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# A guide to consumer participation in electricity pricing and revenue determinations

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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's office is on the land of the Gadigal people of the Eora nation. We pay our respects to Aboriginal and Torres Strait Islander elders past and present and stand with them in their fight for justice for their people.

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# Table of Contents

<b>TABLE OF ACRONYMS</b>	<b>3</b>
<b>BACKGROUND TO THE LIMITED MERITS REVIEW FRAMEWORKS</b>	<b>4</b>
<b>PARTICIPATING IN THE AER'S DETERMINATION PROCESSES</b>	<b>6</b>
THE AER'S DETERMINATION PROCESS	6
WAYS TO PARTICIPATE	7
WHAT TO MAKE SUBMISSIONS TO THE AER ABOUT	8
SHARING WORK BETWEEN ORGANISATIONS	9
ADOPTING ASPECTS OF THE CCP REPORTS	9
STANDING FOR LIMITED MERITS REVIEW	9
<b>PARTICIPATING IN LIMITED MERITS REVIEW</b>	<b>11</b>
WHAT IS LIMITED MERITS REVIEW?	11
WHAT IS THE AUSTRALIAN COMPETITION TRIBUNAL?	11
WAYS TO PARTICIPATE IN LMR	12
PARTICIPATING AS A PARTY BEFORE THE TRIBUNAL	12
PARTICIPATING IN THE CONSUMER CONSULTATION PROCESSES	17
<b>WHAT HAPPENS AFTER A DECISION IS MADE BY THE TRIBUNAL</b>	<b>20</b>
WHEN THE AER IS SUCCESSFUL	21
WHEN A DNSP OR CONSUMER APPLICANT IS SUCCESSFUL	21
WHAT EFFECT DO TRIBUNAL DECISIONS HAVE ON FUTURE TRIBUNAL DECISIONS?	21
<b>THE ROLE OF JUDICIAL REVIEW</b>	<b>22</b>
JUDICIAL REVIEW OF THE AER'S DETERMINATIONS	22
JUDICIAL REVIEW OF THE TRIBUNAL'S DECISIONS	22
WHAT EFFECT DO JUDICIAL REVIEW DECISIONS HAVE ON FUTURE TRIBUNAL DECISIONS?	23
<b>KEY DETERMINATION DATES 2018-2020</b>	<b>24</b>

## Table of Acronyms

AER	Australian Energy Regulator
CCP	Consumer Challenge Panel
COAG	Council of Australian Governments
DNSP	Distribution Network Service Provider
ECA	Energy Consumers Australia
LMR	Limited Merits Review
NEL	National Electricity Law
NEM	National Electricity Market
NEO	National Electricity Objective
NER	National Electricity Rules
PIAC	Public Interest Advocacy Centre
SACOSS	South Australia Council of Social Service
WACC	Weighted Average Cost of Capital

## **Background to the Limited Merits Review frameworks**

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The National Electricity Market (NEM) is the interconnected electricity system that supplies energy to consumers in Queensland, New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory. There are 12 monopoly distribution network service providers (DNSPs) across the NEM. These are the ‘poles and wires’ companies responsible for providing the infrastructure for electricity delivery. Charges for these network services are significant for consumers as they comprise between 20-55% of a typical residential electricity bill, depending on the state or territory.

In order to regulate these monopolies, the Australian Energy Regulator (AER) undertakes an assessment of the revenue requirements of each of the DNSPs by state or territory jurisdiction on a five-yearly basis. The AER then publishes a final determination which sets the maximum revenue or price that each DNSP can recover from consumers over the five year regulatory cycle.

Limited Merits Review (LMR) is a process by which aspects of the AER’s determination may be challenged in the Australian Competition Tribunal (‘Tribunal’). Prior to 2015, the only parties that had challenged the AER’s decisions had been the DNSPs themselves. However, in 2015, the Public Interest Advocacy Centre (PIAC) in NSW and the South Australia Council of Social Service (SACOSS) lodged applications for review of the AER’s final determinations for their state.

Drawing on these experiences, this guide aims to assist consumer organisations to participate effectively in the LMR process. While it is targeted at consumers wishing to challenge electricity distribution determinations, it may also have relevance to consumers engaging in gas determinations, as many of the key concepts and processes under the national electricity and gas laws and rules are very similar. It is hoped that stronger consumer engagement in the LMR process for both electricity and gas will improve outcomes for consumers and lead to fairer and more efficient pricing.

This guide was drafted in May 2017. At the time of drafting, COAG (the Council of Australian Governments) has agreed to make a number of changes to the LMR frameworks, and established a working group to consider these changes. While the working group had commenced consultations on proposed changes, none had been made at the time of publication. Therefore, it is important that any consumer organisation check the status of that review and any subsequent changes made before relying on the information provided in this guide. For the most up-to-date information in relation to the COAG Energy Council, see the link below:

<http://bit.ly/2qaLIF7>

Importantly, the LMR system is governed by the National Electricity Law (NEL) and the National Electricity Rules (NER). The most important section for consumer organisations is Division 3A of the NEL (sections 71A-71Z), which sets out the process for LMR, and Chapter 6 of the NER, which are the rules governing the AER in the making of an electricity distribution determination. The NEL is available online here:

<http://bit.ly/2q8XprM>

For a comprehensive guide to the statutory regimes governing the regulation of the National Energy Market as a whole, it may be useful to refer to the ECA/Maddocks National Energy Regulation Handbook, produced in October 2016 and available here:

<http://bit.ly/2qZBxjY>

# Participating in the AER's determination processes

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## The AER's determination process

In each regulatory cycle, the process commences with the AER publishing its framework and approach to the determination process. DNSPs must then make proposals to the AER detailing and substantiating the different components of revenue they expect to be required in the coming five-year determination period. The AER uses a 'building block' approach, determining the value of different elements of the overall proposal to arrive at the DNSPs' total revenue. The AER sets out its consideration of each building block in separate chapters of its draft and final determinations. These include:

- operating expenditure
- capital expenditure
- the financing of the DNSP through debt and equity funds raising
- an allowance for forecast tax
- depreciation; and
- indexation of the regulated asset base.

