

2. The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

2.1 Energy + Water Consumers' Advocacy Program

This program was established at PIAC as the Utilities Consumers' Advocacy Program in 1998 with NSW Government funding. The aim of the program is to develop policy and advocate in the interests of low-income and other residential consumers in the NSW energy and water markets. PIAC receives policy input to the program from a community-based reference group whose members include:

- Council of Social Service of NSW (NCOSS);
- Combined Pensioners and Superannuants Association of NSW;
- Ethnic Communities Council NSW;
- Salvation Army;
- St Vincent de Paul Society;
- Physical Disability Council NSW; and
- Tenants Union.

2.2 PIAC's involvement in the NEM

The Public Interest Advocacy Centre Ltd (PIAC) is pleased to have the opportunity to respond to the Issues Paper of the Review of Governance Arrangements for Australian Energy Markets. This submission draws on PIAC's seventeen years of experience in running the Energy + Water Consumers' Advocacy Program on behalf of NSW residential energy consumers (with a particular

focus on the needs of low income and vulnerable consumers). While PIAC has a focus on NSW consumers, it has been very broadly involved across the NEM, including:

- in engaging (where possible) with the COAG Energy Council, especially the Energy Market Reform Working Group;
- in detailed engagement with rule change processes and market reviews undertaken by the Australian Energy Markets Commission (AEMC);
- in the development of network regulation (including guidelines) and network determinations with the Australian Energy Regulator (AER);
- with the Australian Energy Market Operator (AEMO), including as a member of its Consumer Forum;
- with the NSW Independent Pricing and Regulatory Tribunal (IPART) on retail price regulation and competition;
- with the AER on retail market matters (since 2013), and
- other energy policy development matters, including inquiries by the Productivity Commission and the development of Australian Government Energy White Papers.

PIAC is a member of the AER's Customer Consultative Group, Endeavour Energy's Customer Consultative Committee, Transgrid's Customer Consultative Committee, AGL's Customer Council and Jemena's Customer Council.

In preparing this submission, PIAC has drawn on four expert reports it commissioned with funding from Energy Consumers Australia, which are appended to this submission:

- Dr Gabrielle Appleby, University of New South Wales, 'Accountability in the National Energy Market'
- Penelope Crossley, University of Sydney, 'Review of Institutional Governance arrangements of the National Electricity Market'
- Bruce Mountain, Carbon + Energy Markets, 'Bifurcation in the economic regulation of network service providers in the National Electricity Market'
- Bruce Mountain, Carbon + Energy Markets, 'The inclusion of environmental protection in the National Electricity Objective'.

PIAC is very grateful to the authors of these reports for producing high quality detailed reports at such short notice.

3. The systemic weaknesses in the regulatory and market arrangements

3.1 The challenges of a Federal approach for energy markets

Legislation to transfer responsibility for network regulation to the AER was completed in 2006. While the establishment of the national rules for distribution businesses was intended to harmonise decision-making within one independent national regulator, the process itself appears to have led to outcomes that are not in the best interests of consumers. A key contributing factor, as Crossley highlights, is that:

The ownership arrangements in electricity generation, transmission, distribution and retail in Australia vary markedly between the states and territories.⁴ Australian governments currently own about 75 per cent of electricity network assets in the NEM.⁵ Before the 1990s, all state governments owned and operated all four components of the retail electricity market. However, as Table 1 indicates, there has been a gradual shift towards privatisation.

Table 1 - Ownership Structures in the NEM⁶

	Generation	Transmission	Distribution	Retail
SA	Private	Private	Private	Private
Vic	Private	Private	Private	Private
Qld	Public/Private	Public	Public	Public/Private
NSW ⁷	Public/Private	Public	Public	Private
Tas	Public	Public	Public	Public
ACT	Public/Private	Public/Private	Public/Private	Public/Private

Although typically these public ownership arrangements do not equate to complete day-to-day control of the utilities, governments exert shareholder control; and may effectively influence the behaviour of their utility companies.⁸ In addition to the specific influence which may be exerted by a state or territory government through their shareholder rights, State Owned Corporations (SOCs) are typically required under legislation to explicitly include multiple objectives in their decision-making.

Crossley highlights how this ownership structure has a number of implications for the governance of the NEM:

First, state and territory governments exert significant regulatory control over the governance framework of the NEM through the COAG Energy Council. For states and territories that

⁴ Australian Energy Regulator, State of the energy market 2014, above n 3.

⁵ Productivity Commission, *Electricity Network Regulatory Frameworks, Report No. 62* (2013), 273.

⁶ ABC News, 'Fact check: Does privatisation increase electricity bills?', ABC News (online), 30 March 2015 <<http://www.abc.net.au/news/2015-03-25/fact-check-does-privatisation-increase-electricity-prices3f/6329316>>.

⁷ There are currently plans to partly privatise transmission and distribution in NSW, involving the leasing of 100% of TransGrid and 51% of AusGrid and Endeavour Energy for 99 years, while the government will retain 51% ownership. See New South Wales Government, *Rebuilding NSW: Update on Electricity Networks* (2014) <<http://www.nsw.gov.au/sites/default/files/miscellaneous/rebuilding-nsw-update-electricity-networks.pdf>>.

⁸ AMP Capital, Submission to Australian Productivity Commission, *The Capital Efficiency of Australian Electricity Distributors – Results of a Benchmarking Study*, November 2012, 4.

operate SOCs [State Owned Corporations], virtually every decision has financial implications for the capacity of the government to raise revenue. This clear conflict of interest in many senses explains the parochial approach taken by some state and territory governments to the regulatory environment through COAG.

Secondly, the current regulatory design presumes that market entities will respond to incentives to cost-minimise through regulatory compliance; and that investment will reward the most efficient entities within the market. There are a number of reasons why SOCs, and the financial institutions that invest in them, respond less predictably to these incentives, including the additional legislative objectives that may compete with the incentive to reduce cost, finance being more readily available in comparison to private businesses and that insolvency is effectively impossible.

Thirdly, the economic performance of state-owned utilities is a significant point of contention in state and territory political debates. Retail electricity consumers place significant pressure upon their state and territory political leaders in relation to the management of the SOCs – including in relation to the cost of retail electricity, regional development and access, and environmental concerns. In some senses, this explains the desire of the states and territories to retain substantial control over some elements of the regulation of the NEM.

These impacts of ownership will be discussed at various points throughout this submission and clearly it is important to understand the origins of energy markets with state governments to understand the current regulatory arrangements.

3.2 The NEM has fragmented, overly complex governance, which has significant barriers to competition

In PIAC's view, the NEM has fragmented governance, lacking coherence and a consumer-focus and this is the overarching issue that needs to be addressed by this Governance Review.

At the core of the fragmentation in the regulatory arrangements is the combination of:

- overarching governance by a COAG Ministerial Council (which has operated often inefficiently and ineffectively by consensus);
- a national market rule maker that is a body corporate under cooperative state jurisdiction (via a South Australian Act) and funded by the states and territories;
- a rule implementer that exists under Commonwealth legislation and is funded by the Commonwealth (which is constituent part of the Australian Competition and Consumer Commission (ACCC) although it is a separate legal entity to the ACCC);
- a national wholesale market operator which 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 and funded by a levy on market participants,
- and, until January 2015, no national consumer advocacy body.

These arrangements are outlined in further detail in the Appleby and Crossley reports attached. While complexity is not necessarily an issue in and of itself, PIAC considers that the inconsistency and incoherence in arrangements (especially in terms of accountability and transparency provisions) has created a fragmented system and that, in part, this is what has allowed incumbent industry interests to dominate over consumer interests in the NEM.

Participants in the original creation of the AEMC have noted to PIAC that the rules were established with an incumbent supply-side industry-bias, in order to ensure national regulation did not prevent 'necessary' infrastructure. That industry-bias still exists and was a major focus of the recent Senate Inquiry into Electricity Networks⁹ (and also the 2012 Senate Inquiry¹⁰). In particular, the AEMC appears to have interpreted the NEO as meaning that incentives for investment in the energy markets must take precedence over any or all other consumer priorities.

This submission will detail how the regulatory failure resulting from this incumbent industry bias has resulted in excessive costs for consumers. In particular, PIAC is concerned that these systemic weaknesses are not only inefficient, but have created barriers to innovation and competition. It will recommend changes required as a result, including to the NEO and institutional arrangements for policy and rules making.

This is an arena ripe for regulatory reform – indeed where, implemented with a consumer-focus, deregulation could greatly assist both consumers and productivity. PIAC considers it is time to deregulate by consolidating the institutional arrangements in the NEM and this submission will outline some directions and recommendations to this end. PIAC believes partial changes are unlikely to address the systemic weaknesses, especially given that unbalanced nature of the rule making (detailed in section 7.3).

3.3 Consumers are disenfranchised

Appleby highlights 'the National Electricity Law makes it clear that its overriding objective is to serve the consumer and therefore the involvement and power of consumers within the NEM processes must be paramount'.

The NEM ought to serve consumer interests – and subsequently the productivity of the Australian economy, along with social and environmental objectives. In particular, consumers not only ought to be actively engaged, but to have representation in the decision making of the NEM. Consumers ought to have a seat at table where significant policy decisions are made. This is particularly vital as currently many consultation processes are onerous for individuals and community groups due to volume and complexity of documents and processes. The new national consumer advocacy body has taken over a decade to establish and fund.

Across the energy market institutions, consumers are disenfranchised by the lack of accountability and review mechanisms in practice (even if they exist in theory). In policy-making consumers are further disenfranchised by the lack of transparency (especially in regard to COAG Energy Council). In rule making, consumers are disenfranchised by the unbalanced approach of the rule maker and the difficulty involved in initiating rule changes (and the long time taken to process rule changes). In network revenue determinations, consumers are disenfranchised by the complexity and resource intensity of the process. All these issues will be detailed in the respective sections on each institution.

⁹ Senate Environment and Communications References Committee, Performance and Management of Electricity Network Companies: Interim Report (April 2015)

¹⁰ Senate Select Committee, Senate Select Committee on Electricity Prices: Report (November 2012)

3.4 Unnecessarily high electricity prices

The recent Energy White Paper acknowledged the financial impact of electricity bills has increased dramatically over recent years.¹¹ The last regulatory period (2009/10 - 2013/14) saw an extraordinary and unprecedented escalation in NSW electricity prices. It is estimated that network prices alone have led to an increase in average household prices of some \$500 - \$600 per year each year since 2007/08.¹²

The immediate impact of this in NSW can be seen in Figure 1, which illustrates the average change in NSW residential customer bills from 2007/08 to 2012/13. Residential bills doubled over a five-year period. While there were a number of factors driving higher bills, some \$654 dollars (or more than half the increase) was due to increases in network charges.

Figure 1: Change in average NSW residential customer bills, 2007/08 to 2012/13 (\$nominal)¹³

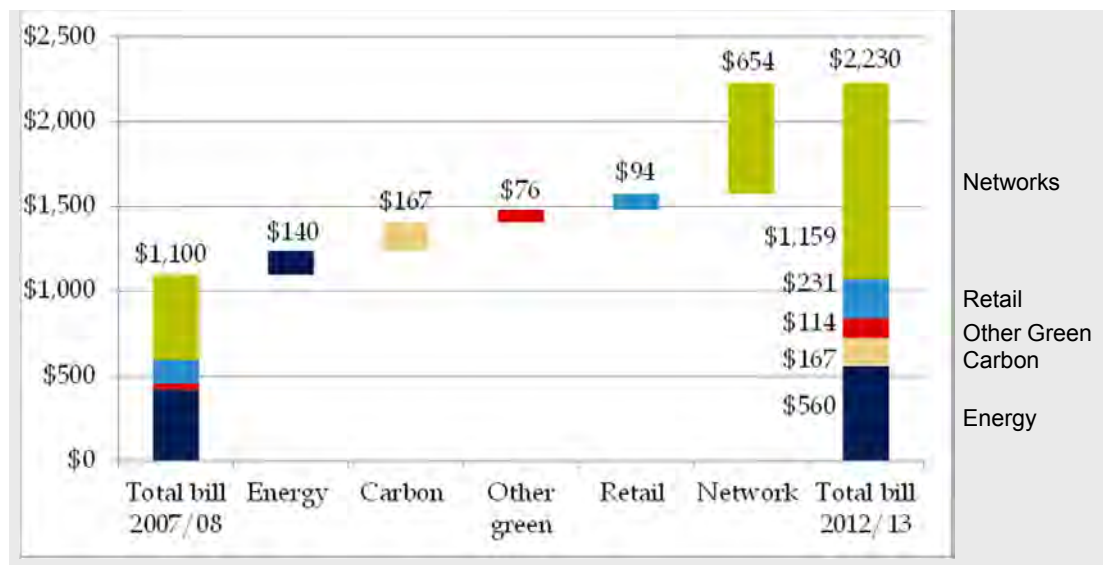


Figure 2 puts electricity price rises in Australia's major cities in historical context. Nationally, Australia's electricity price rises are amongst the highest in the developed world as the Figure 3 indicates. Critically, across the NEM, the average Australian household has consumed 7 per cent less power since 2006, while its average power bill increased by more than 85 per cent from \$890 to \$1660 a year over the same period.¹⁴

There is ample evidence of the significant consequences of these price rises, for example:

- Very high levels of debt (\$8,000-\$10,000) are now not uncommon (according to Energy Ombudsmen)
- Only 20% of customers are successfully completing hardship plans every year¹⁵

¹¹ Commonwealth of Australia, 'Energy White Paper' (2015).

¹² Independent Pricing and Regulatory Tribunal, Review of regulated retail prices for electricity from 1 July 2013 to 30 June 2016 (Final Report, IPART, 2013), 18.

¹³ Draper, S, 2012, *IPART's Energy Pricing*, presentation at EWON Anti-Poverty Week Conference.

¹⁴ Grattan Institute figures from <<http://grattan.edu.au/grattan-tv/shock-to-the-system-dealing-with-falling-electricity-demand>>.

¹⁵ AER, 'State of the Energy Market 2014', (Report, Australian Energy Regulator, 2015), p 139.

Figure 2: ABS capital cities electricity price indices¹⁶

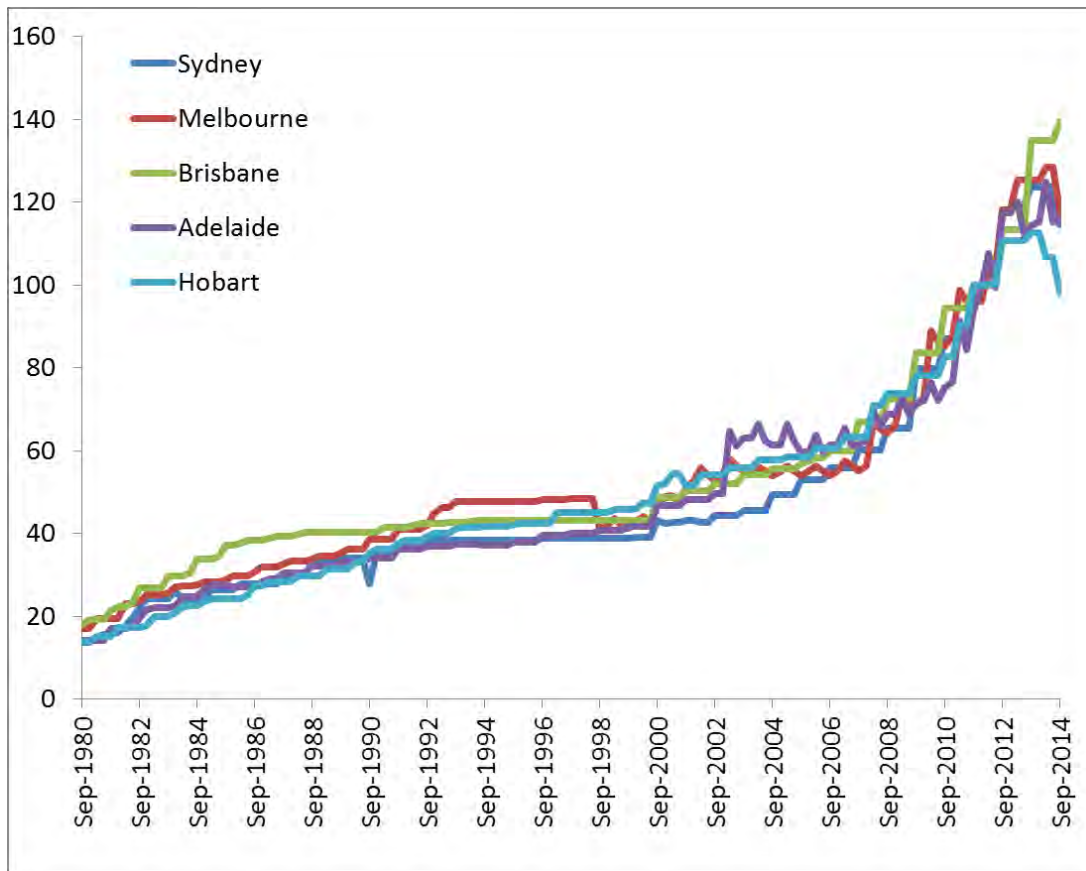
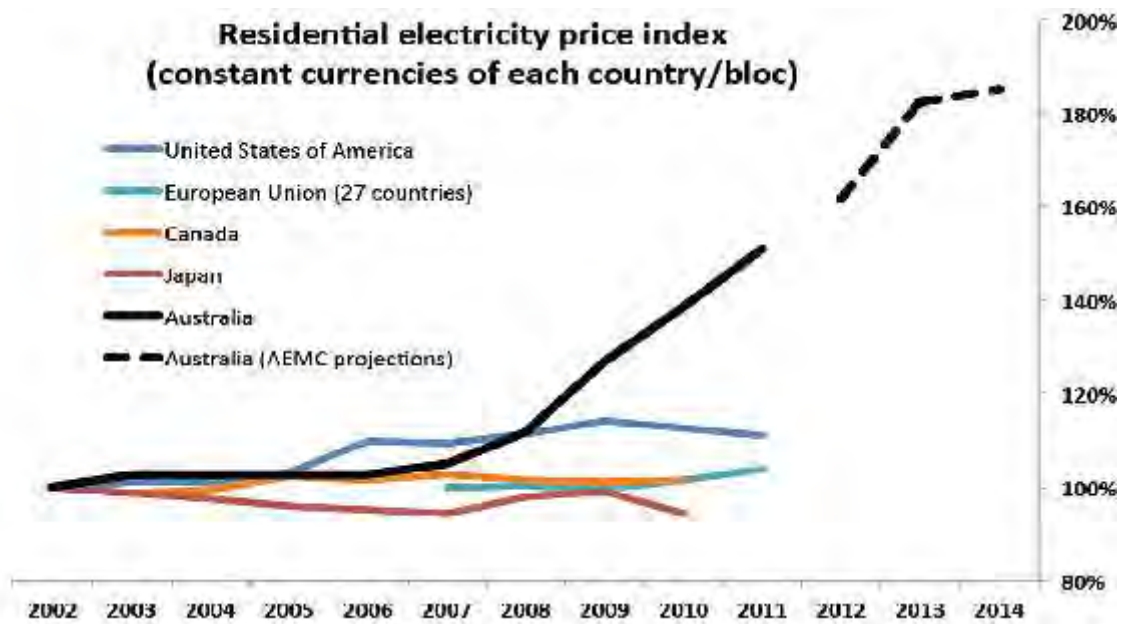


Figure 3: Change in residential electricity price index¹⁷



¹⁶ Carbon and Energy Markets, 'Network tariffs applicable to households in Australia: empirical evidence' (report, February 2015)

¹⁷ CME Australia

- Complaints to the Energy and Water Ombudsman of NSW (EWON) have doubled over the last five years.¹⁸

Gas prices have also risen. The typical increase to the annual gas bill of NSW households with an average gas consumption level over the period July 2009-12 was \$205 or 33 per cent.¹⁹ Analysis for the St Vincent de Paul Society shows that for the last financial year (2013/14), the annual energy cost for dual-fuel households with typical consumption levels increased by between \$125 and \$230 (16-22%).²⁰

While these past gas price increases have been significant, there is no short-term relief forecast. This year, in its price determination for the cap on regulated retail gas prices in NSW, the Independent Pricing and Regulatory Tribunal (IPART) agreed to proposals by retailers to increase prices for 2014/15 by 17-21% (varying by region).²¹

IPART stated that the development of export facilities on the east coast was the 'main driver' of the price increases.²² While the repeal of the carbon price has removed one small component of final gas prices paid by residential consumers, this is relatively insignificant in the face of rising wholesale prices.²³

Over the medium term (to 2020), Jemena expects wholesale costs to double from \$200 to \$400 per year²⁴ so overall gas prices are expected to continue to rise for NSW households, as with most other states.

PIAC's contends that energy has gone from being relatively affordable to being largely unaffordable for a proportion of the Australian population. While energy poverty is not well defined in Australia, the Productivity Commission's report on 'Electricity Network Regulatory Frameworks' noted that 'More disaggregated analysis by the Independent Pricing and Regulatory Tribunal (IPART) for the Sydney region reveals that electricity spending can be as high as 14 per cent of income for the poorest households.'²⁵

The consequences of an essential service being so high cost places a significant burden on low-income and vulnerable consumers. As detailed in PIAC's *Cut Off* series of reports²⁶, being disconnected from electricity as a result of non-payment has a range of detrimental impacts, most commonly anxiety and emotional distress, loss of perishable food and an inability to adequately wash and care for children.

Alongside negative social impacts, high energy prices have significant negative impact on economic productivity. The Australian economy is now suffering large dead weight losses as a result of paying such high prices for an essential service which, as will be discussed, is the result

¹⁸ EWON, 'Annual Report 2013/14' (Report, Energy and Water Ombudsman NSW, 2014).

¹⁹ Gavin Dufty, Creating fairer energy and water markets for all (PIAC Conference presentation, 9 October 2013, St Vincent de Paul Society).

²⁰ May Mauseth Johnston, New South Wales Energy Prices July 2013 – July 2014: An Update Report on the NSW Tariff Tracking Project (Report, St Vincent de Paul Society and Alviss Consulting Pty Ltd, 2014).

²¹ IPART, Fact sheet: Regulated retail gas prices from 1 July 2014 to 30 June 2016 (IPART, 2014) 2.

²² Ibid, 3.

²³ IPART, Fact sheet: Removing carbon costs from regulated gas prices, (IPART, 2014) 1.

²⁴ Ibid, 7.

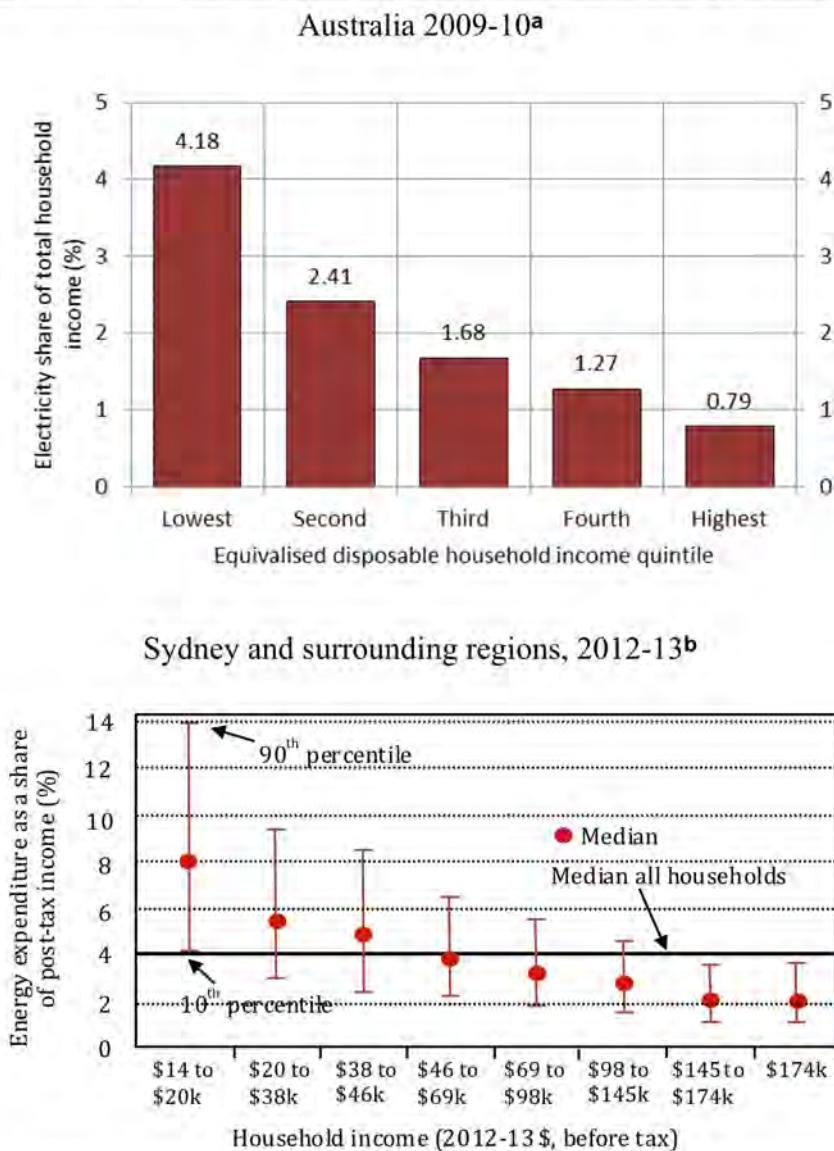
²⁵ Productivity Commission, above n 2.

²⁶ PIAC, see: <http://www.piac.asn.au/projects/social-impact/introduction>

of major regulatory and market failures. The loss of Australia's domestic energy competitiveness is both significant and strategic, especially given the decline in the manufacturing sector over the last decade.

Figure 4: Consequences of price rises for lower-income households in NSW²⁷

Figure 2.8 Lower-income households are hit harder by rising prices



²⁷ Productivity Commission, 'Electricity Network Regulatory Frameworks' (Report No. 62, 2013).

4. Significant regulatory failures in the NEM

4.1 Failure of network regulation since 2006

A number of reviews have now drawn a clear link between the significant increases in network prices and the changes in the rules and regulatory arrangements around 2006.²⁸ The report of the Senate's 2012 Select Committee on Electricity Prices²⁹ noted evidence from Professor Ross Garnaut that:

The big increases in Australian electricity prices began in 2006 with the establishment of a new price regulatory system. This new regulatory system was the culmination of a structural change in the Australian electricity market in which generation, high-voltage transmission, distribution to users and retail sales to small users were placed under separate ownership and institutional arrangements.³⁰

The Select Committee also highlighted the difficulty that the new national body the AER had experienced in effectively regulating energy networks in the years after 2009 when it assumed responsibility from jurisdictional regulators. In its evidence to the Select Committee, the AER noted that weaknesses in regulatory framework (the NEL, NER, NGL and NGR) had constrained the AER's ability to regulate networks. As a result, network prices had 'increase[d] beyond what has been necessary for a safe and reliable supply'.³¹

Effectively incentives in the rules (together with a lack of penalties for over-investment) enabled network owners to invest above prudent levels and to achieve rates of return well in excess of the risks that the network businesses faced. This was further exacerbated by the rules governing networks' appeals of the AER's decisions to Australian Competition Tribunal (the merits review process which will be discussed in section 9.4).

The resulting adverse outcomes for consumers of the new network regulatory arrangements (including the appeals process) have included:

- approval of rates of return that are in excess of those required by an efficient network service provider;
- network values (the RAB) and network revenues and prices have generally escalated well above CPI;
- a continued surge in capital investment and increasing operating costs (in total, and at a per consumer level);
- a growing divide between network pricing outcomes for consumers in states serviced by privately-owned and government-owned networks;
- performance on network reliability measures that has been reasonably flat, with limited and patchy improvements, particularly given level of investment;

²⁸ Productivity Commission, *Electricity Network Regulatory Frameworks, Report No. 62* (2013), Senate Select Committee, *Senate Select Committee on Electricity Prices: Report* (November 2012), Senate Environment and Communications References Committee, *Performance and Management of Electricity Network Companies: Interim Report* (April 2015)

²⁹ to which PIAC gave both written and oral evidence, see: PIAC, 'Equitable access to the essential', (submission, 2012) available at: www.piac.asn.au/publication/2012/10/equitable-access-essential, as at 17 December 2014.

³⁰ Senate Select Committee on Electricity Prices, above n 11, 64.

³¹ *Ibid*, 40.

- declining energy use - peak demand has flat-lined despite general growth in the economy, due to the decline in both manufacturing and usage per household;
- spare capacity has increased on the networks - a combination of expanded assets and declining demand, and
- a pervasive culture of network businesses aggressively and continuously appealing decisions made by the independent regulator, creating regulatory uncertainty, price volatility and high regulatory costs that have flowed through to consumers.

The financial impacts are illustrated in the following two charts which summarise:

- trends in revenue per customer (Figure 5); and
- trends in Regulated Asset Base (RAB) per customer (Figure 6).

Figure 5: Revenue per customer³²

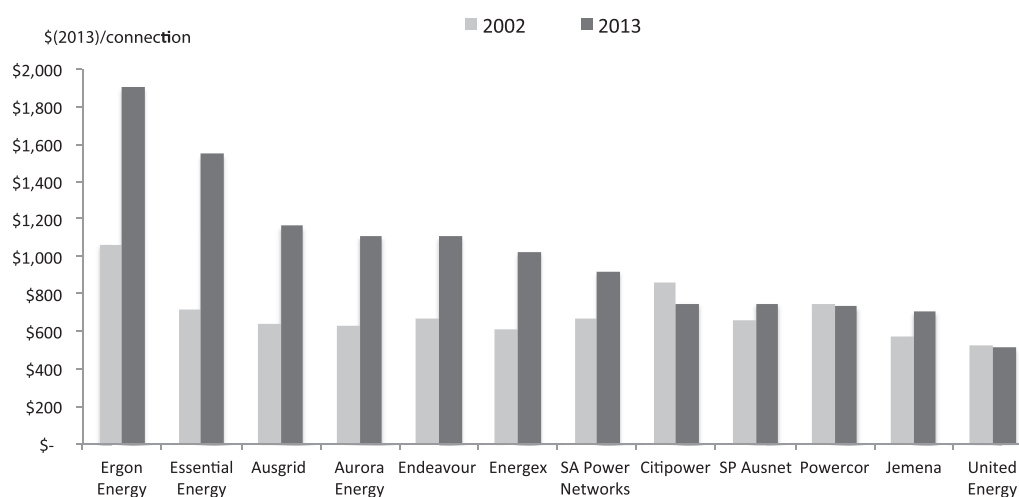
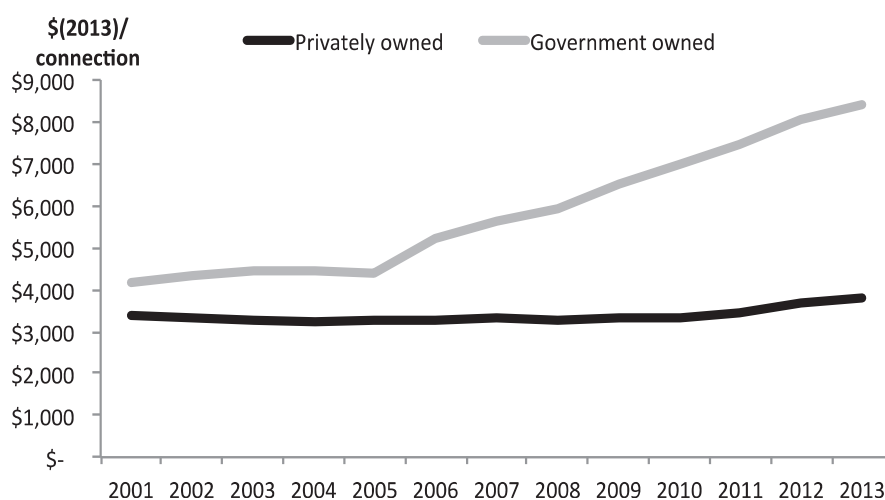


Figure 6: Regulated asset base per connection³³

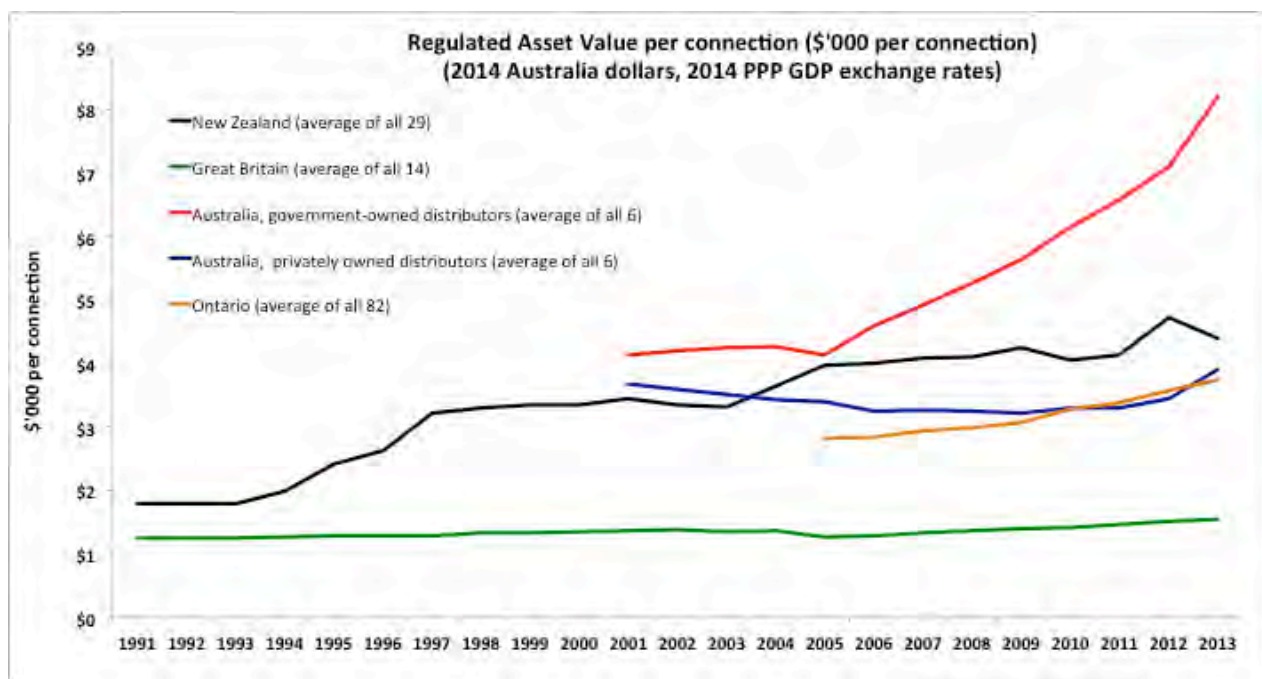


³² Mountain, B, 2014, 'Independent regulation of government-owned monopolies: An oxymoron? The case of electricity distribution in Australia', *Utilities Policy* (2014), 4.

³³ Ibid, 5.

The result is that Australia has inefficient network pricing compared with other jurisdictions internationally (and far worse in government-owned networks) and excessive regulated asset values (as shown in Figure 7).

Figure 7: Regulated Asset Value per connection in Australia, Great Britain, New Zealand and Canada (2014 Australian dollars thousand, PPP GDP exchange rates)³⁴



PIAC is particularly interested in the consequences of over-investment (sometimes called ‘gold plating’) in terms of stranded assets that might be sold when the NSW Government leases 100% of Transgrid and 49% of Ausgrid and Endeavour Energy for 99 years. PIAC commissioned research by Carbon + Energy Markets (CME) on ‘Privatisation and the regulatory valuation of electricity distribution network service providers in New South Wales: Evidence and issues’³⁵. This report concluded that if the Regulated Asset Base (RAB) of the NSW electricity distribution network companies had been maintained or upgraded to the same standard as Victoria over the last thirteen years, the NSW network would be worth \$9 billion less than its June 2013 value of \$22 billion, resulting in significant savings for consumers (for example, a decrease in bills for households of up to \$325 per year).³⁶

Another indicator of the rising amounts of unused capacity on the networks is the sharply declining ratio of transformer capacity to average demand for the NSW networks in Figure 8.

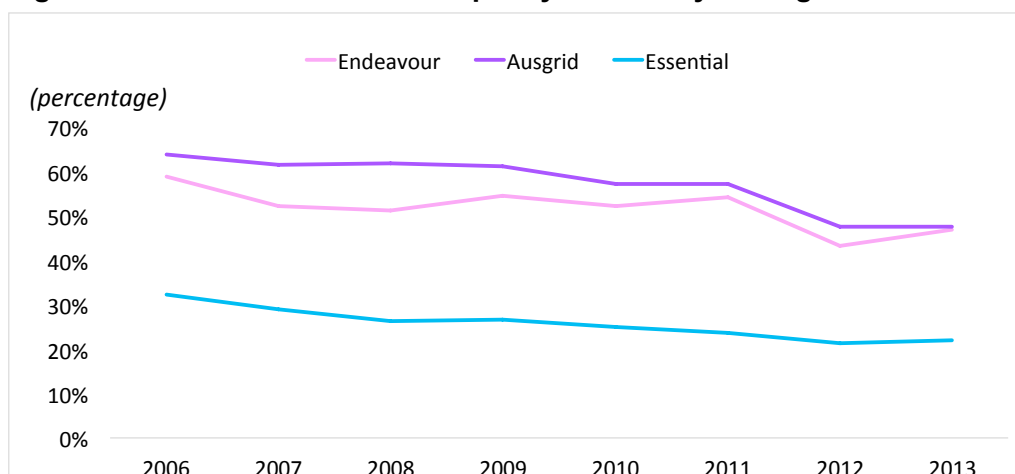
NSW households are now paying about twice as much per kWh for network services as Victorian households. PIAC considers that NSW consumers are paying dearly for unused assets and this is only likely to increase with changing commercial and technological conditions outlined in section 5.

³⁴ Mountain report for PIAC

³⁵ Carbon + Energy Markets, ‘Privatisation and the regulatory valuation of electricity distribution network service providers in New South Wales: Evidence and issues’ (Report, Public Interest Advocacy Centre, Sydney, 2014).

³⁶ Ibid.

Figure 8: Installed transformer capacity divided by average demand³⁷



4.2 Dominance of ‘investment conditions’ as criteria for rule making

As noted above, changes in the rules since 2006 have meant that consumers have paid much more than the efficient cost of supply.

PIAC’s belief is that a core issue has been the excessive focus on supply-side investment. Our understanding is that the underlying assumption in the rules from 2006 onwards was that investment has to be incentivised regardless of the cost to current consumers. It appears that the presumption that what was good for generation and network businesses was good for consumers did not operate alone. It seems to have operated in concert with assumptions of:

- continuing growth in demand;
- that more, bigger infrastructure (rather than any form of smarter provision) was necessary;
- that wherever possible consumers should be connected to the grid, and
- that decentralised generation and storage were not going to be cost effective for the foreseeable future (even though network investments are made on 40-50 year timeframes).

In sum, a set of supply-side big engineering values have dominated rule-making consistent with a ‘statist development’ approach to public policy.³⁸

A few examples of how these values have operated in practice are noted below:

- The investment bias embodied in the rules requires the AER to index the RAB and does not allow for any adjustment for redundant/unused assets. The automatic roll in of past capex even for assets not required meant AER cannot impose its view of an efficient outcome as required by the NEO.
- The investment bias was also related to separating the setting of reliability standards (by government) from the costs involved (set by the regulator). Governments were allowed to set (sometimes politically influenced) reliability standards without any price signal as to what customers were willing to pay.
- AEMC’s Reliability Panel now has six members from supply-side entities and only two from consumers (but none from small consumers).

³⁷

Ibid

³⁸

Ken Walker (ed), ‘Australian Environmental Policy’, 1992, University of New South Wales Press.

- Another example is that the NEM Maximum Price Cap one of the highest in the developed world. Given the abundance of cheap fossil fuel and renewable generation resources in Australia, and the current massive oversupply of generation capacity, this seems strange indeed.

4.2.1 State government interests dominate

The Executive Summary noted the Productivity Commission's finding that the beneficiaries of the regulatory arrangements have primarily been state governments, particularly where they have been the owners of generation and/or network businesses. Therefore the failures of network regulation and the supply-side bias emphasising the primacy of infrastructure investment have primarily benefitted the NSW and Queensland governments.

4.3 Some gaming of wholesale market

In February 2015:

The Federal Court of Australia [ordered] Snowy Hydro pay total penalties of \$400 000 for failing to comply with the Australian Energy Market Operator (AEMO) dispatch instructions in contravention of the National Electricity Rules, in proceedings brought by the Australian Energy Regulator. These are the first court ordered penalties for a breach of the National Electricity Rules.

The Court declared by consent that Snowy Hydro had breached the National Electricity Rules on nine occasions in 2012 and 2013, by failing to comply with dispatch instructions issued by AEMO. On each occasion, Snowy Hydro generated more power than the dispatch instruction required.³⁹

It is significant that after years of consumer concerns about gaming of the wholesale market – as observed by excessive and marked volatility in spot electricity prices – this is the first enforceable undertaking accepted by the AER under the provisions of the NEL. It indicates the difficulty of detecting and prosecuting gaming of the market that is clear to expert observers.

To date, three rule changes have been proposed to deal with wholesale market gaming:

1. By the AER, to limit the ability of generators to use their ramp rates to either unnecessarily maintain a high price in the market despite there being lower priced offers or to unnecessarily increase the regional price (recently completed).
2. By the MEU, to limit the ability of the dominant generator in a region from using its market power to set the regional price (not accepted by the AEMC).
3. By the SA government to limit the ability of generators to increase average prices by rebidding where there is no other reason than to increase prices (currently underway).

4.4 Failures in accountability to consumers

Appleby's report outlines the importance of a 'robust and responsive accountability framework that provides consumers with real avenues for participation and review' and assesses the NEM against accountability values of:

³⁹ <http://www.aer.gov.au/node/30382>

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 report finds the NEM lacking in a number of areas which will be outlined in detail in respect of the COAG Energy Council and each of the energy market institutions. In PIAC's view, this has been especially true in terms of rule making, the accountability of the energy market institutions and the lack of availability of appeals mechanisms.

4.4.1 Failure of effective consumer participation

As noted in section 3.3, many of the crucial decision making processes by the COAG EC and AEMC have not effectively involved consumers. Despite the NEL ensuring processes that allow for consumer consultation on the rules, in practice there has been little effective consideration of consumers' views in market design or operation. The Productivity Commission's view that, 'While the objective of the National Electricity Law is to meet the long-term interests of consumers, the involvement of consumers in the processes of the NEM has been partial and intermittent' (p. 10)

The Merits Review review spoke of how consumers were treated like 'unwelcome guests' in Tribunal processes⁴⁰ and this same sense pervades consumer participation in AEMC processes. There is a sense that consultation with consumers has not changed outcomes in the NEM. The unbalanced approach of the AEMC in regards to rule making processes in this regard will be discussed later in this submission.

4.5 Failure of national consistency in retail regulation

The great hope of the National Energy Consumer Framework (NECF) was that it would facilitate national consistency in retail regulation. However, the large number of derogations and Victoria's continuing to have separate retail laws mean that the NECF has been a marginal success. PIAC is uncertain of the continuing value of the NECF, especially given the transforming nature of the energy market. It is noted that a review of the National Energy Consumer Framework (NECF) is being planned for later in 2015.

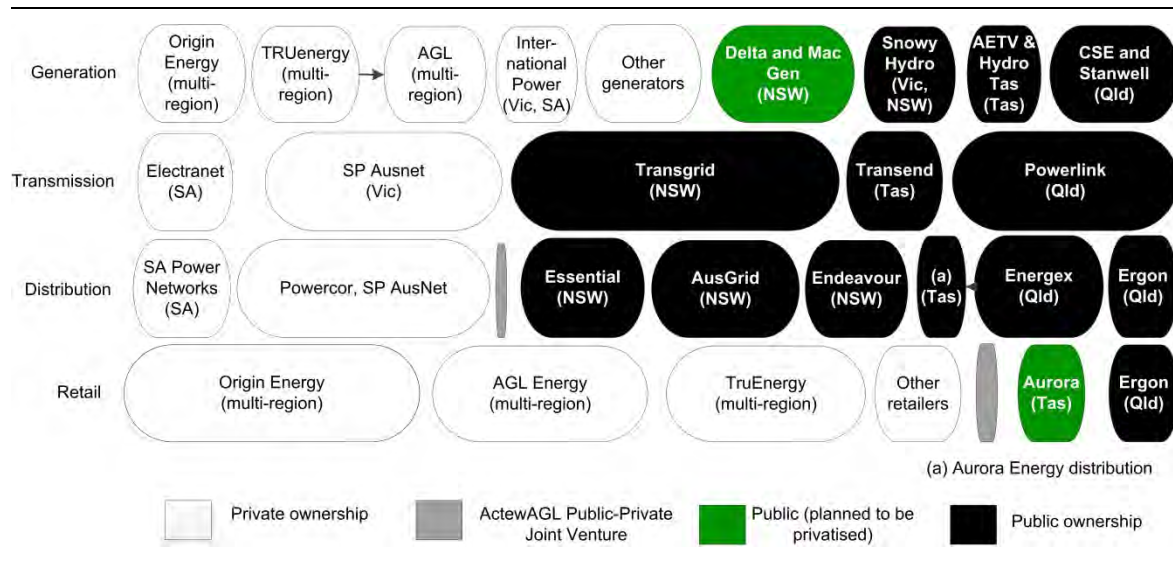
4.6 Failures of competition

Related to the regulatory failures, an examination of the generation and retail sectors suggests there is a significant a failure in terms of facilitating competition and lowering barriers to entry in the generation and retail markets.

⁴⁰ George Yarrow, Michael Egan and John Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report* (30 September 2012).

Gentailers (retailers that own generation assets) dominate both the generation and retail markets (as shown in figure 9). The retail market has the greatest concentration with the big three gentailers serving about three quarters of residential customers across the NEM. This suggests that there are in fact higher barriers to entry than existed prior to the creation of the NEM.

Figure 9: Participants in the National Electricity Market by ownership and market share⁴¹



4.6.1 Retail margins in Victoria

A particularly egregious failure of competition is the retail market in Victoria where margins appear to be approximately twice what they are in other jurisdictions. The highest level of churn in the world has bought with it not lower prices for consumers, but instead higher retail prices where it appears that consumers pay to be marketed to.

⁴¹ Queensland Commission of Audit (2013, figure 2, p. 13).

5. The NEM is no longer fit for purpose in a transforming energy market

5.1 A sector in the midst of major transformation

Australia's stationary energy market is currently in the midst of a major transformation. The deployment of new technologies, such as solar PV and rapid energy efficiency improvements (e.g. LED lighting) are having a massive impact. There are already over 1.3 million Australian households with solar PV on their roofs and household-scale energy storage is expected to be cost competitive for residential electricity consumers within the next five years.⁴² As a result, AGL is predicting that 3 million Australian customers will be either wholly or partially off-grid by 2030.⁴³ A few tentative steps have been made by SA Power Networks, Ergon Energy in Queensland, and Horizon Power in WA to trial the use of battery storage to replace poles and wires.

The Australian energy sector also faces market distortions and failures due to the slow response to past changes, such as the rapid adoption of air conditioners and inefficient lighting. There is a need to develop new responses to address both existing and emerging factors impacting on energy infrastructure costs and revenues and the ways consumers can manage those costs. Moreover, the challenge of adapting to the climate change already underway and that projected, in both the short and medium term, is a massive one for the sector (climate change is discussed further in the section 5).

Former AER Chair, Andrew Reeves, gave a speech at the Energy Networks Association (ENA) Forum in Brisbane on 6 August 2014 where he spoke on this overarching issue of transformation and the need to rethink network services so they deliver maximum benefit to consumers. He suggested that the networks needed to redefine their product to become a platform to support generation, storage and demand management. In other words, two-way trading, instead of the historic one-way supply from centralised generation model.

As Melbourne University academic Mike Sandiford put it recently:⁴⁴

As an essential service, a death-spiral seems implausible. However, there is clearly a need to move on from the old game of simply selling more electrons. There is now a need to focus on delivery of quality energy services with less capital expenditure. This necessarily means accommodating the new technologies of distributed generation and demand management, with a sharp focus on mitigating peak demand growth.

