



Paved with good intentions: an assessment of practical outcome against policy intent

Submission in response to the COAG Energy Council Review of the Limited Merits Review Regime Consultation Paper

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1. Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to provide a submission to the COAG Energy Council's review of the limited merits review (LMR) regime in the National Electricity Law and the National Gas Law.

PIAC's view is that changes to the LMR framework are warranted. Our submission identifies a number of ways to address problems with the current regime and better protect the interests of consumers.

PIAC does not at this stage support removing access to LMR. In our view this would reduce scope for consumer participation. Any move to a model based only on judicial review must be accompanied by significant protections for consumer interests through changes to rules of standing and costs protection. It would also need to be accompanied by significant changes to the initial decision making process to ensure consumer interests are properly protected.

1.1 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 was established in 1982. It has maintained an active role in advocating for the interests of energy consumers since its inception.

PIAC's Energy + Water Consumers' Advocacy Program (EWCAP) represents the interests of low-income and other residential consumers of electricity, gas and water in New South Wales. EWCAP is funded by NSW Trade and Investment.

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 of NSW;
- Salvation Army Eastern Australia Conference;
- St Vincent de Paul Society of NSW;
- Physical Disability Council NSW;
- Tenants Union of NSW;
- Financial Rights Legal Centre; and
- Good Shepherd Microfinance.

PIAC has been actively involved in the process of revenue determination, including limited merits review (LMR), with the support of Energy Consumers Australia (ECA). PIAC was the first consumer organisation to be a participant in LMR proceedings in the Australian Competition Tribunal (the Tribunal), as an applicant and intervener in the Tribunal's NSW proceedings. PIAC

has also acted as a consumer observer and advisor during the community consultations carried out by the Tribunal in NSW, South Australia and Victoria.

PIAC acknowledges the assistance of Dr Gabrielle Appleby in the preparation of this submission.

2. Context of the LMR review

The Expert Panel¹ that reviewed the LMR regime in 2012 called for a ‘significant re-orientation of the review process’, recommending, among other things, modifying the framework to:

- recognise that the ‘ultimate end, and therefore the ultimate test, is the long-term interests of consumers’;
- avoid the ‘manifest economic error that promoting economic efficiency necessarily serves that purpose’; and
- make the process investigative rather than adversarial in nature.

In PIAC’s view, it is too early to fully assess the efficacy of the LMR process following the 2013 reforms. The operation of the law remains unsettled, with the first decisions of the Tribunal under the new regime being the subject of ongoing judicial review.

It seems clear, however, that the LMR framework is still not providing an accessible avenue of review that is quick, inexpensive and informal. Rather, it has proven to be time-consuming and costly, and requires participants to have access to extensive resources to participate meaningfully. It therefore does not provide equitable access for consumer participants.

There is a clear case for reform.

In considering options for reform, PIAC recognises the complex and specialist nature of the AER’s determinations. This may make them less amenable to effective merits review by a tribunal. PIAC also recognises that another round of changes to the law is likely to add to regulatory uncertainty.

On balance, however, PIAC considers that the LMR regime would benefit from targeted reforms to improve protection for consumer interests. Our submission identifies barriers to consumer participation that have persisted despite the reforms and suggests ways in which those barriers might be overcome.

We also highlight our concerns about the ability of consumers to participate in a system that lacks a mechanism for merits review. Any move towards a system that provides for only judicial review will require significant amendments to other parts of the regulatory regime to ensure an increase in genuine consumer involvement and accountability in the initial decision making process as well as an ability to participate fully in any process of judicial review.

¹ Yarrow, Egan and Tamblyn, *Review of the Limited Merits Review Regime: Stage Two Report*, 2012, available at <https://scer.govspace.gov.au/files/2012/10/Review-of-the-Limited-Merits-Review-Stage-Two-Report.pdf>

2.1 Summary of PIAC's involvement in LMR and associated processes

2.1.1 Merits review

It was PIAC's view that the AER's 2015 revenue determinations for the NSW distribution network service providers (Ausgrid, Endeavour Energy and Essential Energy) (the NSW Networks) would result in excessive costs for consumers over the next four years. Therefore, PIAC applied to the Tribunal for review of each determination. This was the first time a consumer organisation participated in a Tribunal review of an electricity or gas revenue determination made by the AER.