The AER is required to perform each of its functions and powers in a manner that is likely to contribute to the achievement of the National Electricity Objective (NEO). The NEO, which is contained within s 7 of the NEL is:

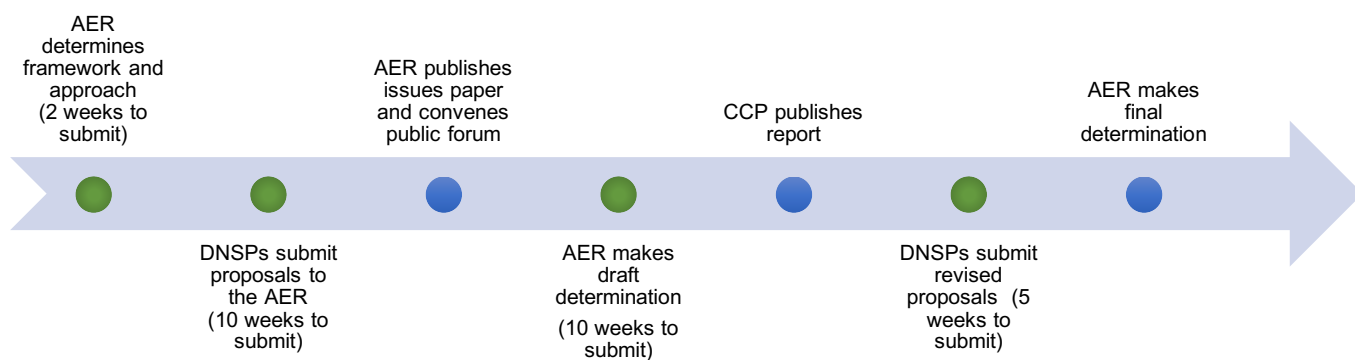
to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to—  
(a) price, quality, safety, reliability and security of supply of electricity; and  
(b) the reliability, safety and security of the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

More generally, the AER is required to consider the DNSPs' proposals in line with the NEL, the NER, and any arrangements, including Acts, Codes and Orders in Council, that apply to DNSPs in a given jurisdiction. The AER must also ensure that stakeholders (including the DNSP to whom a determination will apply, participants in the determination process, network service users, and consumer associations and interest groups) are informed of material issues under consideration by the AER, and have a reasonable opportunity to make submissions on those issues.

For each jurisdiction, the AER will also appoint three members from its Consumer Challenge Panel (CCP) to advise it on whether the proposals made by the DNSPs are in the long term interests of consumers. Members of the CCP will often meet with the DNSPs and other stakeholders. They will then write a report and submission on the AER's draft determination in which it may suggest improvements from a consumer perspective.

Based on the proposals received by the DNSPs, the AER is required to publish an issues paper and to hold a public forum about the key issues in the proposals. The AER is then required to publish a draft determination setting out its forecast and methodology for each of the building blocks for each DNSP.

Each of the DNSPs respond to the AER's draft determination by submitting a revised proposal. Other stakeholders may also make submissions about the AER's methodology and the submissions of the DNSPs. The AER then publishes a final determination which is binding for the upcoming determination period.



### Approximately 18 - 24 months

As indicated by the green dots in the diagram above, consumer organisations generally have at least four opportunities to submit to the determination process:

- When the AER publishes its framework and approach paper
- When the DNSPs submit proposals to the AER
- When the AER makes a draft determination; and
- When the DNSPs submit revised proposals to the AER.

While the time frame for providing a consumer submission varies between determinations, the above diagram also provides approximate time frames for consumer responses.

### Ways to participate

There are multiple ways for consumers to participate in the AER’s determination processes. Many of these ways are informal, and do not necessarily require legal expertise. These ways include:

- Participating in the development of the AER’s guidelines. The guidelines are developed prior to the DNSP proposals, and form the basis for many parts of the AER’s ultimate decisions
- Commenting on the DNSPs’ initial and revised proposals to the AER
- Commenting on the AER’s issues paper
- Commenting on the AER’s draft determination
- Attending the AER’s stakeholder consultation days, which generally take place at the start of a determination period and upon the release of the draft determination
- Providing feedback to, and asking questions of, the AER’s Consumer Challenge Panel throughout the determination process; and
- Providing feedback directly to the AER.

Generally speaking, the AER will make efforts to make it as easy as possible for consumers to participate in their determinations, and will typically publish a consumer guide to the pricing review at the start of the determination process. These may indicate to consumers the particular issues about which they might choose to make submissions during the review. For an example of one such consumer guide, see the link below:

<http://bit.ly/2r6bGDk>

The AER will appoint a head officer for the review in each jurisdiction. Generally, that person is happy to answer questions from consumer groups about aspects of the AER’s

determination process, and to educate consumers about different aspects of the methodology involved in its determinations.

Prior to the AER's determination process, consumers are also encouraged to participate in the stakeholder engagement process that DNSPs are required to undertake in preparing their proposals to the AER. Options for this engagement include:

- Public forums
- Focus groups
- Stakeholder workshops
- Surveys
- Membership of customer councils
- Providing written feedback on matters that DNSPs are considering for their draft proposals; and
- Face to face meetings with the DNSP on specific issues.

As well as the potential to influence the proposals, engaging directly with the DNSP provides consumers with the opportunity to better understand matters of concern that are relevant to the determination process.