As discussed earlier, the NEM was developed to meet the needs of a centralised supply and distribution system in which, apart from the networks, component services (wholesale, retail, and now areas such as metering) were opened to competition. As such, both the energy market institutions and the majority of the businesses are grounded not in the world of transformation and a pro-active response to developing business plans suited to the times, but still in business models based on centralised supply and transport of electrons. In many cases the focus of

⁴² UBS: Australian households could go off-grid by 2018, <http://reneweconomy.com.au/2014/ubs-australian-households-go-grid-2018>

⁴³ AGL Energy pick new CEO with eye to solar and storage <http://reneweconomy.com.au/2014/agl-energy-pick-new-ceo-with-eye-to-solar-and-storage-35344>

⁴⁴ Sandiford, M, 2014, 'When will electricity utilities admit the game is up?' Available at: <http://theconversation.com/another-summer-on-the-nem-24451>, as at 8 August 2014.

distribution businesses seems on calling for protection from emerging competitors (such as the combination of PV and storage) instead of responding to competitive forces, as required by National Competition Policy.

Across the developing world regulators are struggling with how to regulate networks given falling demand, the rise of distributed generation, storage, electric vehicles and other smart technologies and new financial models (including solar PV leasing), as well as constantly evolving renewable energy and greenhouse gas emissions policies.

On 24 April 2014 New York Governor Cuomo announced plans for a fundamental transformation in the way that electricity is distributed and used in New York State. To meet this challenge, the Public Service Commission commenced its Reforming the Energy Vision (REV) initiative to reform New York State's energy industry and regulatory practices. The Commission's stated objective under the REV initiative is to:

make energy efficiency and other distributed resources a primary tool in the planning and operation of an interconnected modernized power grid. Under the customer-oriented regulatory reform envisioned here, utilities will actively manage and coordinate a wide range of distributed resources to accomplish the policy objectives described by the Commission. Markets and tariffs will empower customers to reduce and optimize their energy usage and electric bills, and will stimulate innovation and new products that will further enhance customer opportunities.⁴⁵

A new regulatory framework is being developed through a formal (legalistic) extensive consultation and engagement process to meet these objectives. PIAC believes a comparable process to examine the future role of networks and their regulation is needed in Australia.

It is not merely that technological change is transforming the market but that harnessing new technologies and new business models can make energy cheaper and, potentially, more reliable. New technologies can often deliver superior energy services to consumers more efficiently – such as the replacement of energy hungry desktop PCs with laptops, tablets and smart phones. Unless we reconsider what's possible, Australia will be left with energy markets serving last century's needs and out-of-date business models, reducing our international competitiveness.

5.1.1 The need for a smarter grid

There is a particular need to examine how network regulation, in particular, can evolve with the changing circumstances discussed above. As the US Department of Commerce notes:

In the United States and internationally, modernization of the electric power grid is central to national efforts to increase reliability, resiliency, sustainability, and energy efficiency; transition to renewable sources of energy; reduce greenhouse gas emissions; implement secure smart grid technologies and address cyber security and privacy issues; support a growing fleet of

⁴⁵ NYS Department Of Public Service, 2014, *Reforming The Energy Vision: NYS Department Of Public Service Staff Report And Proposal*, available at: [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/26be8a93967e604785257cc40066b91a/\\$FILE/ATTK0J3L.pdf/Reforming%20The%20Energy%20Vision%20\(REV\)%20REPORT%204.25.%2014.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/26be8a93967e604785257cc40066b91a/$FILE/ATTK0J3L.pdf/Reforming%20The%20Energy%20Vision%20(REV)%20REPORT%204.25.%2014.pdf) as at 8 August 2014.

electric vehicles; and build a sustainable economy that ensures prosperity for future generations⁴⁶.

There is only very limited on-going peaky-ness in networks across Australia and tremendous opportunities to use smart grid technologies to address remaining peaks. To date, however, few network businesses have embraced smart grid technology, let alone considered how they could be a platform for energy services. PIAC is particularly concerned that NSW DNSPs are not changing their business models or operations to fit the current or future circumstances.

One exception worth noting is SA Power Networks CEO Rob Stobbe who said in December last year:

“We will have a totally new business model going forward,” Stobbe told analysts during the presentation. “There is no doubt about that. We just need to be part of it.” Asked by analysts about the future role of networks in a decentralised grid, Stobbe said: “I’d be more concerned about the generators and the retailers and what their future is. They don’t have one.” He continued: “At least we have got the network that can be utilised in micro grid environments. It is easier for us to move into that environment. A lot of people still don’t believe it will happen. We think it is a long way off, but we may be proved wrong.”⁴⁷

Crucially, in PIAC’s view, the rule maker has yet to pay proportionate attention to these matters. PIAC is concerned that regulation will fall years behind market developments with a consequential loss of innovation, productivity, efficiency and effectiveness for consumers.

5.2 Lack of demand management as an example of the inefficiency of the current system

The supply-side bias in the NEM has been discussed above, but is worth revisiting to highlight the lack of demand management (DM) by network businesses and the lack of a demand response mechanism (DRM) in the wholesale market.

Demand management needs to be part of ensuring efficient costs for consumers, which is why it was included in the National Energy Market (NEM) ambitions from the beginning. The National Grid Management Protocol in 1992 included the objective ‘to provide a framework for long-term least cost solutions to meet future power supply demands including appropriate use of demand management’. DM is relatively low cost especially compared to the major capex, which requires a 40 year payback period, for example, for new substations. It is also quick and flexible to deploy compared with asset replacement or augmentation. As the Institute for Sustainable Futures has highlighted, Australian network businesses typically only undertake demand management for less than 2% of NEM-wide peak demand, compared for example to California which implemented legislation in 2006 with an overall target of 10% reduction in consumption within 10 years.⁴⁸

⁴⁶ U.S. Department of Commerce, National Institute of Standards and Technology, ‘NIST Framework and Roadmap for Smart Grid Interoperability Standards’, (Release 3.0, National Institute of Standards and Technology, 2014).

⁴⁷ Giles Parkinson, Network operator sees no future for generators, retailers (Renew Economy, 16 December 2014) <http://reneweconomy.com.au/2014/network-operator-sees-no-future-for-generators-retailers-24660>.

⁴⁸ Dunstan, C., Downes, J. & Sharpe, S., ‘Restoring Power: Cutting bills & carbon emissions with Demand Management’ (Report, Institute for Sustainable Futures, University of Technology Sydney. Prepared for the Total Environment Centre, 2013)

5.3 Barriers to innovation and therefore competition

New products and services can support greater consumer choice and engagement and reduce costs but there are currently multiple barriers to innovation in the NEM including:

- increases to fixed charges (which penalise prosumers – consumers who generate their own electricity);
- the lack of solar export prices that reflect the true benefits of rooftop solar electricity;
- the lack of a Demand Response Mechanism in the wholesale market;
- the low level of demand management being undertaken by network businesses;
- the relatively low take up of smart grid technologies by networks;
- the lack of smart meters (except in Victoria);
- the inability to export from storage and automatic approval for PV systems under 30kW that are unable to export to the grid in Queensland;⁴⁹
- consumers in Victoria being told either that they cannot install PV systems, or will have to downsize the number of modules. There is anecdotal evidence this is also happening in other states;⁵⁰
- no mechanism for consumers to buy and sell excess distributed generation without a retail licence (i.e. no ‘virtual net metering’ or equivalent provision), and
- no clear regulation of networks investment in or use of PV and storage.

It is in consumers’ interest that these and other barriers to innovation and deployment of new products and services are removed.

PIAC’s concern is that the energy market institutions and the governance of Australian energy markets favour incumbents at the expense of competition from emerging players. This is a major competition issue that is adversely impacting on long-term interests of consumers and the broader economy. At present, decisions are sometimes framed as being ‘conservative’ to protect consumers, but may in fact be discriminatory towards emerging energy service solutions that would benefit consumers in the short term and long terms.

⁴⁹ In 1 July 2014, a new connection standard for Small Scale Parallel Inverter Energy Systems (IES) up to 30kVA was introduced. Any rooftop solar system under 30kW will gain automatic approval from the networks, as long as it has equipment installed that can prevent it from exporting electricity back into the grid.
<https://www.energex.com.au/contractors-and-service-providers/solar-pv-installers/new-inverter-energy-systems-ies-connection-standard>

⁵⁰ <http://reneweconomy.com.au/2013/australian-utilities-erect-barricades-in-bid-to-halt-solar-storm-91715>

6. Over-riding instruction (NEO) is narrow and out-of-date

6.1 The NEO has been designed and interpreted as a narrow economic objective

Before discussing in any further detail the institutional arrangements in the NEM, it is vital to address the National Electricity Objective (NEO). The Governance Review Issues Paper notes:

there are a range of energy market issues which link closely to areas outside the remit of energy ministers, including in the areas of sustainability and climate change, financial markets, and some aspects of consumer policy, which may have direct relevance to energy market outcomes.

The NEO is effectively the guiding instruction for the NEM (for the COAG Energy Council and the energy market institutions) and it states:

The National Electricity 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 price, quality, safety, reliability, and security of supply of electricity; and the reliability, safety and security of the national electricity system.

The second reading speech where it was introduced highlights the NEO is an economic objective:

The market objective is an economic concept and should be interpreted as such. For example, investment in and use of electricity services will be efficient when services are supplied in the long run at least cost, resources including infrastructure are used to deliver the greatest possible benefit and there is innovation and investment in response to changes in consumer needs and productive opportunities.

The long term interest of consumers of electricity requires the economic welfare of consumers, over the long term, to be maximised. If the National Electricity Market is efficient in an economic sense the long term economic interests of consumers in respect of price, quality, reliability, safety and security of electricity services will be maximised.⁵¹

While there is no single document that outlines how the AEMC interprets the NEO, the Draft Rule Determination: National Electricity Amendment for Distribution Network Pricing Arrangements Rule 2014 states:

The Commission's assessment approach is based on the NEO. The NEO refers to the three fundamental limbs of efficiency: allocative (efficient use of electricity services), productive (efficient operation) and dynamic efficiency (efficient investment). The Commission has balanced all three aspects of efficiency to reach the decision that best promotes the long term interests of consumers.⁵²

⁵¹ Wednesday 9 February 2005 The Hon. J.D. Hill, for the Hon. P.F. CONLON (Minister for Energy), obtained leave and introduced a bill for an act to amend the National Electricity (South Australia) Act 1996

⁵² p9, available at <<http://www.aemc.gov.au/getattachment/e8ed16d5-011c-4bac-8076-eee575a5141c/Draftdetermination.aspx>>

This division of efficiency into allocative, productive and dynamic efficiency mirrors how the Productivity Commission defines efficiency.⁵³ AEMC office holders have affirmed the AEMC's focus on economic efficiency when interpreting the NEO. For example, Australian Energy Market Commission Chairman John Pierce said recently, "The NEO refers to issues of economic efficiency; environmental and social issues are dealt with through other pieces of legislation"⁵⁴.

6.2 However, originally energy regulation had broader objectives

The objective of energy regulation has not always been so narrow⁵⁵. For example, the mission of National Electricity Code Administrator (NECA) established by the state governments in 1997 to enforce the National Electricity Code was to:

- promote the effectiveness, efficiency and equity of the national electricity market; and
- lead the development of the market towards more competitive, market-oriented outcomes in order to deliver a viable market that benefits end-use customers.⁵⁶

Similarly, the Australian Energy Market Agreement made in 2004 included the objective to 'address greenhouse emissions from the energy sector, in light of the concerns about climate change and the need for a stable long-term framework for investment in energy supplies.'⁵⁷

6.2.1 Comparison with state electricity regulators objectives

Many state government energy regulators still have broader objectives. For example, in NSW IPART must consider 'the need to maintain ecologically sustainable development' and the WA regulator must 'avoid discrimination in that market against particular energy options and technologies, including sustainable energy options and technologies such as those that make use of renewable resources or that reduce overall greenhouse gas emissions' and it has an objective 'to encourage the taking of measures to manage the amount of electricity used and when it is used'. Queensland currently stands alone in having an objective that largely mirrors the NEO, while Victoria's and Tasmania's are broadly consistent with it.

6.3 Climate change and energy policy are inseparable economic objectives

The Intergovernmental Panel on Climate Change (IPCC)'s Fifth Assessment Report⁵⁸ has detailed with certainty that human-caused climate change is underway, and is already having dangerous impacts across all continents and the ocean. The majority of the world's climate scientists are united in calling for urgent action to reduce greenhouse gas emissions. Global economic institutions, including the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD) and World Bank are clear on the need to decarbonise the global economy by the second half of this century.

⁵³ Productivity Commission staff research note, 'On Efficiency and Effectiveness', May 2013. available at <<http://www.pc.gov.au/research/completed/efficiency-effectiveness/efficiency-effectiveness.pdf>>

⁵⁴ John Pierce, 'The Australian National Electricity Market: choosing a new future', (World Energy Forum speech, 12-16 May 2012 Quebec City, Canada).

⁵⁵ Also see additional examples in the expert reports attached

⁵⁶ <http://www.neca.com.au/AboutNECA/index.html>

⁵⁷ AEMA

⁵⁸ Intergovernmental Panel on Climate Change, 'Fifth Assessment Report' (Intergovernmental Panel on Climate Change, 2014) <<http://www.ipcc.ch/report/ar5/>>.

Lord Stern put it that 'climate change is a result of the greatest market failure the world has seen'.⁵⁹ To ignore climate change is to ignore the negative externalities of fossil-fuelled generation. As former British Prime Minister Margaret Thatcher put it, 'We should always remember that free markets are a means to an end. They would defeat their objective if, by their output, they did more damage to the quality of life through pollution than the wellbeing they achieved by the production of goods and services'.⁶⁰

Consequently, even if the NEO is a purely economic objective then it should necessarily include climate change as climate change is a fundamental economics issue. It is inefficient and inappropriate for climate change, renewable energy and energy efficiency policy to be separate. It creates regulatory conflict and complexity.

Mountain's report for PIAC gives a detailed argument using the concepts of Transaction Cost Economics to conclude 'emission reduction is very deeply integrated with the design and operation of energy markets and systems of network regulation'.

6.4 International commitments

Australia is a party to the 1994 United Nations Framework Convention on Climate Change (UNFCCC). The object and purpose of the UNFCCC is to stabilise 'greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous [human-induced] interference with the climate system'. Australia has also ratified the 1997 Kyoto Protocol for agreed emissions reductions by 2012 (although Australia uniquely among developed nations was granted an increase in emissions).

Both major political parties have committed to a minimum 5% emissions reduction target by 2020 and an 80% reduction in emissions by 2050 is enshrined in legislation. Mountain highlights integrating objectives is particularly pertinent because 'Greenhouse gas emissions from the production of electricity in Australia account for around 30% of Australia's annual emissions of around 570 million tonnes of CO₂-equivalent. This is one of the most emission-intensive electricity systems in the world'.

Therefore Australia's international commitments to reduce its emissions will be impossible without reducing emissions from the energy sector.

6.5 International comparison

In her comparison of regulatory objectives worldwide, Penny Crossley found that the Australian NEO is missing core themes of consumers issues; environmental concerns; energy efficiency and demand-side management; competitive market structures, and transparency and accountability:

The objective [NEO] is narrowed by reference to price, quality, safety, reliability, security of supply of electricity. Compared to international jurisdictions, this focus on the economic efficiency of electricity supply to consumers is a narrow regulatory remit. By way of comparison, the United States Federal Energy Regulatory Commission (FERC) extends to

⁵⁹ Quoted in <http://www.theguardian.com/environment/2007/nov/29/climatechange.carbonemissions>

⁶⁰ Quoted in <http://www.smh.com.au/comment/time-for-stateswomen-to-step-forward-on-climate-change-20150409-1mdgil.html>

ensuring that the operation of network businesses are 'in the public interest.'⁶¹ This broader scope would empower regulatory investigations regarding environmental standards, regional development and efficiency of access of demand-side participants.

One particularly comprehensive objective by way of comparison is that governing the Ontario Energy Board Act, 1998:

(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

6.5.1 UK comparison

In the UK, legislation enables the Government to dictate priorities to the electricity and gas regulator Ofgem via a Strategy and Policy Statement:

The Energy Act 2013 provides powers for the Secretary of State to designate a Strategy and Policy Statement (SPS) in which he would set out the Government's strategic priorities and other main considerations of its energy policy, the policy outcomes to be achieved as a result of the implementation of that policy, and the roles and responsibilities of those who are involved in implementation of that policy. The Act and imposed new duties on Ofgem to have regard to the strategic priorities when carrying out its regulatory functions and to carry out those functions in the way it considers is best calculated to further the delivery of the specified policy outcomes.⁶²

The draft Strategy and Policy Statement issued in late 2014 by the UK government states that '[p]laying a leading role in efforts to secure international action to reduce greenhouse gas emissions and tackle climate change' is one of the Governments three strategic priorities in delivering the UK's energy policies. And that:

The interests of existing and future consumers are their interests as a whole, including their interests in the reduction of greenhouse gas emissions, ensuring energy security and the

⁶¹ Federal Power Act, 16 USCS § 824 (1920).

⁶² Department of Energy and Climate Change, UK, 'Strategy and Policy Statement', (A consultation on the draft statement, August 2014) at <https://www.gov.uk/government/consultations/strategy-and-policy-statement>

fulfillment of objectives under the EU Third Energy Package and Energy Efficiency Directives.⁶³

PIAC suggests that this argument (excluding the reference to EU Directives) is equally applicable to Australian consumers.

6.5.2 The integration of energy policy generally

More generally, energy policy elsewhere in the world is deeply intertwined with emissions reduction policy, as well as industry policy. This is clear, for example, in the announcement by the Chinese government of a commitment to twenty percent renewable energy by 2030⁶⁴ when it also plans to peak its carbon emissions. It is similarly clear in President Obama's executive order to the EPA to introduce emissions standards for existing and new electricity generation plants as part of his Climate Action Plan.

6.6 Directions for reform

The Governance Review Issues Paper asks 'What are the opportunities to improve integration between energy market, efficiency and sustainability agendas?'. PIAC considers that the biggest opportunity is to broaden the NEO in the interests of current and future consumers. Any energy policy statement needs to acknowledge the need to decrease greenhouse gas emissions, especially given the economic importance of addressing climate change and Australia's international obligations in this regard.

PIAC also believes it would be consistent with consumer interests and international practice to include social objectives like affordability in the NEO. Similarly, focus needs to be on total cost of energy services, not 'price' (treated as price per unit of energy) which is just one element of consumer benefit.

In addition to broadening the NEO, and as will be discussed below, PIAC believes the COAG Energy Council should utilise its ability to issue Statements of Policy Principles to set directions and/or clarify policy issues for the energy market institutions.

Recommendation 1

That the Governance Review Panel recommends that the National Electricity Objective (NEO) and associated objectives (the National Electricity Retail Objective (NERO) and National Gas Objective (NGO)) be reviewed and updated to meet the needs of existing and future consumers in a transforming electricity market.

And that this review focus on a broader interpretation of the 'long term consumer benefit', including appropriate weighting to emissions reduction and social objectives.

⁶³ ibid

⁶⁴ See for example, <http://www.theguardian.com/environment/2014/nov/12/china-and-us-make-carbon-pledge>

7. The COAG Energy Council

7.1 Energy Council's scope

The Governance Review Panel makes a distinction between those areas that it considers to be outside the direct policy remit of the COAG Energy Council, i.e., financial markets, sustainability and climate change issues, and social policy; and those that it believes are beyond its AEMA coverage, i.e., retail price regulation and technical and safety matters. PIAC believes (consistent with its view of the NEO) that, as the principle decision maker in Australian Energy Markets, the Council's role and scope needs to be appropriately broad. However, as Crossley highlights, 'It has now been 16 months since the inception of the COAG Energy Council and the final Terms of Reference appear to have still not been agreed by the Council' and therefore it is impossible to know what the Council's scope currently is.

The Governance Review Issues Paper asks 'What are the opportunities to improve integration between energy market, efficiency and sustainability agendas?'. The development of terms of reference is one opportunity to do so and should be the subject of consultation with consumers.

PIAC strongly supports the focus on energy productivity in the Australian Government's Green and Energy White Papers and the proposal to develop a National Productivity Plan that includes:

- increasing appliance minimum energy performance standards on a continuous improvement basis, including a focus on standby power and peak demand
- considering more consistent national regimes for energy efficiency standards, including buildings
- ensuring best practice information on energy management and use is widely available
- encouraging market driven productivity through labeling and accessible information
- rewarding innovation by recognising market leaders in energy efficient products
- directly driving productivity by aligning with international energy efficiency standards, raising domestic standards and introducing new standards for appliances covered under the GEMS Act 2012
- strengthening international cooperation on energy productivity to share best practice and foster technology exchange
- improved vehicle energy efficiency.⁶⁵

The importance and breadth of these policy directions further highlights the need for the COAG EC to broaden its approach and consult with other COAG Councils and policy-making bodies, especially in the built environment and transport.

The Senate Inquiry on Electricity Networks came to a similar conclusion recently when it recommended:

that the Australian, state and territory governments increase and prioritise efforts to ensure that networks are prepared to efficiently respond to changes in the energy market, in light of:

- the increased uptake of small-scale solar generation;
- emerging energy storage technologies;
- the anticipation of customers going 'off-grid';

⁶⁵ Commonwealth of Australia, 'Energy Green Paper' (Commonwealth of Australia, 2014) 57.

- the anticipation of further disruptive technologies; and
- the certainty of value destruction as a result of current business models.

7.2 Blurred roles of AEMC and SCER

In theory, as Appleby outlines, ‘The Energy Council has considerable legislative, policy-making and appointing power’:

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.⁶⁶

In practice, the Productivity Commission has noted that much policy work falls to the AEMC:

- 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. The ‘separation of roles’ between SCER and the AEMC claimed by several network businesses is rather indistinct.⁶⁷
 - 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.

Consequently, consideration of the current arrangements should not start with the premise that they are structurally sound. There are grounds for adaptation of the arrangements that move them — even if incrementally — towards conventional policymaking.

⁶⁶ Australian Energy Market Agreement (as amended) (9 December 2013) clause 4.

⁶⁷ ENA (sub. DR71, attachment A, p. 20) and Ergon Energy (sub. DR63, p. 9).

PIAC agrees with the Productivity Commission's conclusion and believes there is a need for the COAG Energy Council to reclaim its role as the pre-eminent decision maker in the NEM. One way for the Council to provide improved policy oversight of the market institutions would be for it to issue Statements of Policy Principles as provided for in the AEMA.

7.2.1 Slowness of decision making

The Productivity Commission also noted the slowness of decision-making at the Energy Council (which has also has been PIAC's experience):

The Standing Council on Energy and Resources should reform its processes and decision making so that critical policy reviews of the National Electricity Market, the corresponding changes to the National Electricity Rules, and their implementation occur in a timely fashion.

Consensus should not be required⁶⁸ and instead majority voting should be used, where necessary, consistent with the operations of other COAG Ministerial Councils. Crossley helpfully highlights the example of the Voting Protocol of the Transport and Infrastructure Council,⁶⁹ where different types of decisions are assigned different voting majorities in order to pass, such as a two-third majority of jurisdictions, or even a simple majority may be a more appropriate voting model for some decisions. Without such voting reform, paralysis can result with a single jurisdiction blocking progress on energy market reform and other policy making.

7.2.2 Disconnected policy processes

Not only is much policy making effectively left to the rule maker, but PIAC has observed that on occasions there are disconnected policy processes underway on the same or similar topics across the COAG EC, AEMC and AER. This is happening currently with all three organisations undertaking reviews and investigations related to the changes to the market and potential changes to regulation needed in respect of new products and services (such as battery storage). Clearly, such overlap and/or duplication is inefficient and constitutes a surfeit of regulatory activities.

7.3 Democratic participation and accountability

Appleby's paper goes into valuable detail about the way in which COAG 'sidesteps, more or less completely, any sort of democratic scrutiny'⁷⁰ and how:

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.⁷¹

⁶⁸ The AEMA requires unanimous agreement on matters related to the AER and it appears that COAG Energy Council has also been operating by consensus on other matters: A regulation, rule, order, declaration or other instrument which confers functions or powers or imposes duties on the AER may only be made or amended under the legislation of a Party that applies, implements or otherwise gives effect to the Australian Energy Market Legislation with the unanimous agreement of the MCE.

⁶⁹ COAG Standing Council on Transport and Infrastructure, *Decision Making (Voting) Protocol* (SCTI, 2014).
⁷⁰ Roger Wilkins, 'A New Era in Commonwealth-State Relations?' (2006) 7 *Public Administration Today* 8, 12.

⁷¹ 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.

In PIAC's experience, these three concerns are all valid in regard to the Energy Council, especially given the majority of the Council's work occurs through the Standing Council of Officials (SCO). Consumers are almost totally disenfranchised from SCO processes, which take place behind closed doors with no public reporting or transparency. 'Consumers are unable to discern whether there have been developments of interest/concern to them' and 'this lack of information and access is not necessarily uniform, and powerful lobby groups (especially incumbent businesses and industry associations) may be at an advantage'. There is no provision for freedom of information through any of these processes and 'The marginalisation of Parliament has repercussions not only for the operation of ministerial responsibility, but also public participation through parliamentary processes'.⁷²

As Appleby highlights, there is a need for a formal process of consultation with consumers to enhance transparency, provide for public participation and improve the functioning of the COAG Energy Council.

7.4 Oversight of Energy Market Institutions

In 2012, COAG recommended that the Energy Council develop enhanced budget and performance reporting for both the AEMC and the AER. Appleby's observes that:

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.'⁷³

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. ...

Nowhere in the Statement of Expectations is there provision or explanation for any sanctions should the AEMC fail to comply with the expectations or its Statement of Intent.

Therefore the COAG Energy Council needs to consider how to create appropriate sanctions for non-compliance of the Energy Market Institutions.

7.5 Directions for reform

Given the imperfections of COAG Councils as policy making bodies, PIAC is cautious about endorsing the COAG Energy Council as the pre-eminent decision maker for Australian energy markets. As such, PIAC suggests the Governance Review Panel carefully examine this issue, including which processes are best undertaken at Federal and state levels.

In keeping with the transforming market and the need for policy to embrace innovation and competition, PIAC believes the overall objectives of regulation should be to maximising demand management, energy efficiency, distributed generation and storage to reduce costs and emissions.

PIAC agrees that in the current circumstances (and in the absence of another national or Commonwealth body) the COAG Energy Council is the appropriate body to make policy and take crucial decisions on behalf of consumers in the NEM, provided consumer participation, accountability, transparency and the speed of decision making is improved. As Appleby notes:

⁷² Ibid; Kildea, above n 71, 83.

⁷³ OECD's The Governance of Regulators: Best Practice Principles for Regulatory Policy (2014) 83.

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.

Therefore consumer representation and participation is particularly important. Consumers need a seat at the table and as such, PIAC supports Appleby's proposal for the creation of a Consumer Advisory Committee.

Crossley further highlights, 'no other Federal jurisdiction in the world appears to have an entity with the roles and responsibilities of the COAG Energy Council without any form of parliamentary oversight' and that 'the COAG Energy Council is one of the least publicly transparent Councils in terms of publishing their governance structure; names, titles and contact details for their SCO, operational guidelines and advance meeting dates'. A detailed series of transparency and accountability changes are therefore proposed.

Recommendation 2

That the Governance Review Panel considers options for reforming the governance of the NEM, including which processes are most effectively the responsibility of state governments and which are most appropriately national responsibilities. This examination should be in the context of the transforming energy market – especially the importance of energy efficiency and demand management, distributed generation and storage to improve outcomes for consumers.

That the Governance Review considers the option of the COAG Energy Council reclaiming its role in setting the future direction of national energy policy. One means by which the Energy Council could do this would be to issue a Statement of Policy Principles on key issues to direct the work of the Energy Market Institutions.

Recommendation 3

That, recognising the declining costs that can be captured through economies of scale, institutional streamlining and on-going innovation, the objectives of regulation (including those set out in the Statement of Policy Principles) should be to maximise demand management, energy efficiency, distributed generation and storage to reduce costs and emissions and support the transition of distribution networks to energy service platform providers.

Recommendation 4

That consumers be given a role in decision-making processes in the NEM and that, therefore, a consumer advisory committee to the COAG Energy Council be established.

In accordance with the National Electricity Objective, this committee should be comprised of a majority of consumer representatives, selected in consultation with Energy Consumers Australia. Such a body should contain representatives from across the spectrum of consumers, including from large, medium and smaller consumer cohorts, from across different regions and from groups with different consumer focuses.

The Council should be required to consult with the consumer 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 energy market institutions' work;*
- *developing scopes for significant policy reviews;*
- *finalising recommendations on appointments to the AEMC and AER; and*
- *proposed legislative changes to the NEL.*

Recommendation 5

That, given the importance of the its in setting the future direction of national energy policy, any future changes to the scope and annual work plan of the COAG Energy Council should be subject to consultation with consumers and industry.

That the COAG Energy Council finalise its terms of reference as a matter of priority. This will provide greater transparency in respect of its role and will enable it to be held accountable for its actions.

That in the interim period, prior to the finalisation of the Terms of Reference, that the Energy Council's draft Terms of Reference be made publicly available to enable consumers to assess how its role has changed since the shift from SCER.

Recommendation 6

That the Australian Energy Markets Agreement be amended to allow for majority voting on all matters, consistent with other COAG Ministerial Councils.

Recommendation 7

That the Energy Council consider how to create appropriate sanctions for non-compliance of the Energy Market Institutions against the accountability frameworks agreed at the December 2012 meeting.

Recommendation 8

That greater transparency be achieved within the COAG Energy Council by:

- *requiring it to publicly release meeting agendas in addition to Communiqués;*
- *reinstating the requirement for the Energy Council to provide an annual status report to COAG, and making these publicly available on its website; and*
- *reinstating the requirement for the Energy Council to provide an annual work plan to COAG, and making these publicly available on its website.*
- *making the identity of the Senior Council of Officials (SCO), any delegations made to them, and their ultimate supervisor public so that these delegations are transparent and appropriate accountability mechanisms can be put in place.*
- *updating the COAG Energy Council website to provide up-to-date and meaningful information to the public, especially on the legislation that the Council is currently responsible for and its governance.*

8. The Australian Energy Markets Commission (AEMC)

8.1 Board governance

Two of the AEMC's three Commissioners are appointed by state governments. None of the Commissioners are required to have any knowledge of or experience in consumer matters or demand side participation. By contrast section 7 (4) of the Competition and Consumer Act requires that 'At least one of the members of the [Australian Competition and Consumer] Commission must be a person who has knowledge of, or experience in, consumer protection'.

PIAC is of the view that the absence expertise in consumer protection and demand side participation in the governance of energy market institutions is a major barrier to innovation and competition in the transforming energy markets. The supply-side bias discussed above means that energy market institutions are not responsive to consumer needs and regulation is fast falling behind technological and commercial innovation. As a result, the benefits of innovation are not being unlocked to support greater productivity in the Australian economy. In PIAC view, this is a major issue, especially given the over-investment in electricity network infrastructure over the last decade.

8.2 Policy maker or rule-maker?

In addition to the COAG Energy Council effectively outsourcing policy making to AEMC as noted above, the Productivity Commission highlighted a similar issue in the AEMC's role of undertaking reviews at the direction of the Energy Council, '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'⁷⁴.

This point may not be crucial in and of itself, but it points to the fact that the boundary between policy-making and rule making is blurred. Effectively, in making the rules, the AEMC is making policy, especially as the NEL gives the AEMC very significant discretion as Appleby notes:

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 [emphasis added]

Nicholas writes '(a) key achievement of this delegated rule-making function is to enshrine separation between rule-making, and hence policy development, and the task of applying and enforcing the rules'⁷⁵. However, at present the AEMC controls:

1. The determination of the risk free rate;

⁷⁴ Productivity Commission, *Electricity Network Regulatory Frameworks, Report No. 62* (2013) 800.

⁷⁵ Peter Nicholas, 'Administrative Law in the Energy Sector: Accountability, Complexity and Current Developments' (2008) 59 *AIAL Forum* 73, 80.

2. The methodology for the calculation of debt allowances and tax;
3. The valuation of sunk assets;
4. The indexation of the regulator asset base;
5. The requirement on the AER to justify why network service provider proposals are reasonable.

Each of these are critically important factors that affect prices, network service provider profits and efficiency incentives (as was alluded to in section 3 on regulatory failure).

Appleby notes of the delegated rule making:

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.

As Peter Nicholas explains, this means that the AEMC is, in theory, able to ‘check’ the operation of the AER:

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.⁷⁶

However, in practice, the AEMC has not seen AER’s decisions in this way. In fact, the AER has had to initiate rule changes to assist it to undertake its functions/fulfil its objectives effectively. That is because of the lack of balance in the approach of the AEMC, alluded to in section 3.2 with the dominance of ‘investment conditions’ as criteria for rule making and the respective state government beneficiaries.

8.3 An unbalanced approach

PIAC’s view is that there are issues with the performance of the AEMC’s functions and that the AEMC’s rule making process are not achieving the national energy objectives of serving the long term interests of consumers for a range of reasons, including:

- the narrow nature of the NEO itself;
- the narrow interpretation of the NEO by AEMC (as an ‘economic’ objective focused on price, not ‘in long term interests of consumers’ as noted by the Productivity Commission and the Senate Inquiry);
- the dominance of Commissioners who have been incumbent ‘industry players’ (associated with for example, government owners of assets, major generators and/or financiers or legal firms acting for supply side entities);
- the nature of the original (2006) rules, which were biased toward infrastructure investment;
- an organisational culture that is focused on the interests of the supply-side of the markets (one example of this supply-side bias is that when consumers have sought to limit their exposure to over-investment through ex-post reviews (as was previously applied under the

⁷⁶ Ibid 80-81.

electricity Code by previous state regulators), this attempt to limit costs was rejected by the AEMC as 'intrusive and undermined regulatory certainty'⁷⁷);

- an organisational culture that does not prioritise consumer concerns;
- a tendency to privilege incumbents (one example of this is the AEMC's proposed approach to Optional Firm Access which grandfathered arrangements for existing generators creating a significant barrier to new entrants⁷⁸);
- that the AEMC not seeing its role as cooperating and pro-actively working with policy makers from other areas (for example, social or environment) to deliver on whole-of-government outcomes, but to advise government on the impacts of policy proposals from other areas on the incumbent electricity industry;
- an unwillingness to accept evidence from behavioural economics (for example, in the 'fix it' rule change proposed by Consumer Action Law Centre and Consumer Utilities Advocacy Centre in Victoria);
- favouring research and opinions of its own consultants over those consumers, and more often that not, the AER and AEMO.

All too frequently, input by AEMO and/or AER into analytical work by AEMC in relation to a review or a rule change proposal is considered to be less valuable than the views of the AEMC or of AEMC consultants. Arguments put by consumer advocates are rarely accepted, regardless of the quality of the argument or evidence offered. Crossley draws this conclusion more broadly, 'this has led such groups to doubt the extent to which their submissions are taken into real consideration, and to complain of being made to feel unwelcome in the reform process'.⁷⁹ Similarly, Appleby found:

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.⁸⁰

In terms of the supply-side focus, the AEMC appears to be particularly slow on proceeding with rule changes that would support demand management and energy efficiency and greater take up of renewables. The current Demand Management Incentive Scheme (DMIS) rule change took fourteen months (for no transparent reason) with the result that the DMIS has not been able to be used by the AER in the current round of network revenue determinations. The relatively simple and straightforward rule changes proposed by the Property Council of Australia to improve the ease of connection to the distribution network for building-size distributed generation took two years.

Crossley's analysis shows consumer representatives have only lodged 3% of rule change applications (5 of the 180 total, compared with 52% of applications being from individual businesses or industry organisations) and the consumer organisations which lodged the only retail rule change were very unsatisfied with the AEMC's determination on that matter. It is also worthy of note that AEMC has no equivalent forum to AER's Customer Consultative Group and has resisted creating such a body.

⁷⁷ AER, 2012, Answer to written questions on notice from the Senate Inquiry, 3-4.

⁷⁸ Reference PIAC's submission on OFA

⁷⁹ Stephen Orr, Submission No 36 to Commonwealth Productivity Commission, Electricity Network Regulation, 16 April 2012, 6-7.

⁸⁰ See, eg, Visy submission to the Productivity Commission, extracted in the Productivity Commission, *Electricity Network Regulatory Frameworks, Report No. 62 (2013)* 786, see also extracts of submissions on page 789.

8.3.1 AEMC's rule change processes are very slow and inefficient

Crossley's report includes detailed analysis of the time frames for the AEMC's rule-making process, variously:

The AEMC has to date considered 180 applications to amend the National Electricity Rules and National Electricity Retail Rules, of which 152 have resulted in some alteration to the Rules.⁸¹

There were 86 determinations (49.14%) that took the AEMC in excess of 6 months to finalise, and 26 determinations (14.86%) that took more than 12 months.

since the 2010-2011 Annual Report of the AEMC, only 2 of the 73 determinations made have been through a fast-track process.⁸²

[the expedited] process was used 24 times since the 2010-2011 AEMC reporting period. Most often, this process was used in respect of applications initiated by the AEMC itself.

She further notes:

The Productivity Commission variously described the AEMC Rule-making process as 'a graveyard for reform proposals'⁸³ and 'paralysis by analysis.'⁸⁴ As previously identified, the average time taken for a claim to progress to a determination is 29.55 weeks.⁸⁵ The time taken to implementation is even longer. Given the requirement to provide significant notice to the NEM prior to the implementation of a rule change, the average time between application and commencement of a successful Rule-change is 35.34 weeks.⁸⁶ One application by COAG, in relation to inter-regional transmission charging, has taken over five years to implement.⁸⁷

Crossley concludes from this analysis that 'it becomes clear that the system suffers both from a bureaucratic inefficiency and an industry bias at the expense of the consumer's interests'.

8.4 The AEMC's lack of accountability

8.4.1 No higher approval required for rule-making

Appleby highlights the importance of transparency and accountability in the operation of the AEMC:

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.⁸⁸ It

⁸¹ Australian Energy Market Commission, Rule Changes (2015) <<http://www.aemc.gov.au/Rule-Changes>>.

⁸² Australian Energy Market Commission, Annual Report 2010-2011 (AEMC, 2011).

⁸³ Productivity Commission, above n 2, 9.

⁸⁴ Ibid 102.

⁸⁵ Statistics compiled from Australian Energy Market Commission, *Rule Changes*, above n 102.

⁸⁶ Ibid.

⁸⁷ Australian Energy Market Commission, Inter-regional Transmission Charging (2015) <<http://www.aemc.gov.au/Rule-Changes/Inter-regional-Transmission-Charging>>.

⁸⁸ Nicholas, above n 93, 82.

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.

However, as the Productivity Commission highlighted, there is no process by which Rules created and imposed by the AEMC are reviewed or endorsed by COAG, the minister, the government or the parliament:

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.

...

Given the historically parochial nature of energy policy in Australia and the requirement for reasonable nimbleness in making policy changes, this structure was desirable at the commencement of the NEM, but it cannot be said to be conventional or necessarily desirable over the long run.⁸⁹

This critique is of particular concern given the preceding discussion about how the AEMC's rule making is effectively policy-making and the way in which the Energy Council's role in policy making has been largely and significantly devolved to the AEMC.

Appleby concludes:

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.

8.4.2 Judicial review – effectively impossible

Appleby investigated the extent to which judicial review is possible for AEMC decisions. In general terms:

'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.⁹⁰ 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.

However, Appleby outlines there may be difficulties in consumers (and others) being granted standing in such matters and that further, grounds are limited:

⁸⁹ Productivity Commission, Electricity Network Regulatory Frameworks, Report No. 62 (2013), 800.

⁹⁰ National Electricity Law, s 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.

...

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).

...

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’,⁹¹ or that its decision was not proportionate to the purpose of the delegation.

Given the scope of the NEO and AEMC’s discretion outlined above, there is in effective no review mechanism of AEMC’s decisions. This is borne out by the fact that no AEMC decision has ever been reviewed in the courts.

8.5 The relationship between the rule maker and rule implementer

8.5.1 Administrative law perspective

From an administrative law perspective, Appleby raises a number of concerns about the relationship between the AEMC and the AER. Principally, she is concerned that the separation creates potential inefficiencies, accountability gaps and complexity:

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.⁹²

As is obvious from the prior detail, the result in practice is massive inefficiencies and delay in making changes to the rules and implementing them in order to benefit consumers. Mountain’s report provides a comparison of changes to the arrangements for cost of debt which in Britain were very prompt, while in Australia the process for discussion (and regulatory decision) took almost four years and it effectively still remains unresolved:

In Britain the change was first announced in a final decision before which there had been bilateral discussions with interested parties. It was implemented four months later. In Australia, the same issue was considered by the AEMC for 18 months at the end of which the AER was authorised to consider it. This took another 18 months, at the end of which a non-binding

⁹¹ *City of Brunswick v Stewart* (1941) 65 CLR 88, 98 (Starke J).

⁹² Productivity Commission Report No 62: Report into Electricity Networks (2013) 4.

regulatory guideline was established. If implemented, it would have taken another 10 years for the rolling average approach to be fully implemented.

This suggests that the disconnect between the rule maker and rule implementer (or policy maker and implementer) in Australia is indeed a serious issue. This process is not responsive to the concerns of consumers or of the AER and is in need of streamlining.

Given, in particular, this disconnect and the slowness of AEMC processes, the Productivity Commission's view was that:

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. Currently, lack of coordination and overlap of AEMC and AER activities has been seen as problematic (for example, Grid Australia 2011b, p. 5).

The Productivity Commission also cautioned that:

However, this option also raises 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. Concerns about coordination and overlap in the activities of the AEMC and the AER might be better addressed under the 2009 Memorandum of Understanding between the ACCC, the AEMC and the AER.

In PIAC's view, while in theory the diffusion of power across different institutions ensures that no single institution is able to control more than one process within the scheme, in practice no organisation is able to hold the AEMC to account, and ossification has been the result (as outlined in Mountain's report).

8.5.2 International perspective

Mountain notes that "the separation of regulatory design and implementation between institutions ("bifurcation") is unique, as far as we know, not just in the regulation of utility monopolies in Australia, but also in other countries' and 'We are not aware of any document in the public domain (or privately) that explains why this approach, compared to alternatives, has been adopted'.

Crossley further observes that international trends have been to consolidate institutional arrangements in energy market regulation:

over the past decade, while Australia has been developing its complex institutional and governance structure, a number of other jurisdictions have been taking positive steps to consolidate their institutional arrangements. Jurisdictions such as the United Kingdom, the Netherlands, New Zealand, Ontario and Alberta have all taken steps to consolidate some or all of their competition, economic regulation and consumer protection functions into either a single or fewer agencies that are better resourced. For example, market entities in California,⁹³ the United Kingdom,⁹⁴ New Zealand,⁹⁵ Ontario⁹⁶ and Alberta⁹⁷ have comparable

⁹³ Federal Power Act, 16 USCS § 824h (1920).

⁹⁴ Utilities Act 2000 (UK).

regulatory, investigatory and enforcement functions to the AER and AEMC, however, in each of these jurisdictions the functions are performed by a single entity.

PIAC believes there is a need for similar consolidation in Australia.

8.6 Directions for reform

Crossly notes, 'While ostensibly this appears to be a mundane regulatory function, the reality of the operations of the AEMC has been as chief policymaker in relation to electricity in the NEM'. Given the important role played by the AEMC in the NEM scheme, and its capacity to affect the operation of the AER, its processes must be efficient, its accountability must be robust, and the opportunities for consumer participation in its processes meaningful. PIAC is of the view that the inefficiencies of the current AEMC processes are a significant barrier to competition, innovation and achieving better outcomes for consumers. This is an area in need of urgent deregulation, especially in a transforming market. Streamlining and consolidation of energy market institutions and their processes is critical. In addition, Appleby highlights 'the rule-making function of the AEMC should be made subject to greater democratic accountability'.

In Appleby's view:

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.

PIAC agrees and suggests these advantages would outweigh any theoretical advantages of maintaining separate rule-making and rule-enforcing bodies. These advantages (which, for example, exist in the case of Ofgem in the UK) are also discussed in Mountain's report.

There are other advantages to combining the two agencies, given the differential accountabilities resulting from the AEMC being a South Australian (state) body, and the AER being constituted as a Commonwealth body (which will be made clear in the following section outlining the AER's transparency and accountability).

8.6.1 The advantages of making rules under Commonwealth law

Aside from the vital efficiency and effectiveness grounds outlined above, there are substantial accountability benefits from bringing the rule maker in under Commonwealth law. To quote Appleby in detail on this point:

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

⁹⁵ Electricity Industry Act 2010 (Vic) s 16.

⁹⁶ Ontario Energy Board Act, SO 1998, c 15.

⁹⁷ Alberta Utilities Commission Act, SA 2007, s 39.

AER within the jurisdiction of that legislation.⁹⁸ 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.

PIAC is of the view that if the AEMC's rule making functions were transferred to the AER with its more consumer-focused practice and stronger accountability framework (see below), that would mitigate the risk of regulatory ease dominating the rule-making.

Appleby also proposes that:

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. 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. 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.

PIAC supports delegating final approval of a representative committee of consumer groups in theory, but we are uncertain how it would work in practice.

What would be perhaps preferable would be for two Commissioners of the Commonwealth Energy Regulator to have expertise in consumer protection and demand side participation. This should ensure the regulator is responsive to consumer needs and the changing nature of the energy market and assist it to regulate more efficiently in a transforming energy market.

Appleby raises the prospect (should the two functions not be combined into a single energy market institution) of alternatively making improvements 'through other structural changes, including additional mandatory information sharing and the streamlining of processes between the AEMC and the AER'. However, PIAC believes this would only be a partial solution which is unlikely to be sufficient given evidence of the inefficiencies in the regulatory process and the disconnect between the institutions. In addition, there is no international precedent for arrangements that successfully achieves effective and efficient arrangements between separate bodies.

⁹⁸ It is likely that the Commonwealth Parliament would have legislative power to scrutinise this legislation under the corporations powers (s 51(xx)).

Another alternative would be for a formal Consumer Consultative Group to be established to advise the AEMC from the perspective of electricity consumers (as with the AER) and/or a comparable Consumer Challenge Panel could be established. However, this would duplicate consumer participation processes across two institutions, creating further inefficiencies. In PIAC's view the best option is to transfer the rule making function to the AER (or, more generally, a Commonwealth Energy Regulator) and the AEMC's reviews function to the COAG Energy Council.. PIAC is aware that bringing rule making in under Commonwealth law is likely to be controversial and opposed by state governments and requires careful consideration as to how the transfer of responsibility would take place. However, PIAC concurs with Dimasi that:

there are no simple solutions to the regulation of monopoly networks. We should, however, resist the urge to throw more resources and more rule changes at the current system. There are simpler, potentially more effective ways to tackle the problem.⁹⁹

A further related question is how to fund such a body. Given that AEMO and ECA are both funded by a levy on market participants to support the functioning of Australian energy markets and that this provides funding certainty, PIAC considers the new Commonwealth regulatory agency should also be funded in the same manner.

In addition, while this is outside the scope of governance changes, PIAC suggests a process should be undertaken to examine the future rule of networks and their regulation in Australia. In this the objectives of network regulation should be to maximising demand management, energy efficiency, distributed generation and storage to reduce costs and emissions (as per recommendation 2). And that further, consideration should be given to how to transition networks from monopoly supply businesses to energy service platform providers which can contract and compete with other services.

Recommendation 9

That, having examined all available options and consistent with international practice, in order to create substantial efficiencies and ensure more streamlined, effective and accountable regulation, rule-making in the NEM be brought in under Commonwealth legislation and combined with rule administration.

In practice, this would mean transferring:

- *the AEMC's rule-making functions to a Commonwealth Energy Regulator (currently the AER).*
- *the AEMC's review and energy market reform roles to the COAG Energy Council, consistent with its role as the lead policy maker in the NEM.*

In order to facilitate more effective regulation in a transforming energy market, two Commissioners of the Commonwealth Energy Regulator should be required to have knowledge of, or experience in, consumer protection and demand side participation.

Recommendation 10

That, consistent with the other energy market institutions AEMO and ECA, the new Commonwealth-based Energy Regulator should be funded by market participants through a levy administered by government.

⁹⁹ Joe Dimasi, 'Bringing an end to electricity network gold-plating', (The Conversation, 29 April 2015), at <https://theconversation.com/bringing-an-end-to-electricity-network-gold-plating-40830>.

9. Australian Energy Regulator (AER)

As we have seen, the AER's effectiveness and efficiency as a regulator has been severely curtailed by the rule making process. Therefore, if that process was brought in house, streamlining and greater effectiveness are the anticipated outcome.

9.1 AER's accountability and transparency

In contrast with her critique of the AEMC, Appleby finds that '[o]verall, the AER sits within a robust accountability framework, and is subject to pre-existing federal accountability mechanisms'. She details this framework, including how:

The AER is subject to the jurisdiction of the Commonwealth Ombudsman, as a prescribed authority under the *Ombudsman Act 1976* (Cth).

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).¹⁰⁰ It also creates a right of access to the public to documents held by the AER.¹⁰¹

And:

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.

