PUBLIC INTEREST ADVOCACY IN THE AUSTRALIAN COMPETITION TRIBUNAL

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In February 2016, the Australian Competition Tribunal delivered its decisions in the high-profile applications by the Public Interest Advocacy Centre (PIAC) and the New South Wales (NSW) and Australian Capital Territory (ACT) electricity distributors ActewAGL, Ausgrid, Endeavour Energy and Essential Energy (the latter three known collectively as Networks NSW) for review of the Australian Energy Regulator's (AER) determinations of the four distribution networks' regulated revenue for the five-year period spanning 2014 to 2019.

Eight gas and electricity utility operators across the national energy market with an interest or stake in the review outcome intervened in the appeals, as did the Commonwealth Minister for Energy, who intervened for the sole purpose of advancing points-of-law submissions on the application of the review regime.

The Tribunal heard eight appeals concurrently in its first major application of a merits review regime reconstructed in 2013 to deliver consumer-centric outcomes and the first appeals in Australia by a consumer advocate of a regulated utility's revenue determination. This article will focus on the six appeals (three by PIAC and three by Networks NSW) of the Australian Energy Regulator's determinations applying to the Networks NSW distributors.

Background

Controversy in recent years surrounding rising electricity prices and the alleged 'gold-plating' of NSW poles and wires led the AER to make a five-year determination in April 2015 (applying also to a transitional year commencing July 2014) reducing the revenue allowance of the state-owned NSW distributors by 28 to 33 per cent, with corresponding reductions of $106 to $313 per annum to the average NSW household electricity bill commencing July 2015.[1]

In May 2015, PIAC appealed the AER's decisions to the Australian Competition Tribunal claiming that the AER's reductions to network revenue did not go far enough and that an additional $2.3 billion in cuts was needed across the three NSW networks to make them efficient. Contemporaneously, the three NSW networks appealed the AER's decisions to the Tribunal and to the Federal Court. They argued that the extent of the proposed cuts went too far, compromising network safety and reliability. The Federal Court appeal was stayed pending the outcome of the application to the Tribunal.

In July 2015, the Tribunal granted all applicants leave to appeal. Hearings took place over three weeks in October 2015, and the Tribunal delivered its final decisions in February 2016.[2] The Tribunal found in favour of the AER in some matters and in favour of Networks NSW in others. Having assessed the interrelationship between constituent decisions and the

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complexities of each AER determination as a whole, the Tribunal remitted the AER's determinations to the AER to be remade in accordance with the Tribunal's rulings. In March 2016, the AER applied to the Federal Court for judicial review of the Tribunal's decisions.

With judicial review underway, each Networks NSW distributor entered into an enforceable undertaking to the AER to apply, as an interim arrangement commencing May 2016, the network charges resulting from the AER's final determinations and to continue to provide network services in accordance with the non-price terms and conditions of the AER's determinations as set aside by the Tribunal.

Appeals by a consumer advocate

PIAC's appeals were the first in Australia by a consumer advocate of a regulated utility's revenue determination. PIAC, established by the NSW Attorney-General in 1982, is a self-proclaimed 'independent, non-profit law and policy organisation, committed to social justice and addressing disadvantage'.[3] The significance of PIAC's appeals of the AER's Networks NSW regulatory determinations was not only for the combined $5.7 billion, or 22 to 24 per cent, of network revenue at stake (as contended by the networks) but also, appropriately, for the scale of the 'public interest' it set out to defend — being one which extended to all end users and consumers of services provided by regulated utilities.

The Tribunal made its determinations, for the first time, under a revised merits review regime — one which requires applicants to seek leave to apply for review and provides that a reviewable decision is to be displaced only if the Tribunal is satisfied that another decision is materially preferable in the long-term interests of the consumer.[4] Applicants for review must establish that a reviewable decision is affected by an error of fact, an incorrect exercise of discretion and/or unreasonableness, and a prima facie case that another decision is, or is likely to be, materially preferable.[5]

The Tribunal heard eight applications concurrently — three by PIAC, three by Networks NSW, one by ActewAGL and one by Jemena Gas Networks (NSW) Ltd. The submissions of the parties to the electricity appeals, particularly those relating to the AER's methodologies, were relevant to the Tribunal's determination of Jemena's appeal of its 2015–20 revenue determination[6] — the first by a regulated gas network under the revised regime, although PIAC was not a party to the Jemena proceedings.

