Australian Competition Tribunal

ACT 3-8 of 2016 – Applications by the Victorian Power Networks

Consumer Utilities Advocacy Centre (CUAC) – Additional Written Submissions – 10 November 2016

Introduction

1. These submissions are made pursuant to the Tribunal's direction dated 18 October 2016, and supplement the oral and written submissions CUAC has already made as part of the Tribunal's consultation under s 71R(1)(b) of the National Electricity Law (**NEL**).

2. Specifically, they supplement CUAC's previous submissions on the ground of labour price growth rates raised by CitiPower and Powercor,[1] with reference to the recent decision in *Application by SA Power Networks* [2016] ACompT 1.

3. These submissions also support the grounds of review raised by the Minister for Energy, Environment and Climate Change for the State of Victoria (**the Minister**) in relation to the productivity improvements arising from the mandatory roll out of Advanced Metering Infrastructure (**AMI**).[2] This ground of review applies to the AER's forecast of productivity growth in respect of each of the Victorian DNSPs.[3]

4. Although CUAC does not comment on other aspects of the Minister's submissions, it registers its support for the Minister's submissions as a whole. CUAC considers that the Minister's submissions are broadly reflective of consumer concerns.

5. CUAC acknowledges that on both topics canvassed by these submissions, it has put some limited material before the Tribunal that was not before the AER in the course of its determinations. However, as explained further below, CUAC's position is that the material:

   (a) broadly arises out of matters that it fairly raised before the AER in its determination process; and

   (b) responds to matters raised by the AER, the Applicants, and the Minister intervening in these proceedings.

6. In CUAC's submission, the Tribunal is both empowered, and required, to consider this material, contrary to the submissions of the CitiPower and Powercor.[4] The final section of these submissions addresses the Applicants' contentions in this respect, setting out CUAC's submissions on the proper interpretation of the law concerning the Tribunal's consultation process.

Labour price growth rates

7. CUAC's submissions before the Tribunal's Public Consultation on 6 October 2016 addressed CitiPower and Powercor's application for review of the AER's determination of the labour price growth rate for the 2016 regulatory year. CUAC responded to CitiPower and Powercor's contention that the AER should

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[1] AER, *CitiPower Final Decision*, Attachment 7, page 7-50; AER, *Powercor Final Decision*, Attachment 7, page 7-49.

[2] Minister for Energy, Environment and Climate Change for the State of Victoria, *Notice of Intervention* (26 August 2016) at [62]-[65] and [68].

[3] See AER, *CitiPower Final Decision*, Attachment 7, B.4.5; AER, *Powercor Final Decision*, Attachment 7, B.4.5; AER, *United Energy Final Decision*, Attachment 7, B.4.4; AER, *Jemena Final Decision*, Attachment 7, B.4.4; AER, *AusNet Final Decision*, Attachment 7, B.4.3.

[4] CitiPower and Powercor, Joint outline of submissions in reply on labour price growth, 9 November 2016.

have applied the growth rates provided for their existing enterprise agreements by providing evidence that these agreements were inefficient at the time they were struck.[5]

8. In its earlier submissions, CUAC did not address the preliminary questions of whether an enterprise agreement (**EA**) struck under the *Fair Work Act 2009* (Cth) is an "applicable regulatory obligation or requirement" within the meaning of rules 6.5.6(a)(2) and 6.5.7(a)(2) of the National Electricity Rules (**NER**) and section 2D(1)(b)(v) of the NEL, or is otherwise necessary to maintain the safety of the distribution system within rules 6.5.6(a)(4) and 6.5.7(a)(4) of the NER.

9. In their applications to the Tribunal, CitiPower and Powercor contend that the AER erred in concluding that compliance with their respective EAs was not a regulatory obligation or requirement and was not otherwise required by the NER.[6]

10. CUAC would like to express its support for the approach to these questions taken by a differently constituted Tribunal in *Application by SA Power Networks* [2016] ACompT 1.[7] First, CUAC submits that the Tribunal should adopt the following construction to the question in the current proceedings of whether the CitiPower and Powercor EAs are regulatory obligations or requirements:

    a. Neither the *Fair Work Act* nor an EA materially affects the provision of electricity network services within the meaning of s 2D(1)(b)(v). It is only labour generally, and not the *Fair Work Act* or the particular EBAs agreed to by CitiPower and Powercor, that has a direct connection to the provision of electricity network services. It would have been equally open to CitiPower and Powercor to engage labour by other means;

    b. The *Fair Work Act* applies to all Australian companies, and the EA model is ubiquitous. There is no unique connection between the character of EA and the provision of electricity network services; and

    c. Unlike the other instruments contemplated by subss 2D(1)(b)(ii)-(iv), the decision to pursue EAs was not "imposed" on CitiPower and Powercor, rather their contents were negotiated between the DNSPs and the employees covered by the EAs.