PIAC's participation was enabled by the amendments to the NEL in 2013 that:

- a) allowed parties other than the affected network businesses to commence a review; and
- b) limited the circumstances in which costs may be awarded against a small user/consumer intervener, and the types of costs that may be awarded ('reasonable administrative costs'), in the Tribunal.

The NSW distribution determinations were the first group of determinations made by the AER since the 2013 amendments to the NEL. They were also made in circumstances where:

- the previous determinations for the NSW distribution businesses (for the 2009-14 period) are widely perceived to have resulted in those businesses receiving excessive regulated revenues (brought about, in part, by successful Tribunal reviews made by those businesses in 2009);
- the NSW Government had announced its intention to privatise a substantial portion of the NSW distribution networks and it was not expected that it would exercise its statutory right to intervene in the merits review process to argue for reductions in revenue to the benefit of electricity consumers generally, as to do so may adversely affect its expected returns from the partial privatisation of the networks.

In this combination of circumstances, the NSW distribution determinations presented an important opportunity for a consumer representative organisation to seek to take advantage of the 2013 amendments to the NEL to obtain a reduction of the revenues allowed to the distribution businesses by the AER; and/or to act as a counterweight in the Tribunal review process, so that the Tribunal was forced to consider possible reductions from, and not merely increases to, the revenues allowed by the AER.

In May 2015, PIAC filed applications in the Tribunal under section 71B of the NEL seeking merits review of the revenue decisions made on 30 April 2015 by the AER for the NSW Networks. PIAC was granted leave as an applicant on 17 July 2015. The NSW Networks also lodged applications for limited merits review and were granted leave.

In its decisions in February 2016, the Tribunal upheld grounds of review advanced by the NSW/ACT networks in relation to three broad issues, namely the return on debt, the value of imputation credits, and opex. The Tribunal ordered that the determinations should be remitted to the AER, to be remade in accordance with the Tribunal's reasons.

The Tribunal's approach meant it did not directly determine all of PIAC's grounds, but it did endorse PIAC's valuable input and in some instances directed the AER to consider PIAC's

contentions in making its revised decisions.² PIAC's involvement had a positive impact that PIAC anticipates will flow through to the AER's decision making for other jurisdictions in the NEM. The Tribunal's reasons demonstrate that PIAC's submissions influenced the decisions on each of the three grounds it was involved in (opex, return on equity and return on debt), as well as the directions to the AER regarding its obligations in remaking its decisions.

2.1.2 Judicial review

The AER has sought judicial review of the Tribunal's decision in each of the above-mentioned reviews. Each aspect of the Tribunal's decisions that will be considered by the Full Federal Court relates to complex questions of regulatory method and approach that arise as a direct consequence of the Economic Regulation rule change. The AER has asked the Full Federal Court to consider whether the grounds of review were properly established by the network businesses and whether the NEL was correctly applied by the Tribunal. The applications cover grounds of review on opex, debt and gamma.

The judicial review proceedings will be heard in October 2016, with judgment likely to be given in the first half of 2017. If the Federal Court upholds any aspects of the AER's claim for judicial review, it will likely remit those aspects of the determination back to the Tribunal for rehearing. If the Court dismisses the judicial review proceeding, then the AER will be required to reconsider its original determinations, in accordance with the Tribunal's February 2016 decisions.

The NSW judicial review proceedings are the first opportunity for the court to consider the Tribunal's functions and powers under the 2013 amendments to the NEL, an important purpose of which was to facilitate consumer representation before the Tribunal.³ PIAC has requested leave to intervene in the proceedings. PIAC's submissions to the court will include submissions going to the interaction between the AER's new obligation under s16(1)(d) of the NEL and the grounds of, and limitations on, Tribunal review, which will be significantly different from the submissions advanced by both the AER and the networks.