PIAC's advocacy aimed to press network providers to operate efficiently both in the immediate future and in the longer term. Efficiency is a legislated objective in the National Electricity Law (NEL) underpinning the AER's decision-making and an economic benchmark, as reflected in the NEL's revenue and pricing principles,[7] for regulating monopoly infrastructure where competitive market dynamics cannot operate to affect price. The National Electricity Objective (NEO), as prescribed in the NEL, is to promote efficient investment in, and efficient operation and use of, electricity services for the long-term interests of consumers with respect to price, quality, safety, reliability and security of supply and the reliability, safety and security of the national electricity system.[8] One interpretation of the NEO, and its various elements as prescribed, is that efficient networks are more reliable service providers and deal better with network contingencies. Efficiency, accordingly, is not simply a measure of savings; it also imports notions of weighed outputs and deliverables.

The applicants' respective challenges

PIAC challenged the AER's determination of the operating expenditure (opex) and return on capital components of the legislative building block model. PIAC argued that the AER made errors of fact, exercised incorrect discretion and was unreasonable in its constituent decision

on opex and its application of the return on debt formula (feeding into the return on capital building block) and that the AER should have considered the interrelationship between return on debt and return on equity in determining the rate of return on the regulatory asset base. PIAC submitted that correction of the AER's errors on opex and return on debt would lead to a materially preferable decision with respect to the NEO.

Networks NSW appealed the AER's decisions on the opex allowance and returns on debt and equity, as well as constituent decisions of the AER on the X-factor (the real rate of revenue change over consecutive years), the Efficiency Benefit Sharing Scheme (EBBS) (incentivising efficiency gains in operating expenditure), and gamma (the value of imputation credit used to forecast corporate income tax). Individual network operators further appealed particular constituents of the AER's decisions as those constituents applied to them. For example, Ausgrid (and ActewAGL) appealed the AER's constituent decisions on metering classification (determining the type of regulatory control applicable to meters and the contestability of metering services) and the operation of the Service Target Performance Incentive Scheme (STPIS) (a scheme rewarding operators for low outage rates and duration).

The opex allowance and return on capital building blocks (discussed in detail below) together comprise more than 80 per cent of a NSW network's total revenue. Once a total revenue allowance is constructed using building blocks, networks manage their own budgets and are not constrained by individual building block decisions in their expenditure. To the extent that the networks' appeals of the remaining constituent decisions had a marginal revenue impact, they sought to clarify the operation of the National Electricity Rules (NER) made under the NEL, adopted in NSW as a schedule to the *National Electricity (New South Wales) Act 1997* (NSW).

In granting PIAC and the three networks leave to apply for review, the Tribunal said:

> They each complain of the same three decisions of the AER ... Networks NSW say the AER's … building blocks is [sic] far too low. PIAC says they are far too high. Those competing submissions did have two common points. First, that adherence to the prescribed requirements of the NEL and the NER is prima facie likely to result in a materially preferable NEO decision, and second that the economic consequences of the adjustments to the AER decision for which each contended were not simply a very substantial sum, but a sum which (either way) would detrimentally affect in a material way the long-term interests of consumers.[9]

The Tribunal determined that, collectively, the applicants established grounds for review in the AER's constituent decisions on the opex allowance, return on debt, and gamma. The applicants failed to establish a ground for review with respect to the EBSS, return on equity, and metering services (challenged by Ausgrid only). The Tribunal did not consider whether a ground for review was established with respect to the X-factor and the STPIS, as its determination to the opex appeal meant that constituent decisions on the X-factor and the STPIS needed to be remade in any event.

Considering the decision as a whole, the Tribunal determined to set aside the AER's determinations and remit them to the AER to be remade in accordance with the Tribunal's directions.

Operating expenditure

Operating expenditure typically comprises 25 to 30 per cent of a NSW distribution network's allowable revenue.