Nevertheless, Appleby does make some minor suggestions for improvements to AER's accountability and transparency, detailed in the recommendations below.

9.2 AER's consumer focus

Similarly, Appleby finds that the AER has better consumer engagement and public participation mechanisms and culture, including through the Consumer Consultative Group (CCG) and the Consumer Challenge Panel. This has certainly been PIAC's experience as a member of the CCG. AER staff are generally highly responsive to consumer advocates concerns and suggestions. Appleby gives culture and practice some organisational context noting that:

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.¹⁰² 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.¹⁰³

¹⁰⁰ *FOI Act 1982* (Cth) s 8.

¹⁰¹ *FOI Act 1982* (Cth) s 11.

¹⁰² Australian Competition and Consumer Commission and Australian Energy Regulator, 'AER Stakeholder Engagement Framework' (2013) available at

¹⁰³ <http://www.aer.gov.au/sites/default/files/AER%20Stakeholder%20Engagement%20Framework_2.pdf>. Ibid 8-12.

Despite this, in keeping with the theme of consumer representation, PIAC's view is that there is not currently a meaningful role for consumer in decision-making at the AER. The AER's role is not to represent consumers and therefore consumers must have a seat at the table. As set out above, PIAC recommends two Commissioners of the Commonwealth Energy Regulator be required to have knowledge of, or experience in, consumer protection and demand side participation.

9.2.1 AER funding

Back in 2004, the Ministerial Council on Energy (as it then was) rejected industry funding for the AER (instead requiring Commonwealth funding), but it is not clear why:

The option of full funding of the AER (and the AEMC) through 'appropriate industry levies' was recommended by the MCE in 2003. Although a consultation paper was subsequently released (MCE Standing Committee of Officials 2004b), this option did not eventuate, although the reasons for this are not apparent.¹⁰⁴

As discussed above, PIAC believes it is inconsistent for the AER to be reliant on Commonwealth funding, given it is an energy market institution. It would be preferable to have the national regulator funded by a secure and consistent levy on market participants, managed by government, at arms length from the regulator, as recommended above.

9.3 Directions for reform

The major changes needed to the AER are for it to undertake rule making for the NEM, have Commissioners with expertise in consumer and demand-side matters, and to have secure industry funding (all outlined previously).

Recommendation 11

That a range of minor amendments to accountability, transparency and participation measures of the Commonwealth-based Energy Regulator be considered, including:

- *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 (see discussion above in relation to the Energy Council, and Recommendation 4).*
- *Easily accessible information about the different ways that consumers may challenge the decisions of the AER must be provided.*
- *Consideration could be given to changing the standing rules in judicial review proceedings to make certain the standing of consumer groups to challenge or intervene in judicial review proceedings.*

9.4 Merits Review at the Australian Competition Tribunal

In 2012 the Merits Review process for AER decisions at the Australian Competition Tribunal was the subject of an extensive review, not least because of the fact that:

Between 2009 and 2011 the Australian Competition Tribunal (ACT) decided 5 substantive reviews related to the WACC that the AER had determined. The ACT is a quasi-judicial institution, presided by a chief justice. Its processes are adversarial with parties represented

¹⁰⁴ Productivity Commission, 'Electricity Network Regulatory Frameworks', (Report No. 62, 2013).

by barristers and supported by attorneys. All of these five reviews were decided in favour of the NSPs, and led to regulated revenues around \$3.3bn, or 8% higher than the allowed revenue determined by the AER (Mountain 2012d). In addition, and perhaps even more significantly, the arrangement for merits review, has made the regulator more risk averse and promoted a culture of compliance reflecting the regulator's desire to "appeal-proof" its decisions. This has detrimentally affected the AER's decisions to apply broader economic assessments of NSPs' regulatory proposals.¹⁰⁵

Appleby outlines the significant changes that were made to the merits review process in the NEL, which should reduce the risk of adverse outcomes for consumers in the Tribunal. Appleby has two remaining concerns regarding:

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.

And:

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).¹⁰⁶

to which she proposes appropriate amendments supported by PIAC, as below.

Recommendation 12

That further minor changes to the Limited Merits Review Regime be considered:

- *Consideration should be given to amending the capacity to have costs awarded against consumers under the Limited Merits Review Regime.*
- *Consideration should be given to removing the availability of merits review if an application is sought for judicial review.*

¹⁰⁵ Bruce Mountain, 'Independent Regulation of government-owned monopolies: An oxymoron? The case of electricity distribution in Australia'. (Utilities Policy, September 2014)

¹⁰⁶ National Electricity Law s 71X(2) and (3); 71Y(2).

10. Regulation of retail/energy services

Further to the discussion in section 3.6 about the failure of national consistency in retail regulation, PIAC suggests that in the review of the NECF, consideration be given to developing an enforceable energy-related code to complement the Australian Consumer Law (ACL), rather than amending the NECF. This would ensure greater national consistency, especially in light of the increasing complexity and diversity of the energy market, which is daily becoming more comparable to telecommunications than a monopoly essential service based on large-scale fixed infrastructure. PIAC believes this cutting of red tape would be welcomed by retailers and consumer advocates alike, as long as the protections were of a standard at least comparable to those in Victoria.

If such an approach were taken, the new code would need to include dispute resolution provisions, as the ACL does not provide these.

Recommendation 13

That in regard to the review of the NECF, consideration be given to creating an energy-related code (including dispute resolution provisions) to complement the Australian Consumer Law, rather than further amending the NECF.

11. Australian Energy Market Operator (AEMO)

11.1 Industry part-ownership and unbalanced approach

One of consumer advocates key concerns in regard to the market operator is that like the AEMC AEMO has tended to take an unbalanced approach, favouring supply-side incumbents at the expense of innovation, including innovation that would benefit consumers by opening the market to new products and services that compete with existing energy businesses.

One specific example of this was AEMO's decision in 2013, under pressure from incumbent generation and retail businesses, to not submit the Demand Response Mechanism (DRM) Rule Change proposal to the AEMC, in spite of having been tasked with doing so by SCER.

AEMO's ownership structure is split between government and industry, 60% Government Members and 40% Industry Members. PIAC believes that the part-ownership by industry needs to be investigated as part of the Governance Review, given the unbalanced approach detailed above.

Again, consumers need representation, rather than simply consultation and therefore the board needs members with expertise in consumer and demand-side matters in order to counter-act the unbalanced approach. Similarly, there is no requirement for background or experience in consumer issues for the selection of AEMO Board Members.

11.2 Information Exchange Committee (IEC)

PIAC has also noted the ATA's concerns regarding the Information Exchange Committee (IEC), which is the body responsible for changes to B2B processes and procedures that, in some regards, have a similar standing to Rules. ATA are concerned that the IEC lacks independence as it:

- comprises only retail and distribution businesses and 'independent' members who are appointed by industry members;
- is not directly bound by the NEO (it has an efficiency objective, but this is not the same as the long term interests of consumers)
- is not directly accountable to any external institution.

In ATA's view:

the problem of the IEC lacking independence will become worse with time as the energy market evolves to adopt new products, services and participants: if an 'industry' body is tasked with governance that impacts access to innovative services and/or services provided by third parties – as the IEC would inevitably be under current arrangements – then these parties need to be fully represented in a voting /decision-making capacity. On the other hand, the nature of the challenges around membership and voting for an industry led model may be such that they would be most effectively addressed simply by not using an industry led model.¹⁰⁷

It makes sense therefore that the IEC needs direct representation by consumer advocates and potentially providers of new products and services.

¹⁰⁷ Craig Memery, ATA, pers. comm.

11.3 Directions for reform

As with the other energy market institutions, the governance arrangements for AEMO need to be amended in order for them to be more responsive to the needs of consumers and more accountable to them.

Recommendation 14

That the AEMO Board include at least two consumer representatives (one representing residential consumers and one representing small business) and that the government and industry representation decrease proportionally.

That these AEMO Board members be selected in consultation with ECA.

Recommendation 15

That knowledge of, or experience in, consumer protection and demand side participation be part of the necessary skillset for AEMO Board Directors.

Recommendation 16

That the constitution of AEMO's Information Exchange Committee (IEC) and related working groups be changed to provide for direct representation by consumer advocates and providers of non-supply side products and services.

And that further measures are investigated to address the matters of representation, accountability and transparency with respect to AEMO and the IEC.

12. Energy Consumers Australia (ECA) and consumer engagement

12.1 International best practice ideas for ECA

Crossley examined the ECA's functional equivalents in other jurisdictions in order to provide some examples of innovative practice. She was particularly positive in her assessment of the Citizen's Energy Forum established by the European Commission to help facilitate the establishment of 'competitive, energy-efficient and fair retail markets for consumers.'¹⁰⁸

The Forum is chaired by the Commission, with the Commissioner for Consumer Policy, the Director of the Directorate-General for Energy (DG Energy) and the Director for the Directorate-General for Health and Consumers (DG SANCO) all taking active roles. The Forum, held annually in London with the support of Ofgem (the Office of Gas and Electricity Markets in the United Kingdom), attracts a wide range of participants from national and European consumer advocacy organisations, national regulators, representatives of Member States, and industry representatives. It is actively supported by the Council of European Energy Regulators.

The Forum tackles a wide range of consumer related topics, which in 2015 included 'energy consumer empowerment, the roll-out of smart meters, self-generation, consumer vulnerability and energy poverty.'¹⁰⁹ Working Groups are established to follow-up on the issues raised in the Forum. The Forum has a number of benefits. First, it keeps consumer issues on the agenda across the sector. Secondly, by bringing all of the key stakeholders together, it minimises the ability of stakeholders to pass the buck to other organisations that may otherwise not be engaged in the Forum. Thirdly, it encourages the sharing of ideas and best practices across Europe. Finally, as the agenda, presentations, reports, and conclusions of the Forum, as well as associated Working Group documents are publicly available, it is transparent and participants can be held accountable.

12.2 Negotiated settlements

The Productivity Commission noted 'it is widely recognised that existing arrangements do not involve sufficient engagement with consumers' (section 21.4) and proposed strengthening the role of the consumer representation to a point where consumers and industry could have meaningful debate and process about energy market rules. Then the regulator, instead of getting bogged down in thousands of pages of technical data and obscure debate could mediate/adjudicate.

Effectively the Productivity Commission proposed a significantly different regulatory model, where industry and consumers were encouraged to work through issues and the regulator would mediate instead of becoming embroiled in enormous detail:

Currently, end-users (whether households or commercial users) are disenfranchised from the regulatory process. While greater engagement should occur regardless of the form of the regulatory model (chapter 21), it may also be possible for end-users to play an active role in

¹⁰⁸ European Commission, *Citizens' Energy Forum in London* (2015), <<http://ec.europa.eu/energy/en/events/citizens-energy-forum-london>>.

¹⁰⁹ Ibid.

reaching negotiated settlements in regulatory determinations — avoiding the complex and protracted processes currently in place. Benchmarking would support such a framework (section 8.4).

In effect, the AER would facilitate negotiation and arbitrate between networks and consumers on total revenue. This is sometimes referred to as a negotiated settlement. The PC noted that in theory, such an approach should maximise community welfare, as ‘the only contract that two parties with equal bargaining power would mutually agree to would be one involving no removable inefficiencies’.¹¹⁰ The Productivity Commission also noted that if the AER was acting as an arbitrator rather than a consumer advocate pitted against the regulated businesses, its decisions would not be subject to merits review. This would be the case ‘because, as an arbiter, the regulator would already have fairly addressed both parties concerns’.¹¹¹

For its part, PIAC believes that when consumers are equipped to make a genuine contribution to network planning and running, and their views are considered and heeded by networks, better outcomes for all consumers will be the result. Therefore PIAC believes that such a model of network regulation is worthy of future consideration. PIAC has concerns about the resourcing that would be necessary to ensure both consumers and networks ‘had equal bargaining power’, however these concerns could be overcome. As a first step in any such effort, PIAC recommends that the Governance Review Panel express its support for transitioning the Australian regulatory system to a negotiated settlements model.

12.3 Directions for reform

PIAC supports Crossley’s suggestion that ECA consider whether an equivalent of the Citizen’s Energy Forum might be appropriate in order to encourage greater concern for consumer interests across both market institutions and stakeholders in Australian energy markets.

Consumer representation and participation in the NEM is in need of substantial improvement, most importantly in regards to the network revenue setting process. PIAC is in favour of consideration of alternatives to the propose-respond model that give consumers a seat at the table.

Recommendation 17

That ECA consider an annual Consumer Forum (including more regular working groups) modeled on the EU’s Citizens’ Energy Forum.

Recommendation 18

That consideration be given to introducing a negotiated settlements process for network revenue determinations as one means of providing more meaningful consumer participation in the NEM.

¹¹⁰ Productivity Commission, above n 2, 142.

¹¹¹ Ibid 140.

Accountability in the National Energy Market

Report for the Public Interest Advocacy Centre

6 May 2015

Dr Gabrielle Appleby

This report was prepared with the research assistance of Sophie Duxson

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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 Communiqués;
- 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:

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 AEMC⁷ 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 Communiqués 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

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

<<https://www.coag.gov.au/sites/default/files/files/Guidance%20on%20COAG%20Councils%20014%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 Communiqués;
- 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 of 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 requirements 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 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

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. ...

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,

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.

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

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.

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

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 Minister⁶⁴ 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.

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 *ALAL 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 (sch 1, 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.

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.

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.

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 AER⁸⁵ 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 plan⁹⁹ 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 competition in wholesale energy markets, building consumer confidence in energy markets, promoting efficient investment in, operation

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

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 *ADJR 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;

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 providers 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;

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;

¹²² National Electricity Law, s 71C.

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

¹²⁴ National Electricity Law s 71M.

¹²⁵ National Electricity Law, s 710; 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 710(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.

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

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.

APPENDIX 2: COMPARISON OF INTERNATIONAL INSTITUTIONAL MANDATES

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
Australia		<p>COAG Energy Council</p> <p>The COAG Energy Council's terms of reference are still under development. This is the SCER terms of reference. The COAG Energy Council commenced operation on 13 December 2013.</p> <p>The Terms of Reference for the COAG Energy Council is under development. Under the new COAG council system each Council's Terms of Reference are to be action oriented and reflect current COAG priorities. Terms of Reference will be reviewed annually as part of a broader review of the COAG council system to ensure they remain consistent with COAG's priorities.</p> <p>The Terms of Reference for the former Standing Council on Energy and Resources (SCER), agreed to by COAG in 2011, included a number of priority issues of national significance. The work streams currently detailed on this website refer to their relevant priority issue under the</p>	<p>AEMA</p> <p>2.OBJECTIVES</p> <p>2.1 The objectives of this agreement are:</p> <p>(a) the promotion of the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services; and</p> <p>(b) the establishment of a framework for further reform to:</p> <p>(i) strengthen the quality, timeliness and national character of governance of the energy markets, to improve the climate of investment;</p> <p>(ii) streamline and improve the quality of economic regulation across energy markets to lower the cost and complexity of regulation facing investors, enhance regulatory certainty, and lower barriers to competition;</p> <p>(iii) improve the planning and development of electricity transmission networks, to create a stable framework for efficient investment in new (including distributed) generation and transmission capacity;</p> <p>(iv) enhance the participation of energy</p>	<p>AER</p> <p>Part 3—Functions and powers of the Australian Energy Regulator</p> <p>Regulator</p> <p>Division 1—General</p> <p>15—Functions and powers of AER</p> <p>(1) The AER has the following functions and powers—</p> <p>(a) to monitor compliance by—</p> <p>(i) Registered participants and other persons with this Law, the Regulations and the Rules; and</p> <p>(ii) regulated network service providers with network revenue or pricing determinations; and</p> <p>(iii) AEMO with this Law, the Rules, the Regulations or a transmission determination; and</p> <p>(b) to investigate breaches or possible breaches of provisions of this Law, the Regulations or the Rules, including offences against this Law; and</p> <p>(c) to institute and conduct proceedings—</p> <p>(i) against persons under section 61 of this Law or section 44AAG of</p>	<p>AEMC</p> <p>Part 4—Functions and powers of the Australian Energy Market Commission</p> <p>Commission</p> <p>Division 1—General</p> <p>29—Functions and powers of the AEMC</p> <p>(1) The AEMC has the following functions and powers—</p> <p>(a) the Rule making functions and powers conferred on it under this Law and the Regulations; and</p> <p>(b) the market development functions conferred on it under this Law and the Rules; and</p> <p>(c) any other functions and powers conferred on it under this Law and the Rules.</p> <p>(2) The AEMC has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.</p> <p>5. AUSTRALIAN ENERGY MARKET INSTITUTIONS</p> <p>5.1 The Parties agree that the Australian energy market institutions will comprise: (a) The AEMC, responsible for rule-making and energy market development at a national level, including in respect of the National Electricity</p>	<p>AEMO</p> <p>Part 5—Role of AEMO under National Electricity Law Division 1—General 49—AEMO's statutory functions (1) AEMO has the following functions: (a) to operate and administer the wholesale exchange; (b) to promote the development and improve the effectiveness of the operation and administration of the wholesale exchange; (c) to register persons as Registered participants; (d) to exempt certain persons from being registered as Registered participants; (e) to maintain and improve power system security; (f) to facilitate retail customer transfer, metering and retail competition; (g) for an adoptive jurisdiction—the additional advisory functions or declared network functions (as the case requires); (h) any functions conferred by jurisdictional electricity legislation or an application Act; (i) any other functions conferred under this Law or the Rules.</p> <p>Notes—</p> <p>1 AEMO has additional functions under its Constitution.</p> <p>2 It should be noted that AEMO's statutory</p>	<p>Energy Consumers Australia Ltd</p> <p>4 OBJECTS, ACTIVITIES AND POWERS</p> <p>4.1 Objects</p> <p>The object of the Company is:</p> <p>(a) To promote the long term interests of Consumers of Energy with respect to the price, quality, safety, reliability and security of supply of Energy services by providing and enabling strong, coordinated, collegiate evidence based consumer advocacy on National Energy Market matters of strategic importance or material consequence for Energy Consumers, in particular for Residential Customers and Small Business Customers.</p> <p>4.2 Activities</p> <p>Without limiting the effect of article 4.3, the Company will seek to achieve its objects through:</p> <p>(a) Effectively and objectively participating in National Energy Market issues and influencing regulatory activities and Energy market reform to benefit Consumers;</p> <p>(b) Frequently engaging and communicating with</p>

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
		<p>former SCER Terms of Reference.</p> <p>By way of reference, SCER's priority issues, as specified in its Terms of Reference, were:</p> <p>Progressing consistent upstream petroleum administration and regulation standards, (including through the establishment of a National Offshore Petroleum Regulator and responding to the Productivity Commission Review of Regulatory Burden on Upstream Petroleum (Oil & Gas) Sector);</p> <p>Addressing issues impacting on investment in resources exploration and development, including land access, community, infrastructure, and labour;</p> <p>Developing a nationally consistent approach to clean energy technology development and deployment, including Carbon Capture and Storage;</p> <p>Addressing impediments to, and promoting the commercial adoption of, demand-side response in</p>	<p>users in the markets including through demand side management and the further introduction of retail competition, to increase the value of energy services to households and businesses;</p> <p>(v) further increase the penetration of natural gas, to lower energy costs and improve energy services, particularly to regional Australia, and reduce greenhouse emissions; and</p> <p>(vi) address greenhouse emissions from the energy sector, in light of the concerns about climate change and the need for a stable long-term framework for investment in energy supplies.</p>	<p>the Competition and Consumer Act 2010 of the Commonwealth; or</p> <p>(ii) in respect of Registered participants under section 63 of this Law; or</p> <p>(iii) against persons under section 68 of this Law; or</p> <p>(iv) in relation to offences against this Law; and</p> <p>(d) to institute and conduct appeals from decisions in proceedings referred to in paragraph (c); and</p> <p>(e) to exempt persons proposing to engage, or engaged, in the activity of owning, controlling or operating a transmission system or distribution system forming part of the interconnected transmission and distribution system from being registered as Registered participants; and</p> <p>(ea) to prepare and publish reports on the financial and operational performance of network service providers in providing electricity network services; and</p> <p>(eb) to approve compliance programs of service providers relating to compliance by service providers with this Law or the Rules; and</p> <p>(f) AER economic regulatory functions or</p>	<p>Rules, the National Gas Rules and the National Energy Retail Rules.</p> <p>(AEMA 2013)</p>	<p>functions include its functions under the National Gas Law, the National Gas Rules and related subordinate legislation: See definition of statutory functions in section 2.</p> <p>3 AEMO also has responsibilities, under Part 4 of the Australian Energy Market Commission Establishment Act 2004 of South Australia, related to administrative costs associated with the work of the Consumer Advocacy Panel. 4 AEMO has additional functions and powers under the National Energy Retail Law and the National Energy Retail Rules.</p> <p>(2) In its role as National Transmission Planner, AEMO has the following functions: (a) to prepare, maintain and publish a plan for the development of the national transmission grid (the National Transmission Network Development Plan) in accordance with the Rules; (b) to establish and maintain a database of information relevant to planning the development of the national transmission grid and to make the database available to the public; (c) to keep the national transmission grid under review and provide advice on the development of the grid or projects that could</p>	<p>Consumers and consumer advocates to discuss, support, liaise, collaborate, educate, identify and to receive and provide updates on the National Energy Market and its policies, reforms, issues and general news;</p> <p>(c) Building national and jurisdictional expertise and capacity through research, knowledge development and consultation to advance the interests of Australian Energy Consumers, in particular residential and small business Energy Consumers;</p> <p>(d) Undertaking robust research to build knowledge, engage and influence policy development and educate Consumers in the Energy markets;</p> <p>(e) When notified by the Member, after the Effective Date, of the Company's capacity to do so – funding and managing grants to build knowledge and sectoral capacity supporting policy development and consumer education in the National Energy Market;</p> <p>(f) Creating and maintaining effective working relationships with key stakeholders including but not limited to: Consumers and consumer advocates, the</p>

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
		<p>Australian markets;</p> <p>Promoting efficiency through the development of consistent national frameworks where appropriate, including the implementation of the National Energy Customer Framework, Intergovernmental Agreement (IGA) on Energy Supply Industry Safety and the National Mine Safety Framework;</p> <p>Assessing existing market mechanisms and regulatory frameworks (including governance of network regulation) to ensure facilitation of adequate, efficient, and timely investment in, and operation of, generation and networks; and</p> <p>Identifying changes required to ensure market resilience and energy security, and ongoing testing of national emergency management arrangements for liquid fuel, electricity and gas.</p> <p>MCE</p> <p>1.6 (o) “Ministerial Council on Energy” or “MCE” means the</p>		<p>powers; and</p> <p>(g) any other functions and powers conferred on it under this Law and the Rules.</p> <p>(2) The AER has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.</p> <p>(3) However, the AER—</p> <p>(a) cannot make a transmission determination—</p> <p>(i) regulating the revenue AEMO earns or may earn; or</p> <p>(ii) regulating the price of electricity network services provided by AEMO unless the services are shared transmission services provided by means of, or in connection with, a declared shared network; and</p> <p>(b) cannot regulate by transmission determination or in any other way the price of any other service provided by AEMO, or the amount of any other charge made by AEMO.</p> <p>5. AUSTRALIAN ENERGY MARKET INSTITUTIONS 5.1 The Parties agree that the Australian energy market institutions will comprise: (b) The AER, responsible for regulation and compliance at a</p>		<p>affect the grid; (d) to provide a national strategic perspective for transmission planning and coordination; (e) any other functions conferred on AEMO under this Law or the Rules in its capacity as National Transmission Planner.</p> <p>(3) AEMO must, in carrying out functions referred to in this section, have regard to the national electricity objective.</p> <p>5. AUSTRALIAN ENERGY MARKET INSTITUTIONS 5.1 The Parties agree that the Australian energy market institutions will comprise: (c) AEMO, responsible for the day-to-day operation and administration of both the power system and electricity wholesale spot market in the NEM, the retail electricity markets, the retail and wholesale gas markets and other support activities.</p> <p>(AEMA 2013)</p>	<p>AER, jurisdictional regulators, Energy market participants, the AEMC, the AEMO, governments and Energy Ombudsmen; and</p> <p>(g) Developing an understanding of the distinct market differences between jurisdictions within the National Energy Market and applying these considerations when engaging, responding or initiating work on behalf of Energy Consumers’ interests, and with jurisdictional bodies where appropriate;</p> <p>(h) Frequently and collaboratively engaging and communicating with representatives from the Energy industry on issues in the interest of Consumers to help inform the Company when performing the activities in this article 4.2; and</p> <p>(i) Doing all things as may be incidental or ancillary to achieving the Objects and performing the activities in this article 4.2.</p> <p>In performing these Activities, the Company must have regard to any relevant objectives set out in the National Energy Laws.</p> <p>4.3 Powers</p> <p>The Company may exercise all powers, rights and privileges as a</p>

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
		<p>body established on 8 June 2001, being the Council of Ministers with primary carriage of energy matters at national level comprising Ministers representing the Commonwealth and each of the States and Territories;</p> <p>4. MINISTERIAL COUNCIL ON ENERGY</p> <p>Role of the MCE</p> <p>4.1 The Parties agree that the MCE is the national policy and governance body for the Australian energy market including for electricity and gas.</p> <p>4.2 The MCE will report to COAG on the operation of this agreement and any proposed amendments.</p> <p>4.3 The Parties agree that the MCE has responsibility for:</p> <p>(a) the national energy policy framework;</p> <p>(b) policy oversight of, and future strategic directions for the Australian energy market;</p> <p>(c) governance and institutional arrangements for the Australian energy market;</p> <p>(d) the legislative and</p>		<p>national level, including in respect of the Australian Energy Market Legislation.</p> <p>(AEMA 2013)</p>			<p>natural person may do or exercise, for the purpose of furthering the Objects set out above.</p> <p>(Constitution of Energy Consumers Australia Ltd December 2014)</p>

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
		<p>regulatory framework within which the market operates and natural monopolies are regulated;</p> <p>(e) longer-term, systemic and structural energy issues that affect the public interest; and</p> <p>(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.</p> <p>4.4 The Parties agree that the MCE has:</p> <p>(a) power to issue statements of policy principles to the AEMC with respect to rulemaking or electricity, gas or retail market reviews;</p> <p>(b) power to recommend appointments of commissioners to the AEMC in accordance with this agreement and the Australian Energy Market Commission Establishment Act 2004 (SA);</p> <p>(c) power to recommend certain appointments of members to the AER in accordance with this agreement and the Competition and</p>					

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
		<p>Consumer Act 2010 (Cth); and</p> <p>(d) any other energy related power conferred on it by agreement between the Parties or by legislation.</p> <p>4.5The Parties agree that the MCE will not be engaged directly in the day-to-day operation of the energy markets or the conduct of regulators.</p> <p>(AEMA 2013)</p>					
				<p>16—Manner in which AER performs AER economic regulatory functions or powers</p> <p>(1) The AER must, in performing or exercising an AER economic regulatory function or power—</p> <p>(a) perform or exercise that function or power in a manner that will or is likely to contribute to the achievement of the national electricity objective; and</p> <p>(b) if the function or power performed or exercised by the AER relates to the making of a distribution determination or transmission determination, ensure that—</p> <p>(i) the regulated network service provider to whom the determination will</p>	<p>32—AEMC must have regard to national electricity objective In performing or exercising any function or power under this Law, the Regulations or the Rules, the AEMC must have regard to the national electricity objective.</p> <p>33—AEMC must have regard to MCE statements of policy principles in relation to Rule making and reviews The AEMC must have regard to any relevant MCE statement of policy principles— (a) in making a Rule; or (b) in conducting a review under section 45.</p> <p>Division 2—Rule making functions and powers of the AEMC</p> <p>34—Rule making powers (1) Subject to this Division, the AEMC, in accordance with this Law and the</p>		

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>apply; and</p> <p>(ii) any affected Registered participant; and</p> <p>(iii) if AEMO is affected by the determination— AEMO; and</p> <p>(iv) network service users or prospective network service users of the relevant services that the AER considers have an interest in the determination; and</p> <p>(v) any user or consumer associations or user or consumer interest groups that the AER considers have an interest in the determination, are, in accordance with the Rules—</p> <p>(vi) informed of material issues under consideration by the AER; and</p> <p>(vii) given a reasonable opportunity to make submissions in respect of the determination before it is made; and</p> <p>(c) in relation to making a reviewable regulatory decision, specify—</p> <p>(i) the manner in which the constituent components of the decision relate to each other; and</p> <p>(ii) the manner in which that interrelationship has been taken into account in the making of</p>	<p>Regulations, may make Rules, to be known, collectively, as the "National Electricity Rules", for or with respect to— (a) regulating— (i) the operation of the national electricity market; (ii) the operation of the national electricity system for the purposes of the safety, security and reliability of that system; (iii) the activities of persons (including Registered participants) participating in the national electricity market or involved in the operation of the national electricity system; (iv) the provision of connection services to retail customers; and (aa) facilitating and supporting the provision of services to retail customers; and (b) any matter or thing contemplated by this Law, or is necessary or expedient for the purposes of this Law. Note— The procedure for the making of a Rule by the AEMC is set out in Division 3 of Part 7. National Electricity (South Australia) Act 1996—30.1.2015 Schedule—National Electricity Law 66 This version is not published under the Legislation Revision and Publication Act 2002 [30.1.2015] (2) Without limiting subsection (1), the AEMC, in accordance with this Law and the Regulations, may make Rules for or with respect to any matter or thing specified in Schedule 1 to this Law. (3)</p>		

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>the reviewable regulatory decision; and</p> <p>(d) if the AER is making a reviewable regulatory decision and there are 2 or more possible reviewable regulatory decisions that will or are likely to contribute to the achievement of the national electricity objective—</p> <p>(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</p> <p>(ii) specify reasons as to the basis on which the AER is satisfied that the decision is the preferable reviewable regulatory decision.</p> <p>(2) In addition, the AER—</p> <p>(a) must take into account the revenue and pricing principles—</p> <p>(i) when exercising a discretion in making those parts of a distribution determination or transmission determination relating to direct control network services; or</p> <p>(ii) when making an access determination relating to a rate or charge for an electricity network service; and</p>	<p>Rules made by the AEMC in accordance with this Law and the Regulations may— (a) be of general or limited application; (b) vary according to the persons, times, places or circumstances to which they are expressed to apply; (c) confer functions or powers on, or leave any matter or thing to be decided or determined by— (i) the AER, the AEMC, AEMO or a jurisdictional regulator; or (ii) the Reliability Panel or any other panel or committee established by the AEMC; or (iii) any other body established, or person appointed, in accordance with the Rules; (d) confer rights or impose obligations on any person or a class of person (other than the AER, the AEMC or a jurisdictional regulator); (e) confer a function on the AER, the AEMC, AEMO or a jurisdictional regulator to make, prepare, develop or issue guidelines, tests, standards, procedures or any other document (however described) in accordance with the Rules, including guidelines, tests, standards, procedures or any other document (however described) that leave any matter or thing to be determined by the AER, the AEMC, AEMO or jurisdictional regulator; (f) empower or require any person (other than a person referred to in paragraph (e)) or body to make or issue guidelines, tests, standards, procedures or any other</p>		

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>(b) may take into account the revenue and pricing principles when performing or exercising any other AER economic regulatory function or power, if the AER considers it appropriate to do so.</p> <p>(3) For the purposes of subsection (2)(a)(ii), a reference to a "direct control network service" in the revenue and pricing principles must be read as a reference to an "electricity network service".</p> <p>(4) In this section— affected Registered participant means a Registered participant (other than the regulated network service provider to whom the distribution determination or transmission determination will apply) whose interests are affected by the distribution determination or transmission determination.</p>	<p>document (however described) in accordance with the Rules; (fa) provide for procedures governing the operation of the national electricity market and the sale and supply of electricity to retail customers; (g) apply, adopt or incorporate wholly or partially, or as amended by the Rules, the provisions of any standard, rule, specification, method or document (however described) formulated, issued, prescribed or published by any person, authority or body whether— (i) as formulated, issued, prescribed or published at the time the Rules are made or at any time before the Rules are made; or (ii) as amended from time to time; (h) confer a power of direction on the AER, the AEMC, AEMO or a jurisdictional regulator to require a person conferred a right or on whom an obligation is imposed under the Rules (including a Registered participant) to comply with— (i) a guideline, test, standard, procedure or other document (however described) referred to in paragraph (e), (f) or (fa); or (ii) a standard, rule, specification, method or document (however described) referred to in paragraph (g); (i) if this section authorises or requires Rules that regulate any matter or thing, prohibit that matter or thing or any aspect of that matter of thing; (j)</p>		

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					<p>provide for the review of, or a right of appeal against, a decision or determination made under the Rules and for that purpose, confer jurisdiction on the Court;</p> <p>(k) require a form prescribed by or under the Rules, or information or documents included in, attached to or given with the form, to be verified by statutory declaration; (l) in a specified case or class of case, exempt— (i) AEMO; or (ii) a Registered participant or class of Registered participant; or (iii) any other person or body performing or exercising a function or power, or conferred a right, or on whom an obligation is imposed, under the Rules or a class of any such person or body, from complying with a provision, or a part of a provision, of the Rules; (m) provide for the modification or variation of a provision of the Rules (with or without substitution of a provision of the Rules or a part of a provision of the Rules) as it applies to— (i) AEMO; or (ii) a Registered participant or class of Registered participant; or (iii) any other person or body performing or exercising a function or power, or conferred a right, or on whom an obligation is imposed, under the Rules or a class of any such person or body; (n) confer an immunity on, or limit the liability of, any person or</p>		

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					<p>body performing or exercising a function or power, or conferred a right, or on whom an obligation is imposed, under the Rules; (o) require a person or body performing or exercising a function or power, or conferred a right, or on whom an obligation is imposed, under the Rules to indemnify another such person or body; (p) contain provisions of a savings or transitional nature consequent on the amendment or revocation of a Rule.</p> <p>35—Rules relating to MCE or Ministers of participating jurisdictions require MCE consent The AEMC must not, without the consent of the MCE, make a Rule that confers a right or function, or imposes an obligation, on the MCE or a Minister of a participating jurisdiction. Note— The term "function" is defined in clause 10 of Schedule 2 to this Law to include "duty".</p> <p>36—AEMC must not make Rules that create criminal offences or impose civil penalties for breaches The AEMC must not make a Rule that— (a) creates an offence for a breach of a provision of the Rules; or (b) provides for a criminal penalty or civil penalty for a breach of a provision of the Rules.</p> <p>37—Documents etc</p>		

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
					<p>applied, adopted and incorporated by Rules to be publicly available (1) The AEMC must make publicly available— (a) 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; and (b) if a standard, rule, specification, method or document (however described) formulated, issued, prescribed or published by any person, authority or body is applied, adopted or incorporated by a Rule as amended from time to time—any amendment to that standard, rule, specification, method or document. (2) For the purposes of subsection (1), the AEMC makes a standard, rule, specification, method or document (however described) formulated, issued, prescribed or published by any person, authority or body applied, adopted or incorporated by any Rule publicly available if the AEMC— (a) publishes the standard, rule, specification, method or document on the AEMC's website; or (b) specifies a place from which the standard, rule, specification, method or document may be obtained or purchased (as the case requires).</p>		

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EU	<p>'Under the political guidance of Commissioner Günther H. Oettinger, the Directorate-General for Energy is responsible for developing and implementing a European energy policy. Through the development and implementation of innovative policies, the Directorate-General aims at:</p> <ul style="list-style-type: none"> - Contributing to setting up an energy market providing citizens and business with affordable energy, competitive prices and technologically advanced energy services. - Promoting sustainable energy production, transport and consumption in line with the EU 2020 targets and with a view to the 2050 decarbonisation objective. - Enhancing the conditions for secure energy supply in a spirit of solidarity between Member States. <p>In developing a European energy policy, the Directorate-General aims to support the Europe 2020 programme which, for energy, is captured in the Energy 2020 strategy.'</p> <p>'CEER's work complements (and does not overlap) the work of the Agency for the Cooperation of Energy Regulators (ACER). ACER, which has its seat in Ljubljana, is an EU Agency. CEER is a Belgian not-for-profit association. They share similar objectives. ACER's focus is on what is required in the legislation and CEER does everything else in energy regulation. CEER's motto is fostering energy markets, empowering customers. CEER's work includes international cooperation, smart grids, sustainability, Demand Side Operators and customer issues.'</p> <p><http://www.ceer.eu/portal/page/portal/EER_HOME/EER_ABOUT/CEER></p>	<p>Council of European Energy Regulators (CEER)</p> <p>Articles of Association</p> <p>Article 3 - Purpose</p> <p>3.1. The association does not seek to make profits. The objectives of the association are to:</p> <ul style="list-style-type: none"> - promote the development of efficient and competitive internal markets for electricity and gas in Europe through the establishment of appropriate mechanisms; - set up co-operation in order to achieve competitive internal markets for electricity and gas in Europe, in which the principles of transparency and non-discrimination are ensured; - promote a broad and representative vision of Europe's energy markets; - set up co-operation, information exchange and assistance amongst the Members and Observers, with a view to establishing expert views for discussion with the institutions of the European Union and, 	Directive 2009/72/EC	<p>Agency for the Cooperation of Energy Regulators (ACER) (Formerly ERGEG)</p> <p>Regulation (EC) No 713/2009</p> <p>The Agency should ensure that regulatory functions performed by the national regulatory authorities in accordance with Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity (1) and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas (2) are properly coordinated and, where necessary, completed at the Community level. To that end, it is necessary to guarantee the independence of the Agency from electricity and gas producers, transmission and distribution system operators, whether public or private, and consumers and to ensure the conformity of its actions with Community law, its technical and regulatory capacities and its transparency, amenability to democratic control and efficiency.</p>	Directorate-General for Energy	<p>ENTSO-E</p> <p>Regulation No (EC) 714/2009</p> <p>1. The ENTSO for Electricity shall elaborate network codes in the areas referred to in paragraph 6 of this Article upon a request addressed to it by the Commission in accordance with Article 6(6).</p> <p>2. The ENTSO for Electricity may elaborate network codes in the areas set out in paragraph 6 with a view to achieving the objectives set out in Article 4 where those network codes do not relate to areas covered by a request addressed to it by the Commission. Those network codes shall be submitted to the Agency for an opinion. That opinion shall be duly taken into account by the ENTSO for Electricity.</p> <p>6. The network codes referred to in paragraphs 1 and 2 shall cover the following areas, taking into account, if appropriate, regional specificities:</p> <p>(a) network security and reliability rules including rules for technical transmission reserve capacity for operational network security;</p>	<p>Citizens' Energy Forum</p> <p>IP/08/1594</p> <p>The aim of the forum is to tackle consumer problems and propose practical solutions so that current EU-wide consumer rights exist in practice and not only on paper and improve regulatory conditions in the retail markets. The Forum brings together national consumer organisations, industry, national regulators, and government authorities to work on key issues such as switching energy suppliers, user-friendly billing, smart metering or protecting vulnerable groups.</p>

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		<p>in particular, with the European Commission, and representative international organizations of other sectors which may be involved;</p> <ul style="list-style-type: none"> - contribute to the advancement of research on regulatory issues; - establish coherent and expert knowledge and analysis such that the institutions with which Members wish to hold discussion naturally consult the Members at a formative stage in policy development; - provide a framework for the discussion of regulatory issues and exchange of experience; - provide the necessary elements for the development of regulation in the fields of electricity and gas; - develop joint approaches vis-à-vis transnational energy companies that operate in ,or can exert influence on, separated regulated utility markets; - promote training; - cultivate relations with similar 		<p>The Agency should monitor regional cooperation between transmission system operators in the electricity and gas sectors as well as the execution of the tasks of the European Network of Transmission System Operators for Electricity (ENTSO for Electricity), and the European Network of Transmission System Operators for Gas (ENTSO for Gas). The involvement of the Agency is essential in order to ensure that the cooperation between transmission system operators proceeds in an efficient and transparent way for the benefit of the internal markets in electricity and natural gas.</p> <p>The Agency should monitor, in cooperation with the Commission, the Member States and relevant national authorities, the internal markets in electricity and natural gas and inform the European Parliament, the Commission and national authorities of its findings where appropriate. Those monitoring tasks of the Agency should not duplicate or hamper monitoring by the Commission or national authorities, in particular national competition authorities.</p> <p>The Agency has an important role in</p>		<ul style="list-style-type: none"> (b) network connection rules; (c) third-party access rules; (d) data exchange and settlement rules; (e) interoperability rules; (f) operational procedures in an emergency; (g) capacity-allocation and congestion-management rules; (h) rules for trading related to technical and operational provision of network access services and system balancing; (i) transparency rules; (j) balancing rules including network-related reserve power rules; (k) rules regarding harmonised transmission tariff structures including locational signals and inter-transmission system operator compensation rules; and (l) energy efficiency regarding electricity networks. 	

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		<p>associations outside the EU area;</p> <ul style="list-style-type: none"> - With the agreement of the other members of the International Confederation of Energy Regulators (ICER), CEER will, as and where appropriate, represent ICER in the management of projects related to the dissemination of best regulatory practices; - work together, where possible, to establish common policies among Members and Observers towards agreed issues; and - share the knowledge and expertise acquired in Europe in respect of energy market regulation with authorities, organisations or associations from countries situated outside of the European Union, on its own or through entities it cooperates with. 		<p>developing frame- work guidelines which are non-binding by nature (frame-work guidelines) with which network codes must be in line. It is also considered appropriate for the Agency, and consistent with its purpose, to have a role in reviewing network codes (both when created and upon modification) to ensure that they are in line with the framework guidelines, before it may recommend them to the Commission for adoption. page 55 of this Official Journal. page 94 of this Official Journal.</p> <p>(10) It is appropriate to provide an integrated framework within which national regulatory authorities are able to participate and cooperate. That framework should facilitate the uniform application of the legislation on the internal markets in electricity and natural gas throughout the Community. As regards situations concerning more than one Member State, the Agency should be granted the power to adopt individual decisions. That power should under certain conditions cover technical issues, the regulatory regime for electricity and natural gas infrastructure that connects or that might connect at least two Member States and, as a last resort, exemptions</p>			

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				<p>from the internal market rules for new electricity interconnectors and new gas infra- structure located in more than one Member State.</p> <p>(11) Since the Agency has an overview of the national regulatory authorities, it should have an advisory role towards the Commission, other Community institutions and national regulatory authorities as regards the issues relating to the purpose for which it was established. It should also be required to inform the Commission where it finds that the cooperation between transmission system opera- tors does not produce the results which are needed or that a national regulatory authority whose decision is not in compliance with the Guidelines does not implement the opinion, recommendation or decision of the Agency appropriately.</p> <p>(12) The Agency should also be able to make recommendations to assist regulatory authorities and market players in sharing good practices.</p>			
NordReg	<p>Establish a common Nordic retail electricity market.</p> <p>There are nearly 15 million electricity customers in the combined Nordic market of Denmark, Finland, Norway and Sweden. Of these, over 12 million are residential. If these customers were combined into a common Nordic electricity market, it would be a market similar in size (number of customers) to Australia, and similar in consumption volume to the entire Benelux region. Under such a harmonised</p>	<p>NordREG Board</p> <p>The highest decision making organ within NordREG is the Board. The Board consists of the Director Generals from the</p>	<p>Memorandum of Understanding</p> <p>Promote the development of efficient electricity markets in the Nordic area, consistent with the development in within the European</p>				

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	<p>scenario (a common Nordic end user market as it is often referred to), market models and processes would be similar if not the same across the Nordic market; competitors could operate with similar systems and approaches across the Nordic market, and the Nordic market should be able to thereby gain greater efficiencies and choice in electricity supply. It would also present a more appealing picture to those potential entrants for whom the scale of any one Nordic market is currently seen as too small. Because the four markets are already relatively similar to each other in terms of market size, structure, culture (though not language), politics and competitive maturity, harmonisation would seem a reasonable target.¹⁶⁰</p> <p>'Member States are:</p> <p>Denmark</p> <p>The Danish Energy Regulatory Authority (DERA) regulates the infrastructure of the electricity and gas sectors as well as access to this infrastructure. For supply-obligation companies providing electricity, the Authority is also responsible for price control, partly based on requirements for security of supply. Furthermore the Authority carries out benchmarking of the regulated enterprises.</p> <p>The purpose is to ensure that consumers – households and enterprises – are charged reasonable and transparent prices under reasonable, uniform and transparent terms of supply.</p> <p>If it is a matter of transparency, DERA regulations can also apply for areas subject to competition, e.g. publication of prices and terms.</p> <p>DERA's competence is laid down in the three energy supply acts – the Electricity Supply Act, the Natural Gas Supply Act and the District Heating Supply Act and the Energinet.dk Act.</p> <p>Finland</p> <p>The Energy Market Authority (Energiamarkkinavirasto), established in 1995, is an expert authority in the Ministry of Trade and Industry's field of administration. Its tasks are related to the electricity and natural gas markets as well as emissions trading.</p> <p>The mission of the Energy Market Authority is to regulate</p>	<p>Nordic National Regulatory Authorities (NRAs). NordREG Board authorises the</p> <p>Retail Market Working Group and has the ultimate decision making powers on all tasks and deliverables that are organized under the Board. One specific task for the Board in the work on creating a harmonised Nordic retail market will be to approve proposals from the project organisation that should be passed on to EMG and NCM in order to make high level political decisions.'</p> <p>'Retail Market Working Group</p> <p>NordREG's Retail Market Working Group (RMWG) is the group in charge of all retail market projects within NordREG. The RMWG monitors ongoing national work, consults with stakeholders, develops the work programme, prepares all deliverables to the Board and receives all material from the underlying task forces. Furthermore, the RMWG manages</p>	<p>Union.</p> <p>Co-operate in order to promote a competitive Nordic market in electricity, in which the principles of transparency and non-discrimination are ensured. "The Regulators" will monitor, reinforce and follow up these processes of liberalization in the electricity market.</p> <p>Co-operate in issues relating to energy markets in which "The Regulators" have responsibilities according to respective national legislation.</p> <p>Set up the appropriate mechanisms of co-operation, information exchange and assistance amongst "The Regulators", and reinforce their level of common representation in the cooperation within the Council of European Energy Regulators and joint actions especially in connection with the co-operation among the Nordic transmission system operators (Nordel).</p> <p>Provide a framework for the discussion of regulatory issues and exchange of experience in order to facilitate convergence of views</p>				

¹⁶⁰ Philip Lewis, 'Market Entrant Processes, Hurdles and Ideas for Change in the Nordic Energy Market – the View of the Market' (Report, Nordic Energy Regulators, 2014), 11.

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
	<p>and promote the operation of the electricity and natural gas markets and to create a framework for emissions trading.</p> <p>Norway</p> <p>The Norwegian Water Resources and Energy Directorate (NVE) is subordinated to the Ministry of Petroleum and Energy, and is responsible for the administration of Norway's water and energy resources.</p> <p>The goals of NVE are to ensure consistent and environmentally sound management of water resources, promote an efficient energy market and cost-effective energy systems, and contribute to the economic utilization of energy.</p> <p>Sweden</p> <p>The Energy Markets Inspectorate supervise the Swedish electricity, natural gas and district heating markets. The Inspectorate works for an improvement of the functioning and efficiency of these markets.</p> <p>Iceland</p> <p>Orkustofnun (National Energy Authority of Iceland)</p> <p>Orkustofnun is a government agency under the Ministry of Industries and Innovation. Its main responsibilities are to advise the Government of Iceland on energy issues and related topics, license and monitor the development and exploitation of energy and mineral resources, regulate the operation of the electrical transmission and distribution system and promote energy research.</p> <p>Organization / Divisions Energy Administration Division</p> <p>The Energy Administration Division is in charge of administration of energy issues, and directs research on energy resources in Iceland.</p> <p>Hydrological Service</p> <p>The Hydrological Service monitors the hydrological conditions and the hydrological budget of Iceland's water resources, for public authorities and energy organizations.</p> <p>The United Nations University Geothermal Training Programme is operated by the National Energy Authority under a special agreement with the United Nations University.¹⁶¹</p>	<p>the work of negotiating and issuing recommendations, making status reports and coordinates the implementations and development on a national and European level. This implies contact with other organisations such as the EC, for example, to be part of and interact with the European development.'</p> <p>(NordREG, <i>Strategy for a harmonised Nordic retail market 2015-2018</i> (NordREG, 2014)).</p>	<p>and common positions when appropriate.</p> <p>Provide the necessary elements for the development of regulation and promote increased harmonisation and efficiency in the regulatory framework and processes.</p> <p>Provide where appropriate the necessary elements for developing joint approaches vis-a-vis transnational energy utilities and companies that operate in separated regulated utility markets (multi-utilities).</p> <p>With due regard to national differences in the legal framework and responsibilities, work to establish common policies toward agreed issues.</p>				

¹⁶¹ Nordice Energy Regulators, *NordREG* (2015) <<http://www.nordicenergyregulators.org>>.