The judicial review proceedings will almost certainly have a significant impact on the price paid by NSW and ACT consumers, as well as clarifying some key aspects of the legal framework under which the AER makes its decisions across the NEM. PIAC considers that a consumer perspective is vital to give effective voice to the National Electricity Objective (NEO).

2.1.3 PIAC's contribution

The long-term objective of PIAC's involvement in the merits review and associated proceedings is to strengthen the role of consumer voices in the regulatory process and ultimately improve the way in which those processes consider the interests of consumers. At the Tribunal stage, PIAC demonstrated to the AER and the networks that consumer organisations can and will make clear, on-point challenges to regulatory decisions that do not deliver the best outcomes for consumers. This is intended to encourage the AER and the networks (both in NSW and in other NEM jurisdictions) to respond better to consumer concerns at the earlier stages of the decision-making process, and prompt networks to consider the risk of a consumer challenge in assessing whether to seek review of an AER decision. The prospect of intervention by consumer groups arguing for

² See for example, *PIAC-Ausgrid* at [58], [63]-[64]).

³ See *PIAC-Ausgrid* at [31]

a decrease to the networks' revenue allowances should offer some disincentive against marginal challenges by networks of revenue determinations in the Tribunal. This was not possible prior to the 2013 LMR reforms.

PIAC continues to assist consumer advocacy organisations in the limited merits review process in other NEM jurisdictions. The combined appeals and review experience gleaned from these jurisdictions, and PIAC's liaison with consumer organisations in these places, is aimed at enabling a better understanding by PIAC and the consumer organisations of how to participate most effectively with the AER decision-making process and, subsequently, the Tribunal appeal process.

Significantly, despite efforts to reform the LMR regime to lower barriers to consumer participation, it is still not possible to make such a contribution without significant resources, including for experienced counsel. The high cost of formal participation remains a barrier to participation, although the establishment of the ECA has gone some way to correcting the significant resource imbalance. The establishment of the ECA has assisted with the correction of a significant resource imbalance.

2.2 Key issues with the operation of the LMR framework

PIAC has identified the following as key issues with current operation of the LMR regime:

1. The Tribunal's interpretation of the NEO demonstrates a need for clearer guidance as to what factors must be taken into account and how they are to be weighed. This has undermined the regime's ability to deliver outcomes for the 'long term interests of consumers'.
2. While the Tribunal is now required to focus on the question of whether there is a materially preferable decision in the long term interests of consumers, in practice the Tribunal's decisions to set aside the AER's determination have not been strongly justified by reference to this requirement. This is also not a subject of the judicial review.
3. The Tribunal's task to determine whether varying or setting aside the determination would result in a decision that is materially preferable in making a contribution to the achievement of the NEO is extremely technical and complex. It requires the Tribunal to engage in a lengthy and highly technical endeavour in which it is necessarily heavily reliant upon competing views of experts on matters that are largely hypothetical and theoretical, and which generate large volumes of documentation. This means that participants have to be well resourced, and legally represented, to participate in a meaningful way.
4. In practice, the regime is circular, lengthy, expensive and resource-intensive. This privileges the involvement of well-resourced parties. The process is protracted by the fact that the Tribunal is unlikely to find itself in a position where it can vary the AER's determination, rather than sending it back to the AER for redetermination. This is exacerbated by the availability of judicial review and the courts' limited powers to make orders on judicial review.
5. The views of consumers provided in the community consultation appear to have been given little weight by the Tribunal in its NSW determination, which raises concerns about the efficacy of the community consultation element of the 2013 reforms.
6. The Tribunal commented favourably on the involvement of PIAC in the process. However, the high participation costs of formal involvement do not make this a sustainable prospect for consumer organisations.

7. The evidence demonstrates that network businesses are still seeking review as a routine step in the regulatory process. This leads to a situation where the AER is not seen as the primary target audience for participants in the decision-making process, who are rather looking ahead to a review before the Tribunal. This affects the nature of the submissions put forward in the initial regulatory process, which tend to be highly legalistic and highly voluminous. This acts to exclude consumer groups from the process, to undermine meaningful engagement, and thus undermine the objects of the LMR framework.