Importantly, consumer experience of the DNSPs' approach to stakeholder engagement can also help the CCP and AER to understand the quality and effectiveness of that engagement, and therefore the validity of assumptions or assertions made by a DNSP about stakeholder preferences. If a consumer organisation believes that a DNSP has failed to engage sufficiently on a particular matter, or that their proposal misrepresents feedback given to them through their engagement, this information may be used to influence the AER's assessment of that matter in their determination.

## **What to make submissions to the AER about**

Many organisations representing the needs of small consumers are very focused on the harmful impact of high electricity prices on the people they represent. Because of this, many of the submissions made by consumer groups to the AER in the past have been statements of policy, to the effect that the high levels of revenues proposed by the AER or DNSPs are unfair to and harmful for consumers.

From the AER's perspective, it is most assisted by (and able to rely upon) evidence-based submissions that put forward alternative methodologies and considerations to guide their decision making across various aspects of their determination. Alternate perspectives on consumer and community preferences claimed by the DNSP, such as "willingness to pay" studies, may also be effective.

If you anticipate participating in an LMR challenge of the AER's determination, it is important to consider that the matters you can raise in the review may be limited to those you have raised with the AER during their process. This is explained further below. Submissions that may be most likely to form the basis for a substantive LMR challenge are submissions that challenge and provide considered alternatives to:

- The qualitative and quantitative methods applied to any decision or formula used by the AER or by DNSPs
- The values adopted by the AER for any variables in their decisions or formula; and
- Any assumptions made by the AER in conducting their economic analysis and forecasts.



These submissions will necessarily be of a highly technical nature, and generally require external consultant advice for those organisations that do not have a high level of internal capacity. Many of the members of the CCP are available for individual consultant work to consumer organisations, though are likely to be conflicted out of providing this advice in determinations in which they are part of the CCP three-member panel advising the AER.

Further information on the CCP, and a list of its current members, is available at the link below:

<http://bit.ly/2r6i7Gj>

## **Sharing work between organisations**

From a practical perspective, much of the methodology used in some of the AER's building blocks will be the same across jurisdictions within a determination cycle. For example, in its most recent round of determinations for the electricity distribution providers, the AER's general approach to issues such as benchmarking, gamma, and WACC was very similar across each of the states and territories in which determinations were made. For this reason, it may be worthwhile for consumer organisations to pay close attention to, and provide detailed critique of, the methods and models used by the AER in the first jurisdiction to be decided in a determination period (usually NSW).

If the AER does not adopt the alternative methodologies and approaches suggested by a consumer organisation in one jurisdiction, this alone is not a reason not to adopt the approach taken by that organisation and suggest it to the AER in a different jurisdiction (though of course, it is prudent to be mindful of any reasons that the AER has given for not adopting the suggested methodology). Each process undertaken by the AER is an individual one (or, at least, unique to a point in time and jurisdiction) and the AER is required to consider fresh material that is before it in every separate determination. Likewise, each Tribunal hearing throughout a determination period will be separately constituted with different members, who may come to different conclusions about similar arguments. Although each Tribunal is to have regard to decisions that have been made in relation to similar issues, the Tribunal is not strictly bound to make the same decision as previous Tribunals before it.

## **Adopting aspects of the CCP reports**

Consumer organisations could also consider formally adopting aspects of the CCP reports by repeating them in their submissions, including CCP reports from other jurisdictions. Again, where reference is made to materials from other jurisdictions, it is prudent to be mindful of any reasons that the AER or Tribunal has already given for rejecting those methodologies.

## **Standing for Limited Merits Review**

If you anticipate that you may participate in an LMR challenge of an AER determination, it is important to consider that the matters you can raise in the review may be limited to those you have raised directly with the AER, in the form of a timely written submission, during the course of their determination process.

In the LMR process, consumer organisations will only be allowed to raise matters canvassed in the CCP report, if they have also separately raised the same issues or formally adopted (by repeating) the CCP's approach in their own submissions to the AER. See 'The role of s 710 of the NEL' below.

If there are a number of consumer organisations with similar policy objectives, matters raised in one submission to the AER on behalf of multiple organisations can be considered for LMR by any one contributing organisation, provided it is clear that that organisation has, in its individual capacity, contributed to the submission and the name of this organisation appears separately as a contributor within the document. Any of the contributors that meets these requirements should individually be able to apply for review as an applicant or intervener in LMR processes in the Tribunal without the participation of the others.

An example of a joint submission made to the AER on behalf of multiple consumer organisations is available here:

<http://bit.ly/2qyerB4>

Engaging directly with the DNSPs about issues of concern to consumers will not in itself allow consumers to raise those matters in LMR processes, unless those issues are also directly raised with the AER. This is because when a matter is raised by a consumer organisation with a DNSP, there is no guarantee that the AER has had the chance to consider it.

Similarly, participating in the AER's guideline process, or engaging with the CCP, will not open the door to allow consumers to raise those matters in LMR processes, unless those issues are also directly raised with the AER during the determination process.

## Participating in Limited Merits Review

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### What is Limited Merits Review?

As outlined above, Limited Merits Review (LMR) is a process by which aspects of the AER's determination may be challenged in the Australian Competition Tribunal. In general, the term 'merits review' is used to refer to a process of review where all the evidence is considered again and a fresh or 'de novo' decision is made. The reviewer is usually a more senior member of a government agency, or a Tribunal. This is distinct from 'judicial review' in which a court considers the lawfulness of the decision in relation to a number of narrow legal grounds.

The National Electricity Law (NEL) establishes a process of 'limited' merits review. The Tribunal can review the AER's determination where it is shown that the AER has:

- Made one or more errors of fact
- Exercised its discretion incorrectly; or
- Made an unreasonable decision.