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California	<p>Several states have independent system operators (ISO) that are regulated by the Federal Energy Regulatory Commission (FERC).</p> <p>The ISO Board consists of five Governors nominated by the governor of California and confirmed by the Senate that serve staggered three-year terms. The Board selection process involving stakeholders was outlined in a FERC order issued July 1, 2005. The Board Nominee Review Committee is comprised of six stakeholders from each of the following member-class sectors: transmission owners, transmission-dependent utilities, public interest groups, end-users and retail energy providers, alternative energy providers, and generators and marketers. Each sector is responsible for selecting its own six members to serve on the committee. Typically, the Committee becomes active beginning late summer each year.¹⁶²</p>			<p>FERC and the California Public Utilities Commission (CPUC)</p> <p><u>Federal Power Act</u></p> <p>201</p> <p>(a) Federal regulation of transmission and sale of electric energy</p> <p>It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.</p> <p>205</p> <p>(a) Just and reasonable rates</p> <p>All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.</p> <p>206</p> <p>(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues</p> <p>Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or</p>	<p>CAISO</p> <p><u>FERC Order 2000</u></p> <p>The Federal Energy Regulatory Commission (Commission) is amending its regulations under the Federal Power Act (FPA) to advance the formation of Regional Transmission Organizations (RTOs). The regulations require that each public utility that owns, operates, or controls facilities for the transmission of electric energy in interstate commerce make certain filings with respect to forming and participating in an RTO. The Commission also codifies minimum characteristics and functions that a transmission entity must satisfy in order to be considered an RTO. The Commission's goal is to promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest price possible for reliable service.'</p> <p><i>California Public Utilities Code</i></p> <p>345. The Independent System Operator shall ensure efficient use and reliable operation of the transmission grid consistent with</p>	<p>California Public Utilities Commission (CPUC)</p>	

¹⁶² California Independent System Operator, *Our Leadership* (2015) <<https://www.caiso.com/about/Pages/OurLeadership/Default.aspx>>.

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				<p>preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.</p> <p>219</p> <p>(a) Rulemaking requirement</p> <p>Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.</p> <p>307</p> <p>The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.</p>	<p>achievement of planning and operating reserve criteria no less stringent than those established by the Western Electricity Coordinating Council and the North American Electric Reliability Council.</p> <p><i>CAISO Bylaws</i></p> <p>ARTICLE II: PURPOSES AND OBJECTIVES</p> <p>Section 1. Purposes.</p> <p>The purpose of the Corporation is to ensure efficient use and reliable operation of the electric transmission facilities of those transmission owners that have transferred operational control of those facilities to the Corporation (the "ISO Controlled Grid"), consistent with Chapter 2.3, Part 1, Division 1, of the California Public Utilities Code.</p> <p><i>ISO Articles of Incorporation</i></p> <p>II.b. The specific purpose of this corporation is to ensure efficient use and reliable operation of the electric transmission grid pursuant to the Statute.</p>		

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				<p>309</p> <p>The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.</p>			
United Kingdom	<p>GEMA has primary responsibility for regulation of the energy sector. It comprises individuals appointed by the Secretary of State, and other than the Secretary's powers to remove/determine remuneration of members, it is independent and has no stakeholder participation.</p> <p>GEMA delegates its day-to-day administration to Ofgem. Ofgem's primary duty is to protect the interests of consumers.</p> <p>NGET is the licensed national electricity transmission operator.</p>			<p>GEMA/Ofgem</p> <p>Utilities Act 2000</p> <p>3A(2) The Secretary of State and the Authority shall carry out those functions in the manner which he or it considers is best calculated to further the principal objective, having regard to—</p> <p>(a) the need to secure that all reasonable demands for electricity are met; and</p> <p>(b) the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under this Part or the Utilities Act 2000.</p> <p>(5) Subject to subsection (2), the Secretary of State and the Authority shall carry out their respective functions under this Part in the manner which he or it considers is best calculated—</p> <p>(a) to promote efficiency and economy on the part of persons authorised by licences or exemptions to</p>	<p>NGET</p> <p>Electricity Act 1989</p> <p>S 6(1)(b) a licence authorising a person to transmit electricity for that purpose in that person's authorised area ("a transmission licence")</p> <p>Transmission Licence Standard Conditions</p> <p>Condition C16: Procurement and use of balancing services</p> <p>1. The licensee shall co-ordinate and direct the flow of electricity onto</p>	<p>Ofgem</p> <p>Utilities Act 2000</p> <p>3A(3) In performing that duty, the Secretary of State or the Authority shall have regard to the interests of—</p> <p>(a) individuals who are disabled or chronically sick;</p> <p>(b) individuals of pensionable age;</p> <p>(c) individuals with low incomes; and</p> <p>(d) individuals residing in rural areas; but that is not to be taken as implying that regard</p>	

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>transmit, distribute or supply electricity and the efficient use of electricity conveyed by distribution systems;</p> <p>(b)to protect the public from dangers arising from the generation, transmission, distribution or supply of electricity; and</p> <p>(c)to secure a diverse and viable long-term energy supply, and shall, in carrying out those functions, have regard to the effect on the environment of activities connected with the generation, transmission, distribution or supply of electricity.</p>		and over the national electricity transmission system in an efficient, economic and co-ordinated manner	<p>may not be had to the interests of other descriptions of consumer.</p> <p>(4)The Secretary of State and the Authority may, in carrying out any function under this Part, have regard to—</p> <p>(a) the interests of consumers in relation to gas conveyed through pipes (within the meaning of the M1Gas Act 1986); and</p> <p>(b) any interests of consumers in relation to—</p> <p>(i) telecommunication services and telecommunication apparatus (within the meaning of the M2Telecommunications Act 1984); or</p> <p>(ii) water services or sewerage services (within the meaning of the M3Water Industry Act 1991),which are affected by the carrying out of that function</p>
New Zealand			Memorandum of Understanding between the Electricity Authority and the Ministry of Business, Innovation and Employment (19 September 2014)	<p>Electricity Authority (NZ)</p> <p>Electricity Industry Act 2010 (NZ)</p> <p>15 Objective of Authority</p> <p>The objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.</p> <p>16 Functions of Authority</p>		<p>Transpower</p> <p>State Owned Enterprise (SOE), owns, operates and maintains the transmission network. As owner it provides the infrastructure of electric power transmission that allows consumers to have access to generation from a wide range of sources, and enables competition in the wholesale electricity</p>	<p>Consumer Affairs (part of the Ministry for Business, Innovation and Enterprise)</p> <p>[C]ontributes to the MBIE's purpose by delivering trusted, competitive and well-regulated markets and by creating an environment in which:</p> <p>a) The interests of</p>

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>(1)The Authority's functions are as follows:</p> <p>(a)to maintain a register of industry participants in accordance with subpart 2, and to exempt individual industry participants from the obligation to be registered:</p> <p>(b)to make and administer the Electricity Industry Participation Code in accordance with subpart 3:</p> <p>(c)to monitor compliance with the Act, the regulations, and the Code, and to exempt individual industry participants from the obligation to comply with the Code or specific provisions of the Code:</p> <p>(d)to investigate and enforce compliance with this Part, Part 4, the regulations, and the Code (see subpart 4 of this Part):</p> <p>(e)to investigate and enforce compliance with Part 3 (see subpart 2 of Part 3):</p> <p>(f)to undertake market-facilitation measures (such as providing education, guidelines, information, and model arrangements), and to monitor the operation and effectiveness of market facilitation measures:</p> <p>(g)to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry:</p> <p>(h)to contract for market operation services (but see subsection (2)) and system operator services:</p> <p>(i)to promote to consumers the benefits of comparing and switching retailers:</p> <p>(j)to perform any other specific functions imposed on it under this or any other Act.</p> <p>(2)Instead of, or as well as, contracting for market operation services, the Authority may itself perform—</p> <p>(a)the functions of the market administrator, if the Authority considers it desirable to do so; and</p> <p>(b)any other market operation service, but only on a temporary basis (such as when there is no current</p>	<p>market. As System Operator, under contract with the Electricity Authority, it managed the real-time operation of the network and the physical operation of the New Zealand Electricity Market.¹⁶³</p> <p>Electricity Industry Act 2010 (NZ)</p> <p>8 Transpower is system operator</p> <p>(1) The system operator is Transpower.</p> <p>(2) As well as acting as system operator for the electricity industry, the system operator must—</p> <p>(a) provide information, and short- to medium-term forecasting on all aspects of security of supply; and</p> <p>(b) manage supply emergencies.</p> <p>(3) The Code must—</p> <p>(a) specify the functions of the system operator; and</p> <p>(b) specify how the system operator's functions are to be performed; and</p> <p>(c) set requirements relating to transparency</p>	<p>consumer are protected;</p> <p>b) Businesses compete effectively;</p> <p>c) Consumers and businesses participate confidently.¹⁶⁴</p> <p>MBIE's functions carried out by their internal energy team such as low fixed-charge regulations.</p> <p>Some functions also held by the Electricity and Gas Complaints Commissioner (EGCC): resolves disputes about retailers; and the Ministry of Social Policy/Work and Income New Zealand: assisting vulnerable customers.</p>	

¹⁶³ D Shen and Q Yang, 'Electricity Market Regulatory Reforms and Competition – Case Study of the New Zealand Electricity Market' in Y Wu, X Shi and F Kimura (eds), *Energy Market Integration in East Asia: Theories, Electricity Sector and Subsidies* (ERIA, 2012) 103, 119.

¹⁶⁴ Extracted from Electricity Authority and Ministry of Business, Innovation and Employment, *Memorandum of Understanding*, 19 September 2014.

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				contract, or the contractor is unable or unwilling to perform the service).		and performance. (4) A failure to comply with subsection (2) is to be treated, for the purposes of enforcement under this Part, as a breach of the Code.	
Canada	<p>Canada is a federal state, comprised of 10 provinces (and three territories, which are not addressed in this paper). The provinces are given significant jurisdictional responsibility in many key areas by the Canadian Constitution. The Constitution assigns jurisdiction over electricity and natural resources to the provinces and, as a result, the Canadian electricity industry is primarily organized along provincial lines. As a consequence of this constitutional reality, as well as the variations in each province's political and physical environments, there are significant differences between the electricity industries of each of the provinces. The key market and regulatory characteristics of Canada's individual provincial electricity industries are discussed below.¹⁶⁵</p> <p>'II. Regulatory Responsibilities in Canada</p> <p>A. Federal</p> <p>In the context of the electricity industry, the federal sphere of responsibility is primarily derived from the constitutional authority over international and interprovincial trade and commerce. As a result, the construction and operation of international transmission lines as well as the regulation of electricity exports to the United States are matters that fall within the authority of the National Energy Board, a federal regulatory tribunal. Canada's nuclear industry is also federally regulated; this responsibility falls to the Canadian Nuclear Safety Commission. An additional important area of joint responsibility is that of environmental protection. Responsibility for environmental matters (including the environmental assessment of electricity developments) is shared between the federal and provincial governments – which level of government may be paramount, changes with various environmental, regulatory and government funding considerations.'</p>	<i>National Energy Board Act, RSC 1985, c1 N-7</i>					

¹⁶⁵ Blake, Cassels & Graydon LLP, *Blakes Overview of Electricity Regulation in Canada* (2015) <http://www.acc.com/_cs_upload/vl/membersonly/Article/946100_1.pdf> 1.

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
	<p>'B. Provincial</p> <p>With the exception of those areas of responsibility that are carved out for the federal government, as discussed above, most matters of electricity industry regulation and policy are addressed at the provincial level. Project developers must also obtain certain key environmental approvals at the provincial level.'¹⁶⁶</p> <p>Federal/provincial division of powers for electricity under the <i>Constitution Act 1867</i>, UK 30</p> <p>Federal Powers under s 91 means that the Federal Canadian Government is responsible for the construction and operation of international transmission lines, authorisation of electricity exports to the US, inter-provincial trade and infrastructure. This role is carried out by the National Energy Board, 'an independent federal regulatory agency ... [which is] the Canadian equivalent to the FERC, albeit with less visibility, power, and drive to implement reforms.'¹⁶⁷</p> <p>Provincial governments, under ss 92 and 92A, are responsible for comprehensively regulation for generation, transmission and distribution facilities, approvals and licensing, rate regulation, some Crown corporations.</p>						
Ontario	<p>'Policy Setting and Regulation</p> <p>Two entities set electricity policy and regulate the market: the Government of Ontario and the Ontario Energy Board (OEB or the Board).</p> <p>(a) Government of Ontario</p> <p>The Ontario Cabinet retains legislative authority to set policy for Ontario's energy sector and to alter the mandate of any of the Ontario Hydro successor corporations; however, day-to-day oversight of Ontario's electricity and natural gas industries is maintained by the Minister of Energy (the Minister). Upon the approval of Cabinet, the Minister can issue policy directives to the OEB, the IESO, and the Ontario Power Authority (OPA), and each is required to implement such policy directives. The Minister can also request that the OEB examine and advise upon any issue with respect to Ontario's energy sector.</p> <p>(b) Ontario Energy Board</p> <p>The OEB acts as the regulator of Ontario's electricity and natural gas industries. Although the OEB reports to the</p>			<p>Ontario Energy Board</p> <p>Ontario Energy Board Act, SO 1998, Ch 15 Sch B</p> <p>PART I</p> <p>GENERAL</p> <p>Board objectives, electricity</p> <p>(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:</p> <p>To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.</p> <p>To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and</p>	<p>Independent Electricity System Operator (as merged with the Ontario Power Authority from 1 Jan 2015)</p> <p>Ontario Energy Board Act, SO 1998, Ch 15 Sch A</p> <p>Objects</p> <p>(1) The objects of the IESO are,</p> <p>(a) to exercise the powers and perform the duties assigned to it</p>	<p>Ontario Energy Board</p> <p>Energy Consumer Protection Act, SO 2010, Ch 8</p>	

¹⁶⁶ Ibid.

¹⁶⁷ Pierre-Olivier Pineau, 'Fragmented Markets: Canadian Electricity Sectors' Underperformance' in Fereidoon P Sioshansi (ed), *Evolution of Global Electricity Markets: New paradigms, new challenges, new approaches* (Elsevier Science, 2013) 363, 367.

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
	<p>Minister, it operates as an independent entity. OEB responsibilities include: (a) determining the rates charged for regulated services in the electricity and the natural gas sectors; (b) approving the construction of new transmission and distribution facilities; (c) approving natural gas franchise agreements; (d) formulating rules to govern the conduct of participants in the electricity and the natural gas sectors; (e) engaging in advocacy on behalf of consumers in the electricity and the natural gas sectors; (f) hearing appeals from decisions made by the IESO; (g) monitoring and approving the IESO's budget and fees; and (i) monitoring electricity markets and reporting thereupon to the Minister.</p> <p>The Board also operates as an administrative tribunal with exclusive jurisdiction "in all cases and in respect of all matters in which jurisdiction is conferred on it." In exercising this exclusive jurisdiction, the OEB is entitled to hear and to determine all questions of law and fact, and may render a decision by issuing an order (except in respect of an application for the designation of a gas storage area, on which the Board can only issue a recommendation to the government). An order of the OEB may be appealed to Ontario's Divisional Court, but appeals may only be made on narrow grounds, namely, on jurisdiction or on questions of law.</p> <p>Blake, Cassels & Graydon LLP, 'Blakes Overview of Electricity Regulation in Canada,' http://www.acc.com/_cs_upload/vl/membersonly/Article/946100_1.pdf</p>			<p>demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.</p> <p>To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.</p> <p>To facilitate the implementation of a smart grid in Ontario.</p> <p>To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.</p> <p>Facilitation of integrated power system plans</p> <p>(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the Electricity Act, 1998. 2004, c. 23, Sched. B, s. 1.</p>		<p>under this Act, the regulations, directions, the market rules and its licence;</p> <p>(b) to enter into agreements with transmitters to give it authority to direct the operation of their transmission systems;</p> <p>(c) to direct the operation and maintain the reliability of the IESO-controlled grid to promote the purposes of this Act;</p> <p>(d) to participate in the development by any standards authority of criteria and standards relating to the reliability of the integrated power system;</p> <p>(e) to establish and enforce criteria and standards relating to the reliability of the integrated power system;</p> <p>(f) to work with the responsible authorities outside of Ontario to co-ordinate the IESO's activities with the activities of those authorities;</p> <p>(g) to operate the IESO-administered markets to promote the purposes of this Act;</p> <p>(h) to engage in activities related to contracting for the procurement of electricity supply,</p>	

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
						<p>electricity capacity and conservation resources;</p> <p>(i) to engage in activities related to settlements, payments under a contract entered into under the authority of this Act and payments provided for under this Act or the Ontario Energy Board Act, 1998;</p> <p>(j) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;</p> <p>(k) to forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the short term, medium term and long term;</p> <p>(l) to conduct independent planning for electricity generation, demand management, conservation and transmission;</p> <p>(m) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;</p> <p>(n) to engage in activities in support of system-wide goals for the amount of electricity</p>	

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
						<p>to be produced from different energy sources;</p> <p>(o) to engage in activities that facilitate load management;</p> <p>(p) to engage in activities that promote electricity conservation and the efficient use of electricity;</p> <p>(q) to assist the Board by facilitating stability in rates for certain types of consumers;</p> <p>(r) to collect and make public information relating to the short term, medium term and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and</p> <p>(s) to engage in such other objects as may be prescribed by the regulations. 2014, c. 7, Sched. 7, s. 3 (1).</p> <p>PART I GENERAL Purposes</p> <p>1. The purposes of this Act are,</p> <p>(a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible</p>	

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						<p>planning and management of electricity resources, supply and demand;</p> <p>(b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;</p> <p>(c) to facilitate load management in a manner consistent with the policies of the Government of Ontario;</p> <p>(d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario;</p> <p>(e) to provide generators, retailers, market participants and consumers with non-discriminatory access to transmission and distribution systems in Ontario;</p> <p>(f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;</p> <p>(g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of</p>	

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						<p>electricity;</p> <p>(h) to ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed;</p> <p>(i) to facilitate the maintenance of a financially viable electricity industry; and</p> <p>(j) to protect corridor land so that it remains available for uses that benefit the public, while recognizing the primacy of transmission uses. 2004, c. 23, Sched. A, s. 1; 2014, c. 7, Sched. 7, s. 1.</p>	
Alberta	<p>The AESO provides the function of the Independent System Operator, and is tasked with providing for the safe, reliable and economic operation of the Alberta Interconnected Electric System (AIES) and promoting a fair, efficient and openly competitive market for electricity.</p> <p>The Balancing Pool manages the PPA auction proceeds on behalf of consumers, and acts to backstop certain risks inherent in the PPAs.</p> <p>The Alberta Utilities Commission (AUC) has evolved from the former Electric Utilities Board (EUB) to provide adjudication on ISO rules, transmission applications, penalties and any other related market challenges.</p> <p>The Market Surveillance Administrator (MSA) provides the surveillance function for the market. While the AESO has a role to collect information and recommend areas for evaluation, only the MSA can recommend penalties or fines to the AUC.¹⁶⁸</p>			<p>Alberta Utilities Commission (AUC), Market Surveillance Administrator (MSA)</p> <p>Alberta Utilities Commission Act (2007)</p> <p>MSA mandate</p> <p>39(1) Subject to regulations made under section 59(1)(a), the Market Surveillance Administrator has the mandate to carry out surveillance in respect of</p> <p>(i) the supply, generation, transmission, distribution, trade, exchange, purchase or sale of electricity, electric energy, electricity services or ancillary services or any aspect of those activities, and</p> <p>(ii) the provision of retail gas services, or services provided under a default rate tariff, to natural gas customers by natural gas market participants, or any aspect of those activities, to investigate matters, on its own initiative or on receiving a complaint or referral under section 41, and to undertake activities to address</p> <p>(i) contraventions of the Electric Utilities Act, the regulations under that Act, the ISO rules, reliability</p>	<p>Alberta Electric System Operator (AESO)</p> <p>Electric Utilities Act (2003)</p> <p>Duties of Independent System Operator</p> <p>17 The Independent System Operator has the following duties:</p> <p>(a) to operate the power pool in a manner that promotes the fair, efficient and openly competitive exchange of electric energy;</p> <p>(b) to facilitate the operation of markets for electric energy in a</p>	<p>Utilities Consumer Advocate</p> <p>Government Organization Act</p> <p>Schedule 13.1</p> <p>Responsibilities</p> <p>2 The Office of the Utilities Consumer Advocate has the following responsibilities:</p> <p>(a) to represent the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities</p>	

¹⁶⁸ Alberta Electric System Operator, *Guide to Understanding Alberta's Electricity Market* (2015) <<http://www.aeso.ca/29864.html>>.

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>standards, Part 2.1 of the Gas Utilities Act or the regulations under that Act or of decisions, orders or rules of the Commission,</p> <p>(ii) conduct that does not support the fair, efficient and openly competitive operation of the electricity market or the natural gas market, and</p> <p>(iii) any other matters that relate to or affect the structure and performance of the electricity market or the natural gas market, including negotiating and entering into settlement agreements and bringing matters before the Commission.</p> <p>(2) Without limiting the generality of subsection (1), the Market Surveillance Administrator's mandate</p> <p>(a) in respect of the electricity market includes surveillance and, where applicable, investigation and enforcement, in respect of any one or more of the following:</p> <p>(i) the conduct of electricity market participants;</p> <p>(ii) the structure and performance of the electricity market;</p> <p>(iii) the conduct of the Independent System Operator;</p> <p>(iv) the conduct of the Balancing Pool;</p> <p>(v) the conduct of owners of generating units to which power purchase arrangements apply in meeting their obligations to provide the generating capacity set out in those power purchase arrangements;</p> <p>(vi) arrangements, information sharing and decisions relating to electricity market participants exchanging or wishing to exchange electric energy and ancillary services or any aspect of those activities;</p> <p>(vii) arrangements, information sharing and decisions relating to electricity market participants providing or wishing to provide retail electricity services to electricity customers, or any aspect of those activities;</p> <p>(viii) the relationship between the owner of an electric distribution system and its affiliated retailers or other retailers, or any aspect of the parties in the relationship;</p> <p>(ix) the relationship between the owner of an electric distribution system and a regulated rate provider or between the regulated rate provider and an affiliated</p>	<p>manner that is fair and open and that gives all market participants wishing to participate in those markets and to exchange electric energy a reasonable opportunity to do so;</p> <p>(c) to determine, according to relative economic merit, the order of dispatch of electric energy and ancillary services in Alberta and from scheduled exchanges of electric energy and ancillary services between the interconnected electric system in Alberta and electric systems outside Alberta, to satisfy the requirements for electricity in Alberta;</p> <p>to carry out financial settlement for all electric energy exchanged through the power pool at the pool price unless this Act or the regulations made by the Minister under section 41 provide otherwise;</p> <p>to manage and recover the costs of transmission line losses;</p> <p>to manage and recover the costs for the provision of ancillary services;</p> <p>to provide system access service on the transmission system and to prepare an ISO tariff;</p> <p>to direct the safe, reliable and economic</p>	<p>manner that is fair and open and that gives all market participants wishing to participate in those markets and to exchange electric energy a reasonable opportunity to do so;</p> <p>(c) to determine, according to relative economic merit, the order of dispatch of electric energy and ancillary services in Alberta and from scheduled exchanges of electric energy and ancillary services between the interconnected electric system in Alberta and electric systems outside Alberta, to satisfy the requirements for electricity in Alberta;</p> <p>to carry out financial settlement for all electric energy exchanged through the power pool at the pool price unless this Act or the regulations made by the Minister under section 41 provide otherwise;</p> <p>to manage and recover the costs of transmission line losses;</p> <p>to manage and recover the costs for the provision of ancillary services;</p> <p>to provide system access service on the transmission system and to prepare an ISO tariff;</p> <p>to direct the safe, reliable and economic</p>	<p>Commission and other bodies whose decisions may affect the interests of those consumers;</p> <p>(b) to disseminate independent and impartial information about the regulatory process relating to electricity and natural gas, including an analysis of the impact of decisions of the Alberta Utilities Commission, other bodies and the courts relating to electricity and natural gas;</p> <p>(c) to inform and educate consumers about electricity and natural gas issues;</p> <p>(d) to carry out such other responsibilities relating to electricity and natural gas as the responsible Minister determines.</p> <p><i>Utilities Consumer Advocate Regulation</i></p> <p>Additional responsibilities of the Office of the Utilities Consumer Advocate</p> <p>2 In addition to the responsibilities set out in the Schedule, the Office of the Utilities Consumer Advocate has the following responsibilities:</p> <p>(a) to develop and</p>

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
				<p>retailer, or any aspect of the parties in the relationship;</p> <p>(x) electricity exchanges on the tie lines connecting the interconnected electric system in Alberta with electric systems outside Alberta;</p> <p>(xi) any other conduct that may be specified in the regulations made under section 59(1)(a) and (f), and</p> <p>(b) in respect of the natural gas market includes surveillance and, where applicable, investigation and enforcement, in respect of any one or more of the following:</p> <p>(i) the conduct of natural gas market participants;</p> <p>(ii) the structure and performance of the natural gas market;</p> <p>(iii) arrangements, information sharing and decisions relating to natural gas market participants providing or wishing to provide retail gas services, or services provided under a default rate tariff, to customers, or any aspect of those activities;</p> <p>(iv) the relationship between a gas distributor and its affiliated retailers or other retailers, or any aspect of the parties in the relationship;</p> <p>(v) the relationship between a gas distributor and a default supply provider or between a default supply provider and an affiliated retailer, or any aspect of the parties in the relationship;</p> <p>(vi) any other conduct that may be specified in the regulations made under section 59(1)(a) and (f).</p> <p>(3) In carrying out its mandate, the Market Surveillance Administrator shall assess whether or not</p> <p>(a) the conduct of electricity market participants and natural gas market participants supports the fair, efficient and openly competitive operation of the electricity market or the natural gas market, as the case may be, and</p> <p>(b) the person carrying out the conduct has complied with or is complying with</p> <p>(i) the Electric Utilities Act, the regulations under that Act, the ISO rules, reliability standards, market rules and any arrangements entered into under the Electric Utilities Act or the regulations under that Act, in the</p>	<p>operation of the interconnected electric system;</p> <p>to assess the current and future needs of market participants and plan the capability of the transmission system to meet those needs;</p> <p>to make arrangements for the expansion of and enhancement to the transmission system;</p> <p>to collect, store and disseminate information relating to the current and future electricity needs of Alberta and the capacity of the interconnected electric system to meet those needs, and make that information available to the public;</p> <p>to administer load settlement;</p> <p>to monitor the compliance of market participants with rules made under sections 19, 20 and 24.1;</p> <p>to perform any other function or engage in any activity the Independent System Operator considers necessary or advisable to exercise its powers and carry out its duties, responsibilities and functions under this Act and regulations.</p>	<p>undertake activities that the Utilities Consumer Advocate considers appropriate for the purposes of</p> <p>(i) preventing the disconnection of electricity or natural gas provided by a retailer or provider to a consumer, or</p> <p>(ii) facilitating the reconnection of electricity or natural gas provided by a retailer or provider to a consumer;</p> <p>(b) to assist in the resolution of any consumer issue, complaint or dispute between a consumer and a distributor, provider or retailer relating to the provision of electricity or natural gas as the Utilities Consumer Advocate considers appropriate.</p>	

Jurisdiction	Electricity Market Structure and Regulatory Overview	National Energy Council	Energy Agreement	Regulator and Compliance	Rule Maker and Market Development	Market Operator	Consumer Advocate
					<p>case of an electricity market participant,</p> <p>(ii) the Gas Utilities Act, the regulations under that Act, market rules and any arrangements entered into under the Gas Utilities Act or the regulations under that Act, in the case of a natural gas market participant, or</p> <p>(iii) a decision, order or rule of the Commission, and</p> <p>(c) the ISO rules are sufficient to discourage anti-competitive practices in the electric industry and whether or not the ISO rules support the fair, efficient and openly competitive operation of the electricity market.</p> <p>(4) As part of its mandate, the Market Surveillance Administrator may establish guidelines to support the fair, efficient and openly competitive operation of the electricity market and the natural gas market and shall make those guidelines public.</p>		

APPENDIX 3: INTERNATIONAL EQUIVALENTS OF THE AER AND AEMC

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
<p>New Zealand Electricity Authority</p>	<p><u>Electricity Industry Act 2010</u></p> <p>15 Objective of Authority The objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.</p> <p>16 Functions of Authority (1) The Authority's functions are as follows: (a) to maintain a register of industry participants in accordance with subpart 2, and to exempt individual industry participants from the obligation to be registered: (b) to make and administer the Electricity Industry Participation Code in accordance with subpart 3: (c) to monitor compliance with the Act, the regulations, and the Code, and to exempt individual industry participants from the obligation to comply with the Code or specific provisions of the Code: (d) to investigate and enforce compliance with this Part, Part 4, the regulations, and the Code (see subpart 4 of this Part): (e) to investigate and enforce compliance with Part 3 (see subpart 2 of Part 3): (f) to undertake market-facilitation measures (such as providing education, guidelines, information, and model arrangements), and to monitor the operation and effectiveness of market facilitation measures: (g) to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry: (h) to contract for market operation services (but see subsection (2)) and system operator services: (i) to promote to consumers the benefits of comparing and switching retailers: (j) to perform any other specific functions imposed on it under this or any other Act. (2) Instead of, or as well as, contracting for market operation services, the Authority may itself perform— (a) the functions of the market administrator, if the Authority considers it desirable to do so; and (b) any other market operation service, but only on a temporary basis (such as when there is no current contract, or the contractor is unable or unwilling to perform the service).</p>	<p>The Authority is an independent Crown entity (under the <i>Crown Entities Act 2004</i>), free to adopt its own approach to matters covered by government policy statements presented in Parliament by the Minister of Energy and Resources.</p>	<p><u>Our values</u></p> <p>Our people We support the development of each other and work together to achieve our goals.</p> <p>Boldness We are decisive, forward thinking and not afraid to do the right thing.</p> <p>Excellence We are committed to producing the highest-quality work.</p> <p>Openness We are transparent in our work and listen to others.</p> <p>Integrity We are honest and trustworthy and treat everyone with fairness and respect.</p>	<p>The Board of the Electricity Authority comprises four Directors and one Chairperson. They are appointed by the Governor-General on the recommendation of the Minister, following a public call for nominations. They are appointed for five-year terms, and are tasked with hiring the Chief Executive Officer.</p>	<p>Funded through appropriations approved by Parliament each financial year. The government is then reimbursed through a levy on industry participants, collected in accordance with the <i>Electricity Industry (Levy of Industry Participants) Regulations 2010</i>.</p>

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
United States Federal Energy Regulatory Commission	<p><u>Federal Power Act</u></p> <p>201 (a) Federal regulation of transmission and sale of electric energy It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.</p> <p>205 (a) Just and reasonable rates All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.</p> <p>206 (a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes</p>	<p>FERC is an independent government agency.</p>	<p><u>Guiding Principles</u></p> <p>Organizational Excellence: The Commission strives to use its resources efficiently and effectively to achieve its strategic priorities.</p> <p>Due Process and Transparency: Paramount in all of its proceedings is the Commission's determination to be open and fair to all participants.</p> <p>Regulatory Certainty: In each of the thousands of orders, opinions and reports issued by the Commission each year, the Commission strives to provide regulatory certainty through consistent approaches and actions.</p> <p>Stakeholder Involvement: The Commission conducts regular outreach to ensure that interested parties have an appropriate opportunity to contribute to the performance of the Commission's responsibilities.</p> <p>Timeliness: The Commission's goal is to reach an appropriate resolution of each proceeding in an expeditious manner.</p>	<p>FERC is composed of up to five commissioners who are appointed by the President with the advice and consent of the Senate. Commissioners serve five-year terms, and possess an equal vote on regulatory matters.</p> <p>No more than three Commissioners may belong to the same political party. There is no review of FERC decisions by the President or Congress.</p>	<p>The Commission is funded through costs recovered by the fees and annual charges from the industries it regulates.</p>

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
	<p>therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.</p> <p>219 (a) Rulemaking requirement Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.</p> <p>307 The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.</p> <p>309 The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports</p>				

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
	<p>to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.</p>				
<p>California Public Utilities Commission</p>	<p>California Constitution</p> <p>ARTICLE XII</p> <p>SECTION 1. The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.</p> <p>SEC. 2. Subject to statute and due process, the commission may establish its own procedures. Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval.</p> <p>SEC. 3. Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.</p> <p>SEC. 4. The commission may fix rates and</p>	<p>The CPUC is an independent government agency.</p>	<p>Values</p> <p>Leadership</p> <p>We lead with integrity, take initiative, and inspire a shared vision in the pursuit of the public interest.</p> <p>Excellence</p> <p>Our skilled, dedicated, and diverse workforce provides the highest quality products and services.</p> <p>People</p> <p>We promote professional growth, empowerment, innovation, accountability, teamwork, collegiality, and mutual respect.</p> <p>Participation</p> <p>We provide an open, fair, timely, and inclusive process.</p> <p>Stewardship</p> <p>We are responsible stewards of the human, financial, information, and natural resources entrusted to us.</p> <p>Communication</p>	<p>The Governor appoints five Commissioners, who must be confirmed by the Senate, for six-year staggered terms.</p>	

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
	<p>establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.</p> <p>SEC. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.</p> <p>SEC. 6. The commission may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.</p> <p>SEC. 7. A transportation company may not grant free passes or discounts to anyone holding an office in this State; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.</p> <p>SEC. 8. A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.</p>		<p>We provide accurate, timely information and consumer education.</p>		

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
Ontario Energy Board	<p>Ontario Energy Board Act 1998</p> <p>PART 1 GENERAL 1 Board Objectives, Electricity</p> <p>1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.</p> <p>2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.</p> <p>3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.</p> <p>4. To facilitate the implementation of a smart grid in Ontario.</p> <p>5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.</p>	The accountability relationships between the chair, the management committee and the Minister are determined every three years in an MOU (s 4.6).	<p>Our Mission</p> <p>The Board's mission is to promote a viable, sustainable and efficient energy sector that serves the public interest and assists consumers to obtain reliable energy services that are cost effective.</p>	The Board has full and part-time members who are appointed by the Lieutenant Governor in Council for two years, and renewable up to five years. It comprises a Chairperson/CEO, and seven additional members.	The OEB is an independent, self-financing Crown corporation.
Office of Gas and Electricity Markets UK (Ofgem)	<p>Utilities Act 2000</p> <p>3A(2) The Secretary of State and the Authority shall carry out those functions in the manner which he or it considers is best calculated to further the principal objective, having regard to— (a) the need to secure that all reasonable demands for electricity are met; and (b) the need to secure that licence holders are able to finance the activities which are the subject of obligations imposed by or under this Part or the Utilities Act 2000.</p> <p>(5) Subject to subsection (2), the Secretary of State and the Authority shall carry out their respective functions under this Part in the manner which he or it considers is best calculated— (a) to promote efficiency and economy on the part of persons authorised by licences or exemptions to transmit, distribute or supply electricity and the</p>	Non-ministerial government department and an independent National Regulatory Authority, recognised by EU Directives.	<p>Our themes</p> <ul style="list-style-type: none"> • Promoting value for money • Promoting security of supply • Promoting sustainability • Delivering government programmes <p>Simpler Clearer Fairer</p>	Its governing body is the Gas and Electricity Markets Authority (GEMA), which comprises non-executive and executive members and a non-executive chair. GEMA oversees the work of Ofgem and provides strategic direction.	Ofgem recovers costs from the licensed companies it regulates. Licensees must pay an annual licence fee.

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
	<p>efficient use of electricity conveyed by distribution systems;</p> <p>(b) to protect the public from dangers arising from the generation, transmission, distribution or supply of electricity; and</p> <p>(c) to secure a diverse and viable long-term energy supply, and shall, in carrying out those functions, have regard to the effect on the environment of activities connected with the generation, transmission, distribution or supply of electricity.</p>				

APPENDIX 4: TRANSPARENCY MEASURES OF THE COAG COUNCILS

COAG Council	Terms of reference	Governance structure	Names, titles and contact details of SCO	Guidance or delegation issued to SCO	Advance meeting dates
Transport and Infrastructure Council (TIC)	No	Yes - governance diagram showing reporting lines for the interaction between the Council, TISOC, working groups etc. published on website.	Yes - publishes the names, titles and contact details of the members of the Transport and Infrastructure Senior Officials' Committee (TISOC)	No – not publicly available	Yes - publishes the advance meeting dates of both the TIC and TISOC for the year.
Health Council (CHC)	Not yet finalised. No draft publicly available.	Yes – details available on the website and through the Operating Guidelines.	Yes- publishes the names and titles of the Australian Health Ministers' Advisory Council (AHMAC).	<p>Yes - Operating Guidelines provide information and advice about the Council of Australian Governments (COAG) Health Council (CHC) and the Australian Health Ministers' Advisory Council (AHMAC). These guidelines are updated regularly (last in December 2014) and are publicly available on their website.</p> <p>In relation to AHMAC they provide guidance on: membership, the AHMAC Terms of Reference, chairing and Executive Committee arrangements, decision making, recording decisions and records of meetings, meetings, agenda setting and management, responsibilities and administrative arrangements for AHMAC meetings, funding and principal working committees.</p>	No – not publicly available
Federal Financial Relations	No	No	No	No	No
Energy Council	No	No	No	No	No

COAG Council	Terms of reference	Governance structure	Names, titles and contact details of SCO	Guidance or delegation issued to SCO	Advance meeting dates
Education	<p>Terms of Reference (ToR) for the new Council are currently being developed and will be considered by COAG in due course.</p> <p>The Education Council will continue to operate under SCSEEC Terms of Reference until COAG endorses the new Council's ToR.</p>	No but the Operating Protocol provides helpful guidance.	Yes – publishes the names and titles of both the Education Council members and the members of the Australian Education, Early Childhood Development and Youth Affairs Senior Officials Committee (AEEYSOC).	Yes – Operating Protocol for AEEYSOC (last updated in March 2013) publicly available on their website,	Yes – for both the Education Council and AEEYSOC meetings.
Law, Crime and Community Safety Council	No Terms of Reference are publicly available but a summary of their role and priorities is available on their website.	No	No- the names of the National Justice and Policing Senior Officer's Group (NJPSOG) and Australia-New Zealand Emergency Management Committee (ANZEMC) are not publicly available although their titles are published in the Operating Procedure.	Yes – Operating Procedures For the Law, Crime And Community Safety Council are publicly available on their website (last updated in July 2014)	No
Industry and Skills Council	No	No	No	No	No
Disability Reform Council	Yes – publicly available on website.	No	No	No	No

APPENDIX 6: INTERNATIONAL FUNCTIONAL EQUIVALENTS OF AEMO

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
<p>Transpower, New Zealand</p>	<p><u>Electricity Industry Act 2010 (NZ)</u></p> <p>8 Transpower is system operator</p> <p>(1) The system operator is Transpower.</p> <p>(2) As well as acting as system operator for the electricity industry, the system operator must—</p> <p>(a) provide information, and short- to medium-term forecasting on all aspects of security of supply; and</p> <p>(b) manage supply emergencies.</p> <p>(3) The Code must—</p> <p>(a) specify the functions of the system operator; and</p> <p>(b) specify how the system operator's functions are to be performed; and</p> <p>(c) set requirements relating to transparency and performance.</p> <p>(4) A failure to comply with subsection (2) is to be treated, for the purposes of enforcement under this Part, as a breach of the Code.</p>	<p>100% State owned enterprise. The shares are held on behalf of the Crown by the Minister of Finance and the Minister for State Owned Enterprises.</p>	<p>Our purpose</p> <p>We connect New Zealanders to their power system, through safe, smart solutions for today and tomorrow.</p> <p>Our values</p> <p>The power of us</p> <p>We listen to each other – we unite to make things happen – we are better together</p> <p>We work with care</p> <p>We care for each other and our communities and we keep everybody safe – we are open, honest and respectful</p> <p>We're here for New Zealand</p> <p>We work hard to keep the lights on for our fellow Kiwis and we're careful how we spend their money</p> <p>We do clever simply</p> <p>This is a great place to work. We deliver excellence – we change, adapt, and make better</p>	<p>Transpower is governed by a Board of seven directors. The Board is responsible for Transpower's performance, and for guiding and monitoring the company on behalf of the shareholding Ministers. The Board is appointed by, and accountable, to the Crown. Transpower's General Management Team is responsible for the day-to-day operation of the company.</p>	<p>Transpower recovers the costs of its regulated transmission business from generators and line companies. The Commerce Commission sets the amount of revenue that Transpower can earn from transmission activities.</p> <p>The System Operator service is provided and funded under an agreement with the Electricity Authority.</p>

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
<p>California Independent System Operator Corporation (CAISO), California</p>	<p><i>California Public Utilities Code</i></p> <p>345. The Independent System Operator shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Electricity Coordinating Council and the North American Electric Reliability Council.</p> <p><i>ISO Articles of Incorporation</i></p> <p>II.b. The specific purpose of this corporation is to ensure efficient use and reliable operation of the electric transmission grid pursuant to the Statute.</p> <p><i>CAISO Bylaws</i></p> <p>ARTICLE II: PURPOSES AND OBJECTIVES</p> <p>Section 1. Purposes.</p> <p>The purpose of the Corporation is to ensure efficient use and reliable operation of the electric transmission facilities of those transmission owners that have transferred operational control of those facilities to the Corporation (the "ISO Controlled Grid"), consistent with Chapter 2.3, Part 1, Division 1, of the California Public Utilities Code.</p>	<p>A non-profit public benefit corporation organised under the Nonprofit Public Benefit Corporation Law for the charitable purposes set forth in Chapter 2.3, Part 1, Division 1 of the Public Utilities Code of the State of California.</p>	<p>OUR PURPOSE</p> <p>Lead the way to tomorrow's energy network</p> <p>OUR STRATEGY</p> <ul style="list-style-type: none"> • Lead the transition to renewable energy • Maintain reliability during industry transformation • Expand regional collaboration to unlock mutual benefits <p>OUR OPERATING PRINCIPLES</p> <p>For the benefit of our customers, we:</p> <ul style="list-style-type: none"> • Attract, develop and retain a highly skilled workforce • Operate the grid reliably and efficiently • Provide fair and open transmission access • Promote environmental stewardship • Facilitate effective markets and promote infrastructure development • Provide timely and accurate information <p>OUR COMMITMENTS</p> <p>We are committed to being:</p> <ul style="list-style-type: none"> • Reliable 	<p>There shall be five members of the Governing Board. Members of the Governing Board are selected by appointment of the Governor of the State of California and subject to confirmation by the Senate of the State of California.</p> <p>The Board selection process involving stakeholders was outlined in a FERC order issued July 1, 2005. The Board Nominee Review Committee is comprised of six stakeholders from each of the following member-class sectors: transmission owners, transmission-dependent utilities, public interest groups, end-users and retail energy providers, alternative energy providers, and generators and marketers. Each sector is responsible for selecting its own six members to serve on the committee.</p> <p>Once the Committee has been established and secretaries nominated, the Board member selection process proceeds as follows:</p> <ul style="list-style-type: none"> • An independent search firm creates a list of at least four qualified candidates for each open seat on the Board. • The list of qualified candidates is then forwarded to the 36-member Board Nominee Review Committee. • Each member-class sector will select one person to represent the group to conduct a personal interview of selected candidates. • Based on inputs from the member-class sectors, recommendations are submitted to the Office of the Governor for the State of California. <p>Terms of office of each member of the Governing Board are three years in duration and are staggered in accordance with section 337 subdivision (e) of the California Public Utilities Code. Governors may serve multiple terms, with no maximum number of terms. The Chair of the Governing Board shall be elected by</p>	<p>The California ISO operates under the terms and conditions of its FERC-approved tariff, which is modified, amended, supplemented or restated as needed.</p>

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
			<ul style="list-style-type: none"> • Sustainable • Efficient • Resilient • Responsive <p>OUR CORE VALUES</p> <ul style="list-style-type: none"> • Integrity • Teamwork • Excellence • People focus • Open communication 	<p>the Board from among the members of the Governing Board.</p> <p>No member of the Governing Board shall be affiliated with any actual or potential participant in any market administered by the Corporation.</p>	
<p>National Grid Electricity Transmission plc, United Kingdom</p>	<p>Electricity Act 1989</p> <p>S 6(1)(b) a licence authorising a person to transmit electricity for that purpose in that person’s authorised area (“a transmission licence”)</p> <p>Transmission Licence Standard Conditions</p> <p>Condition C16: Procurement and use of balancing services</p> <p>1. The licensee shall co-ordinate and direct the flow of electricity onto and over the national electricity transmission system in an efficient, economic and co-ordinated manner</p>	<p>NGET is a public limited company, registered in England and Wales. National Grid Electricity Transmission plc operates as a subsidiary of National Grid Holdings One Plc.</p>	<p>Connecting you to your energy today, trusted to help you meet your energy needs tomorrow.</p>	<p>The parent company, National Grid plc, is governed by an eleven member Board of Directors. They are supported by an eleven member Executive Committee.</p>	<p>The cost that can be charged by NGET for its regulated activities is governed by RII0-T1 pricing control model, where stands for:</p> <p>Revenue = Incentives+Innovation+Outputs</p> <p>This process is controlled by Ofgem.</p>

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
<p>Independent Electricity System Operator (as merged with the Ontario Power Authority from 1 Jan 2015)</p>	<p>(1) The objects of the IESO are,</p> <p>(a) to exercise the powers and perform the duties assigned to it under this Act, the regulations, directions, the market rules and its licence;</p> <p>(b) to enter into agreements with transmitters to give it authority to direct the operation of their transmission systems;</p> <p>(c) to direct the operation and maintain the reliability of the IESO-controlled grid to promote the purposes of this Act;</p> <p>(d) to participate in the development by any standards authority of criteria and standards relating to the reliability of the integrated power system;</p> <p>(e) to establish and enforce criteria and standards relating to the reliability of the integrated power system;</p> <p>(f) to work with the responsible authorities outside of Ontario to co-ordinate the IESO's activities with the activities of those authorities;</p> <p>(g) to operate the IESO-administered markets to promote the purposes of this Act;</p> <p>(h) to engage in activities related to contracting for the procurement of electricity supply, electricity capacity and conservation resources;</p> <p>(i) to engage in activities related to settlements, payments under a contract entered into under the authority of this Act and payments provided for under this Act or the Ontario Energy Board Act, 1998;</p> <p>(j) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;</p> <p>(k) to forecast electricity demand and the adequacy and reliability of electricity resources for</p>	<p>The IESO is a not-for-profit corporate entity established in 1998 by the Electricity Act of Ontario.</p>		<p>The IESO is governed by an independent board of eleven directors that oversees its business and affairs. The IESO Board also approves the Market Rules, policies and guidelines that govern the IESO-administered markets.</p> <p>The Board Directors are appointed by the Minister of Energy. However, the Board has the power to elect both their own Chair and Vice-Chair from among the Directors by a majority vote.</p> <p>The IESO Stakeholder Advisory Committee provides appointed stakeholder representatives with the opportunity to present advice and recommendations on market development and planning decisions directly to the IESO's Board of Directors and Executive Leadership Team. Members of the Committee represent electricity service providers, generators, conveyors and consumers of electricity. Stakeholders are encouraged to contact their representative on the Advisory Committee to provide input on issues that affect them.</p> <p>The Stakeholder Advisory Committee meetings are open to all stakeholders with an interest in the electricity industry.</p>	<p>The IESO's usage fees and licence conditions are approved by the Ontario Energy Board (OEB) in accordance with the Electricity Act, 1998.</p>

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
	<p>Ontario for the short term, medium term and long term;</p> <p>(l) to conduct independent planning for electricity generation, demand management, conservation and transmission;</p> <p>(m) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;</p> <p>(n) to engage in activities in support of system-wide goals for the amount of electricity to be produced from different energy sources;</p> <p>(o) to engage in activities that facilitate load management;</p> <p>(p) to engage in activities that promote electricity conservation and the efficient use of electricity;</p> <p>(q) to assist the Board by facilitating stability in rates for certain types of consumers;</p> <p>(r) to collect and make public information relating to the short term, medium term and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and</p> <p>(s) to engage in such other objects as may be prescribed by the regulations. 2014, c 7, Sch 7, s 3 (1).</p>				