3. Analysis of key issues

3.1 Long term interests of consumers

The NEO makes it clear that the overarching objective is to serve the consumer. The NEO states that the long term interests of consumers are to be determined with respect to a list of factors, including price, quality, safety, reliability and security of the supply of electricity, and the reliability, safety and security of the national electricity system. These are often highly technical factors to determine. The NEO does not provide guidance as to how to resolve a conflict between the factors, or how to resolve a disagreement between various stakeholders as to how to balance these factors, particularly where there is disagreement between consumer and industry views. There will be divergences in relation to whether particular decisions that prioritise price or that prioritise safety, reliability and security of supply, are more consistent with the NEO.

Generally, the LMR framework amendments of 2013 were intended to ensure that regulatory decisions promote efficient investment, operation and use of energy infrastructure in ways that best serve the long-term interests of consumers. This included avoiding lengthy and excessively legalistic hearings that make it difficult for all stakeholders to participate. The amendments were intended to address two main deficiencies identified in relation to the merits review regime; firstly, the tendency to focus on specific aspects of a regulatory determination (i.e. on 'error correction'), rather than on the overall outcome represented by the regulatory determination; and, secondly, the absence of any requirement to assess the regulatory determination against the long-term interests of electricity or gas consumers.

The amendments that were enacted framed the process as more 'NEO-advancing' in an attempt to rebalance the system towards a more appropriate consumer focus. This included introducing the requirement on applicants seeking leave to apply for review to justify an application on the basis that correcting the relevant error of fact or discretion would, *prima facie*, be likely to lead to a materially preferable outcome for consumers (as expressed in the NEO). The intention was that leave to review would only be granted on matters of substance, which would be determined by reference to the statutory objectives of the national electricity and gas law.

This reform was made on the assumption that if reference to the NEO was made more explicit, then it would follow that the interests of consumers would be better served in that the system would be explicitly assessed against what was in the 'long-term interests of consumers'. However, while the decision-making and LMR regimes squarely vest the AER and the ACT with statutory duties to make evaluative assessments as to how the long-term interests of consumers are to be most effectively advanced through a revenue determination, the NEO includes various aspects of consumer interests that may throw up difficult and complex value judgments. The statutory scheme is further complicated by the fact that a decision making body needs to balance

not only consumer aspect of the NEO, but also integrate the various aspects of the revenue and pricing principles.

Therefore, despite the good intentions behind these reforms in terms of a rebalancing toward consumers, they appear to continue to fail to recognise that the NEO is open to interpretation and that interpretations can be, and generally have been, more favourable to network businesses than to consumers. An explicit orientation to the NEO has only served to emphasise just how open to interpretation the NEO is, and how contestable the concept of the 'long term interests of consumers' continues to be.

The NEO and the SCER Policy Statement of Intent make it clear that the long term interests of consumers should be the sole criterion for determining the preferable decision, both at the initial decision-making stage and at merits review. In the community consultations related to the recent LMR in NSW, consumer representatives emphasised price, security and reliability of supply as key considerations relevant to the interpretation of the NEO. However, the Tribunal in its decision found that the long term interests of consumers would be served through 'the promotion of efficient investment in and efficient operation and use of, electricity and natural gas services'.⁴ This raises concerns that the consumer perspective was not being adequately taken into account in the interpretation of the NEO. The Tribunal in parts of its decision also appears to consider that the long term interests of consumers had to be balanced against the interests of network business.⁵ This is at odds with the both the NEO and the SCER Policy Statement of Intent.

3.2 The new 'materially preferable' test

The Expert Panel that reviewed the LMR regime in 2012 found that, in conducting merits review, the Tribunal took 'an approach that affords more weight to narrow legal considerations and less weight to matters of policy substance than is contemplated in the regulatory design'. The Panel considered it problematic that the Tribunal focused on the issues raised by the parties before it, instead of conducting a weighing exercise by considering the decision against the overarching policy objectives of the national electricity law to determine whether the decision was 'preferable' in all of the circumstances.