The NER provide that the AER must approve a network's proposed opex if satisfied that the proposed opex meets the 'opex criteria'.[10] The 'opex criteria' provide that opex must reasonably reflect the efficient costs and a realistic expectation of the demand forecast and cost inputs that a prudent operator would require to achieve the 'opex objectives'.[11] The 'opex objectives' are to meet and manage expected demand; comply with regulatory obligations; and maintain quality, reliability and security of supply and the reliability, security and safety of the distribution system, having regard to the benchmark opex that an efficient distributor would incur and other relevant factors.[12] If the AER is not satisfied that a network's proposed opex reasonably reflects the 'opex criteria', it is to estimate the network's required opex in making its regulatory determination.[13]

For the 2014–19 regulatory period, the AER rejected the opex proposed by all three NSW networks and estimated their required opex using the 'EI model' — a benchmarking model developed by Economic Insights Pty Ltd for the AER for this purpose. The EI model benchmarked the efficiencies of all 13 distribution networks in Australia against one another by assigning each distributor an efficiency rating between 0 and 1. The EI model was developed using economic benchmarking data from 13 Australian distributors, 18 New Zealand distributors and 37 Ontario distributors. Economic Insights explained that overseas comparators were included due to 'insufficient variation' in the domestic data not allowing for reliable estimates and robust comparisons and not in order to benchmark Australian distributors against their international counterparts.

The AER's draft determinations of November 2014 averaged the efficiency scores of the five distributors in the top quartile of benchmarked distributors, each with an efficiency rating greater than 0.75 (with the most efficient network — Victorian distributor CitiPower — scoring an efficiency rating of 0.95), to produce a target efficiency score of 0.86, which the NSW distributors, with efficiency ratings ranging 0.45 to 0.59, were to meet by their opex allowances as awarded. The resultant opex, calculated by this method, constituted a 23 to 39 per cent reduction to the opex proposed by the networks.

The AER made its final determinations in May 2015 — six months after its draft determinations — pursuant to a statutory process which provided for networks to submit revised regulatory proposals before final determinations are made. In its final determinations, the AER lowered its setting of the networks' efficiency target from 0.86 to 0.77, responding to various qualitative and quantitative arguments advanced by the networks' revised proposals on the impact of the proposed reduction to their opex. The revised efficiency target of 0.77 equates to the lowest of the efficiency scores of the distributors in the top quartile (that is, the efficiency target is now that of the fifth most efficient distributor rather than the average of the five most efficient distributors). In addition, the AER applied a positive adjustment of 11 to 12 per cent (notionally, a margin of error) to the benchmark base year opex to account for differences in the operating environment, as it did in the draft determination.

PIAC challenged the AER's final decision to lower the opex benchmark comparison point from 0.86 to 0.77 as one which artificially improved the networks' apparent relative efficiency and introduced quantitative bias into the revenue determinations. The AER's adjustments for operating environment factors, PIAC contended, were arbitrary and illogical and its reasoning circular. The AER's revised efficiency target reduced the networks' opex allowances by 17 to 30 per cent compared to corresponding reductions of 23 to 39 per cent to their opex as proposed in the AER's draft determination. PIAC contended a reversion to the AER's draft opex determination on the basis that the final determination's revision to the efficiency target involved an incorrect exercise of discretion and was unreasonable, with the result that the networks' allowed opex were substantially higher than the efficient opex requirements of a prudent operator. Its contention, if adopted, would have reduced the networks' opex allowances by $196 million to $365 million per distributor.[14]

The networks contended that the opex they incurred in the past were the best forecast of the opex they would require in the future. To this end, their submission targeted the AER's reliance on the EI model to benchmark relative efficiency. Networks NSW submitted that the model incorrectly relied on both Australian and overseas benchmarking data. It contended that Australian benchmarking data which the AER collected from regulated networks over eight years under its statutory information-gathering powers was unreliable for having been recorded inconsistently and for containing estimates and back-casting. The networks also argued that the EI model incorporated New Zealand and Ontario data, mainly because of the similar format of their presentation to the AER's data rather than because of any substantive comparability between regulated networks in those jurisdictions and Australia.

The networks contended that use of the EI model as the sole determinant of opex was contrary to 'sensible regulatory practice' and the experience of other jurisdictions. They argued that, even if use of the EI model were correct, which was an assumption in PIAC's submission, PIAC provided no evidence or reason to suggest that the average of the upper quartile was a more appropriate benchmark comparison point than the bottom of the upper quartile. Even if the AER's opex modelling were correct, the networks contended, the AER's failure to provide a transition period over which networks were to improve their efficiency further involved an incorrect exercise of discretion or constituted an unreasonable decision.