Entity	Legislative or corporate mandate	Ownership	Corporate values	Governance	Finance
PJM Interconnection, LLC., United States	<p>3.1 Purposes. The purposes of the LLC shall be: (a) to operate in accordance with FERC requirements as an Independent System Operator, comprised of the PJM Board, the Office of the Interconnection, and the Members Committee, with the authorities and responsibilities set forth in this Agreement; (b) as necessary for the operation of the PJM Region as specified above: (i) to acquire and obtain licenses, permits and approvals, (ii) to own or lease property, equipment and facilities, and (iii) to contract with third parties to obtain goods and services, provided that, the LLC may procure goods and services from a Member only after open and competitive bidding; and (c) to engage in any lawful business permitted by the Act or the laws of any jurisdiction in which the LLC may do business and to enter into any lawful transaction and engage in any lawful activities in furtherance of the foregoing purposes and as may be necessary, incidental or convenient to carry out the business of the LLC as contemplated by this Agreement.</p>	<p>PJM Interconnection LLC, is a 100% industry, limited liability company registered in Delaware.</p> <p>11.6 Membership Requirements.</p> <p>(a) To qualify as a Member, an entity shall:</p> <p>i) Be a Transmission Owner a Generation Owner, an Other Supplier, an Electric Distributor, or an End-Use Customer; and</p> <p>ii) Accept the obligations set forth in this Agreement.</p>	<p>Vision</p> <p>To be the electric industry leader – today and tomorrow – in reliable operations, efficient wholesale markets, and infrastructure planning.</p> <p>Mission</p> <p>As the primary task, to ensure the safety, reliability and security of the bulk electric power system.</p> <p>Create and operate robust, competitive and non-discriminatory electric power markets.</p> <p>Understand customer needs and deliver valued service to meet those needs in a cost-efficient manner.</p> <p>Achieve productivity through the efficient union of superior knowledge workers and technology advances.</p>	<p>PJM has a two-tier committee structure consisting of 10-person Board of Managers (made up of individuals with no financial interests in PJM market participants) and a Members Committee which represents the interests of participating members. The structure is designed to secure that individual members have strong input on issues while protecting the neutrality of PJM's decision-making process.</p>	<p>PJM recovers its administrative costs ☐ the costs of operating the electric transmission system and the wholesale electric markets – through fixed rates billed to members based on their activity levels.</p> <p>With effective cost-control and productivity initiatives, PJM manages its costs within the established rate, refunds savings to members and funds a financial reserve.</p> <p>In benchmarking against other grid operators, PJM continues to be the lowest-cost operator administering markets in the world.</p>

APPENDIX 7: AEMC RULE CHANGE DETERMINATIONS

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Aligning TasNetworks' regulatory control periods	TasNetworks	Corporate	Yes	26-Feb-15	9-Apr-15	9-Apr-15	6.14	6.14	ERC0180
Governance Arrangements and Implementation of the Reliability Standard and Settings	COAG Energy Council	Government	Yes	25-Sep-14	17-Mar-15	26-Mar-15	24.57	25.86	ERC0160
Improving demand side participation information provided to AEMO by registered participants	COAG Energy Council	Government	Yes	11-Sep-14	26-Mar-15	26-Mar-15	27.86	27.86	ERC0174
Early application of STPIS components to transmission businesses	ElectraNet	Corporate	Yes	31-Jul-14	19-Feb-15	19-Feb-15	28.43	28.43	ERC0173
Removal of Force Majeure Provisions in the DWGM	AEMO	AEMO	Yes	10-Jul-14	11-Dec-14	4-May-15	21.57	42.00	GRC0027
Connecting embedded generators under Chapter 5A	Clean Energy Council	Community	Yes	15-May-14	13-Nov-14	1-Mar-15	25.43	40.86	ERC0158
Customer access to information about their energy consumption	COAG Energy Council	Government	No	8-May-14	6-Nov-14		25.43		RRC0003
Customer access to information about their energy consumption	COAG Energy Council	Government	Yes	8-May-14	6-Nov-14	1-Mar-16	25.43	93.29	ERC0171
Extension of Call Notice Timing	AEMO	AEMO	Yes	1-May-14	12-Jun-14	1-Jul-14	5.86	8.57	ERC0163
Setting the Opening Capital Base	AER	AER	Yes	17-Apr-14	2-Oct-14	2-Oct-14	23.57	23.57	GRC0025
Minor Changes 2014	AEMC	AEMC	Yes	10-Apr-14	22-May-14	1-Jul-14	6.00	11.57	ERC0170
Minor Changes 2014	AEMC	AEMC	Yes	10-Apr-14	22-May-14	1-Jul-14	6.00	11.57	GRC0026

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
System Restart Ancillary Services	AEMO, AGL, Alinta Energy, Energy Brix, GDF Suez, Intergen, NGF, Origin Energy	Mixed (Public / Private)	Yes	27-Mar-14	2-Apr-15	1-Jul-15	52.14	64.86	ERC0168
Portfolio Rights Trading	AEMO	AEMO	No	13-Mar-14	26-Nov-14		36.14		GRC0021
National Gas Bulletin Board Capacity Outlooks	AEMO	AEMO	Yes	6-Mar-14	1-May-14	8-Jan-15	7.86	43.14	GRC0024
Victorian jurisdictional derogation (smelter agreements)	Minister for Energy and Resources (Victoria)	Government	Yes	27-Feb-14	10-Apr-14	1-Aug-14	6.14	22.00	ERC0167
STTM settlement surplus and shortfall	AEMO	AEMO	Yes	20-Feb-14	3-Apr-14	1-May-14	6.14	10.14	GRC0023
Generator ramp rates and dispatch inflexibility in bidding	AER	AER	Yes	13-Feb-14	19-Mar-15	1-Jul-16	56.57	122.57	ERC0165
Retailer Price Variations in Market Retail Contracts	CALC, CUAC	Community	Yes	13-Feb-14	23-Oct-14	1-May-15	35.71	62.57	RRC0001
Publication of the GSOO and Gas VAPR	AEMO	AEMO	Yes	30-Jan-14	13-Mar-14	1-Apr-14	6.14	8.71	GRC0022
Distribution Network Pricing Arrangements	IPART, SCER (merged with referral from Tribunal below)	Government	Yes	14-Nov-13	27-Nov-14	1-Dec-14	53.29	53.86	ERC0161
Governance of retail market procedures	AEMO	AEMO	Yes	24-Oct-13	31-Jul-14	24-Oct-14	39.57	51.43	ERC0162
AER Authorisation of Software Changes by AEMO	AER	AER	Yes	24-Oct-13	17-Apr-14	17-Apr-14	24.71	24.71	ERC0151
Reliability Panel Public Meetings	Reliability Panel	AEMC	Yes	4-Jul-13	15-Aug-13	15-Aug-13	5.86	5.86	ERC0157
Victorian jurisdictional derogation, advanced metering infrastructure	Minister for Energy and Resources (Victoria)	Government	Yes	4-Jul-13	28-Nov-13	1-Jan-14	20.57	25.29	ERC0159

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Annual Network Pricing Arrangements	Referral from Tribunal	Government	N/A	6-Jun-13	27-Nov-14		75.86		ERC0149
Publication of zone substation data	NGF	Corporate	Yes	26-Apr-13	13-Mar-14	13-Mar-14	45.29	45.29	ERC0156
Minor Rule Change 2013	AEMC	AEMC	Yes	18-Apr-13	30-May-13	4-Jul-13	6.00	10.86	GRC0020
Minor Rule Change 2013	AEMC	AEMC	Yes	18-Apr-13	30-May-13	4-Jul-13	6.00	10.86	ERC0155
Recovery of Network Support Payments	SP Ausnet	Corporate	No	11-Apr-13	31-Oct-13		28.57		ERC0154
Access to NMI standing data	EnergyAustralia	Corporate	Yes	14-Mar-13	31-Oct-13	31-Oct-13	32.43	32.43	ERC0153
Changes to Cost Allocation Method	Trans Tasman Energy Group	Corporate	No	14-Feb-13	8-Aug-13		24.86		ERC0150
Network Service Provider Expenditure Objectives	SCER	Government	Yes	7-Feb-13	19-Sep-13	26-Sep-13	31.71	32.71	ERC0152
STTM Brisbane participant compensation fund	AEMO	AEMO	Yes	17-Jan-13	28-Feb-13	7-Mar-13	5.86	7.14	GRC0018
Pipeline operator cost recovery processes	AER	AER	Yes	6-Dec-12	27-Jun-13	1-Jul-13	28.71	29.29	GRC0017
STTM deviations and the settlement surplus and shortfall	AEMO	AEMO	Yes	8-Nov-12	20-Jun-13	1-May-14	31.71	76.14	GRC0014
Changes to normal voltage	GDF Suez	Corporate	Yes	23-Aug-12	28-Feb-13	7-Mar-13	26.43	27.71	ERC0148
STTM Market Schedule Variation Transactions	AEMO	AEMO	Yes	19-Jul-12	28-Aug-12	19-Mar-13	5.57	34.29	GRC0015

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Market operator service - timing and eligibility	AEMO	AEMO	Yes	22-Jun-12	23-May-13	1-Apr-14	47.29	91.29	GRC0016
Connecting embedded generators	ClimateWorks, Seed, Property Council	Community	Yes	14-Jun-12	17-Apr-14	1-Oct-14	94.71	118.14	ERC0147
Minor Changes 2012	AEMC	AEMC	Yes	10-May-12	14-Jun-12	26-Jul-12	4.86	10.86	ERC0146
Distribution Losses in Expenditure Forecasts	The Copper Development Centre	Community	Yes	12-Apr-12	18-Oct-12	1-Jan-13	26.57	37.00	ERC0142
Negative offers from scheduled network service providers	IPRA and LYMMCo	Corporate	Yes	29-Mar-12	19-Dec-13	1-Jan-14	88.57	90.29	ERC0140
Assumed utilisation of imputation credits	SP Ausnet and Electranet	Corporate	No	22-Mar-12	20-Sep-12		25.43		ERC0143
Small Generation Aggregator Framework	AEMO	AEMO	Yes	15-Mar-12	29-Nov-12	1-Jan-13	36.29	40.86	ERC0141
Negative intra-regional settlements residue	AEMO	AEMO	Yes	2-Feb-12	22-Mar-12	5-Apr-12	7.14	9.00	ERC0139
Cost pass through arrangements for network service providers	Grid Australia	Corporate	Yes	2-Feb-12	2-Aug-12	2-Aug-12	25.71	25.71	ERC0137
Optimisation of Regulatory Asset Base and Use of Fully Depreciated Assets - Gas	Major Energy Users Inc.	Corporate	No	1-Dec-11	13-Sep-12		40.29		GRC0013
Optimisation of Regulatory Asset Base and Use of Fully Depreciated Assets	Major Energy Users Inc.	Corporate	No	1-Dec-11	13-Sep-12		40.29		ERC0136
Calculation of Return on Debt for Electricity Network Businesses	Energy Users Rule Change Committee	Corporate	Yes	3-Nov-11	29-Nov-12	29-Nov-12	55.14	55.14	ERC0135
Economic Regulation of Network Service Providers	AER and EURCC	Mixed (Public / Private)	Yes	3-Nov-11	29-Nov-12	29-Nov-12	55.14	55.14	ERC0134

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
New Prudential Standard and Framework in the NEM	AEMO	AEMO	Yes	20-Oct-11	18-Oct-12	1-Nov-12	51.14	53.00	ERC0133
Price and Revenue Regulation of Gas Services	AER	AER	Yes	20-Oct-11	29-Nov-12	29-Nov-12	57.00	57.00	GRC0011
Reference service and rebateable service definitions	AER	AER	Yes	6-Oct-11	1-Nov-12	2-May-13	55.00	80.86	GRC0012
Distribution Network Planning and Expansion Framework	MCE	Government	Yes	29-Sep-11	11-Oct-12	1-Jan-13	53.14	64.57	ERC0131
Expiry of the Reliability and Emergency Reserve Trader	Reliability Panel	AEMC	Yes	8-Sep-11	15-Mar-12	15-Mar-12	26.71	26.71	ERC0132
Short Term Trading Market - Market Schedule Variation	AEMO	AEMO	Yes	30-Aug-11	13-Oct-11	13-Oct-11	6.14	6.14	GRC0010
Definition of Temporary Over-Voltage Limits	Hydro Tasmania	Corporate	No	30-Jun-11	19-Jan-12		28.43		ERC0120
Inclusion of Embedded Generation Research into Demand Management Incentive Scheme	MCE	Government	Yes	23-Jun-11	22-Dec-11	22-Dec-11	25.57	25.57	ERC0128
Efficiency Benefit Sharing Scheme and Demand Management Expenditure by Transmission Businesses	MCE	Government	Yes	23-Jun-11	22-Dec-11	22-Dec-11	25.57	25.57	ERC0127
Network Support Payments and Avoided TUoS for Embedded Generators	MCE	Government	Yes	23-Jun-11	22-Dec-11	22-Dec-11	25.57	25.57	ERC0129
Tasmania Tranche 5a Procedure Changes	Tasmanian Government	Government	Yes	2-Jun-11	14-Jul-11	14-Jul-11	6.00	6.00	ERC0130
Minor Changes 2011	AEMC	AEMC	Yes	5-May-11	16-Jun-11	16-Jun-11	5.86	5.86	GRC0009
Minor Changes 2011 - Electricity	AEMC	AEMC	Yes	5-May-11	16-Jun-11	1-Jul-11	5.86	8.00	ERC0124

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Potential Generator Market Power in the NEM	Major Energy Users Inc.	Corporate	No	14-Apr-11	26-Apr-13		104.57		ERC0123
STTM Brisbane Hub	AEMO	AEMO	Yes	4-Apr-11	15-Sep-11	15-Sep-11	23.00	23.00	GRC0007
Application and operation of Administered Price Periods	AEMO	AEMO	Yes	31-Mar-11	10-Nov-11	10-Nov-11	31.43	31.43	ERC0121
STTM Data Validation and Price Setting Process	AEMO	AEMO	Yes	24-Mar-11	5-May-11	16-Jun-11	5.86	11.71	GRC0008
Business day definition	AEMO	AEMO	Yes	8-Mar-11	21-Apr-11	21-Apr-11	6.14	6.14	ERC0122
Calculation of STTM Participant Compensation Fund Contributions	AEMO	AEMO	Yes	3-Feb-11	17-Mar-11	17-Mar-11	6.29	6.29	GRC0006
Application of Dual Marginal Loss Factors	AEMO	AEMO	Yes	9-Dec-10	29-Jun-11	30-Jun-11	28.57	28.71	ERC0117
Various Hedging Instruments in the Declared Wholesale Gas Market	AEMO	AEMO	Yes	18-Nov-10	25-Aug-11	17-Apr-12	39.57	72.71	GRC0004
Reliability Settings from 1 July 2012	Reliability Panel	AEMC	Yes	11-Nov-10	16-Jun-11	1-Jul-11	30.71	32.86	ERC0115
Timetable for Prescribed Gas STTM Reviews	AEMO	AEMO	Yes	28-Oct-10	9-Dec-10	16-Dec-10	5.86	6.86	GRC0005
Calculation of Interest for Gas Markets	AEMO	AEMO	Yes	23-Sep-10	4-Nov-10	4-Nov-10	5.86	5.86	GRC0002
DNSP recovery of transmission-related charges	United Energy Distribution	Corporate	Yes	2-Sep-10	24-Mar-11	24-Mar-11	28.86	28.86	ERC0114
Network Support and Control Ancillary Services	AEMO	AEMO	Yes	22-Jul-10	7-Apr-11	5-Apr-12	36.43	87.57	ERC0108

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Release of Generator information by AEMO	Senergy Econnect Australia Pty Ltd	Corporate	Yes	15-Jul-10	23-Dec-10	20-Jan-11	22.57	26.43	ERC0112
Timing for spot price reporting	AER	AER	Yes	17-Jun-10	22-Jul-10	22-Jul-10	5.00	5.00	ERC0111
Dandenong Liquefied Natural Gas Storage Facility	AEMO	AEMO	Yes	10-Jun-10	16-Dec-10	23-Dec-10	26.57	27.57	GRC0003
Inter-regional Transmission Charging	MCE	Government	Yes	13-May-10	28-Feb-13	1-Jul-15	143.57	264.00	ERC0106
Amendments to PASA-related Rules	AEMO	AEMO	Yes	7-May-10	2-Dec-10	16-Dec-10	29.29	31.29	ERC0107
Minor Changes 2010	AEMC	AEMC	Yes	22-Apr-10	3-Jun-10	10-Jun-10	5.86	6.86	ERC0105
Scale Efficient Network Extensions	MCE	Government	Yes	1-Apr-10	30-Jun-11	1-Jul-11	64.14	64.29	ERC0100
Aggregation of Ancillary Services Loads	AEMO	AEMO	Yes	25-Mar-10	9-Sep-10	16-Sep-10	23.43	24.43	ERC0104
SA Jurisdictional Derogation (Connections Charging)	South Australian Minister for Energy	Government	Yes	18-Mar-10	6-May-10	1-Jul-10	6.86	14.71	ERC0101
Victoria Generator Technical Performance Standards Derogations	Minister for Energy and Resources (Victoria)	Government	Yes	11-Mar-10	9-Sep-10	16-Sep-10	25.43	26.43	ERC0102
Timing for intervention compensation determinations	AEMO	AEMO	Yes	11-Feb-10	25-Mar-10	25-Mar-10	6.29	6.29	ERC0099
Publication of a Carbon Dioxide Equivalent Intensity Index for the National Electricity Market	AEMO	AEMO	Yes	23-Dec-09	22-Jul-10	22-Jul-10	29.86	29.86	ERC0098
Payments under Feed-in Schemes and Climate Change Funds	ETSA Utilities	Corporate	Yes	16-Dec-09	1-Jul-10	1-Jul-10	27.86	27.86	ERC0097

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Prioritisation of Tied Controlled Withdrawal Bids Rule proposal	AEMO	AEMO	Yes	17-Nov-09	20-May-10	7-Jun-10	26.14	28.57	GRC0001
Transparency of Operating Data	AEMO	AEMO	Yes	12-Nov-09	11-May-10	13-May-10	25.57	25.86	ERC0096
Provision of Metering Data Services and Clarification of Existing Metrology Requirements	AEMO	AEMO	Yes	27-Aug-09	25-Nov-10	16-Dec-10	64.00	67.00	ERC0092
Improved RERT Flexibility and Short-notice Reserve Contracts	Reliability Panel	AEMC	Yes	13-Aug-09	15-Oct-09	15-Oct-09	8.86	8.86	ERC0094
Early Implementation of Market Impact Parameters	Grid Australia	Corporate	Yes	6-Aug-09	11-Mar-10	12-Mar-10	30.71	30.86	ERC0093
Cost Recovery for Other Services Directions	AEMO	AEMO	Yes	13-Jul-09	13-May-10	1-Jul-11	42.86	101.14	ERC0090
Bid and Offer Validation Data	AEMO	AEMO	Yes	11-Jun-09	3-Dec-09	16-Dec-10	24.57	77.86	ERC0091
Confidentiality Provisions for Network Connections	Grid Australia	Corporate	Yes	14-May-09	12-Nov-09	12-Nov-09	25.43	25.43	ERC0089
EnergyAustralia Participant Derogation Extension (Settlement Residue Auctions)	EnergyAustralia	Corporate	Yes	30-Apr-09	11-Jun-09	1-Jul-09	5.86	8.71	ERC0088
AETV Participant Derogation to Allow Commissioning of a New Power Station	Aurora Energy (Tamar Valley) Pty Ltd	Corporate	Yes	16-Apr-09	28-May-09	28-May-09	6.00	6.00	ERC0087
Arrangements for Managing Risks Associated with Transmission Network Congestion - Rule 16	MCE	Government	Yes	5-Mar-09	13-Aug-09	1-Sep-09	22.57	25.14	ERC0076
Negative Settlements Residue Recovery, Extension of Sunset	NEMMCO	NEMMCO	Yes	5-Mar-09	16-Apr-09	16-Apr-09	5.86	5.86	ERC0079
National Transmission Statement	MCE	Government	Yes	26-Feb-09	2-Apr-09	16-Apr-09	5.14	7.14	ERC0078

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Regulatory Investment Test for Transmission	MCE	Government	Yes	26-Feb-09	25-Jun-09	1-Jul-09	17.00	17.86	ERC0077
NEM Reliability Settings: VoLL, CPT and Future Reliability Review	Reliability Panel	AEMC	Yes	22-Feb-09	28-May-09	28-May-09	13.71	13.71	ERC0080
Minor Changes 2009	AEMC	AEMC	Yes	19-Feb-09	26-Mar-09	31-Mar-09	5.29	6.00	ERC0085
WACC Reviews - Extension of Time	AER	AER	Yes	19-Feb-09	26-Mar-09	31-Mar-09	5.29	6.00	ERC0083
Causer Pays for Ancillary Services to Control the Tasmanian frequency	Hydro Tasmania	Corporate	No	29-Jan-09	15-Oct-09		36.57		ERC0082
Removal of Performance Standard for Identifying Manifestly Incorrect Inputs	NEMMCO	NEMMCO	Yes	15-Jan-09	26-Feb-09	27-Feb-09	5.86	6.00	ERC0081
Contingency Administered Price Cap Following a Physical Trigger Event	NGF	Corporate	No	26-Nov-08	4-Jun-09		26.86		ERC0075
Easement Land Tax Pass Through	SP Ausnet	Corporate	Yes	16-Oct-08	27-Nov-08	1-Jan-09	5.86	10.71	ERC0072
Clarification of Market Information Requirements for Market Ancillary Services	NEMMCO	NEMMCO	Yes	16-Oct-08	27-Nov-08	1-Jan-09	5.86	10.71	ERC0074
Preservation of Prudential Margin Through Call Notices	NEMMCO	NEMMCO	Yes	16-Oct-08	27-Nov-08	1-Jan-09	5.86	10.71	ERC0073
Registration changes for Traders, Reallocators, and Transfer of Registration	NEMMCO	NEMMCO	Yes	2-Oct-08	4-Dec-08	1-Jan-09	8.86	12.71	ERC0071
Queensland Generator Technical Performance Standards Derogations	Queensland Government	Government	Yes	28-Aug-08	11-Dec-08	1-Jan-09	14.71	17.57	ERC0070
Transmission Network Prices Publication Date	EnergyAustralia	Corporate	Yes	24-Jul-08	26-Mar-09	31-Mar-09	34.57	35.29	ERC0069

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Total Factor Productivity for Distribution Network Regulation	Minister for Energy and Resources (Victoria)	Government	No	24-Jul-08	22-Dec-11		175.43		ERC0068
Minor Change to Technical Requirement for Generators	NEMMCO	NEMMCO	Yes	26-Jun-08	7-Aug-08	23-Oct-08	5.86	16.71	ERC0067
Ramp Rates, Market Ancillary Service Offers, and Dispatch Inflexibility	AER	AER	Yes	22-May-08	16-Jan-09	31-Mar-09	33.43	44.14	ERC0065
Parameter Values, Equity Beta and Gamma	EUAA	Corporate	No	22-May-08	13-Nov-08		24.43		ERC0063
WACC Parameters – Technical Drafting Issues	AER	AER	Yes	15-May-08	26-Jun-08	1-Jul-08	5.86	6.57	ERC0066
Confidentiality Arrangements in Respect of Information Required for Power System Studies	NGF	Corporate	Yes	8-May-08	19-Feb-09	27-Feb-09	40.14	41.29	ERC0062
Setting VoLL Following the Shedding of Interruptible Load	AER	AER	Yes	24-Apr-08	20-Nov-08	20-Nov-08	29.43	29.43	ERC0061
Reclassification of Contingency Events	AER	AER	Yes	10-Apr-08	2-Oct-08	23-Oct-08	24.57	27.57	ERC0060
Cost Allocation Arrangements for Transmission Services	NGF	Corporate	Yes	3-Apr-08	29-Jan-09	13-Feb-09	42.29	44.29	ERC0057
NEM Reliability Settings: Information, Safety Net and Directions	Reliability Panel	AEMC	Yes	20-Mar-08	26-Jun-08	1-Jul-08	13.71	14.43	ERC0059
Performance Standard Compliance of Generators	NGF	Corporate	Yes	6-Mar-08	23-Oct-08	23-Oct-08	32.43	32.43	ERC0058
Futures Offset Arrangements	Australian Power & Gas, Infratil Energy Australia, Momentum Energy	Corporate	No	14-Feb-08	16-Apr-09		60.29		ERC0056
Compensation Arrangements Under Administered Pricing	EnergyAustralia	Corporate	Yes	20-Dec-07	18-Dec-08	1-Jan-09	51.14	53.00	ERC0051

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Regulatory Test Thresholds and Information Disclosure on Network Replacements	ETNOF	Corporate	Yes	20-Dec-07	23-Oct-08	23-Oct-08	43.29	43.29	ERC0052
Victorian Jurisdictional Derogation (Advanced Metering Infrastructure Roll Out)	Minister for Energy and Resources (Victoria)	Government	Yes	20-Dec-07	29-Jan-09	1-Jul-09	57.00	78.71	ERC0053
Demand Management	TEC	Community	Yes	22-Nov-07	23-Apr-09	1-Jul-09	73.00	82.71	ERC0047
Minor Changes 2007	AEMC	AEMC	Yes	30-Aug-07	11-Oct-07	25-Oct-07	5.86	7.86	ERC0054
Timing of System Restart Ancillary Services Testing	NEMMCO	NEMMCO	Yes	23-Aug-07	25-Oct-07	25-Oct-07	8.86	8.86	ERC0048
Registration of Foreign Based Persons and Corporations as Trader Class Participants	BP Energy Asia	Corporate	Yes	19-Jul-07	20-Dec-07	1-Jan-08	21.57	23.14	ERC0044
NEMMCO Participant Derogation (Deferral of Settlement Payments due to APEC)	NEMMCO	NEMMCO	Yes	5-Jul-07	16-Aug-07	16-Aug-07	5.86	5.86	ERC0046
Integration of NEM Metrology Requirements	NEMMCO	NEMMCO	Yes	31-May-07	6-Mar-08	6-Mar-08	39.43	39.43	ERC0045
Central Dispatch and Integration of Wind and Other Intermittent Generation	NEMMCO	NEMMCO	Yes	10-May-07	1-May-08	1-May-08	50.14	50.14	ERC0043
Economic Regulation of Transmission Services Undertaken by Distributors	EnergyAustralia	Corporate	Yes	5-Apr-07	26-Jun-08	1-Jul-08	63.00	63.71	ERC0039
Congestion Pricing and Negative Residue Management Arrangements for the Snowy Region	Hydro Tasmania, International Power, LYMMCO, NRG Flinders, TRUenergy	Corporate	No	22-Mar-07	8-Nov-07		32.29		ERC0042
Transmission Last Resort Planning Guidelines	AEMC	AEMC	No	15-Mar-07	10-Jul-07		16.43		ERC0040
Split Snowy Region	Macquarie Generation	Corporate	No	8-Mar-07	8-Nov-07		34.29		ERC0041

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Efficient Dispatch of Regulation Services	Hydro Tasmania	Corporate	Yes	22-Feb-07	23-Aug-07	1-Jan-09	25.86	95.57	ERC0035
Responsible Person Contestability	Metropolis Metering Assets Pty Ltd	Corporate	No	13-Feb-07					ERC0038
Dispatch of Scheduled Network Services	Hydro Tasmania	Corporate	No	1-Feb-07	16-Aug-07		27.86		ERC0037
Cost Recovery of Localised Regulation Services	NGF	Corporate	Yes	21-Dec-06	23-Aug-07	1-Jan-09	34.57	104.29	ERC0032
Origin Energy Participant Derogation (Technical Requirements for Mount Stuart Power Station)	Origin Energy	Corporate	No	30-Nov-06					ERC0036
Resolution of existing generator performance standards	NGF	Corporate	Yes	2-Nov-06	7-Dec-06	7-Dec-06	5.00	5.00	ERC0033
NEMMCO Participant Derogation (Extension of Cost Recovery of Regulation Services in Tasmania)	NEMMCO	NEMMCO	Yes	2-Nov-06	7-Dec-06	7-Dec-06	5.00	5.00	ERC0034
Obligations of Network Service Providers - Connection Applications	Energy Solutions Australia	Corporate	No	14-Sep-06	26-Apr-07		31.71		ERC0029
Studland Bay Wind Farm Participant Derogations	Woolnorth Studland Bay Pty Ltd	Corporate	Yes	14-Sep-06	19-Oct-06	1-Nov-06	5.00	6.71	ERC0030
Pricing of Prescribed Transmission Services	AEMC	AEMC	Yes	24-Aug-06	21-Dec-06	28-Dec-06	16.71	17.71	ERC0015
Reallocations	NEMMCO	NEMMCO	Yes	29-Jun-06	15-Feb-07	31-May-07	32.29	47.43	ERC0020
Transmission network replacement and reconfiguration	Stanwell Corporation Limited	Corporate	No	15-Jun-06	1-Mar-07		36.57		ERC0028
Management of negative settlement residues by re-orientation	Snowy Hydro Limited	Corporate	No	8-Jun-06	9-Nov-06		21.57		ERC0027

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
Extension of Inter-regional Settlements Agreement	Department of Infrastructure (Victoria)	Government	Yes	25-May-06	13-Jul-06	13-Jul-06	6.86	6.86	ERC0026
Inspection and Testing of Metering Installations	EnergyAustralia	Corporate	Yes	11-May-06	29-Jun-06	1-Jul-06	6.86	7.14	ERC0025
Participation in SRA - EnergyAustralia Participant Derogation	NEMMCO	NEMMCO	Yes	11-May-06	16-Jun-06	22-Jun-06	5.00	5.86	ERC0023
Technical Standards for Wind Generation and Other Generator Connections	NEMMCO	NEMMCO	Yes	4-May-06	8-Mar-07	15-Mar-07	43.43	44.43	ERC0022
Metrology	NEMMCO	NEMMCO	Yes	30-Mar-06	9-Nov-06	9-Nov-06	31.29	31.29	ERC0024
Economic Regulation of Transmission Services	AEMC	AEMC	Yes	16-Feb-06	16-Nov-06	16-Nov-06	38.57	38.57	ERC0001
Alternative Snowy Region Boundary (Discontinued)	Macquarie Generation	Corporate	No	16-Feb-06	22-Mar-07		56.57		ERC0084
Abolition of Snowy Region	Snowy Hydro Limited	Corporate	Yes	12-Jan-06	30-Aug-07	30-Aug-07	84.00	84.00	ERC0016
Advocacy Panel	MCE	Government	Yes	12-Jan-06	15-Jun-06	1-Jul-06	21.86	24.14	ERC0019
Process for Region Change (formerly called Region Boundaries)	MCE	Government	Yes	12-Jan-06	20-Dec-07	1-Jul-08	99.71	127.00	ERC0005
Reliability Safety Net Extension	Reliability Panel	AEMC	Yes	23-Dec-05	11-May-06	18-May-06	19.71	20.71	ERC0018
Reform of dispute resolution process for the Regulatory Test	MCE	Government	Yes	23-Dec-05	29-Jun-06	1-Jul-06	26.57	26.86	ERC0003
Statement of Opportunities Update	NEMMCO	NEMMCO	Yes	2-Dec-05	13-Apr-06	20-Apr-06	18.71	19.71	ERC0017

Title	Proponents	Type of Entity	Rule Made?	Date Initiated	Date Determined	Date Commenced	Weeks (Initiated - Determined)	Weeks (Initiated - Commenced)	Reference
TransGrid Participant Derogation (Treatment of Contingent Projects (Interim Arrangements))	TransGrid	Corporate	Yes	20-Oct-05	27-Jul-06	27-Jul-06	39.57	39.57	ERC0012
Reform of the Regulatory Test Principles	MCE	Government	Yes	12-Oct-05	30-Nov-06	30-Nov-06	58.29	58.29	ERC0002
Transmission Last Resort Planning	MCE	Government	Yes	12-Oct-05	8-Mar-07	15-Mar-07	72.29	73.29	ERC0004
Review of the Snowy regional boundary by Macquarie Generation	Macquarie Generation	Corporate	No	1-Jul-05					ERC0006
Management of negative settlement residues in the Snowy Region	Hydro Tasmania, International Power, LYMMCO, NEMMCO, NRG Flinders, Southern Hydro	Mixed (Public / Private)	Yes	1-Jul-05	14-Sep-06	1-Nov-06	61.86	68.57	ERC0007
Publication of Information for Non-scheduled Generation	NEMMCO	NEMMCO	Yes	1-Jul-05	15-Dec-05	12-Jan-06	23.43	27.29	ERC0010
Review of operating incidents	NEMMCO	NEMMCO	Yes	1-Jul-05	2-Feb-06	2-Feb-06	30.14	30.14	ERC0014
System restart ancillary service arrangements and pricing under market suspension	NEMMCO	NEMMCO	Yes	1-Jul-05	20-Apr-06	20-Apr-06	41.29	41.29	ERC0011
Revision to dispatch pricing due to manifestly incorrect inputs	NEMMCO	NEMMCO	Yes	1-Jul-05	17-Nov-05	1-Jun-06	19.43	47.14	ERC0009
Recovery of negative inter-regional settlements residue	NEMMCO	NEMMCO	Yes	1-Jul-05	30-Mar-06	1-Jul-06	38.43	51.43	ERC0008
WACC - Alignment of Reviews	AEMO	AEMO	No						
Price Variations in Exit Fee Contracts	Donald Murray Lloyd (private individual)	Individual	No						RRC0004

May 2015

REVIEW OF THE INSTITUTIONAL GOVERNANCE
ARRANGEMENTS OF THE NATIONAL ELECTRICITY MARKET



Report for the Public Interest Advocacy Centre

Penelope Crossley
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ACRONYMS AND ABBREVIATIONS

AC	alternating current
ACCC	Australian Competition and Consumer Commission
AEMA	Australian Energy Market Agreement (as amended on 13 December 2013)
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
CAISO	California Independent System Operator
CEER	Council of European Energy Regulators
COAG	Council of Australian Governments
DSP	demand side participants
ECA	Energy Consumers Australia
FERC	United States Federal Energy Regulatory Commission
GEMA	Gas and Electricity Markets Authority
MCE	Ministerial Council on Energy
NECF	National Energy Customer Framework
NEL	National Electricity Law – Schedule 1 to the <i>National Electricity (South Australia) Act 1996</i> (South Australia) (as amended)
NEM	National Electricity Market
NEMLA	National Electricity Market Legislation Agreement
NEO	National Electricity Objective—section 7 of the NEL
NER	National Electricity Rules
NERL	National Energy Retail Rules
NERR	National Energy Retail Regulations
NGET	United Kingdom National Grid
NSP	network service provider
Ofgem	Office of Gas and Electricity Markets in the United Kingdom
PV	photovoltaic solar
SCER	Standing Council on Energy and Resources
SPP(s)	Statement of Policy Principle(s)

SCO Standing Council of Officials
SOC State Owned Corporation
UCA Utilities Consumer Advocate, Alberta, Canada

SCOPE OF THE REPORT

This Report was commissioned by the Public Interest Advocacy Centre to advise a number of consumer advocacy groups about the institutional and governance arrangements of the National Electricity Market. The purpose of this Report was to review the existing arrangements, compare these arrangements to those in other international jurisdictions and then identify areas of strength and those requiring reform.

Part I of this Report considers the recent transformation of the energy sector and highlights the need for a flexible approach that encourages demand-side management, the deployment of emerging energy sources and technologies, and greater energy efficiency. It also briefly considers whether the narrow drafting and interpretation of the NEO remains fit for purpose when compared to developments in other international jurisdictions. Part II of this Report then considers the existing governance structure adopted within the National Electricity Market. In particular, it examines each of key market institutions – the COAG Energy Council, the Australian Energy Regulator, the Australian Energy Markets Commission, the Australian Energy Markets Operator and Energy Consumers Australia Ltd. The legislative or corporate mandates of each institution are analysed, along with their governance processes, to assess areas of strength and possible areas of reform. This Part also considers the roles and responsibilities of international institutions that act as functional equivalents to the market institutions. In Part III of this Report, the challenges of federalism and how these can be better managed into the future are considered. The Report concludes in Part IV with a consolidated list of potential areas for reform.

1. THE TRANSFORMATION OF THE ENERGY SECTOR

The Australian National Electricity Market (NEM) is a wholesale electricity market through which generators generate, sell, transmit and distribute electricity across six jurisdictions in eastern and southern Australia — namely, Queensland, New South Wales, the Australian Capital Territory (ACT), Victoria, South Australia and Tasmania. It was designed to facilitate interstate trade, to lower barriers to competition, to increase regulatory certainty and to improve productivity within the electricity sector as it transitioned from being dominated by large unbundled state owned monopolies to privatised corporations. The NEM is made up of approximately ‘...200 large generators, five state based transmission networks (linked by cross-border interconnectors) and 13 major distribution networks that supply electricity to end use customers.’¹ These industry players are physically linked to over nine million residential and business customers in participating jurisdictions are physically linked by one of the longest continuous alternating current (AC) transmission networks in the world.

Similar to many overseas jurisdictions, the energy sector in Australia is currently in the process of significant transformation. This has led to a range of recent developments already impacting upon, or likely to impact upon the operation of the NEM in the near future, including:

- Increasing concern among both large-scale and residential consumers about rapidly rising energy prices. Much of these prices increases, which have far exceeded the rate of inflation over the past five years, can be attributed to network prices, which now account for more than half of the cost of residential electricity bills. This has led to the widespread adoption of energy efficiency measures and the gradual increase in demand-side management tools, such as smart meters, to assist consumers to better manage, and ultimately reduce, their overall energy consumption.
- Changes in the fuel sources used to generate electricity, with a shift from carbon intensive fossil fuel sources to less carbon intensive sources, such as natural gas and renewable energy sources. In particular, the advent of larger volumes of intermittent generation from renewable energy sources has implications for the system operation of the NEM, as well as future market development and transmission planning.²

¹ Australian Energy Regulator, *State of the energy market 2014* (AER, 2014).

² Note the scale and likely timeframe of the impact of this change is unpredictable, with this area becoming highly politicised in recent years. With the repeal of the carbon price legislation and uncertainty regarding the Renewable Energy Target undermining future, and in some cases, ongoing, investments in cleaner energy sources. This has led to the pipeline of renewable energy projects being

- The growth in distributed generation, particularly in the form of photovoltaic (PV) solar cells on residential and commercial rooftops. In its 2014 State of the Energy Market Report, the Australian Energy Regulator (AER), stated that in the 2013-2014 financial year alone 'solar PV generation reduced grid consumption by 2.9%.³ This trend is predicted to continue, with the Australian Energy Market Operator (AEMO) projecting growth rates in photovoltaic (PV) solar installations of approximately 24% annually over the next three years.⁴
- Coupled with the growth in PV solar, is the ongoing development and commercialisation of grid-scale and residential energy storage. While energy storage is already cost competitive in some rural and remote areas of Australia,⁵ UBS has predicted that it will be cost competitive for residential electricity consumers by 2018.⁶ Indeed, AGL Energy has stated that its modelling shows that 3 million customers will be either wholly or partially off-grid by 2030.⁷ This is likely to have profound impacts on the NEM and the roles played by the institutions governing it.

The COAG Energy Council has stated that these changes in the production and consumption of electricity 'may have significant implications for the future of the electricity markets and the electricity supply industry.'⁸ As shown in Part II, the structure of the NEM is unique and while Australia has been developing its complex institutional and governance structure, a number of other jurisdictions have been taking positive steps to consolidate their institutional arrangements. In considering the governance and institutional structure of the Australian energy markets, the COAG Energy Council has an opportunity to engage in strategic forward planning to meet the future needs of Australian energy consumers, both large and small. In order to ensure that Australia's energy markets are resilient and can adapt to these changing environments, the governance and regulatory arrangements need to be open to learning and

effectively frozen until there is greater certainty about the future policy direction of the sector, and a reduction in investment in the renewable energy sector back to 2002 levels.

³ Australian Energy Regulator, *State of the energy market 2014* (AER, 2014).

⁴ Australian Energy Market Operator, *National Electricity Forecasting Report* (AEMO, 2014) 2-1.

⁵ Jonathan Gifford, 'Solar plus storage becoming "new normal" in rural and remote Australia', *RenewEconomy* (online), 4 December 2014, <<http://reneweconomy.com.au/2014/solar-plus-storage-becoming-new-normal-rural-remote-australia-59236>>.

⁶ Giles Parkinson, 'UBS: Australian households could go off-grid by 2018', *RenewEconomy* (online), 9 May 2014, <<http://reneweconomy.com.au/2014/ubs-australian-households-go-grid-2018>>.

⁷ Giles Parkinson, 'AGL Energy pick new CEO with eye to solar and storage', *RenewEconomy* (online), 18 November 2014 <<http://reneweconomy.com.au/2014/agl-energy-pick-new-ceo-with-eye-to-solar-and-storage-35344>>.

⁸ COAG Energy Council, 'Meeting Communiqué', 1 May 2014.

not simply adopt a ‘business as usual’ approach.⁹ At the same time, it is an opportunity to take steps to improve stakeholder confidence in the regulatory outcomes through adopting international best practices in performance, transparency and accountability.

There is a lot that Australia can learn from the experiences of international jurisdictions, who are currently facing similar challenges.¹⁰ For example, a recent report on ‘The Evolving Role of the Power Sector Regulator’¹¹ conducted by the National Renewable Energy Laboratory in the United States found that the regulatory priorities in the power sector are also changing. Previously, regulators were concerned with:

- designing and managing electricity tariffs;
- maintaining system reliability, meeting demand growth and expanding access to electricity;
- ensuring the financial health of utilities;
- facilitating private investment;
- protecting the interests of the poor or vulnerable consumers;
- supporting the technical safety and reliability of the power system; and
- enhancing energy security and managing risk.¹²

However, the report notes that a new set of regulatory objectives are currently emerging in the power sector that need to be considered alongside the existing objectives, including:

- reducing the health and environmental impacts of power system operation;
- meeting rapidly growing demand while minimising environmental impacts and risk;
- supporting the procurement of renewable energy;
- integrating renewable and distributed generation resources to the grid;
- incentivising energy efficiency, demand side management and smart grid technologies;
- utilising microgrid technologies;
- facilitating consumer participation in power markets;
- enhancing cyber security and protecting privacy; and
- managing increased interactions with other sectors.¹³

⁹ Andreas Goldthau, ‘Rethinking the governance of energy infrastructure: Scale, decentralization and polycentrism’ (2014) 1 *Energy Research & Social Science* 134, 134.

¹⁰ See e.g. Darryl SJ Jarvis and Benjamin K Sovacool, ‘Conceptualizing and evaluating best practices in electricity and water regulatory governance’ (2011) 36 *Energy* 4340.

¹¹ Owen Zinaman, Mackay Miller and Morgan Bazilian, *The Evolving Role of the Power Sector Regulator* (Alliance for Sustainable Energy, 2014).

¹² *Ibid.*

¹³ *Ibid.*

The notion of the changing role of regulators was also raised by the House of Lords in their Report on UK Economic Regulators in 2007 when they stated that ‘the latter increase in the importance within the regulators’ roles of other duties (particularly social and environmental duties) means that there is now a less clear distinction between what policy issues should be dealt with by government and which by regulators.’¹⁴

1.1 THE NATIONAL ELECTRICITY OBJECTIVE

In considering the transformation of the energy sector and the new roles and responsibilities for regulators, it is also time to consider whether the National Electricity Objective (NEO), contained in Section 7 of the National Electricity Law (NEL), is also still fit for purpose. Does its narrow focus on the economic interests of consumers limit the ability of our energy market institutions to adequately plan for the long-term future of the electricity sector? Does it enable proper consideration of the equity impacts of increasing numbers of consumers that are self-generating or going off-grid? Ultimately, does the NEO meet the needs of the modern energy consumer? Appendix 1 provides an international comparison of the legislative objectives of different regulatory schemes.

A study of the objectives of other international regulatory schemes for electricity markets reveals that the Australian NEO is missing several core themes which are found in the objectives of many other jurisdictions. These include:

Consumer issues

- Chile: ‘Energy is an essential material for society. Its availability and supply directly affect social and economic growth and consequently the reduction of poverty. The lack of access to reliable energy sources and networks constitutes a dangerous limitation to sustained social progress, to economic growth and to the wellbeing of the population.’
- Estonia: ‘The [Electricity Market] Act prescribes the principles for the operation of the electricity market based on the need to ensure an effective supply of electricity at reasonable prices and meeting ... the needs of customers...’
- European Union: ‘The internal market in electricity, which has been progressively implemented throughout the Community since 1999, aims to deliver real choice for all

¹⁴ Select Committee on Regulators, *UK Economic Regulators*, House of Lords Report No 1, Session 2006-07 (2007) 24-5.

consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service...'

- Hungary: 'ensuring the accessibility of the services and prices affordable to a large group of consumers.'
- Ireland: 'Principal objective and functions of Minister, the Commission and SEM Committee in carrying out their functions in relation to the Single Electricity Market...is to protect the interests of consumers of electricity in the State and Northern Ireland.'
- Russia: '...balancing the economic interests of suppliers and consumers of electricity and heat.'
- Yemen: 'Structure the relationship between consumers, licensees and any other relevant parties to the electricity supply service in a fair and balanced manner.'

Environmental concerns

- China: 'The State encourages and supports the generation of electricity through the use of renewable and clean energy resources.'
- Estonia: 'The [Electricity Market] Act prescribes the principles for the operation of the electricity market based on the need to ensure an effective supply of electricity ... meeting environmental requirements ... and balanced, environmentally clean and long-term use of energy sources.'
- European Union: 'to contribute to ...sustainability.'
- Netherlands: 'the importance of reliable, sustainable, efficient and environmentally sound operation of electricity.'
- Switzerland: 'The secure and sustainable supply of electricity to end users in all parts of the country.'

Energy efficiency and demand-side management

- Hungary: 'The energy policy of the future ... should focus on achieving both a rationalised energy demand and an energy supply (infrastructure and service) encouraging the growth of the Hungarian economy, ensuring the accessibility of the services and prices affordable to a large group of consumers.'

Competitive market structures

- NordReg: ‘Increased competition: lower the obstacles for the market players in the competitive part of the electricity market, there should be room for innovation and development of energy services in order to increase the attractiveness of the competitive market.’
- Poland: ‘The creation of the conditions for ...[the] development of competition, counteracting negative consequences of natural monopolies ... and balancing the interests of energy enterprises and fuel and energy customers.’

Transparency and accountability

- NordReg: ‘The Nordic retail market should have the highest customer service level. It should be easy to be a customer. Relevant information should be easy accessible and there should be efficient processes...’

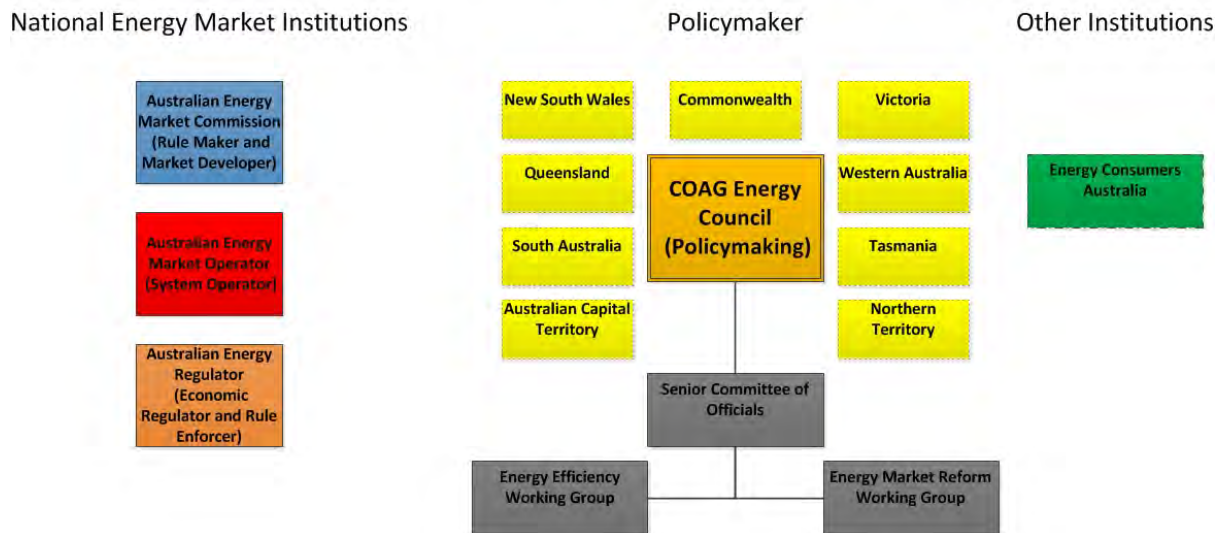
What this brief study highlights is that many countries no longer adopt a narrow economic interpretation of what is in the ‘long-term interests of consumers,’ but rather actively use their objectives to enhance the long-term competitiveness of the electricity sector by encouraging competition and innovation. This includes by actively encouraging energy efficiency and demand-side management within their market structures. They further recognise that the interests of consumers include the need for affordable electricity prices and access to information. Environmental concerns also feature prominently in the objectives for the electricity sector in many countries. This reflects a growing international concern about the long-term sustainability of the electricity sector. It is argued that due to its role in decision-making the NEO is an integral component of the governance of the NEM. There is a real need to review whether the NEO is fit for purpose in the context of a transforming energy market.