As recognised by the reforms, from the perspective of improving outcomes, it is not always the case that correcting a single error or a subset of errors will lead to a preferable outcome. Indeed, depending on the context, correcting an error may lead to a worse outcome from the perspective of the relevant objective. This is because, in a complex decision problem, errors may be offsetting, and eliminating only some may actually increase the cumulative effect of error. The networks' continued focus on the identification of 'error' by the AER is therefore not overly helpful or efficient.

To try to address the inefficiency of 'error correction', the 2013 reforms added the filter that an applicant is required to establish a prima facie case that, if its grounds of review are established, varying or setting aside the original decision is likely to result in a 'materially preferable decision' with regard to the advancement of the national electricity or gas objectives.⁶ It was considered

⁴ *Applications by Public Interest Advocacy Centre Ltd and Ausgrid Distribution* [2016] ACompT 1 (26 February 2016)

⁵ PIAC/Ausgrid at [151]

⁶ NEL, s 71E(b), NGL, s 248(b)

that this additional requirement would impose a higher threshold at the leave stage. This would in turn reduce the use of the review as a routine part of the regulatory process, and would address concerns regarding the ‘cherry picking’ of issues for review.⁷

Based on the Tribunal’s NSW decisions, it does not appear to PIAC that the materially preferable NEO decision filter, both at the leave stage and also in s 71P(2a)(c) where it is a core test of whether ground of reviews should be upheld, has changed the way the Tribunal is approaching its task.⁸ For example, the Tribunal found that the network businesses had established that ‘in significant respects the AER had formed its decision on foundations that are not properly established’. On the basis that these errors had given rise to ‘very significant outcomes’, this satisfied the Tribunal that the AER’s decision should be set aside.⁹ It appears that the Tribunal did not engage with the question of whether these errors and outcomes had given rise to a decision that was not the materially preferable one in the long term interests of consumers.

3.3 Consumer participation

The 2013 reforms aimed to improve accessibility for user and consumer stakeholders by:

- broadening the scope of ‘affected or interested persons or bodies’ who have standing to apply for merits review;¹⁰
- requiring the Tribunal to engage in community consultation, in parallel with the formal hearing process;¹¹ and
- enhancing the costs protections for small/medium user or consumer parties who participate in the formal hearing process.¹²

The Expert Panel review clearly articulated the objective to ensure that consumers and users feel “that, if not exactly ‘at home’ in the [merits review] process, they are more than simply inconvenient guests”. The reforms were partially successful, in that they did address the issue that user and consumer groups were previously systematically excluded from participation in LMR proceedings in the Tribunal, not least by the risk of having adverse costs orders made against them. Consumer groups are now able to participate and the issue of a bilateral contest between the networks and the regulator has been mitigated. However, this is not to say that participation is without its difficulties. The ability to participate is significantly hampered by a resource imbalance and it is not realistically possible to formally participate without legal representation.

In terms of community consultation, PIAC’s experience as an observer, advisor and participant in the Tribunal’s consultation processes to date has revealed particular difficulties faced by consumers that need to be addressed if the community consultation is to be meaningful.

⁷ SCER, Regulatory impact statement, June 2013, at [40]-[41]

⁸ PIAC supports the analysis of the Commercial Bar Association of Victoria in relation to the materiality threshold and why it has not led to a change in the way that the Tribunal approaches its task, see [53] – [70] of CommBar, Submission to COAG Energy Council: Review of the limited merits review regime, 3 October 2016

⁹ PIAC/Ausgrid at [333]

¹⁰ NEL, s 71A; NGL, s 244

¹¹ NEL, s 71R(1)(b); NGL, s 261(1)(b)

¹² NEL, s 71Y(2); NGL, s 269(2)

In PIAC's view, the language of s 71R(1)(b), the evident purpose of the provision and its location within a broader legislative scheme which privileges the interests of consumers, demonstrates the vital role that consumer consultation was intended to play in the Tribunal's decision-making. PIAC has identified three main concerns arising from the Tribunal's interpretation of the community consultation element. We have presented the concerns to the Tribunal and reiterate them here to assist the Energy Council's consideration.