In addition, the Tribunal can only vary or set aside the AER's determination if it can be shown that a fresh decision would be likely to result in a 'materially preferable' decision in making a contribution to the achievement of the national electricity objective (NEO). This is discussed in more detail in 'The identification of error' below.

### What is the Australian Competition Tribunal?

The Tribunal is a federal review body whose powers are contained within the *Competition and Consumer Act 2010* (Cth). When hearing Limited Merits Review proceedings, the Tribunal sits with a Presidential member, who is also a judge of the Federal Court of Australia, and two other members of the Tribunal, who are usually not lawyers. These members typically have knowledge and/or experience in commerce, industry or economics, and may be drawn from academia or the private sector.

Unlike in some Tribunals, hearings before the Australian Competition Tribunal are formal in nature, and generally proceed in the same manner as Federal Court proceedings. However, unlike in Federal Court proceedings, there are few forms, practice notes or procedural guides that would ordinarily apply. It is therefore important to look closely at the documents of previous LMR proceedings on the Tribunal's website, and to speak to the Tribunal's registry, to understand what is required in a hearing or when submitting documents.

The President of the Tribunal is currently Justice Middleton of the Federal Court. Because Justice Middleton is based in Victoria, the 'head' registry for the Tribunal is at the Federal Court in Melbourne, though applications for review can be lodged in any registry of the Federal Court. However, from a practical perspective, participation in most Tribunal reviews is conducted electronically, with applications and submissions lodged by email.

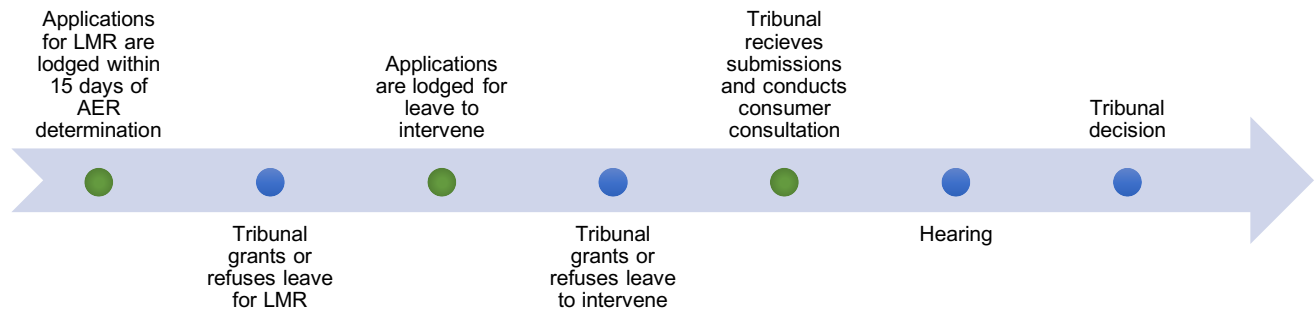
The Tribunal typically makes documents from Limited Merits Review proceedings available on its website. The exception to this is for transcripts of LMR hearings before the Tribunal, which must be purchased through Auscript.

A link to the Tribunal's website is available below:

<http://www.competitiontribunal.gov.au>

## Ways to participate in LMR

LMR proceedings before the Tribunal generally take place in the following stages:



**Approximately 3 – 12 months**

As indicated by the green dots in the diagram above, there are three main ways for consumer organisations to participate in LMR proceedings before the Tribunal:

- Making an independent application to the Tribunal for LMR of the AER's determination
- Intervening in an application for LMR brought by a DNSP or another applicant; and
- Participating in the Tribunal's consumer consultation process.

When participating as either an applicant or intervener in LMR proceedings, a consumer organisation will be considered a 'party' before the Tribunal. In some cases, it is possible for consumer organisations to be both an applicant and an intervener in LMR proceedings.

Participants in the consumer consultation process are not formal parties to the proceedings, and, conversely, organisations that are formal parties to the proceedings cannot participate in the consumer consultation process.

There are many factors for consumer organisations to consider when deciding whether and how to participate in LMR. Relevant factors and the requirements for each type of participation are outlined below, although consumer organisations should seek legal advice about how these factors apply to their specific circumstances.

## **Participating as a party before the Tribunal**

### **Applying for review**

In order to participate in the Tribunal as an applicant for review, a prospective organisation must lodge its application within 15 working days of the AER publishing its final determination. In reality, this means that if an organisation wishes to apply for review as an applicant, it is more likely to be able to do so if, prior to the determination being made it has:

- Secured funding to take advice from solicitors and barristers about the issues about which they made submissions during the draft determinations
- Instructed solicitors about the nature of their organisation, the ways in which they made submissions to the AER's process, the issues they see arising in the draft determination and the proposals of the DNSP, and the issues they would consider challenging if their concerns remain in the final determination
- With their solicitors, sought written legal advice from barristers about their legal standing to mount an application for review, and their prospects of success on their proposed grounds; and
- Briefed their Board or Management committee and sought approval to make a Tribunal application.

The AER's final determination is not always published in accordance with expected timelines. It is therefore important that the organisation, or their solicitor, remain in touch with the AER staff member responsible for the state or territory review in question to determine precisely when the determination will be published.

Once a determination is published, the organisation and its solicitors must take the following steps within the 15 working day period:

- Read the final determination and decide whether any concerns that the organisation has raised with AER remain
- Determine whether the AER has significantly changed its methodology from what it had signalled during the determination process in ways that significantly disadvantage consumers and that can be attributed to an errors of fact, incorrectly exercised discretion or an unreasonable decision
- Update barristers, as appropriate, to secure written advice on the prospects of challenging the AER's determination
- Seek and obtain any funding and approval required from the organisation's Board and/or funding body to proceed with an application; and
- Draft and file an application with the Tribunal.