Throughout this report, the existing energy market institutions and governance have been analysed to consider whether there is:

1. clarity in the roles and objectives of the institutions;
2. sufficient and desirable autonomy from political intervention;
3. transparency of decision-making processes and their outcomes;
4. a requisite degree of accountability of the institution; and
5. a coherent set of structures and regulations to ensure public participation in the regulatory process.

2. THE CURRENT INSTITUTIONAL AND GOVERNANCE STRUCTURE OF THE NATIONAL ELECTRICITY MARKET IN AUSTRALIA

National Energy Market Governance Bodies



As shown in the above diagram, the institutional and governance structures of the NEM in Australia are highly complex. These arrangements reflect the bargain between the Commonwealth, States and Territories that made up the National Electricity Market Legislation Agreement (NEMLA) and continue to form the basis of the Australian Energy Market Agreement (AEMA). A unique feature of these arrangements is the concern that there should be ‘the bifurcation of economic regulation between a rule-making [Australian Energy Market Commission (AEMC)] and a rule implementing [AER] institution.’¹⁵ The resulting sheer volume of institutions, the complicated distribution of roles and responsibilities between them and differing governance arrangements, coupled with a lack of transparency and accountability in some of the institutions, prompted the Productivity Commission to state that:

The fundamental objective of the National Electricity Market (NEM) – the need for efficient investment in, and operation of, electricity networks in the long-term interests of consumers – has been frustrated by flaws in its (ever more) complex regulatory and institutional arrangements.¹⁶

¹⁵ Bruce Mountain, Submission No 19 to Commonwealth Standing Committee on Environment and Communications References Committee, *Inquiry into electricity network companies*, 18 December 2014, 23.

¹⁶ Productivity Commission, *Electricity Network Regulatory Frameworks*, Report No 62 (2013) 4.

This institutional and governance structure has not been replicated in any other jurisdiction. This is highlighted in the table in Appendix 2, which provides a comparison of the mandates of the international functional equivalents to the institutions in the NEM.

Indeed, over the past decade, while Australia has been developing its complex institutional and governance structure, a number of other jurisdictions have been taking positive steps to consolidate their institutional arrangements. Jurisdictions such as the United Kingdom, the Netherlands, New Zealand, Ontario and Alberta have all taken steps to consolidate some or all of their competition, economic regulation and consumer protection functions into either a single or fewer agencies that are better resourced. For example, market entities in California,¹⁷ the United Kingdom,¹⁸ New Zealand,¹⁹ Ontario²⁰ and Alberta²¹ have comparable regulatory, investigatory and enforcement functions to the AER and AEMC. However, in each of these jurisdictions, the functions are performed by a single entity. Appendix 3 details the legislative mandate, corporate structure, governance mechanisms, vision and source of finance for a selection of these international functional equivalents of the AER and AEMC.

Commonly, the entity is either an independent government department or agency, though the New Zealand Electricity Authority and Ontario Electricity Board are an independent Crown entity and an independent Crown corporation, respectively. These entities are commonly funded through an industry levy. However, the approach adopted in New Zealand of funding being through government appropriations approved by Parliament and then the government being reimbursed through an industry levy, may be preferable to ensure that the entity is seen as being at arm's length from the industry it sets rules for and regulates. Another feature of this single entity is that their objectives are often much broader than those adopted by the AER and AEMC and include priorities such as:

- 'to promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances;'²²

¹⁷ *Federal Power Act*, 16 USCS § 824h (1920).

¹⁸ *Utilities Act 2000* (UK).

¹⁹ *Electricity Industry Act 2010* (Vic) s 16.

²⁰ *Ontario Energy Board Act*, SO 1998, c 15.

²¹ *Alberta Utilities Commission Act*, SA 2007, s 39.

²² *Ontario Energy Board Act*, SO 1998, Part , s 1(3).

- ‘to secure a diverse and viable long-term energy supply, and shall, in carrying out those functions, have regard to the effect on the environment of activities connected with the generation transmission, distribution or supply of electricity;’²³ and
- ‘to promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable generation facilities.’²⁴

The governance structures of these entities also show a degree of similarity, with the Boards commonly being appointed by the Head of State on the recommendation of the Minister, the Senate or the Secretary of State. Board directors are expected to have a wide range of experience and expertise, with the non-executive directors on the Gas and Electricity Markets Authority (GEMA) in the United Kingdom having experience and expertise in:

- industry;
- economics;
- consumer and social policy;
- science and the environment;
- finance and investment; and
- European energy issues.

This institutional arrangement of combining the functions of the AER and the AEMC into a single entity has a number of advantages:

1. Insofar as the regulatory environment is less complex, it is more accessible for consumers seeking to initiate a rule-change, or to challenge the compliance of a network business with a particular rule. Particularly for consumers without significant information, resources or technical and legal understanding, the capacity to negotiate a single entity significantly reduces the barriers to asserting their rights.
2. Combining the enforcement and rule-creation mechanisms ensures that the rules are responsive to the evolution of the energy market. This is achieved in two respects. First, given that the enforcement entities require significant coercive and information-gathering powers to perform their mandate, a unitary structure ensures that such

²³ *Utilities Act 2000* (UK) s.3A(5)(c),

²⁴ *Ontario Energy Board Act*, SO 1998, Part 1 s 1(4).

information contributes to the work of the regulator in considering the future development of regulatory frameworks. Secondly, it ensures that the regulation may be updated to account for novel or complex events of non-compliance or partial compliance by network businesses.

A further feature of the institutional arrangements of the NEM is that no other Federal jurisdiction in the world appears to have an entity with the roles and responsibilities of the COAG Energy Council without any form of parliamentary oversight.

For the remainder of this Part of the Report, each of the key market institutions will be considered in turn:

1. the COAG Energy Council as the entity responsible for national energy policy;
2. the AEMC as the entity responsible for rule-making and market development;
3. the AER as the entity responsible for implementing the rules and ensuring compliance;
4. the AEMO as the system operator and the entity responsible for market development;
and
5. Energy Consumers Australia (ECA) as the entity charged with promoting the long-term interests of consumers and advocating on their behalf.

Potential reforms

1. *Noting that:*
 - a) *the separation of the rule making and investigatory and enforcement functions between the AER and AEMC is unique among international arrangements for energy markets;*
 - b) *internationally, many jurisdictions have consolidated their institutional arrangements over recent years; and*
 - c) *internationally, several jurisdictions have developed new or amended regulatory objectives appropriate to transforming energy markets:*

That similar to the approaches in other international jurisdictions, the regulatory, investigatory and enforcement functions of the AER and AEMC should be consolidated into a single agency.

2.1 COAG ENERGY COUNCIL

The original form of the COAG Energy Council was the Ministerial Council on Energy (MCE), which was established on 8 June 2001. It was designed to be the forum through which the Commonwealth, State and Territory Ministers having primary responsibility for energy matters could meet to formulate national energy policy. The role of the MCE is described in cl 4 of the AEMA (as amended on 9 December 2013):

4. MINISTERIAL COUNCIL ON ENERGY

Role of the MCE

- 4.1 The Parties agree that the MCE is the national policy and governance body for the Australian energy market including for electricity and gas.
- 4.2 The MCE will report to COAG on the operation of this agreement and any proposed amendments.
- 4.3 The Parties agree that the MCE has responsibility for:
- (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.

In order to carry out this role, the AEMA provides the MCE with a range of powers in cl 4.4:

- 4.4 The Parties agree that the MCE has:
- (a) power to issue statements of policy principles to the AEMC with respect to rulemaking or electricity, gas or retail market reviews;
 - (b) power to recommend appointments of commissioners to the AEMC in accordance with this agreement and the Australian Energy Market Commission Establishment Act 2004 (SA);
 - (c) power to recommend certain appointments of members to the AER in accordance with this agreement and the Competition and Consumer Act 2010 (Cth); and

(d) any other energy related power conferred on it by agreement between the Parties or by legislation.

4.5 The Parties agree that the MCE will not be engaged directly in the day-to-day operation of the energy markets or the conduct of regulators.

Over the past fourteen years, three institutions have held these legally enduring roles and powers:

1. the MCE from 8 June 2001 – 16 September 2011;
2. the Standing Council on Energy and Resources (SCER) from 17 September 2011 – 12 December 2013; and
3. the COAG Energy Council from 13 December 2013 to present.

The COAG Energy Council

The COAG Energy Council has been in existence since 13 December 2013. It is made up of the ‘ministers from the Commonwealth, each state and territory, and New Zealand, with portfolio responsibility for energy and resources.’²⁵ The current representatives on the Council are as follows:

Jurisdiction	Representative
Commonwealth (Chair)	The Hon Ian Macfarlane MP Minister for Industry and Science
New South Wales	The Hon Anthony Roberts MP Minister for Industry, Resources and Energy
Victoria	The Hon Lily D’Ambrosio MP Minister for Energy and Resources
Queensland	The Hon Dr Anthony Lynham MP Minister for Natural Resources and Mines
	The Hon Mark Bailey MP Minister for Energy and Water Supply
Western Australia	The Hon William Marmion MLA Minister for Mines and Petroleum
	The Hon Dr Michael Nahan MLA Minister for Energy
South Australia	The Hon Tom Koutsantonis MP Minister for Mineral Resources and Energy

²⁵ Council of Australian Governments, *About COAG* (2015) <https://www.coag.gov.au/about_coag>.

Jurisdiction	Representative
Tasmania	The Hon Matthew Groom MP Minister for Energy
	The Hon Paul Harriss MP Minister for Resources
Australian Capital Territory	Mr Simon Corbell MLA Minister for Environment and Sustainable Development
Northern Territory	The Hon David Tollner MLA Minister for Mines and Energy
New Zealand	Hon Simon Bridges Minister of Energy and Resources

Operation and voting

Under cl 4.3 of the AEMA, there is broad procedural discretion placed upon the COAG Energy Council to establish its own

rules concerning its operation as it considers appropriate, including rules concerning frequency of meetings, chairing, and making of decisions.

The definition of ‘decisions’ for the purposes of cls 4.3-4.9, is defined in cl 4.10 as including:

a decision, resolution, direction, recommendation, appointment or other matter to be determined by the MCE.

There are a number of exceptions to this broad procedural discretion. These exceptions generally operate such that only MCE Ministers representing those Parties that are NEM jurisdictions, or NERL jurisdictions or those that have committed to apply the NERL, are eligible to participate in the decision-making with respect to the NEM and the NERL respectively. With respect to the NEM, under cl 4.7(b) the Northern Territory and Western Australia are permitted to participate as observers in decision-making relating to the NEM. With respect to the NERL, under cl 4.9(b), ‘any other Party can participate as an observer in decision-making relating to the Retail Energy Markets,’ with ‘Party’ being defined in cl 1.6(ff) to mean any one party to the AEMA.

It is noted that the COAG Energy Council website lists that the Minister of Energy and Resources for New Zealand is a member of the Council. Despite this, there is no mention made of New

Zealand in the AEMA. It would thus appear that New Zealand may not participate as an observer in either NEM or NERL decisions.

Assuming that the decision-making conventions for the COAG Energy Council are similar to those of SCER, the Council will:

make decisions on the basis of consensus wherever possible, unless specific voting rules are included in relevant governing instrument(s). Where necessary, the principle of one vote per jurisdiction would apply.²⁶

There is a similar provision contained in cls 6.7 and 6.8 of the AEMA, which state that:

6.7 A Party will not take any action that would limit, vary or alter the effect, scope or operation of the Australian Energy Market Legislation without the agreement of the MCE.

6.8 A regulation, rule, order, declaration or other instrument which confers functions or powers or imposes duties on the AER may only be made or amended under the legislation of a Party that applies, implements or otherwise gives effect to the Australian Energy Market Legislation with the unanimous agreement of the MCE.

One of the challenges associated with this consensus-based model of decision-making is that it is likely to result in a 'lowest common denominator' approach to policy-making, which is often a slow process.²⁷ It also means that where one of the participating jurisdictions in either the NEM or the Retail Energy Market holds out on accepting a decision, they may be able to exercise a disproportionate level of power. As a result, it may be appropriate to consider whether an approach such as that adopted by the Voting Protocol of the Transport and Infrastructure Council,²⁸ where different types of decisions are assigned different voting majorities in order to pass, such as a two-third majority of jurisdictions, or even a simple majority may be a more appropriate voting model for some decisions. This is particularly relevant given that it is arguable that some states currently have a conflict of interest in respect of their public ownership of assets, which may lead to their decision-making at the Council favouring the interests of the citizens of their states to the detriment of the long-term consumer interest in the broader market. This issue is discussed in greater detail in Part 3 below.

²⁶ COAG Standing Council on Energy and Resources, *Terms of Reference* (SCER, 2013).

²⁷ Productivity Commission, above n 16, 491-2.

²⁸ COAG Standing Council on Transport and Infrastructure, *Decision Making (Voting) Protocol* (SCTI, 2014).

It is further noted that the implications of the consensus-based decision-making model are difficult to assess, given that the votes of each participating jurisdiction are not publicly available through Meeting Communiqués or any other document.

The Scope of the COAG Energy Council and its Terms of Reference

According to their website, the COAG Energy Council's Terms of Reference are currently under development, though their first meeting communiqué in respect of the meeting of 1 May 2014 notes that:

The first meeting gave Ministers the opportunity to consider the draft Terms of Reference for the COAG Energy Council which are to be action oriented and focus on national priorities for the Council over the next 18 months. The final Terms of Reference for the COAG Energy Council are to be agreed by COAG later this year.²⁹

It has now been almost seventeen months since the inception of the COAG Energy Council and the final Terms of Reference appear to have still not been agreed by the Council. The draft Terms of Reference considered by the Ministers at their meeting of 1 May 2014 have also not been made publicly available. What has been made available, though no reference is made to it on the entirety of the COAG Energy Council website or in any other COAG Energy Council document that is publicly available, is the overarching scope of the COAG Energy Council:

A4. The Energy Council will provide a forum for collaboration on developing an integrated and coherent national energy policy and any implications from the Commonwealth's abolition of the carbon tax.³⁰

This represents a significant departure from the scope of SCER, which was that:

The Council will seek to ensure the safe, prudent and competitive development of the nation's mineral and energy resources and markets to optimise long-term economic, social and environmental benefits to the community. The Council will do this by:

- facilitating national oversight and coordination of governance, policy development and program management to address the opportunities and challenges facing Australia's energy and resources sectors into the future;
- providing national leadership on key strategic issues and effectively integrating these strategic priorities into Government decision-making in relation to the energy and resources sectors; and

²⁹ COAG Energy Council, above n 8, 1.

³⁰ Council of Australian Governments, *Description of COAG Councils Agreed by COAG on 13 December 2013* (Department of Prime Minister and Cabinet, 2014).

- enhancing national consistency between regulatory frameworks to reduce costs and improve the operation of the energy and resources sectors.

The Council has particular policy responsibilities for:

- oversight of Australian energy markets, including for electricity and gas, particularly in terms of enhancing the efficiency of energy supply. This covers joint energy efficiency measures which act directly on the generation, distribution, transmission, retail or delivery of energy, or require changes to the National Electricity or Gas rules and associated laws and regulations;
- energy security and emergency management of national liquid fuels emergencies;
- progressing constructive and compatible changes to the basic legislative and policy framework for the sustainable development of resources; and
- facilitating the economically competitive development of Australia's resources.

The Council's work program will focus on the following broad themes:

- Governance and regulatory frameworks;
- Developing secure and competitive markets;
- Ensuring the efficient provision of monopoly network services;
- Safety and community engagement;
- Technology innovation;
- Market access and demand;
- Environmental sustainability, including monitoring the impacts of climate change policies (such as national carbon pricing) on the energy sector; and
- Energy affordability.

The Council will work actively with the Select Council on Climate Change and other Standing Councils on matters of mutual interest, including national standards for energy efficiency.

This change to the scope of the COAG Energy Council took place as part of a reform of the COAG Council system to reduce the number of Councils from 21 Councils down to 8 Councils. It is unclear what consultation, if any, was undertaken with the Parties to the AEMA, industry participants or other key stakeholders about this change in the scope of the COAG Energy Council. Given that this is likely to have significant implications for the future development of the national energy policy, it is argued that in future, broad consultation with the full range of stakeholders should be considered.

The publication of the Terms of Reference, whether in their draft or final form, is also critically important for both transparency and accountability. It is clear that COAG has envisaged that the COAG Energy Council will play a different role to that previously undertaken by SCER. This is indicated by the statement on the COAG website that 'under the new COAG council system each

Council's Terms of Reference are to be action orientated and reflect current COAG priorities,³¹ and also by the omission of the word 'resources' from the title of the COAG Energy Council and from its overarching scope. At the first meeting of the COAG Energy Council, the Ministers agreed that the Ministers responsible for resources should continue to sit as members of the COAG Energy Council and it continues to have resources as a recurring topic of discussion in its meetings,³² providing conflicting messages about what the scope of the COAG Energy Council's activities actually are.

Indeed, it is remarkable that a review commissioned by the COAG Energy Council into the governance and institutional structure of the National Energy Market could take place without their own Terms of Reference being made publicly available. This is especially important given its role in formulating national energy policy and the questions asked by this review as to whether the COAG Energy Council's agenda is relevant to contemporary market challenges, or its role in areas outside its direct policy remit or beyond its AEMA coverage.

Agenda and work program

The forward agenda of the COAG Energy Council is not publicly available. However, in the Meeting Communiqué reporting on the 11 December 2014 meeting of the Council it was stated that the Council has adopted a new format to its meetings 'to improve the strategic focus of the Council.'³³ This format considered emerging challenges under six themes:

1. Generation – reducing investment uncertainty
2. Networks – securing benefits of technological change
3. Retail – enhancing a national approach
4. Energy productivity – improving energy use decisions
5. Natural gas – accelerating market transformation
6. Resources – productivity and development.³⁴

It appears that this is likely to represent the broad themes that will be considered in each meeting, with the COAG Energy Council to 'align its strategic priorities and work program around these themes and intends to publish regular reports on its progress.'³⁵

³¹ COAG Energy Council, *Terms of Reference* (COAG, 2015) <<http://www.scer.gov.au/about-us/terms-of-reference/>>.

³² COAG Energy Council, above n 8.

³³ COAG Energy Council, 'Meeting Communiqué', 11 December 2014.

³⁴ *Ibid.*

³⁵ *Ibid.*

In terms of the content of the agenda, the Australian energy markets are going through a period of significant transformation. It is advocated that given that one of the central elements of the National Electricity Objective is that decisions must be made in the 'long-term interests of consumers,' one of the missing recurring themes of the agenda appears to be energy consumers. According to the SCER Terms of Reference, the Council 'will also provide a draft work plan for the following financial year annually by 31 May.'³⁶ Aside from the fact that the draft work program appears to be produced after the first face to face meeting of the COAG Energy Council each year, meaning that it can only be discussed through other less formal channels or at the December meeting, there does not appear to have been a publicly available work plan for the 2014/2015 financial year. This should be publicly published once it is finalised to provide industry participants and other stakeholders with advance notice of the strategic priorities for the Council in the coming year.

In light of the above, it is a difficult task to assess how effective the COAG Energy Council is in providing oversight of the three market institutions. Following concerns about the adequacy of the oversight being provided, on 31 May 2013, SCER agreed to establish an accountability and performance framework for the AER and AEMC. To this end, on 13 December 2013, SCER agreed on the Statements of Expectations for the AER and AEMC covering their roles and responsibilities, relationship with SCER, other stakeholder engagement and communications and financial reporting requirements.³⁷ Every year, the AER and the AEMC are required to publish their response to the Statement of Expectations in the form of a Statement of Intent, which will include key performance indicators (KPIs) against which they must report in their annual report.³⁸ The AER published their Statement of Intent on 30 June 2014 for the 2014-2015 financial year.³⁹ The AEMC published their Statement of Intent on 10 July 2014 for the 2014-2015 financial year.⁴⁰ Both the AER and the AEMC then reported against these KPIs in their 2014 annual reports,⁴¹ however, it is not clear what action has been taken by the COAG Energy Council regarding the KPIs that were not met or to ensure that appropriate KPIs are set for this year. This may become clearer following the publication of the May 2015 Communiqué

³⁶ COAG Standing Council on Energy and Resources, above n 26.

³⁷ COAG Energy Council, *AER and AEMC Enhanced Budget and Performance Reporting* (2015) <<http://www.scer.gov.au/workstreams/energy-market-reform/aer-and-aemc-enhanced-budget-and-performance-reporting/>>.

³⁸ Ibid.

³⁹ Australian Energy Regulator, *AER Statement of Intent in response to the COAG Energy Council's Statement of Expectations* (2015) <<http://www.aer.gov.au/node/26301>>.

⁴⁰ Australian Energy Market Commission, *Statement of Intent of the Australian Energy Market Commission for the Financial year 2014/15* (2014) <<http://www.aemc.gov.au/getattachment/51d50777-9999-4c37-af83-71d65812f511/Statement-of-Intent-of-the-Australian-Energy-Marke.aspx>>.

⁴¹ See, Australian Energy Regulator, *Annual Report 2013-14* (AER, 2014).

from the COAG Energy Council or alternatively in the AER's and AEMC's 2015-2016 Statements of Intent.

Ability to issue a Statement of Policy Principles

Under cl 4.4 of the AEMA and s 8 of the NEL, COAG Energy Council is empowered as the MCE to issue a statement of policy principles (SPP) in relation to the exercise and performance by the AEMC of its functions and powers in making a Rule or in conducting a review of the Rules. Prior to issuing a SPP, the COAG Energy Council must ensure that it is consistent with the NEO.⁴² According to the AEMC website, only one SPP has previously been issued in respect of the roll-out of smart meters.⁴³ There are no current SPPs,⁴⁴ which means that the COAG Energy Council is not providing the AEMC with direction as to how they make Rules. This is particularly problematic given that the AEMC has determined that it only will interpret the 'long-term interests of consumers' from an economic perspective which focuses on facilitating investment in the sector. Given the emergence of a number of disruptive elements in the electricity market such as distributed generation and storage, and combined with a greater emphasis on energy efficiency, this business as usual approach is arguably no longer fit for purpose.

Delegation of roles to officials such as the Standing Council of Officials

The Standing Council of Officials is not an officially recognised body in either the AEMA or in the NEL. It is not clear who these officials are, what delegations they have been provided or under whose supervision they operate. Without the provision of this information, it is impossible to contribute meaningfully to an understanding of the implications of their potential decisions for consumers.

Australian Energy Markets Agreement

The objectives of the AEMA are as follows:

2. OBJECTIVES

2.1 The objectives of this agreement are:

- (a) the promotion of the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services; and
- (b) the establishment of a framework for further reform to:

⁴² *National Electricity (South Australia) Act 1996 (SA)* sch 1 s 8(2).

⁴³ Australian Energy Market Commission, *Ministerial Council on Energy Statement of Policy Principles (2015)* <<http://www.aemc.gov.au/Energy-Rules/National-electricity-rules/MCE-statements-of-policy-principles/MCE-Statement-of-Policy-Principles>>.

⁴⁴ *Ibid.*

- (i) strengthen the quality, timeliness and national character of governance of the energy markets, to improve the climate of investment;
- (ii) streamline and improve the quality of economic regulation across energy markets to lower the cost and complexity of regulation facing investors, enhance regulatory certainty, and lower barriers to competition;
- (iii) improve the planning and development of electricity transmission networks, to create a stable framework for efficient investment in new (including distributed) generation and transmission capacity;
- (iv) enhance the participation of energy users in the markets including through demand side management and the further introduction of retail competition, to increase the value of energy services to households and businesses;
- (v) further increase the penetration of natural gas, to lower energy costs and improve energy services, particularly to regional Australia, and reduce greenhouse emissions; and
- (vi) address greenhouse emissions from the energy sector, in light of the concerns about climate change and the need for a stable long-term framework for investment in energy supplies.⁴⁵

The AEMA provides an important role in facilitating the cooperation between the Commonwealth, state and territory governments. Unfortunately, it appears that inconsistencies have emerged between the objectives contained in the AEMA (and possibly also how these objectives then filter down into national energy policy) and the National Electricity Objective under s 7 of the NEL,⁴⁶ the scope of the COAG Energy Council as per the Description of the COAG Councils as agreed by COAG on 13 December 2013,⁴⁷ and the Australian Government's priorities for the future development of the energy sector as contained in the 2015 Energy White Paper.⁴⁸ In addition, there are a number of provisions in the AEMA which appear to have lapsed and thus should be deleted (or, where necessary, replaced). In particular, cls 12.2 and 13.4 should be deleted. If cl 13.10 has now been fully achieved, it too should be deleted; alternatively, if it is still yet to be achieved, an updated clause may be required.

Consideration of areas outside the Energy Council's direct policy remit or beyond its AEMA coverage

It is interesting that the Review Panel makes a distinction between those areas that it considers to be outside the direct policy remit of the COAG Energy Council, i.e. financial markets,

⁴⁵ Council of Australian Governments, *Australian Energy Market Agreement*, 9 December 2013.

⁴⁶ *National Electricity (South Australia) Act 1996* (SA) sch 1.

⁴⁷ Council of Australian Governments, *Description of COAG Councils Agreed by COAG*, above n 30.

⁴⁸ Department of Industry and Science, *Energy White Paper* (Commonwealth of Australia, 2015) 6.

sustainability and climate change issues, and social policy, and those that it believes are beyond its AEMA coverage, i.e. retail price regulation and technical and safety matters. It is a frequent refrain that changing national energy policy with regard to environmental sustainability and social issues is a political decision that should be left to government. However, there appears to have been a conscious effort to avoid dealing with these issues, especially given the likely difficulties in reaching a consensus on them through COAG given the different political orientations and policy priorities of the Ministers involved. These issues are in the long-term interests of consumers and must be dealt with as a considered part of long-term strategy for national energy policy. For all of these areas, COAG should establish a high level strategic approach to national energy policy, which can then be incorporated into the AEMC's Rule making through the issuance of Statements of Policy Principles and the AER's implementation of the Rules.

Transparency, accessibility of information and accountability

An obvious issue that becomes apparent from a study of the other COAG Council websites is that the COAG Energy Council is one of the least publicly transparent Councils in terms of publishing their governance structure; names, titles and contact details for their SCO, operational guidelines and advance meeting dates. Indeed, as shown in Appendix 4, their lack of transparency in terms of publicly available information is only matched by the Federal Financial Relations Council and the Industry and Skills Council. Examples of best practices adopted by other Councils include publishing their Operating Guidelines on their website, identifying and providing contact details for the SCO, publishing advance meeting dates for both the Council and the SCO and publishing a governance structure with reporting lines and responsibilities.

There is also a serious problem with the COAG Energy Council website. Both the pages on 'Governance' and 'Legislation' are still under construction. Further, the Council's 'Terms of Reference,' 'Priority issues of National Significance,' delegations to the Standing Council of Officials (SCO), forward agendas and work plans are also not publicly available. The address of the website is also potentially confusing with the current address being: <http://www.scer.gov.au/>. A number of items posted by officials on the website are being posted under the name 'scer.' This may be confusing for some consumers and is easily rectified.

Reporting to COAG

Under the Guidance for COAG Councils issued in May 2014, all COAG Councils are accountable to COAG. COAG is also responsible for reviewing the COAG Energy Council annually to:

- ‘ensure the Terms of Reference remain consistent with COAG’s priorities;
- review progress made by the Council on issues referred to them by COAG;
- check progress against the Council’s responsibilities under Commonwealth and State legislation and funding agreements (National Agreements and National Partnerships).’⁴⁹

It appears that no Council Reviews were conducted in 2014, so it is not clear how efficient and effective this red tape reduction measure of only reviewing the COAG Energy Council on very limited grounds will be. This lack of an annual Council Review is compounded by the so-called ‘accountability provisions’ of the Guidance, which state that the COAG Energy Council is not required to provide a formal report to COAG (cl 2.3.2) and is only required to ‘raise issues with COAG which they consider genuinely require First Ministers’ attention.’⁵⁰ Further under cl 2.3.3, the ‘assumption is that all priorities of the Council as set out in the agreed Terms of Reference will be progressed satisfactorily and, only if there is significant divergence or unresolved issues, should Councils escalate this to COAG.’ While the COAG Energy Council is still encouraged to develop a work plan to guide their work under clause 2.3.4, this no longer appears to be mandatory and nor does the work plan require the agreement of COAG. Thus, COAG does not currently appear to be providing any real oversight to the vast bulk of the work carried out by the COAG Energy Council.

Potential reforms

1. *That similar to some other COAG Councils, the consensus-based approach to decision-making be reconsidered for some decisions of the COAG Energy Council, with other voting models such as consensus minus one, a two-thirds majority or a simple majority being possible replacements.*
1. *That given the importance of the role played by the COAG Energy Council in setting the future direction of national energy policy, in future, changes to its scope and work plan should be subject to consultation stakeholders, including consumers and industry.*
2. *That the COAG Energy Council finalise their Terms of Reference as a matter of urgency. This would provide greater transparency in respect of their role and would enable them to be held accountable for their actions.*
3. *That in the interim period prior to the conclusion of negotiations on the Terms of Reference, that the Council’s draft Terms of Reference be made publicly available to enable*

⁴⁹ Department of Prime Minister and Cabinet, Commonwealth of Australia, *Guidance on COAG Councils* (2015) 2.

⁵⁰ *Ibid.*

stakeholders, including consumers, to assess how their role has changed since the shift from SCER.

- 4. That AEMA be amended to reflect recent market developments and to ensure consistency with its Objectives.*
- 5. That similar to the approach of other COAG Councils, the identity of the SCO, any delegations made to them, and their governance structure be made public so that these delegations are transparent and appropriate accountability mechanisms can be put in place.*
- 6. That the forward agendas and work plans of the COAG Energy Council be made publicly available for reasons of transparency and accountability.*
- 7. That the COAG Energy Council website be updated to provide up to date and meaningful information to the public, especially on the legislation that the Council is currently responsible for and its governance.*
- 8. That COAG take a more active role in ensuring that the COAG Energy Council is transparent, accountable and meeting their Terms of Reference.*

2.2 AUSTRALIAN ENERGY MARKET COMMISSION

The Australian Energy Market Commission is the market institution responsible for developing changes to the National Electricity Rules, the statutory framework under the National Electricity Law. The AEMC has to date considered 180 applications to amend the National Electricity Rules and National Electricity Retail Rules, of which 152 have resulted in some alteration to the Rules.⁵¹

While ostensibly this appears to be a mundane regulatory function, the reality of the operations of the AEMC has been as chief policymaker in relation to electricity in the NEM. The economic regulation of network services has significant implications given the changing nature of the market. Some of the policy decisions made by the AEMC in the last twelve months have included in relation to governance arrangements for the implementation of the reliability standard,⁵² the disclosure of corporate information by demand side participants (DSPs) to the AEMO,⁵³ and the access of customers to information about their energy consumption.⁵⁴ Each of these decisions reflects the significant discretion afforded to the AEMC to determine the participation of different actors within the NEM.

This section considers the extent to which the Rule-making process of the AEMC remains relevant considering the future development of the NEM. In particular this section will consider:

- the structure of the AEMC;
- the various Rule-making processes available to the AEMC;
- the efficiency of these Rule-making processes, and the potential implications of delays or consumers;
- the genuine capacity for consumers to participate in the Rule-making process; and
- the weakening of parliamentary sovereignty in light of the AEMC Rule-making process.

⁵¹ Australian Energy Market Commission, *Rule Changes* (2015) <<http://www.aemc.gov.au/Rule-Changes>>.

⁵² Australian Energy Market Commission, *Governance Arrangements and Implementation of the Reliability Standard and Settings* (2015) <<http://www.aemc.gov.au/Rule-Changes/Governance-of-the-Reliability-Standard-and-Setting>>.

⁵³ Australian Energy Market Commission, *Improving demand side participation information provided to AEMO by registered participants* (2015) <<http://www.aemc.gov.au/Rule-Changes/Improving-Demand-Side-Participation-information-pr>>.

⁵⁴ Australian Energy Market Commission, *Customer access to information about their energy consumption* (2015) <<http://www.aemc.gov.au/Rule-Changes/Customer-access-to-information-about-their-energy>>.

The AEMC is empowered to make rules in relation to the electricity market in general under both the NEL, and specifically with respect to retail energy, under the National Energy Retail Law (NERL). The functions and processes established for the AEMC under both laws are substantially similar. This section will consider the powers of the AEMC by reference to the NEL, but it should be noted that specific powers in relation to retail regulations also exist.

Structure of the AEMC

The AEMC is an independent body corporate that is not subject to direction by State or Territory Ministers.⁵⁵ The AEMC consists of three Commissioners who are appointed by the Governor-in-Council of South Australia on the recommendation of the relevant MCE Ministers for five-year terms.⁵⁶ Two of the Commissioners are appointed by the MCE (States and Territories), one of whom shall be appointed as the Chairperson of the AEMC.⁵⁷ The Commonwealth Minister appoints the third Commissioner.⁵⁸ The Commissioners are tasked with the appointment and oversight of the Chief Executive, four Senior Directors, General Counsel and one Human Resources and Business Manager, who comprise the Senior Management Team.⁵⁹

The Rule-Change Process

The NEL prescribes the process by which the AEMC must undertake the Rule-making process. The process is measured against the National Energy Objective (NEO) established in s 7 of the NEL:

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 energy 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.⁶⁰

A complete list of the AEMC's rule change determinations to date is contained within Appendix 7 to this Report.

⁵⁵ *Australian Energy Market Commission Act 2004* (SA) s 9(1).

⁵⁶ Council of Australian Governments, *Australian Energy Market Agreement*, 9 December 2013, cl 7.1; *Australian Energy Markets Commission Establishment Act 2004* (SA) s 12.

⁵⁷ The appointment of the Chairperson requires the agreement of at least six States and Territories: Council of Australian Governments, *Australian Energy Market Agreement*, 9 December 2013, cl 7.2. *Australian Energy Markets Commission Establishment Act 2004* (SA) s 12.

⁵⁸ *Australian Energy Markets Commission Establishment Act 2004* (SA) s 12.

⁵⁹ Australian Energy Market Commission, *Annual Report 2013-14* (AEMC, 2014) 16.

⁶⁰ *National Electricity (South Australia) Act 1996* sch 1 s 7.

This section will explain the operation of the NEL with respect to the Rule-change process. To that end, it will consider:

- making an application;
- consideration and consultation; and
- Rule-change and review.

Applications under the Rule Change Process

Generally speaking, any person may request the making of a rule by the AEMC.⁶¹ In the ordinary course of its work, the AEMC makes changes to the National Electricity Rules upon receipt of an application by a market body, government entity, corporation or community group.⁶² **Figure 1** below indicates that the largest proportion of Rule-change applications are made by NEM market entities.⁶³ Of the NEM market entities, the Australian Electricity Market Operator has contributed the greatest number, submitting 36 applications between June 2009 and July 2014. The AEMC may only initiate a Rule-making process without request from a third party in circumstances where the Rule-change corrects a minor error or makes a non-material change to the Rules.⁶⁴

Entity Type	Applications	% Total Applications ⁶⁵
Individual	1	0.5%
Mixed (Public/Private)	3	1.7%
Community	5	2.8%
AER	12	6.7%
AEMC	20	11.1%
NEMMCO	21	11.7%
Government ⁶⁶	30	16.7%
AEMO	36	20.0%
Corporate	52	28.9%
Total	180	100%

FIGURE 1 - RULE CHANGE REQUESTS BY ENTITY TYPE

⁶¹ Australian Energy Market Commission, *Stage 1: Initial consideration of a request for the making of a Rule* (2015) <<http://www.aemc.gov.au/Energy-Rules/Retail-energy-rules/Rule-making-process/Stage-1>>.

⁶² *National Electricity (South Australia) Act 1996* sch 1 s 91.

⁶³ Australian Energy Market Commission, *Rule Changes*, above n 51.

⁶⁴ *National Electricity (South Australia) Act 1996* sch 1 s 91(2).

⁶⁵ Note these numbers have been rounded to one decimal place.

⁶⁶ Note the make-up of Government applications is as follows: 15 applications from the MCE; 2 applications from SCER; 4 applications from the COAG Energy Council; 5 applications from the Minister for Energy and Resources (Victoria); 1 application from the Department of Infrastructure (Victoria); 1 application from the Tasmanian Government; 1 application from the South Australian Minister for Energy; and 1 application from the Queensland Government.

All Rule-change applications must include information including:

- a description of the Rule that the proponent proposes be made;
- a statement of the nature and scope of the issue(s) concerning the existing Rules that is to be addressed by the proposed Rule, and an explanation of how the proposed Rule addresses the issue(s);
- an explanation of how the proposed Rule will or is likely to contribute to the achievement of the National Energy Objective (NEO);
- an explanation of the expected benefits and costs of the proposed change to the Rules and the potential impacts of the change on those likely to be affected.⁶⁷

Consideration and Consultation

There are three iterations of the Rule-making process under the NEL:

- a standard process;
- a fast-track process for circumstances in which the consultation requirements may reasonably be circumvented for a number of prescribed reasons; and
- an expedited process for ‘non-controversial’ or ‘urgent’ Rules.⁶⁸

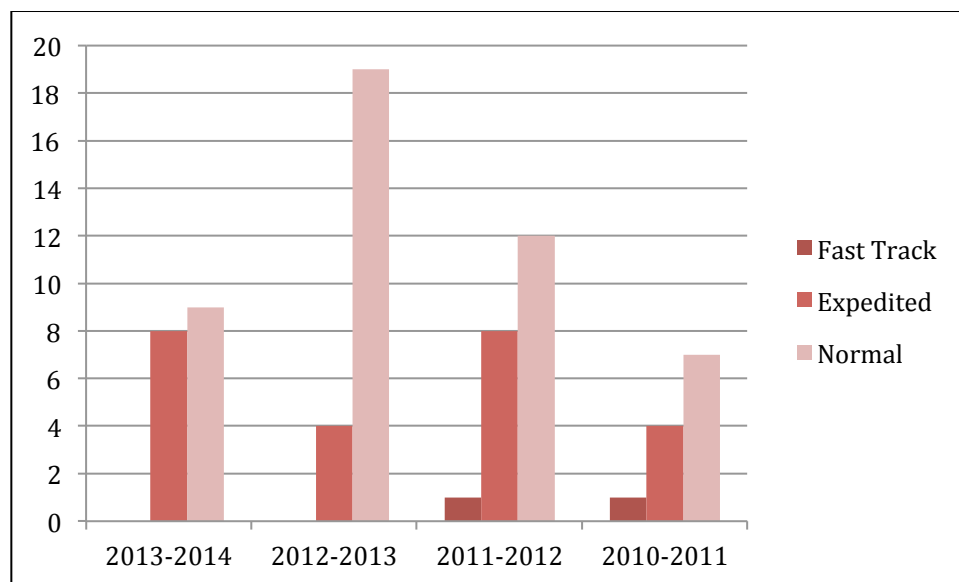


FIGURE 2 - AEMC DETERMINATIONS BY PROCESS TYPE

⁶⁷ Australian Energy Market Commission, *Guidelines for Proponents: Preparing a Rule change request – National Electricity Rules* (AEMC, 2013).

⁶⁸ Productivity Commission, above n 16, 798.

The provisions for a Rule-change under **standard process** are established in Div 3 of the NEL. The process involves two rounds of public consultation and a draft determination, which may be completed within 26 weeks of initiating the process. In practice, this can take up to one year to complete.⁶⁹ The average time taken for a claim to progress to a determination is 29.55 weeks.⁷⁰ There were 86 determinations (49.14%) that took the AEMC in excess of six months to finalise, and 26 determinations (14.86%) that took more than twelve months.⁷¹ These delays may primarily be understood to be the result of extended consultation with relevant stakeholders, including the use of the AEMC’s power to hold public hearings in respect of particular Rule-change proposals.

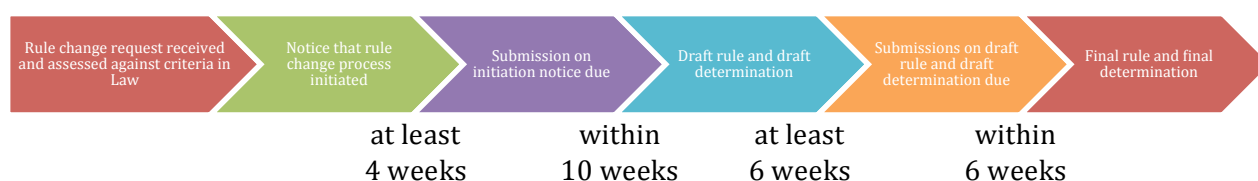


FIGURE 3 - STANDARD RULE CHANGE PROCESS

A **fast-track process** is established in s 96A of the NEL. This process waives the requirement for first-round consultation in prescribed circumstances where another review has already been conducted. Not all reviews that recommend Rule-changes will be sufficient to initiate this process. Such reviews that satisfy these requirements for a fast-track process are only where another electricity market regulatory body has undertaken the first-round consultation in lieu of the AEMC, or where the Rule request is predicated on an AEMC-initiated review or a COAG-directed review during which there was adequate consultation. Reviews of other kinds (for example, a Senate Inquiry or Productivity Commission Report) do not satisfy this requirement. Among other recommendations, the Productivity Commission recommended that a larger number of reviews satisfy the requirements to initiate the fast track process.⁷² This process takes 21 weeks from initiation. However, this process has rarely been used.⁷³ As **Figure 2** indicates, since the 2010-2011 Annual Report of the AEMC, only two of the 73 determinations made have been through a fast-track process.⁷⁴

⁶⁹ Ibid.

⁷⁰ Statistics compiled from Australian Energy Market Commission, *Rule Changes*, above n 51.

⁷¹ Ibid.

⁷² Productivity Commission, above n 16.

⁷³ Ibid 798.

⁷⁴ Australian Energy Market Commission, *Annual Report 2010-2011* (AEMC, 2011).

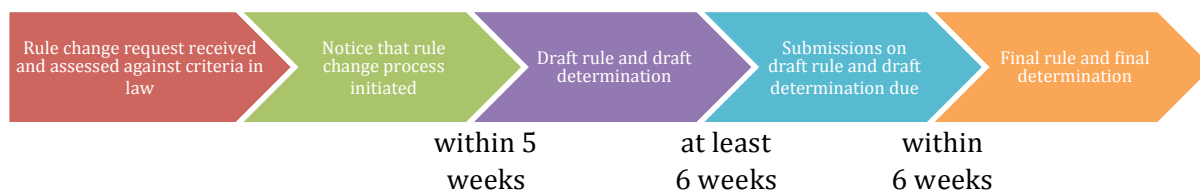


FIGURE 4 - FAST TRACK RULE CHANGE PROCESS

An **expedited process** is established in s 96 of the NEL. This process may be used only for ‘non-controversial’ or ‘urgent’ Rule-making. This process involves one round of public consultation only, which may be completed within six weeks of initiating the process.⁷⁵ This process allows technical changes to be implemented expeditiously without onerous consultation processes.⁷⁶ As can be seen **Figure 2** in above, this process was used 24 times since the 2010-2011 AEMC reporting period.⁷⁷ Most often, this process was used in respect of applications initiated by the AEMC itself.

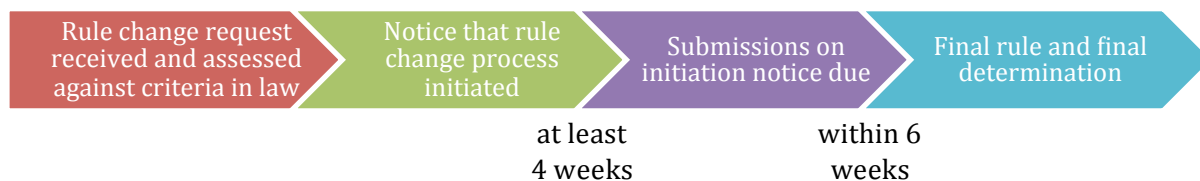


FIGURE 5 - EXPEDITED RULE CHANGE PROCESS

Rule Change and Review

Once a Rule-making process has been completed and the AEMC has so decided, the Rule will be incorporated into the National Electricity Rules. Rules do not require subsequent endorsement by COAG, the Minister, the government or parliament in order to become effective. This is unlike other comparable regulatory bodies such as Food Standards Australia and New Zealand and the National Transport Commission.⁷⁸ This anomaly may be explained by the inertia associated with the difficulties of obtaining consensus from the COAG bodies in light of the historically parochial nature of energy policy in Australia.⁷⁹

A person aggrieved by a decision or determination of the AEMC may apply to the Court for a judicial review of the decision or determination.⁸⁰

⁷⁵ Ibid.

⁷⁶ Productivity Commission, above n 16, 800.

⁷⁷ Statistics compiled from Australian Energy Market Commission, *Rule Changes*, above n 51.

⁷⁸ Productivity Commission, above n 16, 800.

⁷⁹ Ibid. Please refer to the report of Associate Professor Gabrielle Appleby for further details on this issue.

⁸⁰ *National Electricity (South Australia) Act 1996* sch 1 s 70.

Issues Arising from this Process

There are undoubtedly a number of beneficial components of the Rule-making process outlined above. In particular, we may say that the system beneficially operates to:

- maximise the consultation of relevant stakeholders (including both industry and consumer groups) in the process of changing the National Electricity Rules;
- mediate between the competing interests of national standardisation, and the significance of recognising and regulating with respect to jurisdictional differences in local energy markets;
- recognise the significance of industry-based expertise in the design of appropriate regulatory controls;
- preserve the independence of the Rule-making body from industry groups, market entities and governments; as well as the regulator.

Nevertheless, there are a number of shortcomings that have emerged from the operation of the Rule-making process outlined in this section. In particular, when one considers the genuine capacity of consumers to participate in these regulatory processes, it becomes clear that the system suffers both from a bureaucratic inefficiency and an industry bias at the expense of the consumer's interests. This section will consider the shortcomings evident in the operation of this system.

First, participation in all stages of this Rule-making process requires a significant degree of industry knowledge and information. To a large extent, consumers lack the requisite knowledge of the market in order to meaningfully engage in this process as their access to information is limited to their personal energy arrangements, and information that is made publically available by corporations, market entities, and governments. Further, even where consumers may have access to sufficient information, they may lack the technical sophistication to make meaningful submissions to the AEMC.

Even where a consumer is supported by the expertise of a community organisation, they may nonetheless lack access to sufficient information to make credible submissions to the AEMC. Moreover, smaller advocacy groups that focus on residential consumers or smaller businesses often do not have the resources available to those groups that represent generators, networks, retailers or major energy users. This has led such groups to doubt the extent to which their

submissions are taken into real consideration, and to complain of being made to feel unwelcome in the reform process.⁸¹

In particular, the application requirement presents a significant research-burden to parties seeking to alter the National Electricity Rules. Consider that an individual seeking to make a Rule-change application is required to detail the implications of the proposed change for all stakeholders affected, or likely to be affected, by the proposal. To date, only one individual consumer has made an application for a Rule-change under this process, and the application was dismissed prior to any consultation phase.⁸²

Secondly, the overriding criticism provided of the AEMC's operations in a number of public reviews is that of the timeliness of their decision-making processes.⁸³ The recently released interim report of the Senate Environment and Communications References Committee into the Performance and Management of Electricity Network Companies concluded that '[t]he process appears drawn out at every step.'⁸⁴ Significant issues arise from the time-delays experienced by NEM participants seeking rule changes in this process. The Productivity Commission variously described the AEMC Rule-making process as 'a graveyard for reform proposals'⁸⁵ and 'paralysis by analysis.'⁸⁶ As previously identified, the average time taken for a claim to progress to a determination is 29.55 weeks.⁸⁷ The time taken to implementation is even longer. Given the requirement to provide significant notice to the NEM prior to the implementation of a rule change, the average time between application and commencement of a successful Rule-change is 35.34 weeks.⁸⁸ One application by COAG, in relation to inter-regional transmission charging, has taken over five years to implement.⁸⁹

For consumers, these delays represent something of a double-edged sword. On the one hand, a desirable feature of any Rule-change system in the NEM involves robust market and consumer consultation and transparent deliberation. On the other hand, this involves a trade-off in

⁸¹ Stephen Orr, Submission No 36 to Commonwealth Productivity Commission, *Electricity Network Regulation*, 16 April 2012, 6-7.

⁸² Australian Energy Market Commission, *Rule Changes*, above n 51.

⁸³ Senate Environment and Communications References Committee, Parliament of Australia, *Interim report on the performance and management of electricity network companies* (2015) 7.3.

⁸⁴ *Ibid* 7.53.

⁸⁵ Productivity Commission, above n 16, 9.