PIAC's first concern is that community consultation forums tend to have taken place only a few days after the applicants had lodged their submissions, and before interveners and the AER were required to lodge theirs. The timing of the consultation therefore limits the ability of participants in the consultation to make submissions that will be useful and relevant to the Tribunal because the detail of the parties' arguments is not yet known. In previous submissions to the Tribunal, PIAC and other consumer organisations have argued that the Tribunal should provide additional opportunities, including after the hearing, for consumers to provide their views, consistent with the SCER's Statement of Policy Intent calling for 'early *and continued* consultation during the decision-making process'.

PIAC suggests that the Tribunal schedule future consultation forums after the parties have lodged their submissions and closer to the date of the hearing. This would ensure that consumers have adequate information available to them and are able to provide responses that are as relevant and useful to the Tribunal's decision-making as possible.

Secondly, PIAC is concerned by the current three-page limit imposed by the Tribunal on consumer's written submissions and submits that this limit should be increased where consumers have indicated that further pages are necessary to address issues of concern. PIAC notes that even where a decision-maker retains discretion to determine the nature of a consultation process, the opportunity to comment must be reasonable. In PIAC's view it is unreasonable to expect consumers to address the number and complexity of issues raised in the applications before the Tribunal within such a restricted page limit. Consumer organisations are effectively limited to addressing one or at most two or three issues and may have to forgo comment on issues of concern and relevance to their constituents.

The insufficiency of the page limit is clear when cast against the lengthy submissions filed by the parties, which run to hundreds of pages. PIAC notes that no page limit is typically placed on parties' submissions. This creates a significant imbalance between consumers and parties, of the kind that section 71R(1)(b) was clearly intended to prevent.

PIAC is also concerned about the limited consideration given by the Tribunal to consumer submissions in its lead NSW decision, the PIAC-Ausgrid decision. PIAC was troubled by the Tribunal's conclusion that the submissions made by a diverse variety of consumer and user organisations during the NSW consultation were encompassed by PIAC's own submissions as a consumer applicant and intervener, and therefore did not need to be separately addressed.

In circumstances where there is no consumer applicant or intervener in the merit review proceedings, it is of even greater importance that the Tribunal itself take up the issues raised by consumers with the parties during the hearing and ultimately comment directly in its decisions on the use made of material provided as part of the consumer consultation.

If the Tribunal finds it difficult to make use of consumer submissions, PIAC urges that the Tribunal be required to explain why the material was not useful to its decision-making. Such explanation will help guide consumers and improve the quality of future consultations. If it is not practicable for the Tribunal to comment directly on consumer submissions in its decisions, we suggest that the Tribunal should, at a minimum, provide a fact sheet to consumers following the decision that explains to stakeholders how their input was considered and if the Tribunal broadly accepted or rejected consumers input.

These are practical ways in which PIAC believes that best practice consumer consultation principles can be implemented, in order to meet the clearly stated objectives of the 2013 reforms.

4. Consideration of the reform options

4.1 Option 1: Retain the Tribunal without legislative amendments

On the basis of PIAC's experience and the barriers identified and discussed above, PIAC does not support this option.

4.2 Option 2: Retain the Tribunal with legislative amendments

On balance, PIAC supports this option. PIAC is wary of further legislative changes that open the regime to further contestability and uncertainty. We believe that a focus on amendments to procedure and increasing consumer resources is the most practical way to address the identified barriers. The focus should be on streamlining and narrowing the Tribunal process, and enhancing the resources of and deference to the decision of the AER. There are a number of practical measures such as limits on submission dates and length that can be adopted to address the issue of complexity.