The Tribunal determined that the AER placed 'undue reliance' on the EI model in a way which failed to discharge its obligations under the NER: in a determination 'where economic benchmarking is being used for the first time to set opex allowances', the AER relied on the EI model despite acknowledging its 'limitations', 'imperfections and other uncertainties'.[15] The Tribunal held that the AER's approach to determining opex was erroneous. The nature of the AER's errors, the Tribunal continued, made it 'unnecessary to fully explore PIAC's contentions regarding opex':

> PIAC's contentions … were premised on the AER's primary approach being correct. The Tribunal has not accepted with respect to opex that to be the case.[16]

The Tribunal, after reviewing the remaining constituent decisions and each determination as a whole, set aside and remitted the AER's determinations with directions that it is to remake the constituent opex decision to include 'a broader range of modelling', 'benchmarking against Australian businesses', and 'a "bottom up" review of … forecast operating expenditure'. The Tribunal did not preclude reliance by the AER on international data, but it can be inferred from the Tribunal's rulings on the technical weaknesses of the EI model that any inclusion of overseas data in constructing Australian benchmarks must be substantively justified and apply sound actuarial adjustments.

Return on debt (return on capital)

Return on debt is a technical parameter which, together with return on equity, determines the rate of return on the regulatory asset base and the return on capital building block. Return on capital comprises about 50 to 75 per cent of a NSW network's total revenue.

PIAC challenged the commencement year for the introduction of the trailing average approach under a method proposed to the AER by the Queensland Treasury Corporation. Its submission, if adopted, would have reduced Networks NSW allowances by $288 million to $706 million per distributor.[17]

The Tribunal held that it was not necessary, for reasons similar to the opex challenge, to consider PIAC's submission on the commencement year for applying the return on debt formula. The Tribunal held that the AER's selection and characterisation of the benchmark

efficient entity under the legislated rate of return objective[18] should be that of a hypothetical efficient competitor in the market for the provision of standard control services (the core network services) with a similar degree of risk to the regulated network, rather than that of a single regulated competitor which is identical for all distributors. The Tribunal held that the AER's definition of the benchmark efficiency entity involved the wrong exercise of a discretion, and its decision on return on debt was unreasonable. As it determined to remit the decision to the AER to be remade, PIAC's various contentions on this topic were unnecessary for the Tribunal to consider.

Other constituent decisions and the Tribunal's directions

The Tribunal also determined that the AER was to remake its constituent decision on the cost of corporate income tax based on a gamma of 0.25, as contended for by the networks, instead of 0.40. A consequence of the AER's remaking of the opex constituent decision was that constituent decisions on the EBSS and STPIS were to be remade (even though no ground of review for them was established).

The Tribunal directed the AER to vary its final decisions in other respects as would be required in remaking the remitted decision in accordance with the Tribunal's directions.

Materially preferable decision

The NEL requires a reviewable decision found to be affected by error to be affirmed if the Tribunal is not satisfied that a materially preferable decision will, or will be likely to, result from a remittal.[19] The Tribunal was satisfied that setting aside the AER's decision and remitting the matter to the AER for a redetermination would, or would be likely to, result in a materially preferable decision with respect to the NEO.

The parties agreed with the AER's submission that 'materially preferable decision' — a term not defined in legislation — was to be given its ordinary meaning of 'considerably more suitable' or 'more suitable or desirable to an important degree'.[20] Beyond that, the question of how to construe and apply the requirement for a 'materially preferable decision' in the context of the merits review regime was one which the Minister and the networks differed upon. The Tribunal summarised:

> At a straightforward level, Networks NSW contends that correcting an error (as established by a ground of review being made out) will, or will be likely to, result in a materially preferable NEO decision. … Networks NSW says, the proper application of the building block methodology in the NER, with each building block determined in accordance with the NER, will promote the NEO.[21]

The submission of the Minister on 'error correction' said:

> It is not open to the Tribunal to conclude that a different decision would be 'materially preferable' in the requisite sense only because it would correct errors in the AER's original decision. … The Tribunal is required to assess the decision under review as a whole: error by the AER in the determination of one building block is a gateway to merits review remedies, but cannot of itself mean that there is a 'materially preferable' decision.[22]

Both parties noted s 71P(2b)(d)(i) of the NEL, which provides that the fact that a ground of review is established must not, in itself, determine the question of whether a materially preferable NEO decision exists.