⁸⁶ *Ibid* 36.

⁸⁷ Statistics compiled from Australian Energy Market Commission, *Rule Changes*, above n 51.

⁸⁸ *Ibid*.

⁸⁹ Australian Energy Market Commission, *Inter-regional Transmission Charging* (2015) <<http://www.aemc.gov.au/Rule-Changes/Inter-regional-Transmission-Charging>>.

relation to the potential for the expeditious resolution of rule-change proposals. Delays in the process can lengthen the impact of regulatory inefficiencies or stall the development of new technologies. The Productivity Commission was very clear in their conclusion that delays in the Rule-making process could be directly calculated in increased electricity costs for consumers.⁹⁰

Thirdly, we may also question the extent to which different NEM participants are empowered during the consultation periods. Notionally, mandated public consultation empowers consumers and other entities within the NEM to take an active role within the Rule-making process. Submissions from individual consumers during the consultation phases of AEMC Rule-change proposals are incredibly rare. Furthermore, it is clear from **Figure 6** below that both market entities and corporate institutions are significantly more likely to apply for a Rule-change than those from community bodies or individuals.

These facts raise questions as to the extent to which individual consumers may be seen to be genuine, active and equal participants in the process of National Electricity Rule reform.

Entity Type	Approved	Approved %
Individual	0	0.00%
Corporate	31	59.62%
Government	27	90.00%
AEMO	34	94.44%
AEMC	19	95.00%
Mixed (Public/Private)	3	100.00%
Community	5	100.00%
AER	12	100.00%
NEMMCO	21	100.00%
Total	152	84.4%

FIGURE 6 - APPROVAL RATE OF RULE-CHANGE APPLICATIONS BY ENTITY

⁹⁰ Productivity Commission, above n 16.

A final possible criticism of the AEMC Rule-making procedure relates to the implications for this process on the sovereignty of parliamentary decision-making, both at Commonwealth and State levels. To a great extent, the structure and mandate of the AEMC is designed to abrogate the capacity of legislatures to intervene in electricity market policy. To some extent, this is reasonable corollary of the relative inertia and parochialism inherent in the approach of state and territory legislatures to national energy policy within COAG. This parochialism is amplified by the significant role various state governments play as asset owners and operators. However, there is similarly good reason to regard the limitation of the capacity of democratically elected legislatures to shape the NEM with some apprehension.

Governments have a limited capacity to affect electricity policy through this framework in their ability to submit Rule-change proposals to the AEMC. However, this power is significantly limited in two respects. First, even rule change proposals made by or on behalf of governments are not dealt with expeditiously by the AEMC.⁹¹ In relation to the Rule-change proposals submitted by government entities to the AEMC, the average deliberation period is 41.06 weeks.⁹² In fact, during the time of the AEMC deliberation of the COAG application for a Rule-change in relation to inter-regional transmission charging, there were three changes in the relevant Commonwealth minister.⁹³ This is a substantially greater delay than would be likely if various parliaments had legislative competence in this area. Second, rule change proposals are assessed against the NEO. Thus, to the extent that a government wished to add additional considerations to the assessment of a potential Rule-change proposal (for example, environmental, social fairness or equity considerations or regional development incentives), the AEMC would be unable to apply these rationales to the Rule-change proposal. Any change to the NEO would need to be approved through COAG. Therefore, accepting that these interests may differ between states, or between particular parties of government, there is no capacity within this framework to give expression to these different objectives through the AEMC.

Reviews by the AEMC into the operation and effectiveness of the Rules

Under s 45 of the NEL, the AEMC has the power to conduct a review into any matter relating to the Rules, including their operation and effectiveness. Under s 45(2) of the NEL, the review may 'be conducted in such a manner as the AEMC considers appropriate,'⁹⁴ but need not involve public hearings. In conducting the review, the AEMC also has broad discretion to consult with

⁹¹ Senate Environment and Communications References Committee, above n 59, 7.53.

⁹² Statistics compiled from Australian Energy Market Commission, *Rule Changes*, above n 51.

⁹³ *Ibid.*

⁹⁴ *National Electricity (South Australia) Act 1996 (SA)* sch 1 s 45(2)(a).

any person or body it considers appropriate, establish working groups, commission reports, and publish discussion papers.⁹⁵ At the conclusion of such a review, the AEMC must provide a copy of the report to the COAG Energy Council and publish a version of the report with the confidential information omitted.⁹⁶

There are a number of problems with this process. First, the Productivity Commission has indicated that it believes that in conducting some of these reviews, the AEMC is effectively usurping some of the role of the COAG Energy Council.⁹⁷ They further note that several network businesses have claimed that the separation of powers between the SCER and the AEMC is indistinct.⁹⁸ Secondly, by giving the AEMC broad discretion to elect whether or not they hold public hearings and to choose who they believes is appropriate to consult with, there is no inbuilt protection within the legislation to ensure that consumers will be consulted during the review process.

Potential reforms

- 1. That, in the event that any element of the AEMC and the AER are to be merged, the capacity of the regulatory entity to initiate the Rule-change process ought to be revisited.*
- 2. That, for the purposes of the fast-track process, reviews by additional agencies and entities ought to satisfy the consultation requirements where they include thorough stakeholder engagement.*
- 3. That the AEMC should institute mechanisms to ensure the engagement of consumers in the consultation stages of the Rule-change process and in any review of the Rule-change process.*
- 4. That the AEMC ought to publish, in addition to applications for Rule-changes, sufficient information to enable consumers to participate meaningfully in the process.*
- 5. That the AEMC should better prioritise the staffing of Rule-changes and policy reviews to ensure the efficiency of decision-making processes.*

⁹⁵ Ibid s 45(3).

⁹⁶ Ibid s 45(4).

⁹⁷ Productivity Commission, above n 16, 801.

⁹⁸ Ibid.

2.3 AUSTRALIAN ENERGY REGULATOR

Regulation of the NEM falls to the Australian Energy Regulator. Under the National Energy Law, the AER has a range of network-related functions, including:

- the economic regulation of electricity transmission and distribution network providers (including revenue and price determinations);
- monitoring the wholesale and retail electricity markets (including investigating breaches and taking enforcement action); and
- preparing and publishing reports.

The AER is constituted as an independent entity under Part IIIAA of the *Competition and Consumer Act 2010*. The AER has an independent Board made up of one Commonwealth member and two state/territory members, each appointed by the Governor-General for terms of up to five years.⁹⁹ The Board is incredibly active compared to other NEM institutions, holding 50 meetings in the period 2013-2014.¹⁰⁰

This section considers the extent to which the monitoring and enforcement processes of the AER continue to achieve the desired outcomes, and operate in the best interests of consumers. In particular, this section will consider:

- the functions and powers of the AER;
- the structure of the AER; and
- the structural accommodation of the role of consumers in the AER.

Functions and Powers of the AER

The function of the AER is to monitor and enforce the compliance of all participants in the NEM with the NEL, NERL, NER and NERR. The AER achieves this objective by:

- monitoring the compliance by registered participants, persons, network service providers and the AEMO with relevant regulatory provisions;¹⁰¹
 - investigating breaches or possible breaches of the relevant regulatory provisions;¹⁰²
 - instituting proceedings against registered participants, persons, network service providers and the AEMO in respect of breaches of the relevant regulatory provisions;¹⁰³
- and

⁹⁹ Australian Energy Regulator, *The Board* (2015) <<https://www.aer.gov.au/about-us/the-board>>.

¹⁰⁰ Australian Energy Regulator, above n 41.

¹⁰¹ *National Electricity (South Australia) Act 1996* (SA) sch 1 s 15(1)(a).

¹⁰² *Ibid* s 15(1)(b).

- conducting reviews and inquiries regarding the performance of the NEM.

The AER performs this function broadly in relation to all elements of the energy market. The AER classifies the subject matter of its regulatory purview as comprising:

- wholesale energy market regulation;
- energy networks regulation; and
- retail energy market regulation.¹⁰⁴

Monitoring and enforcement actions undertaken by the AER must be in support of the NEO. As noted previously, this implies that the regulatory investigations and enforcement actions carried out by the AER must reflect the obligation of network businesses to act in the advancement of the efficient operation and use of electricity services for the long term interests of consumers. The Objective is narrowed by reference to price, quality, safety, reliability, security of supply of electricity. Compared to international jurisdictions, this focus on the economic efficiency of electricity supply to consumers is a narrow regulatory remit. By way of comparison, the United States Federal Energy Regulatory Commission (FERC) extends to ensuring that the operation of network businesses is 'in the public interest.'¹⁰⁵ This broader scope would empower regulatory investigations regarding environmental standards, regional development and efficiency of access of demand-side participants.

The AER has a number of coercive powers designed to enable it to gather and analyse information appropriate to its regulatory and oversight functions. It should be noted that these powers are comparable to those exercised by the ACCC in their general market regulatory functions. Coercive powers available to the AER under the NEL include the power to:

- apply to a magistrate for the issue of a search warrant;¹⁰⁶
- issue notices requiring the provision of information;¹⁰⁷
- issue notices requiring the production of documentary evidence;¹⁰⁸
- issue a regulatory information order requiring regulated network service providers or related providers, either of a specified class¹⁰⁹ or individually,¹¹⁰ to provide, prepare, maintain or keep information;

¹⁰³ Ibid s 15(1)(c).

¹⁰⁴ Australian Energy Regulator, *Our role* (2015) <<https://www.aer.gov.au/about-us/our-role>>.

¹⁰⁵ *Federal Power Act*, 16 USCS § 824 (1920).

¹⁰⁶ *National Electricity (South Australia) Act 1996* (SA) sch 1 s 21.

¹⁰⁷ Ibid s 28(2)(a).

¹⁰⁸ Ibid s 28(2)(b).

- compel the production of information notwithstanding a duty of commercial confidence;¹¹¹ and
- disclose confidential information produced to it where it considers that the detriment of such a disclosure is outweighed by the public benefit.¹¹²

These broad coercive powers are justified by the necessity of ensuring the accuracy and completeness of information provided in anticipation of regulatory decisions. In practice, they also ensure that effective ongoing oversight of the market guards against the risk of non-compliance by market businesses. Further, the capacity to compel the production, maintenance and retention of particular information in a specified form ensures that comparison between market entities is possible. However, the volume of information required to be reviewed to effectively use these coercive powers across the NEM amplifies the efficiency and capacity concerns in relation to the AER, which will be discussed in the following section.

The AER's enforcement role is important in the context of ensuring compliance with the NEL and the NERL and the ongoing competitive functioning of the NEM. In the past five years, there have only been four enforcement matters affecting retail markets. In one matter, civil proceedings were instituted against EnergyAustralia in the Federal Court in respect of a breach of s.38 the NERL, alleging that they failed to receive explicit consent before entering them into contracts or changing their supplier. The Federal Court ordered EnergyAustralia pay a civil penalty of \$500,000, maintain a compliance program for a period of two years and contribute to the AER's costs. In the three other retail matters, which all related to the loss of life support operations, infringement notices were issued by the AER following an investigation, with fines for the three matters being \$60,000, \$100,000 and \$40,000.¹¹³

Similarly, in the past ten years there have only been eight enforcement matters affecting the wholesale markets. Six of these matters were for breaches of the NER, with fines being imposed for each matter ranging from \$20,000 to \$60,000. The other two matters led to proceedings being instigated in the Federal Court. The first matter, against Stanwell, was ultimately dismissed. However, the more recent proceedings against SnowyHydro were successful with

¹⁰⁹ Ibid s 28C.

¹¹⁰ Ibid s 28D.

¹¹¹ Ibid s 28S.

¹¹² Ibid s 28ZB.

¹¹³ Australian Energy Regulator, *Enforcement Matters* (2015) <<http://www.aer.gov.au/retail-markets/enforcement-matters>>.

Court ordering the imposition of an enforceable undertaking, civil penalties totalling \$400,000, the requirement of an independent compliance review and a contribution to the AER's costs.¹¹⁴

One of the notable features of the AER as a regulator charged with enforcement is the relatively low number of both infringement notices and prosecutions. A further area of concern is the low cost of the infringement notice penalties. Given the size of these infringement penalties and infrequent enforcement actions, it seems unlikely that they are sufficient to act as an adequate disincentive to breach the rules, especially when compared to the annual revenue and profits of these businesses.

Structure of the AER

This section will consider two issues in relation to the impact of the structure of the AER on its capacity to achieve its legislative objectives:

1. the relationship between the AER and the Australian Competition and Consumer Commission (ACCC); and
2. issues arising from the efficiency of AER operations.

Relationship with ACCC

Structurally, the AER is a division of the ACCC. The implications of this relationship include that the AER is funded from the ACCC budget appropriation; that the AER and the ACCC share a number of resources including physical infrastructure and human resources; and that a member of the AER Board is a Commissioner of the ACCC. However, there are also a number of senses in which the AER is independent – including its autonomy regarding budget and strategy, and its independent reporting obligations. Nevertheless, the relationship between the AER and the ACCC is often cited as a significant area of concern in relation to NEM governance. In particular, there is consensus among the States and Territories that the goals of transparency and accountability are best served by the separation of the AER from the ACCC.

The Productivity Commission, although ultimately concluding that the AER ought to remain within the ACCC, gave detailed and balanced consideration of the strengths and limitations of the present governance arrangements. On the one hand, The Productivity Commission considered that arguments in favour of the present arrangement included that:

- proximity and resource sharing enabled a consistent and coordinated multi-sectoral approach to the economic regulation of infrastructure;

¹¹⁴ Ibid.

- there are resource-sharing benefits to the AER, in particular during periods of high demand upon the AER's resources;
- there are real synergies between the two organisations, and each benefits from the specific expertise of the staff of the other;
- integration with the ACCC is a safeguard against the risk of the NEM regulator becoming too closely affiliated with energy industry bodies ('regulatory capture'); and
- there are pragmatic concerns about the burden of undergoing a process of separation.¹¹⁵

On the other hand, the Productivity Commission considered that there were equally a number of advantages to constituting the AER as a separate entity, including that:

- the unique and complex conceptual challenges of the electricity network required expert and specialised knowledge, which could not be found through resource-sharing with the ACCC;
- the multi-sectoral nature of the ACCC, together with its combined role as economic regulator, competition watchdog and consumer protection regulator presents challenges to the efficiency and clarity of mission of the AER; and
- separation would resolve any perceptions (whether well founded or otherwise) that there is a conflict of interest between the AER and the ACCC.¹¹⁶

The Productivity Commission is not the only institution to have considered the meta-structural arrangements of the AER as contributing to market inefficiency. There has been some suggestion, in particular from the *Competition Policy Review* released on 31 March 2015, that the functions of the AER in relation to different regulatory subject matters ought to be transferred to different regulators. The dominant suggestion is that network regulation ought to be separated from their market regulation functions. The *Competition Policy Review* recommends that the pricing regulation functions be transferred to the proposed Australian Pricing Regulator.¹¹⁷ The AER has argued strongly against this position.¹¹⁸ The AER submitted in relation to this proposal that 'it is not possible to consider one element of the supply chain in isolation.'¹¹⁹

¹¹⁵ Productivity Commission, above n 16, 781-3.

¹¹⁶ Ibid.

¹¹⁷ Competition Policy Review, *Competition Institutions* (2015) <http://competitionpolicyreview.gov.au/files/2015/03/Part5_final-report_online.pdf>.

¹¹⁸ Andrew Reeves, *AER Submission to Competition Policy Review* (AER, 2014) <https://www.aer.gov.au/sites/default/files/AER%20submission%20to%20Competition%20Policy%20Review%20-%201%20August%202014_0.pdf>.

¹¹⁹ Ibid 4.

Ultimately, this Report does not adopt a firm view as to whether it is in the interests of consumers for the AER to be constituted separately from the ACCC. Regardless of the system adopted, it is clear that a number of structural considerations have significant implications for consumers within the NEM:

1. The complexity of the regulatory environment affects the extent to which consumers may meaningfully engage in the process. Increasing the number of relevant regulators, introducing more convoluted regulatory environments, and multiplying (or duplicating) the role of market regulation makes it altogether less likely that consumers will engage in these processes. From the perspective of consumers, it is best to prioritise whichever structural model delivers the greatest regulatory clarity for consumers who may lack specialised knowledge of the energy sector.
2. Constant piecemeal changes in the structure of the regulatory environment further amplify the problems associated with a complex institutional arrangement. The outcome of numerous reviews suggests that the current arrangements are not working and that broad reform is needed in order to ensure the future competitiveness of the market given the transformations currently taking place in the energy sector.
3. The independence of the regulator and the avoidance of regulatory capture are important considerations to ensure the protection of consumers within the NEM. A regulator may become burdened by a close relationship to the market businesses, and be consequently unable to act for the (often conflicting) interests of regulators.
4. The capacity of the regulator to recommend reforms to the NER (which the AER could not do were it to be merged within the AEMC under the present NEL) is important to ensure that the regulations remain responsive to the dynamic market needs.
5. The presence of organisational structures that will guarantee consultation with and representation of the interests of consumers is essential.

Efficiency of the AER

Concerns have been raised in a number of public reviews that the AER lacks the resources or technical capacity to execute its functions in an efficient manner. Most critically, the stakeholder survey conducted by the AER itself identifies a number of areas of dissatisfaction within the market regarding its performance. The AER's 2011 stakeholder survey identified a number of alarming systemic inefficiencies. The share of respondents rating an attribute of the AER as 'good' or 'excellent' was only:

- 53% for the AER's communication responsiveness;

- 43% for the AER's output quality;
- 44% for the AER's analytical and intellectual capacity;
- 40% for the AER's technical competence; and
- 36% for the AER's industry understanding.¹²⁰

The most significant concerns identified in relation to the efficiency of the AER relate to the time delay in the process of making a determination, the accuracy of determinations made, and the degree of communication with relevant stakeholders. These have obvious implications for consumers. Further, taking into account the growth of demand side participation, distributed generation and new market technologies, it is likely that the demands upon the capacity of the AER will only increase into the future. It is clear from the submissions made to other reviews, that in order to meet their objective of regulating in the 'long term interests of consumers' requires greater resourcing for the AER.

Role of Consumers in the AER

A significant strategic priority for the AER in 2013-2014 was the increased participation of consumers in market governance. Principally, the AER sought to achieve this objective through a number of structural reforms, including:

- Establishing a Consumer Reference Group to advise the AER from the perspective of electricity consumers in the performance of their duties. Advice from the Consumer Reference Group is integrated into various elements of the AER's operations – including network regulation, retail energy market regulation and the conduct of reviews;
- Drafting Service Provider Consumer Engagement Guidelines to guide the performance of network businesses in the consultation of consumer stakeholders. Significantly, the guidelines provide for the thorough consultation of consumers in the preparation of proposals made to the AER for pricing determinations. However, these guidelines are non-binding and they have not always been interpreted in a way that optimises consumer consultation; and
- Creating a Consumer Challenge Panel to challenge the integrity of consumer consultation in the work of the AER. The Panel represents the perspectives of consumers in two respects. First, they are tasked with investigating and challenging the

¹²⁰ Productivity Commission, above n 16, 766.

thoroughness of the consultation engaged in by network businesses in preparing proposals made to the AER for pricing determinations. Second, they challenge the AER internal processes of review and determination to strengthen the participation and perspectives of consumers at each stage of AER processes. By 2016, the Consumer Challenge Panel will have advised the AER on 23 network businesses' pricing proposals.

Structurally, these developments in the consultation processes of the AER undoubtedly strengthen the position of consumers in regulatory decision-making. Assuming that the processes operate as intended, they serve to ensure that regulatory, oversight and review functions within the NEM are undertaken in the interests of consumers and with appropriate consultation. Given that these systems were only implemented for the 2013-2014, it is too early to provide a definitive assessment of their efficacy.

While these structures serve, in part, to safeguard the position of consumers within the NEM regulatory framework, there are two potential shortcomings in the consultation of consumers through this process.

First, the participation of consumers within the AER consultative bodies is limited to a select group of consumer advocates and selected representatives. While the AER indicates that efforts are made to seek a diversity of experiences in the appointment of both the Consumer Reference Group and Consumer Challenge Panel, it is important to ensure that a diverse range of consumers within the NEM continue to be consulted in the future. As the participation of consumers within the NEM continues to diversify – through the growth of distributed generation, development of cost-effective consumer renewable technologies, and diversification of retail energy offerings – consultation from a greater range of consumers will become more important.

Secondly, participation by consumers within the AER and network business consultation process requires a significant degree of information and understanding – both in relation to the consumer's own market participation and the NEM more broadly. While the AER has significant information-gathering capacities under the NEL, their capacity to publicly disclose that information is significantly limited in light of commercial considerations. The AER must strike a balance between protecting the commercial concerns of network businesses, and empowering consumers through the appropriate provision of relevant information.

Potential reforms

- 1. That, in considering reforms to the relationship of the AER and the ACCC, priority should be given to limiting the complexity of the regulatory environment, ensuring the independence of the regulator, and increasing the capacity of the regulator to safeguard the needs of consumers.*
- 2. That the AER Consumer Reference Group and Consumer Challenge Panel should, in their composition, reflect the diversity of experiences of consumers in the market – including adequate representation of vulnerable consumers and those with a focus on new technologies.*

2.4 AUSTRALIAN ENERGY MARKET OPERATOR

The Australian Energy Market Operator Ltd was established to manage the NEM and gas markets from 1 July 2009. According to cl 5.1(c) of the AEMA, AEMO is:

responsible for the day-to-day operation and administration of both the power system and electricity wholesale spot market in the NEM, the retail electricity markets, the retail and wholesale gas markets and other support activities.

In particular, it carries out a range of functions within the NEM as specified in the NEL, AEMO's Constitution, the *Australian Energy Market Commission Establishment Act 2004* (SA), the NERL and the NERR.

The role and statutory functions of AEMO as specified in the National Energy Law are:

Part 5—Role of AEMO under National Electricity Law Division 1—General 49—AEMO's statutory functions

(1) AEMO has the following functions:

- (a) to operate and administer the wholesale exchange;
- (b) to promote the development and improve the effectiveness of the operation and administration of the wholesale exchange;
- (c) to register persons as Registered participants;
- (d) to exempt certain persons from being registered as Registered participants;
- (e) to maintain and improve power system security;
- (f) to facilitate retail customer transfer, metering and retail competition;
- (g) for an adoptive jurisdiction—the additional advisory functions or declared network functions (as the case requires);
- (h) any functions conferred by jurisdictional electricity legislation or an application Act; (i) any other functions conferred under this Law or the Rules.

(2) In its role as National Transmission Planner, AEMO has the following functions: (a) to prepare, maintain and publish a plan for the development of the national transmission grid (the National Transmission Network Development Plan) in accordance with the Rules; (b) to establish and maintain a database of information relevant to planning the development of the national transmission grid and to make the database available to the public; (c) to keep the national transmission grid under review and provide advice on the development of the grid or projects that could affect the grid; (d) to provide a national strategic perspective for transmission planning and coordination; (e) any other functions conferred on AEMO under this Law or the Rules in its capacity as National Transmission Planner.

(3) AEMO must, in carrying out functions referred to in this section, have regard to the national electricity objective.

The governance and ownership structure of AEMO

AEMO is organised as a company limited by guarantee under the *Corporations Act 2001* (Cth). This is a common corporate structure for not-for-profit companies in Australia. AEMO operates on a cost recovery basis and fully recovers its operating costs through fees paid by market participants and network service providers.

AEMO's ownership structure is split between government and industry, with there being two classes of Member under clause 4.9 of their constitution: Government Members (cl 4.9(a)) and Industry Members (cl 4.9(b)). There are eligibility criteria placed on the ability to qualify as a Member of AEMO under cl 1.1 of its corporate Constitution:

Membership Eligibility Criteria means:

(a) in the case of an applicant for admission as a Government Member:

- (i) being the Crown in right of the Commonwealth of Australia, a State of Australia, the Australian Capital Territory or the Northern Territory; and
- (ii) having conferred on the Company at least one function relating to the objects of the Company; and

(b) in the case of an applicant for admission as an Industry Member, being a person who:

- (i) is a "Registered Participant" within the meaning of section 2 of the National Electricity Law; or
- (ii) is a "Registered Participant" within the meaning of section 2 of the National Gas Law; or
- or
- (iii) is a "Service Provider" within the meaning of section 2 of the National Gas Law; or
- (iv) is required to provide information to the operator of the Natural Gas Services Bulletin Board under section 223 of the National Gas Law.

Note that consumer groups do not qualify as a 'Registered Participant' within the meaning of s 2 of the NEL, and therefore their interests must be represented by the Government Members.

Membership (and consequently, ownership) of AEMO is made up of 60 per cent Government Members and 40 per cent Industry Members. Members of AEMO are included in Appendix 5. It is governed by a Board of Directors comprising nine non-Executive Directors and the Chief

Executive Officer. The Directors must be independent and must have core skills and experience (as outlined in Sch 2 of the AEMO Constitution).

Members of AEMO have many benefits of shareholders of companies organised under the *Corporations Act 2001* (Cth). This includes the ability of any two or more Members to convene a general meeting of AEMO at the cost of AEMO (cl 5.3 of the Constitution) and to vote at a general meeting (cl 6.11).¹²¹ However, there are some limitations on Members. For example, under cl 3.2 of AEMO's Constitution,

[n]o part of the profits, income or property of the Company may be paid or transferred to a Member or officer of the Company, either directly or indirectly, by way of dividend, bonus, or otherwise.

This is consistent with AEMO's being a company limited by guarantee and its not-for-profit status. Further, under cl 7.3, Members do not have the ability to appoint the Board Directors of AEMO. Rather, this power to appoint is vested in 'the members of the Ministerial Council on Energy in accordance with the MCE Protocol and this Constitution.' The Members of AEMO do have the ability to endorse the MCE's Board Selection Panel Report. However, given the effective ownership split between Government and Industry Members and the requirements of quorum under cl 6.2 of the Constitution,¹²² this is really just a 'rubber stamp.' The MCE is also

¹²¹ A formula contained in cl 6.11 of the AEMO constitution is used to calculate the weight of votes at a general meeting depending on the class of Member.

6.11 Number of votes exercisable in a general meeting

At each general meeting of the Company, on a vote decided by a poll or show of hands,

(a) each Government Member present in person or by proxy, attorney or Representative shall be entitled to cast the number of votes calculated according to the following formula:

$$\text{number of votes} = \frac{60}{G} \times 1,000, \text{ where}$$

G = the total number of Government Members present in person or by proxy, attorney or Representative and entitled to vote at the meeting, and

(b) each Industry Member present in person or by proxy, attorney or Representative shall be entitled to cast the number of votes calculated according to the following formula:

$$\text{number of votes} = \frac{40}{I} \times 1,000, \text{ where}$$

I = the total number of Industry Members present in person or by proxy, attorney or Representative and entitled to vote at the meeting.

If the calculation under this article 6.11 results in a fraction, the number of votes will be rounded up or down to the nearest whole number.

¹²² The requirements of quorum under cl 6.2 of the Constitution, which effectively requires 85.71% of Government Members to be present (total number of Government Members minus one) but only 10% of Industry Members (or 8 of the current 74 Industry Members) to be present for a general meeting to be quorate.

responsible for nominating a Chair of the Board of the Directors from among the Independent Directors.

The AEMO Governance Review 2013

The recent AEMO Governance Review highlighted a number of issues in the current governance and ownership structure. First, a number of participants cited concern that AEMO had internally reviewed its own governance and reported its findings to SCER prior to consulting with industry stakeholders or Members on the content of the Governance Review Discussion Paper.¹²³ For example, the Chief Executive Officer of ElectraNet, Mr Ian Stirling, stated:

It is not clear whether this internal review conducted by AEMO somehow purports to represent the review required to be undertaken by SCER or whether it is merely a review initiated by AEMO and passed to SCER, but without any real status.

If it is the former, it is most disconcerting as it lacks independence being in the form of a self-review without any appropriate consultation with shareholders and seems to continue the history of poor or ineffectual consultation on governance matters by AEMO.

If it is the latter, the lack of supporting information, regarding what recommendations were submitted to SCER, any independent assessment as to whether these proposals are consistent with good corporate governance principles and any commentary as to whether there is any acceptance or otherwise by SCER of these recommendations, is of major concern.¹²⁴

The ownership/membership split between Government (60%) and Industry Members (40%) also remains contentious and was cited as an issue by almost every industry submission to the Governance Review. In the Governance Review Discussion Paper, AEMO stated that:

Some parties were of the view that industry membership potentially afford the energy sector a greater degree of accountability to those who use and pay for AEMO's services, and the potential for improved responsiveness to the needs of market participants, enhanced transparency of operations and greater independence from any particular market participant or government stakeholder. Alternatively, other parties, perceived that government membership of AEMO could

¹²³ See e.g. Chris Deague, Senior Market Specialist at GDF Suez, 'Letter on the AEMO Governance Review', 13 September 2013; Ian Stirling, Chief Executive Officer, ElectraNet, 'Letter on the AEMO Governance Review', 13 September 2013; Jamie Lowe, Manager of Market Regulation, Alinta Energy, 'Letter on the AEMO Governance Review', 13 September 2013.

¹²⁴ Peter McIntyre, Managing Director, Transgrid, 'Letter on the AEMO Governance Review', 13 September 2013, 1.

provide greater protection and improved accountability to end users who are the ultimate beneficiary of its services, and greater independence from any particular market participant.¹²⁵

Unfortunately, while the former view is clearly apparent in the industry submissions, the source of the latter view is not transparent. However, given the apparent resistance by the Industry Members to alter the board skills required for directors to include expertise in end-use consumer matters, it is arguable that ongoing Government involvement in AEMO is critical in terms of representing the interests of end-users.

A number of formal submissions also advocated that the composition of the Board should be changed to reflect the Membership of AEMO, i.e. that Industry Members should be able appoint 40% of the Board (i.e. 4 of the Board Directors).¹²⁶ They have further argued that the MCE Selection Panel arrangements should be retained (though the skills required of Board Directors and the standard of independence applying to them should be altered) but only apply to the Directors representing the 60% Government Members.¹²⁷ Alternative proposals also included having the Board or a Board committee propose nominations directly to the Members in order to better reflect the membership make-up of AEMO¹²⁸ and involving an Industry Member representative in the first stage of the nominee selection process.¹²⁹

As part of its Governance Review, AEMO proposed that the Board also consider amending the Board skills to incorporate expertise in end-use consumer matters. Not surprisingly, given the make-up of the organisations that submitted formal submissions to the Review, this recommendation was not well received with a number of submissions stating that this would be more appropriate for the AER and the ECA. GDF Suez in their submission noted that AEMO's core objective to advance the NEO should adequately address consumer interests, without adjusting the skills or experience of the AEMO Board Directors.¹³⁰

Further areas of consideration were whether the terms of Board appointments should be extended, whether Directors should be able to have a greater number of terms and whether the AEMO definition of 'Independent Director' in its Constitution ought to be aligned with that used by the ASX in its Corporate Governance Guidelines.

¹²⁵ Australian Energy Market Operator, *AEMO Governance Review* (AEMO, 2013) 8-9.

¹²⁶ See e.g. Ian Stirling, above n 127, 1.

¹²⁷ Ibid 3-4.

¹²⁸ Chris Deague, above n 127, 2.

¹²⁹ Phil Moody, Group Manager of Energy Markets Regulatory Development, Origin Energy, 'Letter on the AEMO Governance Review', 13 September 2013, 2.

¹³⁰ Chris Deague, above n 127, 2.

The outcome of the AEMO Governance Review was that decisions about whether it was appropriate to amend its Constitution were deferred until after this review. It was, however, noted that ‘a range of views [had been] submitted in respect of the existing governance arrangements, some of which were focused on issues outside of AEMO’s remit to consider, including structural changes to its ownership.’¹³¹

Comparison with other international functional equivalents

AEMO’s structure, with its mix of government and industry participation, is unique amongst international market or system operators. In other jurisdictions, the operators are either:

- a 100% state owned entity, such as Transpower in New Zealand;
- a not for profit corporate entity established under an Act of parliament governed by an independent Board of Directors whose Chair and Directors are appointed by the Government, such as the California Independent System Operator Corporation (CAISO) in California, Independent Electricity System Operator (IESO) in Ontario;
- a publicly listed company, such as National Grid (NGET) in the United Kingdom; or
- an industry owned, limited liability company registered in Delaware, such as PJM Interconnection, LLC.

A comparison of their legislative or corporate mandate, ownership structure, corporate values, governance structure and financing is contained in Appendix 6.

Potential reforms

1. *That in future, reviews of the corporate governance of AEMO should be conducted by an external panel, with a broad range of stakeholders consulted and all of the submissions publicly available.*
2. *That the Government retain an interest in the operation of AEMO given the apparent reticence of the Industry Members of AEMO to consider expertise in end-consumer matters as a necessary skill for the AEMO Board Directors.*
3. *That either experience in or knowledge of end-consumer matters should be a necessary requirement for AEMO Board Directors.*
4. *That in line with its international functional equivalents, AEMO consider adopting a more consumer-centric approach.*

¹³¹ David Swift, *AEMO Governance Review – Next Steps* (AEMO, 2014).

2.5 ENERGY CONSUMERS AUSTRALIA

Traditionally, consumer engagement approaches in the electricity sector seek to inform consumers and collect feedback. This generally occurs through consultation methods such as fact sheets, websites, surveys, focus groups and public meetings. There have been concerns raised over the failure of these methods to bring consumer concerns into major policy discussion, and that they do not encourage consumers to deliberate key issues.¹³²

Energy Consumers Australia Ltd (ECA) was established on 30 January 2015 for the purpose of ‘increasing consumer advocacy on national energy market matters of strategic importance and material consequence for energy consumers, in particular household and small business consumers.’¹³³ ECA is structured as a company limited by guarantee under the *Corporations Act 2001*. Under cl 5 of the Constitution of Energy Consumers Australia Ltd, the company has a single Member, ‘the Minister of the Crown in right of the State of South Australia for the time being administering the National Energy Laws as applied by South Australia.’¹³⁴

Objects and activities of the ECA

The object of the company is enshrined in cl 4.1:

(a) To promote the long term interests of Consumers of Energy with respect to the price, quality, safety, reliability and security of supply of Energy services by providing and enabling strong, coordinated, collegiate evidence based consumer advocacy on National Energy Market matters of strategic importance or material consequence for Energy Consumers, in particular for Residential Customers and Small Business Customers.

The activities of the company are listed in cl 4.2:

Without limiting the effect of article 4.3, the Company will seek to achieve its objects through:

- (a) Effectively and objectively participating in National Energy Market issues and influencing regulatory activities and Energy market reform to benefit Consumers;
- (b) Frequently engaging and communicating with Consumers and consumer advocates to discuss, support, liaise, collaborate, educate, identify and to receive and provide updates on the National Energy Market and its policies, reforms, issues and general news;

¹³² Productivity Commission, above n 16, 10-11.

¹³³ Energy Consumers Australia, *Energy Consumers Australia* (2015) <<http://www.energyconsumersaustralia.com.au/>>.

¹³⁴ Energy Consumers Australia, *Constitution of Energy Consumers Australia Ltd* (2015) cl 5.2.

- (c) Building national and jurisdictional expertise and capacity through research, knowledge development and consultation to advance the interests of Australian Energy Consumers, in particular residential and small business Energy Consumers;
- (d) Undertaking robust research to build knowledge, engage and influence policy development and educate Consumers in the Energy markets;
- (e) When notified by the Member, after the Effective Date, of the Company's capacity to do so – funding and managing grants to build knowledge and sectoral capacity supporting policy development and consumer education in the National Energy Market;
- (f) Creating and maintaining effective working relationships with key stakeholders including but not limited to: Consumers and consumer advocates, the AER, jurisdictional regulators, Energy market participants, the AEMC, the AEMO, governments and Energy Ombudsmen; and
- (g) Developing an understanding of the distinct market differences between jurisdictions within the National Energy Market and applying these considerations when engaging, responding or initiating work on behalf of Energy Consumers' interests, and with jurisdictional bodies where appropriate;
- (h) Frequently and collaboratively engaging and communicating with representatives from the Energy industry on issues in the interest of Consumers to help inform the Company when performing the activities in this article 4.2; and
- (i) Doing all things as may be incidental or ancillary to achieving the Objects and performing the activities in this article 4.2.

The ECA has also established a number of guiding principles to help it carry out its activities.¹³⁵

Analysis

These objects and activities appear admirable, especially as they are designed to supplement rather than supplant the existing forms of consumer engagement and consultation in the other key market institutions. While it is clearly too soon to evaluate the success of this initiative, a study of the ECA's functional equivalents in other jurisdictions may still prove valuable in providing some examples of innovative practice. To this end, we analysed the Citizens' Energy Forum and the 2020 Vision for Europe's energy customers in the European Union, the consumer role of the Ontario Energy Board in Ontario, Canada, and the Utilities Consumer Advocate in Alberta, Canada.

¹³⁵ Energy Consumers Australia, *About us* (2015) <<http://www.energyconsumersaustralia.com.au/about-us>>.

Citizens' Energy Forum (also known as the 'London Forum') (the European Union)

The Citizen's Energy Forum was established by the European Commission in 2007 to help facilitate the establishment of 'competitive, energy-efficient and fair retail markets for consumers.'¹³⁶ The Forum is chaired by the Commission, with the Commissioner for Consumer Policy, the Director of the Directorate-General for Energy (DG Energy) and the Director for the Directorate-General for Health and Consumers (DG SANCO) all taking active roles. The Forum, held annually in London with the support of Ofgem (the Office of Gas and Electricity Markets in the United Kingdom), attracts a wide range of participants from national and European consumer advocacy organisations, national regulators, representatives of Member States, and industry representatives. It is actively supported by the Council of European Energy Regulators.

The Forum tackles a wide range of consumer related topics, which in 2015 included 'energy consumer empowerment, the roll-out of smart meters, self-generation, consumer vulnerability and energy poverty.'¹³⁷ Working Groups are established to follow-up on the issues raised in the Forum. The Forum has a number of benefits. First, it keeps consumer issues on the agenda across the sector. Secondly, by bringing all of the key stakeholders together, it minimises the ability of stakeholders to pass the buck to other organisations that may otherwise not be engaged in the Forum. Thirdly, it encourages the sharing of ideas and best practices across Europe. Finally, as the agenda, presentations, reports, and conclusions of the Forum, as well as associated Working Group documents are publicly available, it is transparent and participants can be held accountable.

2020 Vision for Europe's energy customers

Another consumer-orientated initiative that seems to be effective is the joint Council of European Energy Regulators (CEER) and The European Consumer Organisation (BEUC)'s statement of 'A 2020 vision for Europe's energy customers.' This vision was designed with 'input by 37 consumer bodies from 20 countries, in addition to representatives from the energy industry, the European Commission and the European Parliament.'¹³⁸ The Vision is focused on 'four principles governing the relationship between the energy sector and its variety of customers: reliability, affordability, simplicity, protection and empowerment.'

¹³⁶ European Commission, *Citizens' Energy Forum in London* (2015), <<http://ec.europa.eu/energy/en/events/citizens-energy-forum-london>>.

¹³⁷ Ibid.

¹³⁸ Council of European Energy Regulators, 'A 2020 Vision for Europe's energy customers' (Discussion Paper C12-SC-02-04, CEER, 13 November 2012) 4.

Customers for this purpose are defined as ‘the European retail customers of electricity, gas and district heating, as well as those that both generate and consume electricity. Customers can be a household customer or a small enterprise’¹³⁹ but do not include large energy customers. 2020 was chosen as the date for the Vision due to a series of significant changes occurring in the period immediately prior to 2020, such as:

- the implementation of the European 20-20-20 goals for climate change, renewables and energy efficiency set by European heads of state, where ‘empowering consumers and achieving the highest level of safety and security’ is one of five priorities;
- the implementation of the common internal energy market;¹⁴⁰
- ‘the partial or complete implementation of smart metering systems for electricity should be fulfilled by 2020 (as required by European energy legislation and provided a cost benefit analysis does not show negative results);’¹⁴¹ and
- the need for massive infrastructure investment in Europe both in order to meet the 20-20-20 goals and to support the implementation of the common internal energy market, but also to replace aging transmission, distribution and generation assets.

In the creation of the Vision, CEER committed to engage ‘more actively in securing the views of customers and their representative bodies on what customers want and expect so that they can have trust in a market that will meet their needs.’¹⁴² They further support capacity building consumer organisations around energy issues, while conversely creating specific actions for energy regulators, consumer organisations, and energy suppliers and retail service providers in terms of their engagement with customers. The Vision has been supported by a number of other European umbrella groups such as the European Federation of Local Energy Companies (CEDEC), the European Distribution System Operators’ Association for Smart Grids (EDSO for smart grids), the European Network of Transmission System Operators for Europe (ENTSO-E), the European Smart Metering Industry Group (ESMIG), Eurelectric, Eurogas, the European Group of Distribution Companies and Organizations (GEODE), the National Energy Ombudsmen

¹³⁹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020 A Strategy for competitive, sustainable and secure energy*, COM(2010) 639 final. Where small enterprises are enterprises with fewer than 50 occupied persons and annual turnover or balance sheet not exceeding EUR 10 million, in accordance with *Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC* [2009] OJ L 211/55, art 3 para 3 and *Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC* [2009] OJ L 211/94.

¹⁴⁰ Note that this was meant to be completed by 2014, but remains an ongoing project.

¹⁴¹ Council of European Energy Regulators, above n 143.

¹⁴² Ibid.

Network (NEON) and the Smart Energy Demand Coalition (SEDC). CEER currently has rolling three-year action plans to implement the Vision, with regular reporting on its implementation at the Citizen's Energy Forum.



Ontario Energy Board (Ontario, Canada)

The Ontario Energy Board, not only acts as the entity responsible for rule making, market development, and acts as the market regulator; it also fulfils important compliance and consumer protection roles. Its consumer protection role is specified in Ch 8 of the *Energy Consumer Protection Act 2010* (Ontario). However, its role is more restricted than the proposed role of the ECA or the function carried out by the Citizen's Energy Forum in Europe, as it limited to protecting consumers from 'energy retailers who commit unfair business practices in the sale of energy contracts to electricity and natural gas consumers.'¹⁴³ That said, it does conduct audits of energy retailers to ensure compliance with the wide-ranging enforceable provisions of the *Energy Consumer Protection Act*, with a number of successful investigations leading to fines, revocation or suspension of licences and voluntary assurances of compliance.

Office of the Utilities Consumer Advocate (UCA) (Alberta, Canada)

The entity that seems most similar to ECA is the UCA. The UCA was established in October 2003 to represent the interests of electricity and natural gas consumers (residential, small business, rural) in Alberta. The UCA has 'the following core program areas: Regulatory, Mediation, Advocacy Services, and Consumer Awareness.'¹⁴⁴ Through these programs, the UCA works to ensure that consumers have the information they require to make informed choices in Alberta's deregulated markets through:

¹⁴³ Ontario Ministry of Energy, *Consumer Protection* (2015) <<http://www.energy.gov.on.ca/en/consumer-protection/>>.

¹⁴⁴ Utilities Consumer Advocate, *Annual Report 2013-14* (UCA, 2014) 6.

- consumer education and transparent disclosure;
- representation of consumers by mediating in conflicts with retail service providers; and
- consumer advocacy in regulatory proceedings.

The UCA is also responsible for administering the ‘budget of the Transmission Facilities Cost Monitoring Committee, a committee established by the Minister of Energy pursuant to Ministerial Order 64/2010.’¹⁴⁵

The responsibilities of the UCA are set out in Sch 13.1 of the *Government Organization Act (2000)* and in the Utilities Consumer Advocate Regulation as follows:

Schedule 13.1

Responsibilities

2 The Office of the Utilities Consumer Advocate has the following responsibilities:

- (a) to represent the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions may affect the interests of those consumers;
- (b) to disseminate independent and impartial information about the regulatory process relating to electricity and natural gas, including an analysis of the impact of decisions of the Alberta Utilities Commission, other bodies and the courts relating to electricity and natural gas;
- (c) to inform and educate consumers about electricity and natural gas issues;
- (d) to carry out such other responsibilities relating to electricity and natural gas as the responsible Minister determines.

Utilities Consumer Advocate Regulation

Additional responsibilities of the Office of the Utilities Consumer Advocate

2 In addition to the responsibilities set out in the Schedule, the Office of the Utilities Consumer Advocate has the following responsibilities:

- (a) to develop and undertake activities that the Utilities Consumer Advocate considers appropriate for the purposes of
 - (i) preventing the disconnection of electricity or natural gas provided by a retailer or provider to a consumer, or
 - (ii) facilitating the reconnection of electricity or natural gas provided by a retailer or provider to a consumer;

¹⁴⁵ Ibid.

(b) to assist in the resolution of any consumer issue, complaint or dispute between a consumer and a distributor, provider or retailer relating to the provision of electricity or natural gas as the Utilities Consumer Advocate considers appropriate.

The UCA also provides some guiding principles to inform its work.¹⁴⁶

The UCA in Alberta is currently Mr Chris Hunt, who was appointed on 16 March 2015. Mr Hunt has extensive experience in stakeholder engagement, policy development and regulatory processes and was prior to this appointment the Director of Public Engagement in the Market Diversification Branch of the Alberta Department of Energy.¹⁴⁷ His work is assisted by an annual budget in 2013/2014 of Canadian \$9,135,000.00.¹⁴⁸ The work of the UCA is also guided by the UCA Advisory Board, and the UCA must file mandatory public annual reports on their activities with the Minister of Service, Alberta.

In 2013/2014, the UCA:

- initiated participation in 60 Alberta Utilities Commission (AUC) proceedings and intervened in 115 issues;
- received favourable responses from the AUC on 58.7% of the issues presented;
- total cost disallowances from regulatory proceedings for the year were \$48 million;
- assisted 31, 869 Albertans looking for information or assistance related to their utility service, including providing mediation services to 3517 Albertans; and
- facilitated the reconnection of 112 customers through the AUC's disconnection and reconnection project.¹⁴⁹

Conclusion

Genuine engagement and consultation requires concerted effort on the part of all of the market institutions and stakeholders. It has often been put in the 'too hard basket,' with lack of agency, lack of time and disinterest sometimes cited as reasons preventing consumers from engaging with the NEM. Previous innovative consumer engagement strategies such as the 54-member Citizen Jury used by the NSW Government's Public Accounts Committee Inquiry into the economics of energy generation in 2012 have highlighted that 'citizens were concerned about

¹⁴⁶ Utilities Consumer Advocate, *Who We Are* (2015) <<http://www.ucahelps.alberta.ca/about.aspx>>

¹⁴⁷ Utilities Consumer Advocate, *Who We Are* (2015) <<http://www.ucahelps.alberta.ca/about.aspx>>.

¹⁴⁸ Utilities Consumer Advocate, above n 149, 14.

¹⁴⁹ Ibid 7-11.

complex issues and interested in participating in governance.¹⁵⁰ This Citizen Jury was asked to ‘agree on an order of preference, barriers to adoption (including financial aspects and public perception issues) and recommended course of action with regard to alternative forms of energy generation in NSW.’¹⁵¹ Novel forms of engagement such as this are valuable, with the work of the juries being extensively relied upon by the Public Accounts Committee in its Final Report.

This Report has highlighted that in fact one of the most significant challenges to consumer engagement and consultation is both a lack of willingness on the part of market institutions to engage with end-consumers in a meaningful way, coupled with a complete lack of transparency and effective accountability for entities such as the COAG Energy Council. It is difficult to see how the NEO, with its reference to ‘the long-term interests of consumers’, could possibly be met without actually engaging those same consumers. The consumers engaged must not merely be the large energy users or the most vulnerable, but must reflect the cross-section of interests in Australian society.

The industry seems to rely on the argument that the best possible protection for consumers is an open, dynamic and competitive market. However, this argument relies on the market being perfectly competitive, and free of market failures and the corresponding market interventions used to tackle them. This simply does not reflect the reality of the National Electricity Market. While this should arguably improve with the advent of the ECA and the recent advances made by the AER, this will not resolve the underlying resistance on the part of some market institutions or resolve the transparency and accountability issues.

Potential reforms

1. *That Energy Consumers Australia be supported in their activities and encouraged to consider whether an equivalent of the Citizen’s Energy Forum might be appropriate in the context of encouraging greater concern for consume interests across the range of market institutions and stakeholders in the NEM. If such a Forum were to be established, it may also consider whether a 2030 Vision for Australia’s energy customers might also be a positive development.*

¹⁵⁰ Legislative Assembly Public Accounts Committee, New South Wales, *The Economics of Energy Generation*, Report No 6/55 (2012).

¹⁵¹ Sydney Citizens’ Policy Jury, Submission to Legislative Assembly Public Accounts Committee, New South Wales, *Energy Economics and Security in NSW*, August 2012.