To address the complexity caused by duelling experts in the Tribunal, consideration should be given to appointing an expert, or experts, at the start of the decision-making process. This is an issue that is best resolved at the stage of the AER determination. The AER could appoint a relevant expert, or if necessary experts, in consultation with those affected by the decision, including the network providers, consumer and user groups.

To further streamline the Tribunal process, the threshold for review could be raised. This could be done by increasing the materiality threshold, in s 71F(2) of the NEL, by providing that the financial threshold should apply to each individual ground of review that relates to the amount of revenue to be earned.

The Tribunal's task could also be narrowed through an alternative formulation of the 'materially preferable' filter. For example, it may be re-formulated to be 'whether the 'AER's decision is unreasonable in the context of materially compromising the delivery of the long term interests of consumers as set out in the NEO/NGO'. To reduce the uncertainty and circularity, two additional requirements could be introduced, that:

- the Tribunal must provide clear reasons as to why the AER's decision did not meet the statutory requirements, and directions as to how the AER can rectify these shortcomings;

- upon remaking the original determination, the AER must be required to submit the decision to the Tribunal, who must certify that the new determination has addressed the shortcomings identified in the Tribunal's review decision that led it to conclude the decision did not meet the statutory requirements. The certification process may be iterative, with the Tribunal requiring the AER to make further changes, to bring the AER's decision in line with the Tribunal's directions. Upon certification by the Tribunal, the decision is not subject to further merits review.

More generally, the Energy Council may wish to consider reviewing the NEO, and associated objectives, to provide greater guidance to decision-makers and review bodies as to the relative weighting between the relevant listed factors, and how consumer and user consultation is relevant to determining the objective.

To facilitate participation in the review process by consumer groups and address the resource imbalance, consideration should be given to allowing consumer groups to seek review relying on the submissions that were advanced by any consumer group in the initial decision-making process. This could be achieved through an amendment to s 71O(2)(c) of the NEL. This will not only ease the burden on consumer groups at the initial decision-making stage, but it will also focus and streamline the submissions that are presented before the initial decision-maker.

4.3 Option 3: replace the role of the Tribunal with a new investigatory body

PIAC does not consider that the fundamental reform envisaged by option 3 provides a targeted solution to the identified problems with the current regime. The model is untested and may create unforeseen risks.

4.4 Option 4: Remove access to LMR

The removal of access to LMR would leave recourse only to judicial review. PIAC has significant concerns about the effect this would have on consumer access. The first issue is that of cost protection. The cost protection provisions currently in the LMR framework do not apply to proceedings in the Federal Court and without such protection consumer organisations are very likely to be precluded from participation. PIAC agrees with the view of the Commercial Bar Association of Victoria¹³ that it is unlikely that the Commonwealth government will be willing to enact adverse cost protection provisions, specific to user and consumer representatives in relation to judicial review of network revenue determinations, in Commonwealth legislation, as this is likely to create a precedent for claims for equivalent costs protections by public interest claimants in other areas of judicial review, such as the Federal Court's environmental and migration jurisdictions.

A reversion to judicial review would also mean the loss of the community consultation element that was introduced by the 2013 reforms. Although PIAC has concerns about the operation of community consultation, as outlined above, we believe they can be enhanced, while judicial review proceedings would not be able to accommodate any attempt at incorporating consumer views in the novel and informal ways that reflect best practice consumer engagement.

¹³ CommBar Victoria, 'Submission to COAG Energy Council: Review of the limited merits review regime', 3 October 2016

Consumer organisations would also lose the benefits of the 2013 reforms around standing. Overall, the cost of consumer participation would be very high, and the likelihood of being able to mitigate those costs through changes to either the *Administrative Decisions (Judicial Review) Act 1977* or the *Federal Court Act 1976*, is very low.

Any consideration of removal of access to LMR must be accompanied by consideration of significant amendments to other parts of the regulatory regime. Generally, this would need to include:

- More inclusive and strengthened consumer involvement in the initial decision-making of the AER;
- Greater democratic accountability in the AEMC and the COAG Energy Council; and
- Enabling cost protection and changing the standing rules in judicial review proceedings to make certain the standing of consumer groups to challenge or intervene in judicial review proceedings.