The contention that error correction *is likely to* lead to a materially preferable NEO decision can be accommodated if one considers that the term 'is likely to' connotes a lower standard of satisfaction than 'will'.[23] The networks' submission misconstrued the regime to suppose

that, notwithstanding the prohibition in s 71P(2b)(d)(i), error correction *will* result in a 'materially preferable decision'. The Minister's supplementary submission, taking a considered view, replied that whether error correction will or will not meet the relevant threshold depends on the 'extent to which correction of one or more errors will contribute to the achievement of the NEO'.[24]

The Tribunal, adopting the Minister's submission, further clarified two points in the application of the regime:

(1) On the proper lens through which to view the presence of 'error' in the regime, '[t]he fact that (as may be accepted) the proper application of the NER … will promote the NEO does not mean that, where a step taken by the AER is, or is not, in full accordance with the building block methodology, the NEO is not being achieved. There may be other matters which the AER considered, and which may balance out any adverse consequences of such non-compliance … so as to [not] impair in a material way the NEO.'[25]
(2) On conceptualising elements of the NEO in attaining a 'materially preferable decision' and within the decision-making process overall, the Tribunal contemplated, with a degree of simplification, that 'the elements of the NEO — in the long-term interests of consumers — are potentially in conflict' and that evaluating attainment of the NEO involves 'some compromise' and a balancing act as between price on the one hand and reliable and secure service provision on the other.[26]

The Tribunal held, in remitting the matter to the AER:

> [I]n significant respects the AER … formed its decision on foundations that are not properly established. … [I]ts decisions have been reached on complex factual bases and/or the exercise of discretions giving rise to very significant outcomes which, by reason of the Tribunal's conclusions on the grounds of review, are not appropriate to support the ultimate decision of the AER.
>
> The Tribunal, in that light, is satisfied that it is appropriate to set aside the AER Networks NSW Final Decisions and to remit them to the AER under s 71P(2)(c) of the NEL.
>
> In that way, the AER will better identify the appropriate revenue during the current regulatory control period for those entities to achieve the level of quality, safety, reliability and security of supply of electricity and of the national electricity system in the long-term interests of consumers, and be in a better position then to also address the desirability of consumers not paying more than is necessary over the long term for those services.[27]

It stated:

> The Tribunal does not express any view about the 'correct' outcome, or the range of correct outcomes, following the AER's reconsideration.[28]

Commentary

'Materially preferable' should operate 'as a meaningful limitation on the availability of relief in these proceedings'.[29] It appears that the Tribunal, upon finding error and upon becoming satisfied that the extent of the error or the balance of the issues warranted the decisions to be remade, remitted the AER's determinations without conceptualising, in any meaningful detail, a 'materially preferable decision' or a range of such putative decisions.

The Minister's supplementary submission to the Tribunal stated that 'measuring whether a putative decision is a "materially preferable decision" necessarily involves a comparative exercise — as between the AER's decision, and one or more alternative putative decisions'.[30] The submission explained that this 'requires an assessment of *respective*

contributions'[31] to the NEO and that assessing a 'range of economically efficient outcomes' requires 'a broad balancing and evaluative exercise — not a granular, purist, mechanistic or formulaic approach, especially not one which focuses on constituent components in isolation'.[32]

The Tribunal stated with a level of generality that a materially preferable decision is one which would enable the AER to 'better identify the appropriate revenue'. One can infer from the Tribunal's reasons for judgment that a decision remade in accordance with its directions is one which the Tribunal considers would better enable identification of the appropriate revenue and be a materially preferable one, notwithstanding that the revenue outcome of such a decision cannot be known, or reasonably estimated, at the remittal stage.

The Tribunal also gave no explicit consideration to the materiality threshold in the requirement for a 'materially preferable decision'. Its repeated use of 'significant' in characterisations variously parsed below suggest that it viewed the materiality threshold as satisfied in the corresponding circumstances:

> [I]n *significant* respects the AER has formed its decision on foundations that are not properly established … giving rise to very *significant* outcomes …[33]

> There are obviously *significant* inter-relationships between elements of the building blocks … *[S]ignificant* building blocks are to be revisited …[34]

The Tribunal evidently assessed each determination as a whole and the interrelationship between constituent decisions in determining to set the determinations aside and remit the matter, satisfying an important tenet of the 2013 revisions to the regime.