3. MANAGING THE CHALLENGES OF FEDERALISM

The key structural shift in the regulation of energy in Australia since the late 1990s has been increasing national consistency and centralised federal control of regulation. However, under the Constitution, the Commonwealth government has no basis for policymaking in relation to electricity markets without either the referral of that power from the states or a Commonwealth takeover under the Corporations power. In many senses, the states have recognised the importance of common market regulation and conceded significant portions of their regulatory competency to Federal regulators. However, a number of aspects of the market continue to be regulated by state and territory governments. In practice, this has led to widely divergent market conditions in various states and territories, with differing implications across generation, networks and retail for energy consumers.

This section will consider the implications of different aspects of the complexities of Australian federalism on the regulation of the NEM. In particular, this section will discuss:

- the impact of different ownership structures between the various states and territories upon the regulation of the NEM; and
- the degree to which regulatory power has been derogated to state and territory governments in some instances.

Ownership Structures

The ownership arrangements in electricity generation, transmission, distribution and retail in Australia vary markedly between the states and territories.¹⁵² Australian governments currently own about 75 per cent of electricity network assets in the NEM.¹⁵³ Before the 1990s, all state governments owned and operated all four components of the retail electricity market. However, as Table 1 indicates, there has been a gradual shift towards privatisation.

¹⁵² Australian Energy Regulator, *State of the energy market 2014*, above n 3.

¹⁵³ Productivity Commission, above n 16, 273.

TABLE 1 - OWNERSHIP STRUCTURES IN THE NEM¹⁵⁴

	Generation	Transmission	Distribution	Retail
SA	Private	Private	Private	Private
Vic	Private	Private	Private	Private
Qld	Public/Private	Public	Public	Public/Private
NSW ¹⁵⁵	Public/Private	Public	Public	Private
Tas	Public/Private	Public	Public	Public
ACT	Public/Private	Public/Private	Public/Private	Public/Private

Although typically these public ownership arrangements do not equate to complete day-to-day control of the utilities, governments exert shareholder control, and may effectively influence the behaviour of their utility companies.¹⁵⁶ In addition to the specific influence which may be exerted by a state or territory government through their shareholder rights, State Owned Corporations (SOCs) are typically required under legislation to explicitly include multiple objectives in their decision-making.

By way of example, s 8 of the *State Owned Corporations Act 1989* (NSW) mandates the following:

8 Principal objectives of company SOCs

(1) The principal objectives of every company SOC are:

(a) to be a successful business and, to this end:

(i) to operate at least as efficiently as any comparable businesses, and

(ii) to maximise the net worth of the State's investment in the SOC, and

(b) to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates, and

(c) where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the *Protection of the Environment Administration Act 1991*, and

¹⁵⁴ ABC News, 'Fact check: Does privatisation increase electricity bills?', *ABC News* (online), 30 March 2015 <<http://www.abc.net.au/news/2015-03-25/fact-check-does-privatisation-increase-electricity-prices3f/6329316>>.

¹⁵⁵ There are currently plans to partly privatise transmission and distribution in NSW, involving the leasing of 49% of TransGrid, AusGrid and Endeavour Energy, while the government will retain 51% ownership. See New South Wales Government, *Rebuilding NSW: Update on Electricity Networks* (2014) <<http://www.nsw.gov.au/sites/default/files/miscellaneous/rebuilding-nsw-update-electricity-networks.pdf>>.

¹⁵⁶ AMP Capital, Submission to Australian Productivity Commission, *The Capital Efficiency of Australian Electricity Distributors – Results of a Benchmarking Study*, November 2012, 4.

- (d) to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates.
- (2) Each of the principal objectives of a company SOC is of equal importance.

In other jurisdictions, the objectives required of SOCs are more susceptible to discretionary political control by the serving government. For example, in Tasmania under the *Government Business Enterprises Act 1995* (Tas), the principal objectives of Government Business Enterprises are defined as follows:

7. Principal objectives of Government Business Enterprise

- (1) The principal objectives of a Government Business Enterprise are –
 - (a) to perform its functions and exercise its powers so as to be a successful business by –
 - (i) operating in accordance with sound commercial practice and as efficiently as possible; and
 - (ii) achieving a sustainable commercial rate of return that maximises value for the State in accordance with its corporate plan and having regard to the economic and social objectives of the State; and
 - (b) to perform on behalf of the State its community service obligations in an efficient and effective manner; and
 - (c) to perform any other objectives specified in the Portfolio Act.
- (2) On the request of the Portfolio Minister, the Treasurer may, by notice published in the Gazette, specify the economic and social objectives of the State relevant to the Government Business Enterprise specified in the notice.
- (3) On the request of the Portfolio Minister, the Treasurer may, by order, exempt the Government Business Enterprise specified in the order from the application of subsection (1)(a)(ii).

There are significant financial benefits to state governments from asset ownership, including the revenue from the ownership *per se*, that the regular income from energy assets favourably affects the considerations of the state by credit rating agencies, and that dividend payments are not subject to national income tax. This analysis explains one of the main reasons why state governments have been slow to privatise their utilities.¹⁵⁷

Some submissions to the Productivity Commission review of the NEM suggested that the financial implications of asset ownership for state governments created incentives for state-owned utilities to over-invest in their networks.¹⁵⁸

¹⁵⁷ Ibid 6.

¹⁵⁸ Ibid.

This ownership structure has a number of implications for the governance of the NEM. First, state and territory governments exert significant regulatory control over the governance framework of the NEM through the COAG Energy Council. For states and territories that operate SOCs, virtually every decision has financial implications for the capacity of the government to raise revenue. This clear conflict of interest in many senses explains the parochial approach taken by some state and territory governments to the regulatory environment through COAG.

Secondly, the current regulatory design presumes that market entities will respond to incentives to cost-minimise through regulatory compliance; and that investment will reward the most efficient entities within the market. There are a number of reasons why SOCs, and the financial institutions that invest in them, respond less predictably to these incentives, including the additional legislative objectives that may compete with the incentive to reduce cost, finance being more readily available in comparison to private businesses and that insolvency is effectively impossible.

Thirdly, the economic performance of state-owned utilities is a significant point of contention in state and territory political debates. Retail electricity consumers place significant pressure upon their state and territory political leaders in relation to the management of the SOCs – including in relation to the cost of retail electricity, regional development and access, and environmental concerns. In some senses, this explains the desire of the states and territories to retain substantial control over some elements of the regulation of the NEM.

State and Territory Regulatory Competence and Derogations

Undoubtedly, the introduction of the NEM reflected a significant regulatory shift to empower a consistent national regulation. However, given the strong parochial incentives for local regulatory control, a number of significant areas of regulatory competence in relation to the NEM were preserved within state and territory legislatures. A number of areas of significant areas of concern for retail consumers within the NEM remain with the state and territory governments, including:

- feed-in tariffs;
- the application of National Energy Customer Framework;
- consumer protections;
- retail price regulation;

- energy efficiency standards; and
- environmental regulation.

Additionally, Annexure 2 to the AEMA, as amended in December 2013, indicates that the following components of distribution and retail functions remain allocated to the state and territory governments notwithstanding their referral of power to the Commonwealth in other areas:

- distributor technical/safety business authorisation – licensing and authorisation schemes that require demonstration of technical capability;
- small customer dispute resolution – obligation for distributors and retailers to have internal dispute resolution schemes and participate in independent dispute resolution (Ombudsman) schemes;
- load shedding and curtailment – customer supply reduction sequence to maintain system security;
- service reliability standards – standards to ensure network security and reliability;
- metering – policies on the type of meters required for specific customer classes, accredited service provider arrangements, and load profile arrangements; and
- distribution and retail service areas – specification of geographical areas in which responsibilities/obligations apply.

On these substantive regulatory policy questions within the competency of state and territory governance, policies vary substantially in terms of the extent of regulation, the regulatory mechanisms, the content of the policies, and the effectiveness of enforcement.¹⁵⁹ This has a number of implications for consumers.

First, a lack of consistent regulation regarding market participation, including in relation to retail price regulation, consumer protections, tariffs and environmental standards, has a detrimental effect on the productivity and efficiency of network services between the states and territories.

Secondly, the complexity of divergent regulatory environments makes it more difficult for consumers to engage meaningfully with network institutions.

¹⁵⁹ Michael N Danielson, 'Thinking Politically about American Federalism' in Clinton J Andrews (ed), *Regulating Regional Power Systems* (Quorum, 1995) 53, 54.

Thirdly, in some senses, inconsistent market regulation between jurisdictions also undermines the capacity for NEM market entities to effectively undertake their mandate. In an environment where there is increasing demand side management, energy efficiency measures and at least in Victoria, the take-up of smart metering, this issue is likely to have a greater impact on the market regulation functions of the national institutions.

4. CONSOLIDATED POTENTIAL REFORMS

1. *Noting that:*

- d) the separation of the rule making and investigatory and enforcement functions between the AER and AEMC is unique among international arrangements for energy markets;*
- e) internationally, many jurisdictions have consolidated their institutional arrangements over recent years; and*
- f) internationally, several jurisdictions have developed new or amended regulatory objectives appropriate to transforming energy markets:*

That similar to the approaches in other international jurisdictions, the enforcement, investigatory and enforcement functions of the AER and AEMC should be consolidated into a single agency.

- 2. That similar to some other COAG Councils, the consensus-based approach to decision-making be reconsidered for some decisions of the COAG Energy Council, with other voting models such as consensus minus one, a two-thirds majority or a simple majority being possible replacements.*
- 3. That given the importance of the role played by the COAG Energy Council in setting the future direction of national energy policy, in future, changes to its scope and work plan should be subject to consultation stakeholders, including consumers and industry.*
- 4. That the COAG Energy Council finalise their Terms of Reference as a matter of urgency. This would provide greater transparency in respect of their role and would enable them to be held accountable for their actions.*
- 5. That in the interim period prior to the conclusion of negotiations on the Terms of Reference, that the Council's draft Terms of Reference be made publicly available to enable stakeholders, including consumers, to assess how their role has changed since the shift from SCER.*
- 6. That AEMA be amended to reflect recent market developments and to ensure consistency with its Objectives.*
- 7. That similar to the approach of other COAG Councils, the identity of the SCO, any delegations made to them, and their governance structure be made public so that these delegations are transparent and appropriate accountability mechanisms can be put in place.*
- 8. That the forward agendas and work plans of the COAG Energy Council be made publicly available for reasons of transparency and accountability.*

9. *That the COAG Energy Council website be updated to provide up to date and meaningful information to the public, especially on the legislation that the Council is currently responsible for and its governance.*
10. *That COAG take a more active role in ensuring that the COAG Energy Council is transparent, accountable and meeting their Terms of Reference.*
11. *That, in the event that any element of the AEMC and the AER are to be merged, the capacity of the regulatory entity to initiate the Rule-change process ought to be revisited.*
12. *That, for the purposes of the fast-track process, reviews by additional agencies and entities ought to satisfy the consultation requirements where they include thorough stakeholder engagement.*
13. *That the AEMC should institute mechanisms to ensure the engagement of consumers in the consultation stages of the Rule-change process and in any review of the Rule-change process.*
14. *That the AEMC ought to publish, in addition to applications for Rule-changes, sufficient information to enable consumers to participate meaningfully in the process.*
15. *That the AEMC should better prioritise the staffing of Rule-changes and policy reviews to ensure the efficiency of decision-making processes.*
16. *That, in considering reforms to the relationship of the AER and the ACCC, priority should be given to limiting the complexity of the regulatory environment, ensuring the independence of the regulator, and increasing the capacity of the regulator to safeguard the needs of consumers.*
17. *That the AER Consumer Reference Group and Consumer Challenge Panel should, in their composition, reflect the diversity of experiences of consumers in the market – including adequate representation of vulnerable consumers and those with a focus on new technologies.*
18. *That in future, reviews of the corporate governance of AEMO should be conducted by an external panel, with a broad range of stakeholders consulted and all of the submissions publicly available.*
19. *That the Government retain an interest in the operation of AEMO given the apparent reticence of the Industry Members of AEMO to consider expertise in end-consumer matters as a necessary skill for the AEMO Board Directors.*
20. *That either experience in or knowledge of end-consumer matters should be a necessary requirement for AEMO Board Directors.*
21. *That in line with its international functional equivalents, AEMO consider adopting a more consumer-centric approach.*
22. *That Energy Consumers Australia be supported in their activities and encouraged to consider whether an equivalent of the Citizen's Energy Forum might be appropriate in the*

context of encouraging greater concern for consumer interests across the range of market institutions and stakeholders in the NEM. If such a Forum were to be established, it may also consider whether a 2030 Vision for Australia's energy customers might also be a positive development.

- 23. That a consolidated 'One Stop Shop' of Australian energy market materials be created in the form of an up to date and searchable database on a website such as www.energy.gov.au. This will make it easier for consumers to access information and will increase transparency.*

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APPENDICES

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APPENDIX 1: COMPARISON OF INTERNATIONAL REGULATORY SYSTEM OBJECTIVES

Jurisdiction	Objective
Australia	<p><i>National Electricity Objective</i> <i>National Electricity (South Australia) Act 1996, Sch 1 s 7.</i></p> <p>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-</p> <p>(a) price, quality, safety, reliability and security of supply of electricity; and</p> <p>(b) the reliability, safety and security of the national electricity system.</p>
Chile	<p><u>Chile National Energy Strategy 2012-2030</u></p> <p>1 INTRODUCTION</p> <p>As our country grows, it needs more energy, so there is a natural linkage between the economy and energy. Therefore, the challenge for Chile today is to have sufficient and competitive energy resources to support this development. Energy is an essential material for society. Its availability and supply directly affect social and economic growth and consequently the reduction of poverty. The lack of access to reliable energy sources and networks constitutes a dangerous limitation to sustained social progress, to economic growth and to the wellbeing of the population.</p> <p>This being the case, when it comes to forecasting growth, Chile must be clear that it can sustain it with <i>clean, safe, economical</i> energy.</p> <p><u>General Law of Electric Utilities (DFL-4)</u></p>
Estonia	<p><i>Electricity Market Act 2007</i></p> <p><u>National Development Plan of the Energy Sector Until 2020</u></p> <p>The [Electricity Market] Act prescribes the principles for the operation of the electricity market based on the need to ensure an effective supply of electricity at reasonable prices and meeting environmental requirements and the needs of customers, and balanced, environmentally clean and long-term use of energy sources.</p>
EU	<p><i>Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 211/55</i></p> <p>(1) The internal market in electricity, which has been progressively implemented throughout the Community since 1999, aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.</p>

Jurisdiction	Objective
Finland	<p><u>Electricity Market Act 1995</u></p> <p>1 OBJECTIVES The purpose of this Act is to ensure preconditions for an efficiently functioning electricity market so as to secure the sufficient supply of high-standard electricity at reasonable prices. The primary means to do this is to secure a sound and well-functioning economic competition in electricity generation and sales and reasonable and equitable service principles in the operation of electricity systems.</p>
France	<p><u>New Organisation of the Electricity Market, Loi No 2010-1488</u></p>
Hungary	<p><u>Hungarian Energy Strategy 2030</u></p> <p>2 EXECUTIVE SUMMARY The energy policy of the future should be developed on the basis of the answers to the most important domestic and global challenges and the energy policy efforts of the EU, also taking into consideration our specific geopolitical features. It should focus on achieving both a rationalised energy demand and an energy supply (infrastructure and service) encouraging the growth of the Hungarian economy, ensuring the accessibility of the services and prices affordable to a large group of consumers.</p>
Ireland	<p><u>Electricity Regulation Act 1999</u>; <u>Electricity Regulation (Amendment) (Single Electricity Market) Act 2007</u></p> <p>Principal objective and functions of Minister, the Commission and SEM Committee in carrying out their functions in relation to the Single Electricity Market</p> <p>9BC(1) The principal objective of—</p> <ul style="list-style-type: none"> (a) the Minister in carrying out his or her electricity functions in relation to matters which the Minister considers materially affect, or are likely materially to affect, the Single Electricity Market, (b) the Commission in giving effect to any decision of the SEM Committee, and (c) the SEM Committee in carrying out its functions under section 8A(4), <p>is to protect the interests of consumers of electricity in the State and Northern Ireland supplied by authorised persons, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the sale or purchase of electricity through the Single Electricity Market.</p>
New Zealand	<p><u>Electricity Act 1992</u></p> <p>1A PURPOSES The purposes of this Act are—</p> <ul style="list-style-type: none"> (a) to provide for the regulation, supply, and use of electricity in New Zealand; and (b) [Repealed] (c) to protect the health and safety of members of the public in connection with the supply and use of electricity in New Zealand; and (d) to promote the prevention of damage to property in connection with the supply and use of electricity in New Zealand; and (da) to provide for the regulation of fittings and electrical appliances that are, or may be, exported pursuant to an international trade instrument; and (d) to provide for the regulation of electrical workers.

Jurisdiction	Objective
NordReg	<p>All Nordic electricity customers will enjoy free choice of supplier, efficient and competitive prices and reliable supply through the internal Nordic and European electricity market.</p> <p>Interpretation of strategic priorities and underlying objectives</p> <p>1.A truly common Nordic retail market with free choice of supplier</p> <ul style="list-style-type: none"> A. To develop a common balance management and settlement system B. To ensure easy and harmonised switching procedures in the whole Nordic market C. To create harmonised criteria for unbundling to ensure neutrality <p>2. A well-functioning Nordic wholesale market with competitive prices</p> <ul style="list-style-type: none"> A. To promote competitive market structures B. To ensure smooth interaction with other European regions C. To ensure a well functioning power exchange D. To ensure adequate level of transparency in the market <p>3. Reliable supply</p> <ul style="list-style-type: none"> A. To promote market-based or legal environment for security of supply B. To ensure harmonised procedures for handling extreme situations <p>4. Efficient regulation of TSO</p> <ul style="list-style-type: none"> A. To regulate and monitor the TSOs with focus on efficiency and Nordic harmonisation B. To promote adequate transmission capacity and efficient market-based congestion management methods. <p>In addition to the above, the Strategy for a harmonised Nordic retail market 2015-2018 has also identified the following additional objectives for a harmonised Nordic market:</p> <p>NordREG's work is to ensure that the regulations that define roles and responsibilities for different market players is sufficiently harmonised. The processes between them need to be adequately harmonised in the Nordic countries to make it relatively easy for stakeholders to start operating in all Nordic countries. The framework for customer empowerment should also be sufficient so that customers, with confidence, can be active and benefit from the competitive market. The goals for further development of the Nordic retail market are:</p> <p>The Nordic retail market should be the most efficient retail market in Europe. Characterized by attractive offers to customers, easy business operation, efficient information exchange and efficient process between market actors and have industry in the frontline for development of energy services for active customers</p>

Jurisdiction	Objective
	<p>The Nordic retail market should have the highest customer service level. It should be easy to be customer. Relevant information should be easy accessible and there should be efficient and processes such as supplier switch and customer move should be customer friendly.</p> <p>Further, the supplier and energy service provider should be easy accessible and customer complaints should be handled professionally in a timely manner.</p> <p>All Nordic electricity customers will benefit from a free choice of suppliers and energy service companies along with competitive prices, reliable supply and energy services through the Nordic and European electricity market. The Nordic retail market should be characterized by competitive prices and few entry barriers to make it easy for new market players to enter the market.</p> <p>4.1 Objectives for harmonised solutions</p> <p>NordREG aims at continuing the work to reach a truly harmonised Nordic retail market, future NordREG recommendations and Nordic solutions should focus on the following objectives:</p> <p>Customer friendliness: increase customer friendliness of the market; have a good customer service and create market conditions that make it easy for customers to be active in the market.</p> <p>Well-functioning Nordic electricity market: the goal is to have a well-functioning common electricity market. It should be easy for stakeholders to enter the market and business processes need to be clear and easy to apply. When making business processes – focus should be on speedy, qualitative processes to a reasonable cost.</p> <p>Increased competition: lower the obstacles for the market players in the competitive part of the electricity market, there should be room for innovation and development of energy services in order to increase the attractiveness of the competitive market. EU-regulation: Nordic harmonization should comply with the EU regulations and EU retail market development.</p> <p>Non-discrimination: The Nordic retail market design should promote non-discrimination. The introduction of national Points of Information (NPIs⁷) should guarantee neutrality of Distribution System Operators (DSOs) towards other stakeholder. NPIs should function as market facilitators.</p>
Switzerland	<p><i>Electricity Supply Act 1992</i></p> <p>1 OBJECTIVES</p> <p>This Act defines the general conditions for:</p> <ol style="list-style-type: none"> a. The secure and sustainable supply of electricity to end users in all parts of the country; b. Competition at the national level and participation in international competition in the electricity sector.

Jurisdiction	Objective
United Kingdom	<p data-bbox="391 259 587 291"><i>Utilities Act 2000</i></p> <p data-bbox="391 327 1404 358">3A The principal objective and general duties of the Secretary of State and the Authority.</p> <p data-bbox="391 389 1388 582">(1) The principal objective of the Secretary of State and the Gas and Electricity Markets Authority (in this Act referred to as “the Authority”) in carrying out their respective functions under this Part is to protect the interests of consumers in relation to electricity conveyed by distribution systems, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity.</p>



Bifurcation in the economic regulation of
network service providers in the National
Electricity Market

Research for and advice to the Public Interest Advocacy
Centre in relation to the Governance Review of Australian
Energy Markets

May 2015

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1 Introduction

The Public Interest Advocacy Centre is preparing a submission to the Review of the Governance of the Australian Energy Markets. In the development of its submission, we have been asked to prepare briefing and advice addressing the issue of bifurcation of economic regulation, and the inclusion of broader considerations such as explicit environmental protections in the objectives of the electricity law. This paper deals with the first topic.

2 Bifurcation in the economic regulation of network service providers in the National Electricity Market

2.1 Introduction

Economic regulation in the National Electricity Market (NEM) is split between the Australian Energy Markets Commission (AEMC) which is responsible for the design of regulation, and the Australian Energy Regulator (AER) which is responsible for its implementation. While the line between “design” and “implementation is not always clearly drawn, the separation of regulatory design and implementation (“bifurcation”) between two regulatory institutions is unique, as far as we know, not just in the regulation of utility monopolies in Australia but also in other countries.

This institutional arrangement came into existence with the creation of the AEMC and AER in 2005. Prior to this, in respect of the regulation of electricity and gas transmission by the Australian Competition and Consumer Commission (ACCC), and electricity and gas distribution by state-based commissions, such institutional bifurcation did not exist.

We are not aware of any document in the public domain (or privately) that explains why this approach, compared to alternatives, was adopted. This absence of documented assessment is unusual considering the significance (and uniqueness) of this arrangement. In the first part of this paper, we speculate on the rationale for the bifurcation. In the second part of the paper we argue that bifurcation has led to ossification. The last part of this section we suggest, briefly, the desirable attributes of effective economic regulatory institutions.

2.2 The rationale for bifurcation

During the recent Senate Inquiry¹, Paul Smith, the Chief Executive Officer of the AEMC was asked to explain why the design and implementation of regulation was separated between the AEMC and AER. He replied²:

“These are different functions. The making of rules is a different function from the implementation and application of the rules. They require, I would argue, different considerations, different analysis and different knowledge and skill. They are separate roles in that regard, and that is, in part, why they have been separated out in the way that they have.”

As far as we know, this is the only time that the AEMC has ever been asked, publicly, to explain why regulatory design has been separated from regulatory implementation. Mr Smith’s answer is unconvincing: while the design of regulation is indeed different to its implementation and there is no doubt that different skills are needed for each, why does that justify why design and implementation should be institutionally separated when it was not previously and when evidently this separation seems to have no other precedent?

The only publicly available document that we are aware of that, albeit obliquely, broaches the rationale for the separation of the design and implementation of economic regulation is a report to the Council of Australian Governments by the Ministerial Council on Energy (MCE)³. This report was the outcome of negotiation over the preceding 12 months by senior officials from the Australian Competition and Consumer Commission (ACCC) and senior officials from jurisdictional governments. The principal focus of the negotiation (and the report) was the creation of the AEMC and the AER.

¹ Environment and Communications References Committee, April 2015. “The performance and management of electricity network companies”. Available from www.aph.gov.au

² Transcript, available from <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2Ff1de322f-df61-45f5-a508-e271537ec211%2F0000%22>

³ “Reform of Energy Markets”, 11 December 2003.

The MCE Report provides no explicit rationale for the separation of regulatory design from regulatory implementation. Hearsay, from some of those involved in the negotiation, was that state governments were not willing to transfer the economic regulation of their electricity and gas distribution networks to the ACCC, without confidence that their pecuniary and other interests in these activities could be protected.

We understand that some states were particularly concerned that the ACCC was excessively focused on consumer protection to the detriment of investors (of which the state governments were themselves the largest). The protection to ensure continued state control, we are told, was a regulatory institution (the AEMC) appointed by and accountable to the states that would effectively control regulatory design and oversee the AER.⁴

This is of course mere hearsay. However an analysis of the MCE Report suggests that this is a plausible explanation. In particular the Report focussed on regulatory arrangements that would enhance “investment” a term used 23 times in the Report of which 15 times in the context of networks. By contrast “efficient” is mentioned just once in the report in relation to networks and even then followed immediately by the word “investment”.

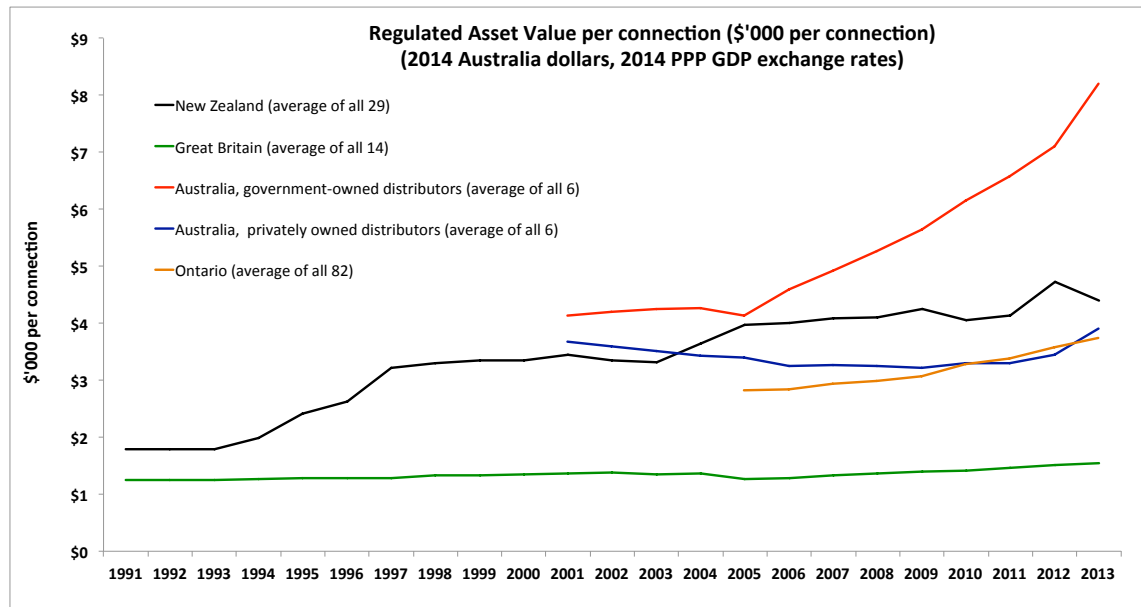
The first dot point recording Ministers’ agreement on the purpose of the “further reform” alluded to in the Report is that such “further reform” is intended to “*Strengthen the quality, timeliness and national character of governance of the energy markets, to improve the climate for investment*”. The second dot point is to “*Streamline and improve the quality of economic regulation across energy markets, to lower the cost and complexity of regulation facing investors, enhance regulatory certainty ...*”

⁴ The AER is a “consistent part of the ACCC”. One of its three members are appointed by the states and its chair is jointly appointed by the Commonwealth and a majority of states/territories). The AEMC is a three person commission reporting to the MCE (now COAG Energy Council) two of whose commissioners and Chairman is appointed by “the states”.

The focus on investment is again evident in the section dealing with “economic regulation”. The first paragraph of that section says “*The regulation of network access (prices and standards) seeks to balance energy users’ short-term interests in price benefits with their long-term interests in a reliable supply, service enhancements and timely investment in new capacity. The making of market and regulatory rules aims to provide reasonable stability to market participants ...*” To put this another way, and more plainly, we understand this to be saying that a system of rules to be determined by an authority separate to the ACCC/AER is needed to guard against consumers’ short-sighted preference for lower prices to which, without rules set by another authority, the ACCC/AER would be susceptible.

The need to refer to hearsay and the parsing of just one somewhat oblique official report is highly unsatisfactory, but in the absence of other documentation, is unavoidable in trying to discern the rationale for the bifurcation of the design and implementation of economic regulation. If indeed the underlying rationale for bifurcation is to promote network investment, then Figure 1 below shows that this objective has been achieved.

Figure 1. Regulated Asset Value per connection in Australia, Great Britain, New Zealand and Canada (2014 Australian dollars thousand, PPP GDP exchange rates)



The figure compares distributor regulated asset values per connection for distributors in the NEM, Great Britain, New Zealand and Ontario. The rapid escalation in regulated asset values per connection by state government-owned distributors in the NEM from 2005 is remarkable. Our econometric analysis, currently underway, suggests that network length, network reliability, network peak demands, customer density and the proportion of network that is underground rather than overhead, are not statistically significant explanations of the outcomes in Australia whereas network ownership is.

Political economy

A paper by Peter Nicholas⁵, an Australian Government Solicitor, provides an alternative view on the argument for the separation of regulatory design (“rule making”) from its implementation:

“Another key achievement of this delegated rule-making function is to enshrine separation

⁵ Nicholas, P. 2008. Administrative law in the energy sector: Accountability, complexity and current developments, AIAL Forum No. 59

between rule-making, and hence policy development, and the task of applying and enforcing the rules. This 'separation of powers' is another institutional innovation of the energy reforms to deal with the perception of regulatory creep by government agencies without the need to refer more matters back to the scrutiny of Parliament ... 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."

Nicholas is suggesting that state governments had delegated their role in policy development ("rule making") to the AEMC who would then oversee the AER (and ensure it did not take on "policy" itself) through "the guidance, limitations and constraints imposed by the rules".

This is a momentous shift in the political economy of the regulation of electricity. Other than for a brief period in which electricity distributors were regulated by state commissions, state governments' regulated their electricity commissions through ownership. Politicians approved budgets and prices, trading the ballot-box loss associated with higher prices against the fiscal gain of the higher profits (or in some cases lower losses) associated with higher prices.

The devolution of "policy development" (rule making) to the AEMC, and implementation of the rules to the AER, introduced a political economy particularly in the case of state governments that own their distributors that is inimical to consumers' interests. Through the creation of the AEMC and under it the AER, state governments that owned their distributors could avoid accountability for adverse price outcomes while reaping the financial benefits (higher profits) from such higher prices. Indeed state government energy ministers often pointed to the AER as the reason for much higher prices, while keeping silent on the higher profits that resulted from this.

We suggest this political economy explains in large part much higher regulatory allowances for government owned distributors and, with that, the much higher prices charged by government-owned distributors (and consequently higher profits). Indeed the big gap in terms of prices and efficiency of the government owned distributors in the NEM, compared to their privately owned peers is unusual in comparison to the

outcomes in other countries that have a mix of investor and non-investor owned distributors.

Our economic analysis shows that in Australia there is a statistically significant relationship between ownership and regulated asset values, regulated revenues and operating expenditure: government ownership explaining much higher values for all of these. In New Zealand on the other hand where a comparable regulatory approach to that in Australia is applied we do not see the same thing: non-investor owned distributors (typically owned by local customer trusts) seem comparable in terms of prices, regulated assets and regulated revenues to their investor-owned peers. Similarly in the United States, which has a long history of both investor and non-investor owned utilities, the evidence does not suggest significant differences in utility performance, albeit that their regulatory arrangements unlike those in Australia and New Zealand do not subject non-investor owned utilities to commission regulation.⁶

2.3 Why is bifurcation problematic?

In the previous section we concluded that the essential rationale for the AEMC's role in designing regulation was to protect investor interests and through that promote "investment" or as it has effectively turned out, expenditure. Introducing an additional institution, the AEMC, and a system of "rules" constrained by a rule change process protects investor interests by resisting change and evolution, thereby leading to ossification. This subsection explores this argument.

There are different views on the desirability of flexibility and adaptiveness in economic regulation. Stephen Littlechild⁷ (2014) suggests regulation should be, like markets, a "rivalrous discovery process". In a recent commentary⁸ Dieter Helm presents an alternative view: that the attractive simplicity of price cap regulation has not been

⁶ See for example Kwoka, 2005. "The comparative advantage of public ownership: evidence from U.S. electric utilities". Canadian Journal of Economics, Volume 38, No. 2.

⁷ Littlechild, Stephen 2014. "RPI-X, competition as a rivalrous discovery process, and customer engagement" Paper prepared for the Conference The British Utility Regulation Model: Beyond Competition and Incentive Regulation? LSE 31 March 2014

⁸ Helm, D. "Regulatory credibility and the irresistible urge to meddle" 16 April 2015. available from <http://www.dieterhelm.co.uk/node/1403>

realised in Britain because, faced with the chance to curry favour with the customers, politicians successfully pressured regulators to intervene. The exception to this - changes to the arrangements for the cost of debt and lengthening regulatory control periods - Helm considers to be justified intervention rather than unhelpful meddling.

Regulatory arrangements for the cost of debt have also been an issue in Australia. A pairwise comparison of how changes to these arrangements were dealt with in Britain and Australia is instructive.

In Britain, reconsideration of the arrangements for cost of debt was one of many issues covered as part of Ofgem's RPI-X@20 review, a review that started in early 2009 and was completed in October 2010. A trawl through the list of documents produced for the RPI-X@20 Review, shows that Ofgem first proposed changes to the calculation of the cost of debt in its June 2010 recommendations. No other documents or reports by Ofgem had been produced on this, although we understand that there were prior bilateral discussions on this between consumer groups (and others) and Ofgem's Board.⁹ The recommendations were subsequently implemented in Ofgem's final decision in October 2010.

By contrast, the process in Australia for discussion (and regulatory decision) of the same issue took almost four years at the end of which it still remains unresolved. In August 2011 the Energy Users Rule Change Committee (EURCC) proposed a change to the arrangements of the cost of debt so that it should be based on an historical moving average. This was preceded by several consultations with the AEMC staff (to ensure that the rule change proposal was consistent with the AEMC's rule change guideline) and then AEMC Board. From September 2011 to November 2012 the AEMC conducted its rule change review, consolidating the EURCC's proposed rule changes on debt with the AER's other proposed rule changes. The rule change process administered by the AEMC involved four stages:

⁹ Rachel Fletcher, Senior Partner, Ofgem, personal communication, 31 May 2011.

1. Initiation: publication of proposals and the AEMC's Issues Paper, two public forums and about 60 submissions from interested parties.
2. Direction paper: publication of AEMC Directions Paper, three consultant reports, four workshops and about another 80 submissions.
3. Draft Report: the publication of AEMC Draft Report, another five consultancy reports and about another 60 submissions.
4. Final Report: Publication of the AEMC's final report (20 documents in total including various legal notices).

While to some degree the number of submissions and reports is exaggerated by the fact that the cost of debt rule change was considered in parallel with rule change proposals by the AER, the cost of debt issues accounted for the greatest number of workshops and consultancy reports.

At the end of this process, the AEMC changed the rules in respect of the cost of debt to be determined by the AER so that the AER was no longer required to apply a specific approach described in the rules, but was now required to have regard to particular information in setting the cost of debt.

With the rule change completed, the AER then embarked on the task of considering how it would set debt costs in regulatory controls. This was part of a process of establishing various regulatory guidelines. The process started at the end of 2012 and consultation on various details was still being undertaken in mid 2014. The process involved Issues Paper, Draft Decision, and Final Decision. In the process of development about another 80 submissions were made, there were about 7 workshops on debt costs, four consultancy reports on aspects of debt costs were commissioned by the AER and several more by other interested parties.

The AER's Final Decision in its Guideline was to allow a rolling average cost of debt measure that would be progressively implemented over 10 years so that by 2025, at the earliest, some network service providers' debt would be based on the rolling average approach specified as the desirable end-point in its Guidelines.

However the Guideline was not binding and in the first set of revenue proposals by the network service providers in New South Wales, they rejected the AER's non-binding

Guideline and instead proposed their own approach, which the AER is required, under the Rules, to consider on its merits.

The AER has now set its Final Decision for the regulated revenues for the distributors in New South Wales. It has rejected the distributors' proposals and instead applied its guidelines although starting retrospectively to the previous regulatory period, not the current period.

This pairwise comparison rather speaks for itself. In Britain the change was first announced in a final decision before which there had been bilateral discussions with interested parties. It was implemented four months later. In Australia, the same issue was considered by the AEMC for 18 months at the end of which the AER was authorised to consider it. This took another 18 months, at the end of which a non-binding regulatory guideline was established. If implemented, it will take another 10 years for the rolling average approach to be fully implemented. At the first instance that the AER proposed to apply this new approach, the distribution network service providers rejected the guideline and proposed their own approach that the AER was required, under the Rules, to consider on its merits. In its Final Decision for the distributors in New South Wales the AER rejected the businesses proposals and the approach it has decided while broadly consistent with its guideline, has been applied retrospectively, an approach not countenanced in its guideline. The application of its approach retrospectively raises regulated revenues by \$1.7bn (around \$550 per connection in NSW) from what they otherwise would have been had the AER's revised approach not been applied¹⁰. It remains to be seen whether market participants or consumers will seek a review of the merits of the AER's decision.

What should have been a fairly straight-forward regulatory matter to resolve, and was resolved in Great Britain in a few months and fully implemented not long after, has taken about four years of deliberation in Australia and will take a further 10 years to

¹⁰ This assumes that borrowing costs do not decline further during the regulatory control period. If they increase from their current record lows the gap between the old approach and revised approach will grow even wider.

implement. Even after such a long period of contemplation, the approach actually adopted, in respect of its retrospective application, does not reflect the outcome of that contemplation. It can be little surprise that if change is so slow and consumes so much effort to bring about and ultimately delivers no benefit (for consumers) that ossification is an inevitable outcome.

2.4 Desirable attributes of effective regulatory arrangements

We have been asked to suggest, briefly, the desirable attributes of effective regulatory arrangements. This is of course a vast topic that is difficult to do justice to in this brief note. However, the experience in Australia where outcomes have obviously been highly unsatisfactory in respect of government-owned firms, suggests three factors seem to be particularly important:

Democratic accountability

Independent regulation of privately-owned firms is valuable in protecting private investors from regulatory expropriation. Investors value this and consumers benefit from it. But accountability for the regulation of government-owned firms should reflect government's democratic right to extract rents from the services it provides, and should ensure transparency and political accountability of that rent extraction.

Consumer participation

Consumers are able to make their wishes known. Success in contestable markets accrues to those that are able to discern consumers' wishes and then meet them. Economic regulation need be no different. Empowerment of consumers in regulatory decision-making, not just consultation, is possible and desirable.

Authority

Effective regulation of private monopolies depends on a regulator that has the authority and flexibility to make decisions under a broadly defined objective. Excessive prescription and specificity undermines the regulator's authority at consumers' expense.

We suggest a regulatory regime that observes these key points is likely to promote efficient, adaptable approaches that deliver outcomes that consumers value and are prepared to pay for.



The inclusion of environmental protection in
the National Electricity Objective

Research for and advice to the Public Interest Advocacy
Centre in relation to the Governance Review of Australian
Energy Markets

May 2015

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1 Introduction

The Public Interest Advocacy Centre is preparing a submission to the Review of the Governance of the Australian Energy Markets. In the development of its submission, we have been asked to prepare briefing and advice addressing the issue of bifurcation of economic regulation, and the inclusion of broader considerations such as explicit environmental protections in the objectives of the electricity law. This document deals with the second issue.

2 The Inclusion of environmental protection in the National Electricity Objective

2.1 Introduction and background

We have been asked to contribute perspectives on the question of whether environmental protections in general – and greenhouse gas emission reduction in particular – should be included as part of the National Electricity Objective.

Background

A recent paper¹ provides background on the history of the inclusion of environmental objectives in federal and state laws and regulations on energy and essential services. They note state legislation (the IPART Act 1992, the Queensland Electricity Act 1989, the State Owned Corporations Act (NSW) 1989) and federal/national energy codes (the National Grid Protocol 1992) and policy statements (COAG's National Energy Policy 2001) had various degrees of explicit recognition of environmental protection, and in some case greenhouse gas emission reduction, objectives. Indeed scanning through various Ministerial Council on Energy policy statements and reports, words such as "sustainable", "greenhouse gas" (and their derivatives) are frequently to be found. Nevertheless environmental protection is not mentioned in the National Electricity Objective.

Environmental and most consumer advocates have argued that environmental protection and specifically greenhouse gas abatement should be included in the National Electricity Objective. Market participants have generally lined up for or against this based on their vested interests. Consumer groups have generally supported the inclusion of environmental objectives, though some have also agitated against environmental obligations that could have adverse energy price impacts.

¹ Total Environment Centre 2013. "Reforming the National Electricity Objective to improve environmental outcomes in the NEM. Discussion Paper.

Regulators have tended to be silent on this issue, although the Chairman of the AEMC, in testimony to a Senate Inquiry², likened environmental objectives to social objectives and suggested that these are best left to governments, not economic regulators to decide and so should not be included in the National Electricity Objective. In our opinion this view tends to be shared by many economic regulators in other parts of the world. However, Dr Crossley's research shows that energy legislation internationally typically reflects

2.2 Issues to be considered

The National Electricity Objective is set out in Section 7 of the National Electricity Law:

“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.”

This phrase or shortened versions of it (“the long term interest of consumers”) is oft-repeated in regulatory documents and is taken to be the guiding rationale for decisions on the economic regulation of networks and for rules relating to the design of the wholesale electricity market.

The issue that we are asked to consider, is the merits of some sort of explicit greenhouse gas objective to be reflected in the electricity law and therefore considered explicitly by regulators and policy makers in their decisions on the design and operation of wholesale and retail markets and the regulation of electricity network monopolies.

² The Senate Select Committee on Electricity Prices, 2012. Reducing energy bills and improving efficiency.

2.3 Framework for evaluation

Greenhouse gas emissions from the production of electricity in Australia account for around 30% of Australia's annual emissions of around 570 million tonnes of CO₂-equivalent. This is one of the most emission-intensive electricity systems in the world.

The Australian Government, and jurisdictional governments, have said that they wish to reduce emissions and this objective seems to enjoy the support of all the main political parties in Australia's governments. Australia is of course a signatory to the Kyoto Protocol and the United Nations Framework Convention on Climate Change

It is inconceivable that a meaningful reduction in Australia's greenhouse gas emissions can be achieved without a substantial reduction in emissions from the production of electricity. Electricity production is also an activity where inexpensive abatement is likely to be found. Governments concerned to reduce Australia's emissions are therefore likely to wish to focus particularly on the electricity sector.

Our understanding of the contemporary economics of electricity production in Australia leads us to conclude that future generation capacity expansion is likely to be dominated by renewable generation even without policy support. Wind and large scale solar now present lower long run (fully absorbed) costs than fossil fuel alternatives. And likewise distributed solar produces electricity at the point of use for households, and increasingly also for large consumers, far more cheaply than electricity provided from the grid.

However, new renewable resources are not able to produce electricity more cheaply than the variable cost of the installed fossil fuel generators, which set market prices. It is also difficult to imagine that this will ever be the case, given the capital intensity of renewable resources.³

³ Those operating costs may be negligible, capital outlays need to be recouped. While these outlays have decreased rapidly in renewable technologies, they can still be expected to be above the variable operating costs of the more efficient fossil fuel plant, for many years into the future.

For these reasons while the electricity sector is likely to progressively decarbonise even without policy support, this is unlikely to be at the rate needed to meet Australia's emission reduction objectives. Our understanding, based on trends in other countries, is that emission reduction objectives are likely to become ever more stringent and this will translate into ever rising demands for emission reductions from the electricity sector.

The relevant question therefore is how policy should be developed and implemented in the governance and regulation of the electricity sector, to achieve rapid decarbonisation. Emission reduction policy will have significant impacts on both the demand-side and supply-side of the electricity sector . On the supply-side we can identify:

- Resource allocation: arrangements for access to land and water for the development of renewable generators; coal and gas development and access arrangements (and possibly in due course for the sequestration of CO₂); arrangements for closure of existing fossil fuel generators and land remediation.
- Capital allocation: ensuring capital markets are able to provide the substantial equity and debt needed to meet significant renewable investment requirements.
- Wholesale market design: dealing with renewable generation intermittency and market design in the context of a supply-side increasingly dominated by generators with zero or close to zero marginal costs.
- Network access and regulation: arrangements for renewable generator access to transmission and distribution networks

On the demand side:

- Retail market design: the design of retail arrangements in the context of increasing opportunity for distributed generation and storage.
- Network tariff design: arrangements to deal with sunk costs of stranded distribution networks and the design of tariffs that incentivise efficiency and balance competing interests between centralised and decentralised production.
- Consumption efficiency: arrangements to promote efficiency improvement in electricity products and building standards.

Emission reduction policy must be informed by these (and of course the many others not mentioned here), just as energy policy must be informed and shaped by emission reduction policy. The relevant question, therefore, is how “joined-up” decisions will be made in the pursuit of governments’ emission reduction policy and in pursuit of its energy policy.

The concepts of Transaction Cost Economics⁴ applied to administrative arrangements for electricity provides a conceptual framework to systematically think this through. Specifically, it provides a way to answer the question whether it is better (i.e. more efficient and effective) to achieve co-ordination by bringing emission-reduction policy within the locus of energy ministers and utility economic regulators, or is it better for emission reduction policy to operate in relative isolation from energy policy, much as say health policy is separated from education policy?

Will greater integration of emission reduction policy into energy policy muddy the waters, distract policy makers from the pursuit of efficiency and diminish their ability to achieve the long term interest of consumers ? Or will greater integration ensure that the many regulatory and policy decisions affecting the industry and consumers achieve environmental and energy objectives more efficiently ?

Transaction Cost Economics with its three principal cost categories (search costs, bargaining costs and enforcement costs) can be applied here:

- Search costs: what arrangement of environmental and energy policy will deliver the best informed decisions in each area?

⁴ See for example: Coase, Ronald H. 1960. The problem of social cost. *Journal of Law and Economics*, 3: 1-44. ; Williamson, Oliver E. 1979. Transaction-cost economics: The governance of contractual relations. *Journal of Law and Economics*, 22(2): 233-261 and Williamson, O.E. 1985. *The economic institutions of capitalism : Firms, markets, relational contracting*. New York, NY: Free Press.

- Bargaining costs: what market and regulatory arrangements will best achieve environmental and energy policy objectives?
- Enforcement costs: how can environmental and energy objectives be enforced most efficiently?

The application of a TCE paradigm means systematically thinking through the various activities and focus areas of energy policy makers and utility economic regulators to assess the extent to which search, bargaining and enforcement costs will be minimised in the delivery of both energy and environmental policy.

Our judgement, in the absence of having done this but based on our long experience at the metaphorical coal-face of energy and regulatory economics, is that emission reduction is very deeply integrated with the design and operation of energy markets and systems of network regulation. Indeed this is somewhat obvious given the fact that emissions are so significant from the energy sector. Therefore, we suggest, it is inevitable that effective co-ordination will require that emission reduction policy be deeply integrated into energy policy and regulation.

Indeed this seems to be the conclusion that policy makers have come to elsewhere - particularly in Great Britain and continental Europe - where rapid emission reduction objectives have translated into administrative departments (and political leadership) bringing together energy and climate change. This has then flowed through into the accountabilities of economic regulators, despite some level of reticence from the regulatory community in many cases.

In Australia, the nature and extent of such climate-energy policy integration and the best way to achieve it having regard to the involvement of both the states in Commonwealth in energy and emission policy adds additional complications that will need to be considered.

Finally, there has been considerable focus on the inclusion of environmental/greenhouse gas abatement objectives in the NEO, as the mechanisms to ensure environmental objectives are reflected in energy market governance and regulation. However, we question whether all that much (in terms of environmental

protection) is to be gained from this. As the Total Environment Centre observed, environmental (and in some cases greenhouse gas emission reduction) objectives have previously featured in state legislation and in industry codes. It seems hard to argue that this had improved environmental/greenhouse gas outcomes then, relative to outcomes now.

Similarly, despite the apparent importance of the NEO and the frequency with which regulators and policy makers allude to it, in fact the demonstrated outcomes in the National Electricity Market seem to be very far from the “long term interest of consumers”, certainly in respect of prices. Simply stating an objective in legislation does not imply successful implementation.

Effort directed at how environmental and energy objectives can be successfully integrated, where beneficial, in deed not just in word, will be helpful.