Introducing accountability for the AEMC's rule-making function, which is currently subject to no democratic scrutiny, could be achieved through the Commonwealth Parliament performing a disallowance-type function over the rules made by the AEMC. Increased transparency and public participation within the COAG Energy Council could be achieved through public release of meeting agendas, public annual reporting and planning obligations, the creation of a public advisory committee, composed of a majority of consumer representatives.

On accountability more broadly, PIAC thinks it is timely to reiterate its position that it is essential for a consumer commissioner to be appointed to both the AER and the AEMC. PIAC outlined its proposals on how to increase accountability in the system in its response to the COAG Review of Governance Arrangements for Australian Energy Markets (the Governance Review).¹⁴

If the Energy Council decides that removing access to LMR is the best course of action, then PIAC submits that significant reforms would be needed in order to fill the accountability gap that would be created by its absence, especially in relation to consumer participation. PIAC would welcome further detail, and stakeholder consultation on models that are under consideration.

Given that PIAC considers it unlikely that the changes to judicial review will occur to provide cost protection and standing for consumer organisations, there would need to be significant changes made to the initial decision making process to ensure consumer interests are properly protected. A proposal for broader reform that may assist option 4 to work for consumers is discussed below.

4.5 Broader reform

The Expert Review Panel considered that the problems with LMR were connected with broader issues to do with the way the entire regulatory regime was structured.¹⁵ For example, the panel held the view that the AER and the network providers needed to work together towards certain objectives, including improving outcomes for consumers, in a more effective and efficient manner. PIAC agrees with this view and observes, on the basis of its experience, that issues with

¹⁴ PIAC, 'From complex fragments to competitive consumer-focused markets', May 2015, Available at http://piac.asn.au/sites/default/files/publications/extras/150508_governance_review_piac_submission_final.pdf

¹⁵ *Stage Two Report*, at [7-8].

meaningful consumer engagement persist, despite numerous reforms to try to address the obstacles to it.

For example, while the AER has recently implemented a number of initiatives to strengthen its consumer engagement, there are concerns that the advice of the Consumer Challenge Panel is having limited influence on the AER's decision-making.¹⁶ It appears that the AER may have limited resource capacity to listen to and respond to the CCP's advice.¹⁷

PIAC, in response to the Governance Review, argued that consumer representation and participation in the NEM is in need of substantial improvement, most importantly in relation to the network revenue setting process.¹⁸ PIAC is in favour of consideration of alternatives to the current propose-respond model that give consumers a seat at the table. PIAC also made recommendations on where accountability should improve, including enhancing the accountability of the rule-maker.

More specifically, we pointed out that the Productivity Commission noted 'it is widely recognised that existing arrangements do not involve sufficient engagement with consumers'¹⁹ 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 needing to assess and determine thousands of pages of submissions including technical data and obscure debate, could mediate/adjudicate between the competing views. The AER would facilitate negotiation and arbitrate between networks and consumers on total revenue. The Energy Council should give strong consideration to alternative models that are predicated on negotiation and meaningful participation.

PIAC believes that a model of network regulation in which consumers are equipped to make a genuine contribution from a position of fair bargaining power will lead to better outcomes for consumers.

¹⁶ See Nous Group, *Independent Review of Consumer Challenge Panel* (6 April 2016) available at https://www.aer.gov.au/system/files/NOUS%20Group%20-%20Review%20of%20the%20Consumer%20Challenge%20Panel%20-%20AER%20-%20Independent%20report%20-%206%20April%202016_2.pdf at [2].

¹⁷ Ibid at [18]-1[9]

¹⁸ PIAC, 'From complex fragments to competitive consumer-focused markets', May 2015, Available at http://piac.asn.au/sites/default/files/publications/extras/150508_governance_review_piac_submission_final.pdf and attached expert reports

¹⁹ Productivity Commission, 'Electricity Network Regulatory Frameworks', (Report No. 62, 2013)