Since a 'reviewable regulatory decision', and consequently a materially preferable decision, refers to all constituent components of the relevant decision and not just its final revenue output, a decision can be materially preferable to another simply for having been arrived at by a different means or reason. Therefore, any AER redetermination, if made in accordance with the Tribunal's directions, must be deemed a materially preferable one, even if it were to produce similar or identical revenue outputs to the initial revenue determination.

The merits review regime at present tolerates the presence of error up to a certain threshold (the materiality threshold) as long as the decision as a whole approximates a materially preferable one. As the Tribunal determined to set aside the AER's determinations, the limitations to the availability of relief imposed by the 'materially preferable decision' requirement has so far had no work to do. The Tribunal's decisions do not distinguish themselves, in this essential aspect, from pre-2013 Tribunal decisions in which error correction was an automatic relief upon the finding of error.

Consumer advocacy in the Tribunal's reviews — effective or not?

On both the constituent decisions challenged by PIAC — decisions on opex and return on debt — the Tribunal deemed it unnecessary fully to explore PIAC's contentions because, in both cases, the networks established fundamental error in the AER's approach, while PIAC's appeals were premised on the AER's basic approach being correct.[35] One might be justified, therefore, in concluding that, without PIAC's intervention in these matters, the Tribunal probably would have arrived at the same or a substantially similar outcome.

Nevertheless, PIAC's appeals in these proceedings were the first in Australia by a consumer advocate of a regulated utility's revenue determination. Revisions to the NEL in 2013 aimed to promote consumer intervention and participation in Tribunal reviews by limiting any cost

order against a small/medium user or consumer in favour of another party to the reasonable administrative costs of that other party.[36] The same revisions provide that a network must not include any costs that it 'incurs, or is forecast to incur, as a result of or incidental to a review' in its capital or operating expenditure or seek to recover that cost from end users via a cost pass-through.[37] Networks NSW, which reportedly incurred legal costs in the vicinity of $90 million[38] in its merits review applications to have the AER's determinations set aside, must meet its legal bill from the dividend it pays to the NSW Government as shareholder ($90 million is about eight per cent of the networks' combined $1.1 billion net profit in 2014–15[39]), while PIAC, describing the challenge as a David and Goliath battle, funded its challenge from its annual operating budget of $3 million.[40]

PIAC, already limiting its appeals to the major revenue drivers, attempted to distil its submission to the making of pointed legal arguments rather than detailed actuarial ones. But, as the review and the review framework are focused on assessing the precision of actuarial approximations of competitive market outcomes in the pricing of natural monopoly services, the strength of the networks' expert evidence cumulatively convinced the Tribunal of the extent of the AER's error. The Tribunal conceded:

> [F]or every competing argument there is a supporting expert or experts and … [the Tribunal must] look through the inevitable conflict and difference of views between experts, all advocating positions which they regard as being preferable … to determine whether an advocated materially preferable NEO decision is, indeed, materially preferable ...[41]

Consumer interveners' weak engagement with the Tribunal's evaluation of technical evidence emerges as a key limitation to their success in any future appeals.

Impending privatisation

It is fair to observe that Networks NSW's apparent success in these proceedings can be attributed, in part, to two circumstances which together realised appeals of the scale which transpired. The first is the Networks NSW cooperative arrangement, established in July 2012, which brought the three distributors under the governance of a single chief executive officer and a common board of directors. That arrangement facilitated the networks' joint appeal of the AER's determinations and the cohesiveness of the arguments they advanced in these proceedings. The second is the NSW Government's reported $90 million investment in these appeals to overturn the AER's cuts to network revenue — a measure directed in part towards preserving the value of the state's infrastructure for the government's impending asset sales.