### **Intervening**

There is no time limit under the NEL for an intervener to lodge its application. However, within around one month of applications for review being lodged, it is likely that the Tribunal will hold a directions hearing. This directions hearing will specify the dates by which the applicants for review must lodge their submissions for leave, and whether leave will be granted 'on the papers' or after an oral hearing.

Once leave is granted to any applicants for review, directions will then be made for any interveners who wish to apply for leave to file their applications. Typically, this will occur around two to three months after the AER's final determination is made. Decisions will then be made about whether any prospective interveners are granted leave to participate.

## **Time lines**

After the parties to a proceeding have been determined, the Tribunal will issue directions as to when substantive written submissions are to be filed by the parties. If there is to be an oral hearing, the Tribunal will make directions as to the time and place that this hearing is to occur.

The Tribunal is required by the NEL to use its best endeavours to reach a decision within three months of granting leave to applicants and interveners in respect of a decision. However, it is unusual that a Tribunal is able to comply with this timeline, and the Tribunal also has the power to extend its own timeline in increments of three months. The Tribunal must alert the parties and the public to any extensions of the time frame by issuing a notice on its website.

Before making a determination, the Tribunal must consult with individuals and user and consumer associations it considers have an interest in the determination. Although the NEL does not specify exactly when this should occur, the Tribunal has generally undertaken this task directly after the grant of leave to any interveners, and prior to the filing of substantive written submissions.

## **Standing**

In order to participate in the Tribunal as an applicant for review, a prospective consumer organisation must seek leave on the basis that it is either:

- a ‘user or consumer association’ – a body (whether incorporated or not) whose members include users of the electricity system, and that represents or promotes the interest of those members in relation to the provision of electricity services; or
- a ‘reviewable regulatory process participant’ – a body or individual that made a submission to the AER’s determination process.

In order to seek leave to participate as an intervener for review, a prospective consumer organisation must seek leave on the basis that it is either:

- a ‘reviewable regulatory process participant’ – a body or individual that made a submission to the AER’s determination process; or
- a ‘user or consumer intervener’ – which is either:
  - a ‘user or consumer association’ (as defined above); or
  - a ‘user or consumer interest group’ – an association or body that has, as a purpose, the object or purpose of representing and promoting the interests of end users of electricity servicesand which has made a submission to the AER’s determination process.

For the reasons discussed below, in practical terms, any applicant or intervener in a Tribunal review must be a reviewable regulatory process participant. Whether an organisation also seeks to define itself as a user or consumer association or intervener may depend (among other things) on whether it wishes to make arguments that relate particularly to consumers, and whether it wishes to take advantage of cost protections for consumer interveners, which are discussed below.

## **The identification of error**

In order to be granted leave to appear before the Tribunal as an applicant, a party seeking review must demonstrate that they have a case that the AER made one or more errors in its

final determination, within the terms set out in s 71C of the NEL. Essentially, a party must show that the AER made one or more errors of fact that were material to the making of one or more of its decisions, that it exercised its discretion incorrectly, or that it made an unreasonable decision. These matters will be closely tied to the statutory powers of the AER under the NEL and the NER. It will not be enough for a consumer organisation to argue that it would have preferred that the AER reached a different decision in its determination.

An applicant also needs to be confident that it can show that any error made by the AER was 'material' to the making of the decision. One way that materiality will be measured is in dollar terms. A party needs to be confident they can show that, for any ground of review, correction of an error in the way that they seek would result in a change of revenue to the relevant DNSP of at least \$5,000,000, or 2% of the average annual regulated revenue of the regulated network service provider (whichever is less).

An applicant must also be confident that it can show that if a fresh decision was made by the Tribunal to correct the error alleged, it would be likely to result in a materially preferable NEO decision. In other words, that the fresh decision would be one that more efficiently promoted investment in, and operation of, electricity services for the long term interests of consumers with respect to price, quality, safety, reliability and security of supply of electricity; and the reliability, safety, and security of the national electricity system.

To date, little focus has been given in reviews as to what kind of material needs to be put on by consumers (or other parties) in the Tribunal process to demonstrate a materially preferable NEO decision. Generally, this question will be easier for consumers in relation to grounds of review related to Weighted Average Cost of Capital (WACC) issues, because these decisions generally correlate most strongly towards price impacts, and less towards safety and reliability of the electricity system. Therefore, it may be enough to point to price impacts for consumers, and show that there will not be any impacts on other aspects of the NEO.

In contrast, where consumers wish to dispute aspects of capital expenditure (capex) or operating expenditure (opex) it may be easier for DNSPs to argue that reducing these aspects of expenditure will impact upon safety and reliability of supply. In this context, it may be important for consumers to point to any credible evidence that suggests that consumers may be willing to trade off high levels of safety and reliability of supply for lower prices, if this is the case in their jurisdiction.

## **Applicant or intervener?**

The NEL allows consumer organisations to participate as either applicants or interveners in Tribunal reviews. Any consumer organisation considering participating in a review should seek legal advice about which role will best serve and protect their particular interests. However, relevant considerations to appearing as an applicant are:

- A short timeline: an application for review must be submitted within 15 days
- Unrestricted subject matter: unlike an intervener, an applicant for review can raise grounds of review across any part of the AER's determination as long as they have raised the matter with the AER during the determination process.
- Near guarantee of participating in the review: a consumer applicant's participation in the review is only contingent on being granted leave, and does not depend on there being another application to intervene upon. Because of this, an applicant also has the freedom to argue that another party should not be granted leave without this prejudicing their own application.
- Lower cost protections: while it is unlikely that the Tribunal would make a cost order against an applicant whose application demonstrated a serious issue to be

determined in relation to the available grounds of review, the cost protections in the NEL only apply to consumer interveners.

- Higher threshold for participation: applicants must demonstrate that their grounds of review, if successful, would be likely to lead to a materially preferable NEO decision.

Relevant considerations to appearing as an intervener are:

- A longer timeline: applicants to intervene may have up to two to three months after the AER's decision is made to submit their application to intervene.
- Restricted subject matter: an intervener is confined to making submissions about the issues raised by the applicants who are granted leave. Although an intervener may raise a new ground of review, this must still directly relate to the material put on by the applicants.
- No guarantee of participating in the review: a consumer intervener's participation in the review is contingent on there being an application to intervene upon.
- Higher cost protections: the Tribunal is not to make a cost order against a consumer intervener unless it runs its case without due regard to the costs and time it is imposing on either the Tribunal or another party to the review.
- Lower threshold for participation: interveners do not need to demonstrate that the matters they raise would be likely to lead to a materially preferable NEO decision (unless they raise new grounds of review).

Importantly, it is possible for consumer organisations to appear as both applicants and interveners. In order to do so, consumer organisations should file applications for review within 15 days that specify that they wish to be heard as applicants on the review, and, should there be another application for review successfully made, to in the alternative be heard as an intervener upon that review. While this strategy will still require another applicant to raise the relevant issues of concern, it may allow consumer organisations the ability to engage with the benefits of each role, while minimising their risk of non-participation in the reviews, or an adverse costs order being made against them.

## **The role of s 710 of the NEL**

Section 710 of the NEL prevents parties appearing before the Tribunal from raising matters that were not previously raised before the AER during the relevant determination process. The intention behind s 710 is to prevent parties from bringing up new arguments before the Tribunal that the AER had not previously had a chance to consider.

The requirement for consumer parties to raise arguments before the AER is somewhat less onerous than for DNSPS: a DNSP may only raise a matter before the Tribunal that was 'raised and maintained' in submissions to the AER, whereas other interested persons must only 'raise' the matter before the AER.

Nevertheless, in order to make an application to the Tribunal, consumer parties are still limited to raising arguments that were raised by them with enough precision before the AER so that the AER should have understood and considered them. As noted above, consumer applicants and interveners are not allowed to rely on arguments made by others (such as the Consumer Challenge Panel) unless they specifically referred to and adopted the measures that were suggested by others in their own submissions. For this reason, if a consumer party is considering seeking leave to apply or intervene on a prospective Tribunal review, it may be worth reviewing the submissions made by other consumer parties prior to the AER's determination period concluding to determine if there has been any other material put on by other parties that a consumer organisation wishes to agree with or adopt. This will preserve an organisation's capacity to make these arguments on a review, should the determination ultimately warrant it.



The exception to s 71O is a situation where the AER substantially changes its methodology in its final determinations such that consumers do not have the ability to comment upon an aspect of the determination before it is made. Where this is the case, it is unlikely that the AER will seek to prevent a party from raising the issue before the Tribunal, as it would not be procedurally fair to do so.

## **Costs and cost risks**

Parties who wish to participate as an applicant or intervener in a Tribunal review will need to have considerable funds available to them. These costs include the cost of solicitors and barristers, experts, Tribunal costs, and, if required, the cost of litigation insurance (to protect organisations against adverse costs orders).

The precise amount of money required for involvement in a Tribunal review is difficult to predict, as it will depend on the extent of the organisation's desired involvement in the legal proceedings, as well as the conduct of the proceedings as determined by the Tribunal, and the positions taken by other parties. As a rough guide, consumer organisations should budget approximately \$100,000-\$200,000 for full participation in a Tribunal review.

Further guidance on funding and costs required is available from both the Public Interest Advocacy Centre (PIAC) and Energy Consumers Australia (ECA). ECA may be able to allocate consumer organisations funds through its Grants Scheme in order to contribute to the costs of participating in Tribunal reviews.

A link to the ECA Grants Scheme is available here:

<http://energyconsumersaustralia.com.au/grants/>

## **Participating in the consumer consultation processes**

The National Electricity Law provides that, before the Tribunal can make a determination, it must take reasonable steps to consult with network service users and prospective network service users of the relevant services, and any user or consumer associations or user and consumer interest groups that the Tribunal considers have an interest in the determination. The NEL does not provide a mechanism for how this consultation should take place, so consumer and user groups with an interest in the determination may seek to promote the manner in which they would like their concerns taken into account. For example, they might seek to influence when and where the consultation process is undertaken, the opportunity for further consultation, and the nature and amount of supporting material that the Tribunal will accept from participating organisations.

### **When will the consultation take place?**

The NEL does not provide a time period for consultation, except that it must occur before the making of a determination. However, generally speaking, shortly after applicants and interveners have been granted leave for review, the Tribunal will ask the AER to circulate a draft consultation protocol to the parties for comment.

Once the consultation process has been finalised, the AER will circulate an invitation to each of the individuals and organisations that made submissions to the determination process to register to speak at the consultation. Generally, applicants, interveners, and the AER attend the consultation process to observe, but do not speak or otherwise participate.

If a consumer organisation knows ahead of time that it will not be an applicant or intervener in the Tribunal, but that it is interested in participating in the consultation process, it is worth contacting the Registry of the Australian Competition Tribunal and/or the solicitors representing the AER to ask that the draft consultation protocol either be published on the website of the Tribunal, or sent directly to them for comment.

An example of a draft consultation protocol appears at the link below:

<http://bit.ly/2r7Ts5n>

In LMR processes to date, it has been common for Tribunals, the AER and the parties to seek to limit consumer consultation to an informal one day hearing before the Tribunal's members, where organisations are permitted to make submissions of up to 20 minutes, and then supplement these submissions with up to three pages of written submissions. However, in some circumstances, consumer organisations have asked for the Tribunal's permission to make more detailed submissions, and been allowed to put further information and legal arguments before the Tribunal.