Independently of the AER's and the Tribunal's regulatory determinations, the *Electricity Network Assets (Authorised Transactions) Act 2015* (NSW) commenced on 4 June 2015 for the 99-year lease of 49 per cent of the four NSW transmission and distribution networks. Under the proposed lease, 50.4 per cent of Ausgrid and Endeavour Energy will be privatised, with Essential Energy only to remain government-owned. The full lease of transmission service provider Transgrid in November 2015 netted the NSW Government $10.3 billion in revenue to the state budget. Although it is irrelevant to the Tribunal's determinations, the networks' revenue allowances directly impact on the sales bids they attract. The partial privatisation of two of the three distributors to separate buyers, once complete, will also dissolve the Networks NSW cooperative arrangement, meaning that any future merits appeals, even if conducted jointly, are unlikely to be of the scale of those recently witnessed.

Conclusion

PIAC's intervention in these proceedings achieved consumer presence in the first major application of a regime which focuses merits review on the long-term interests of consumers.

Endnotes

1 Australian Energy Regulator, 'AER Expects Final Decisions to Lower Electricity Bills for ACT and NSW Customers' (Media Release, 30 April 2015) <www.aer.gov.au>.
2 *Application by Public Interest Advocacy Service Ltd and Ausgrid Distribution* [2016] ACompT 1; *Application by Public Interest Advocacy Service Ltd and Endeavour Energy* [2016] ACompT 2; *Application by Public Interest Advocacy Service Ltd and Essential Energy* [2016] ACompT 3; *Application by ActewAGL Distribution* [2016] ACompT 4; and *Application by Jemena Gas Networks (NSW) Ltd* [2016] ACompT 5.
3 Public Interest Advocacy Centre, 'PIAC Objectives and Strategies', <www.piac.asn.au>.
4 See Sophie Li, 'Merits Review of Regulatory Determinations in the Economic Regulation of Energy Utility Infrastructure' (2016) 83 *AIAL Forum* 56, for details of how this revised regime operates or should operate in contra-distinction to its predecessor.
5 National Electricity Law ss 71C and 71E.
6 *Application by Jemena Gas Networks (NSW) Ltd* [2016] ACompT 5.
7 National Electricity Law s 7A.
8 Ibid s 7.
9 *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2, [20].
10 National Electricity Rules cl 6.5.6(c).
11 Ibid.
12 Ibid cl 6.5.6(a) and (e).
13 Ibid cl 6.5.6(d).
14 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1208].
15 Ibid [495], [496] (applying concurrently to the PIAC – Endeavour Energy and PIAC – Essential Energy appeals).
16 Ibid [1207], [1210].
17 Ibid [1214].
18 National Electricity Rules cl 6.5.2(c).
19 National Electricity Law s 71P.
20 Submission of the Australian Energy Regulator in Matters 1–8 of 2015 in the Australian Competition Tribunal, 29 June 2015, [79].
21 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1178].
22 Submission of the Commonwealth Minister for Industry and Science (from 21 September 2015, the Minister for Resources, Energy and Northern Australia) in Matters 1–8 of 2015 in the Australian Competition Tribunal, 2 September 2015 (Submission of the Minister), [33].
23 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [99].
24 Supplementary Submission of the Commonwealth Minister for Resources, Energy and Northern Australia (before 21 September 2015, the Minister for Industry and Science) in Matters 1–8 of 2015 in the Australian Competition Tribunal, 14 October 2015 (Supplementary Submission of the Minister), [2].
25 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1179].
26 Ibid [1180]–[1181].
27 Ibid [1218]–[1220].
28 Ibid [1226].
29 Commonwealth Minister for Industry and Science, above n 22, [42].
30 Commonwealth Minister for Resources, Energy and Northern Australia, above n 24, [3].
31 Ibid [3(a)] (emphasis added).
32 Ibid [3(f)].
33 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [1218] (emphasis added).
34 Ibid [1221] (emphasis added).
35 Ibid [1210], [1214].
36 National Electricity Law s 71X(2).
37 Ibid s 71YA.
38 Katie Walsh, 'Electricity Giants Invest $90 million, 100,000 Pages in Battle Boon for Lawyers', *Australian Financial Review*, 10 September 2015.
39 Ausgrid, Endeavour Energy, and Essential Energy Annual Reports 2014–15, as tabled in the NSW Parliament, <www.parliament.nsw.gov.au>.
40 Nick Dole, 'NSW "Poles and Wires" Electricity Giants Challenge Ruling over Lower Prices', *ABC News*, 1 July 2015.
41 *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1, [485].