### **What to make submissions about?**

Generally speaking, there are three kinds of submissions that it is possible for consumer organisations to make to the consultation process:

- Commenting upon particular aspect of materials put forward by applicants and interveners, putting forward evidence that contributes to or refutes particular grounds of review
- Putting forward evidence about whether changes to the AER's determination sought by applicants and interveners would be in the long term interest of consumers; and

- Commenting upon the consultation process itself, and putting forward policy suggestions to the Tribunal for how an optimal consumer consultation process would work.

### **Advocating for more effective consultation**

In previous consultations, PIAC and other consumer organisations have advocated for the Tribunal to strengthen the consultation process as initially proposed in the draft protocols. In particular, PIAC and other organisations have urged the Tribunal to:

- Give clear guidance to consumers about the about the specific issues to be addressed at the consumer consultations and the use that would be made of consumer submissions in its decision-making process
- Increase the options for consumers to make submissions, including oral and written submissions and the ability to make oral submissions via telephone or video link
- Increase the page limit for written submissions from three pages, to reflect the number and complexity of issues raised by the DNSPs
- Ensure that consumers have an opportunity to comment after the parties have lodged their submissions and the detail of their arguments are known
- Provide ongoing opportunities for consumer engagement in the Tribunal's decision making process, including after the Tribunal hearing
- Provide feedback to consumers on the matter in which consumer consultations affected its final decision in the proceedings; and
- Evaluate the effectiveness of its consultation processes.

In the Tribunal's proceedings for the Victorian DNSPs in 2016, advocacy by consumer organisations was successful in extending the time for consumer organisations to make submissions, and allowing all consumer organisations the opportunity to submit an additional 10 pages of written submissions. The submissions made by PIAC to the Tribunal on this issue are available here:

<http://bit.ly/2pqqhql>

A useful report on best practice consumer consultation by the former Consumer Utilities Advocacy Centre (now the Consumer Policy Research Centre) is available here:

<http://bit.ly/2pEObAN>

### **The role of s 71O of the NEL in the consumer consultation process**

In previous consultations, the AER and some DNSPs have taken the position that, because of s 71O of the NEL, consumer organisations cannot raise matters in the consultation that they did not previously raise before the AER in its determination process (See 'The role of s 71O of the NEL' above). However, there is an argument available that s 71O does not apply to the consultation process in this way, because not all consumer organisations appearing before it are required to have made submissions before the AER.

While consumer organisations are strongly encouraged to put all relevant information before the AER during its determination process, to date, there has been no binding decision that confirms that s 71O applies to the consumer consultation process. Therefore, consumers should decide what materials they believe will be of the greatest assistance to the Tribunal in coming to its determination, and not feel constrained to simply repeating what was in their submissions before the AER.

## **The long term interests of consumers**

In the South Australian proceedings of 2016, a considerable number of consumer organisations made submissions in the Tribunal's consumer consultation process to the effect that, of all of the concerns captured by the NEO, they considered that the long term interest of consumers was most directly correlated to the high prices that consumers had been forced to pay in previous determination periods. Although the Tribunal ultimately found it unnecessary to rely on these submissions, as it found no error in the AER's determination for SA Power Networks, the Tribunal had indicated it would have taken notice of materials from the consumer consultation had it come to the second stage of its decision making process, regarding whether any remade decision would be likely to advance the long term interests of consumers.

This suggests that on at least one occasion, the Tribunal has considered that consumers appearing before the consultation process are well placed to make submissions about whether any amendments made to the AER's determination would be in the long term interests of consumers. However, once again, consumers should not feel constrained to making submissions on this topic, particularly where they have the capacity to raise materials that are relevant to the grounds of review under consideration.

## **What happens after the consumer consultation process?**

Each of the submissions made by consumer participants in the consultation, and a transcript of the hearing from the proceedings, are typically placed on the website of the Tribunal following the consultation day.

It is common for the AER, the applicants and any interveners to refer to the materials and submissions from the consultation process in their written and oral submissions before the Tribunal.

Where the parties before the Tribunal refute arguments made by consumer organisations at the consultation, there is no formal mechanism for consumer organisations to respond. However, there is also nothing to prevent consumer organisations from taking either or both of the following steps:

- Sending further written submissions to the Tribunal's registry and the parties, to be considered at the Tribunal's discretion; or
- Writing to the solicitors representing a party before the Tribunal to ask that they adopt the responsive arguments that a consumer party would like to see made.

## **What happens after a decision is made by the Tribunal**

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### **When the AER is successful**

If, after a hearing in the Tribunal, the AER's determination is upheld in its entirety, an Applicant for review (either a DNSP or a consumer party) may seek judicial review of the Tribunal's decision by the Full Federal Court (see 'the role of judicial review' below). If no party seeks such a review, then the AER's final determination will stand.

### **When a DNSP or consumer applicant is successful**

If the Tribunal decides that there are errors in the AER's determination, and that correction of those errors would be likely to be in the long term interests of consumers, the Tribunal has the option to either remake the decision itself, or to remit the decision back to the AER with directions for how the determination should be remade. Because of the complex nature of the regulatory process, it is likely that the Tribunal will remit most decisions back to the AER.

In these circumstances, the AER can set about remaking its determination, or seek judicial review of the Tribunal's decision in the Full Federal Court (see 'The role of judicial review' below).

### **After the AER's determination is remade**

If the AER re-makes its determination in accordance with the Tribunal's directions, that determination can also be subject to further LMR in the Tribunal, or to judicial review before the Full Federal Court (see 'The role of judicial review' below).

Under the NEL, there is no limit to how many times a party may continue to seek LMR of the AER's remade determinations, as long as they submit their appeal within 15 days of the AER's decision and satisfy the requirements for standing with respect to that decision. That is because each remade decision may be considered as a 'fresh' determination for the purposes of LMR.

### **What effect do Tribunal decisions have on future Tribunal decisions?**

Tribunal decisions in the Australian Competition Tribunal do not bind future Tribunals. While Tribunals (particularly within the same determination period) are likely to take into consideration the benefits of consistency between decisions concerning the same methodologies or building blocks, it may be that two Tribunals within the same determination period reach different resolutions on similar legal questions.

## **The role of judicial review**

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Judicial review is a different system of review from LMR. As set out above, judicial review is a process of review in which a court considers the lawfulness of the decision-making process in relation to a number of narrow legal grounds. The basis of an application for judicial review in relation to a decision is generally that one or more of the grounds within s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is satisfied.

A party affected by a decision made by a government agency or Tribunal can lodge an application for judicial review in the Federal Court within 28 days of that decision being made.

### **Judicial review of the AER's determinations**

It is possible for DNSPs who are affected by both the AER's draft and final determinations to seek judicial review in the Federal Court prior to (or instead of) seeking Limited Merits Review in the Tribunal. However, the Federal Court can refuse to hear an application for judicial review while there are other opportunities open to the DNSP for review of the determination on the same issues.

For this reason, when a draft or final determination is released, a DNSP may lodge an application for judicial review at the same time as its application for merits review. If this happened, a Court will usually stand the proceedings over until the DNSP can indicate whether it still wishes the application to be heard through judicial review – usually, this will be once Limited Merits Review proceedings have concluded.

Because Limited Merits Review in the Tribunal exists, it will be unusual for DNSPs to ultimately seek judicial review of the AER's draft or final determinations in the Federal Court.

Consumer organisations cannot seek judicial review of the AER's draft and final determinations in the Federal Court, because the decisions are not considered to directly affect their interests to the degree required for legal standing.

### **Judicial review of the Tribunal's decisions**

It is also possible for Applicants (DNSPs and consumer organisations) and the AER to seek judicial review of a decision of the Tribunal once it is made. If this occurs, then it is likely that any other party to the original decision (such as interveners) will be listed as a respondent in proceedings in the Full Federal Court, though this does not always happen automatically. If a party is not listed as a respondent, but wishes to appear, they should contact the Registry of the Full Federal Court, and, if necessary, seek leave from the Court to appear.

Unlike with judicial review of the AER's draft and final determinations, consumer applicants in the Tribunal are able to seek judicial review of decisions of the Tribunal. However, there are considerable costs risks associated with appearing in the Federal Court, as the cost protections that exist in the Tribunal do not apply in judicial review of Tribunal decisions.

If consumer organisations who participated as interveners in the Tribunal proceedings wish to be involved in these kind of judicial review proceedings, they may also seek leave to appear as an intervener in Full Federal Court proceedings brought by another party. However, there are also considerable costs risks for interveners seeking to appear in the Full Federal Court. In order to obtain leave to intervene, a consumer organisation must be able to show that it will make a contribution to the proceedings that is useful and different from that

of the parties, and restrict itself to commenting upon the issues raised by the applicant for the review.

A consumer intervener may also seek to argue that it should be 'cost protected' in the judicial review proceedings, meaning that it should not be able to seek its costs or have costs sought from it. However, there is no guarantee that a Court will order costs protection, and bringing an application for costs protection in itself brings cost risks (i.e. if the application for cost protection is not granted, costs may be ordered against the unsuccessful applicant).

### **What happens after a Full Federal Court (judicial review) decision?**

If the Full Federal Court finds that an application for review is successful, it cannot remake the decision itself. Instead, it may remit the matter back to the Tribunal to remake its decision in accordance with the law. However, relief in judicial review matters is discretionary. This means that even if the Full Federal Court finds in an Applicant's favour, it has a discretion not to remit the matter to the Tribunal, particularly if it is not persuaded that correction of the decision would produce a substantially different outcome.

If a decision is remitted to the Tribunal for it to remake its decision, this remade decision may also be subject to further judicial review.

If the Full Federal Court finds that an application for review is not successful, an Applicant can either accept the Court's decision (meaning that the original determination of the Tribunal stands, with possible consequences of either remittal or non-remittal to the AER) or seek special leave to apply for review of the decision in the High Court of Australia.

### **What effect do judicial review decisions have on future Tribunal decisions?**

Judicial review decisions made by the Full Federal Court bind all future Tribunal decisions. This means that Tribunals must apply the law in the way that the Full Federal Court directs. However, it does not necessarily mean that determinations that have been subject to judicial review in the Full Federal Court cannot be subject to further judicial review in the future. For example, if a party considers that there is legal error in a remade determination, there may be opportunities to seek further judicial review.

## Key determination dates 2018-2020

NSP	State		Proposal	AER forum	Submissions due	Draft Determination	Revised proposal	Submissions	Final Determination
Ausgrid, Endeavour Essential	NSW	2019-24	31-Jan-18	31-Jan-18	May-18	Sep-18	Dec-18	Jan-19	Apr-19
ActewAGL	ACT	2019-24	31-Jan-18	Apr-18	May-18	Sep-18	Dec-18	Jan-19	Apr-19
Tasnetworks	Tas	2019-24	31-Jan-18	Apr-18	May-18	Sep-18	Dec-18	Jan-19	Apr-19
SAPN	SA	2020-25	31-Jan-19	Apr-19	May-19	Sep-19	Dec-19	Jan-20	Apr-20
Energy Q	QLD	2020-25	31-Jan-19	Apr-19	May-19	Sep-19	Dec-19	Jan-20	Apr-20
CitiPower Powercor United Energy Jemena Ausnet	Vic	2021-26	31-Jul-19						