11. Second, CUAC also commends the reasoning of the Tribunal in *Application by SA Power Networks* that an EA should not be considered as 'necessary to maintain the safety of the distribution system through the supply of standard control services' within the opex and capex objectives in rules 6.5.6(a)(4) and 6.5.7(a)(4) of the NER because, as noted above at 7(a), there is no 'direct connection' between the instrument of an EA and the supply of standard control services. Furthermore, CUAC agrees with the Tribunal's reasoning that an assessment of the capex and opex objectives must be undertaken in relation to the total estimate of capex and opex, rather than simply viewing the issue of labour costs in isolation.[8]

12. CUAC also maintains its earlier submissions that the CitiPower and Powercor EAs were inefficient at the time they were struck and so fail to reflect the efficient and prudent costs of achieving the opex and capex objectives as required by the opex and capex criteria in rules 6.5.6(c) and 6.5.7(c) of the NER.

13. CUAC draws the Tribunal's attention to the following statements in *Application by SA Power Networks* [2016] ACompT 1 which, although not binding on the current Tribunal, lend support to CUAC's argument in this regard:[9]

> The EA must satisfy the prudency and efficiency tests under the opex and capex criteria. The mere negotiation of an EA, albeit in good faith and at arm's length, is not itself an adequate foundation for discharging the opex and capex criteria. As earlier explained, the nature of an EA leaves itself open to

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[5] CitiPower and Powercor Applications for Leave and Review, paragraph 134.8.
[6] CitiPower and Powercor Applications for Leave and Review, paragraph 134.1.
[7] *Application by SA Power Networks* [2016] ACompT 1 at [520]-[529].
[8] *Application by SA Power Networks* [2016] ACompT 1 at [545]-[546].
[9] *Application by SA Power Networks* [2016] ACompT 1 at [550].

considerable management discretion on terms, even if they may arise from employee demands. It would be important, for example, to demonstrate productivity and other improvements, consistent with wage conditions in the industry.

14. Finally, CUAC embraces the NEO-focused logic of the Tribunal in *Application by SA Power Networks*, which recognises that the opex and capex criteria support the overarching objective to ensure the efficient investment in and operation of electricity services for the long term interests of consumers. The Tribunal recognised that the negotiated nature of an EA means that there is a capacity for an EA to include terms (and corresponding costs) that are not conducive to meeting the NEO.[10] CUAC submits that this consideration is relevant to both the Tribunal's consideration of whether CitiPower and Powercor's grounds of review establish a putative error, and if so, to the Tribunal's determination under s 71P(2a) of the NEL of whether correction of that error would be likely to result in a materially preferable NEO decision.

Productivity improvements

15. CUAC draws the Tribunal's attention to the submissions made by the Victorian Energy Consumer and User Alliance (VECUA), of which CUAC was a member, to the effect that the AER's decision in its draft determinations to apply a productivity factor of zero was not supported by the evidence and would result in further declines in the distributors' productivity levels.[11]

16. CUAC supports the Minister's submission that the AER erred in applying a zero per cent productivity growth forecast in its final determinations for the Victorian DNSPs. In particular, CUAC supports the Minister's submission that the mandatory rollout of AMI in Victoria has resulted in significant productivity improvements and/or efficiencies that will be realised by the Victorian DNSPs in the 2016-2020 regulatory period.[12]

17. CUAC notes the evidence of present and future efficiencies in the DNSP regulatory proposals to the AER. Jemena's regulatory proposal, for instance, makes clear that the AMI rollout would result in network efficiencies which it was committed to passing onto consumers. The proposal states:

> Currently, more than 98% of JEN's customers have a smart meter in their home or business (see Box 3–1). This creates significant potential for us to change the way we charge customers for using electricity to encourage more efficient use of the network and thus lower network costs. Our customers are currently paying for the costs of these new meters, and we are committed to ensuring they can realise the benefits of the meters. Our proposal includes a range of initiatives that seek to leverage the benefits of smart meters including encouraging more informed energy decision making and ultimately lower network costs.[13]

18. It should also be noted that Jemena explicitly forecast a productivity improvement of 0.89% per year in its opex over the 2016-2020 regulatory period.[14]

19. Although other Victorian DNSPs did not forecast productivity improvements, future efficiency benefits arising from the AMI rollout were nevertheless acknowledged. For instance, the regulatory proposals of both CitiPower and Powercor state:

> We are already realising network benefits from our smart meter program and will continue to do so. These network benefits provide long term benefits to our customers.[15]

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[10] *Application by SA Power Networks* [2016] ACompT 1 at [527].

[11] VECUA, *Submissions to the AER: AER Preliminary 2016-20 Revenue Determinations for the Victorian DNSPs*, dated 6 January 2016 at 1.5.3, 7.5.1.1, 7.5.1.5 and 7.6. See also VECUA, *Submissions to the AER: Victorian Distribution Networks' 2016-20 Revenue Proposals*, dated 13 July 2015 at 2.6 and 7.6.1.

[12] Minister for Energy, Environment and Climate Change for the State of Victoria, *Outline of Submissions* (10 October 2016) at [146]-[147] and [157]-[159].

[13] Ibid, at [76].

[14] Jemena, *Regulatory Proposal* (30 April 2015), Table 8-3 at [276].

20. In addition, the AusNet Services proposal lists an extensive range of present and future benefits being realised by AusNet.[16] In particular, AusNet Services lists 'improved efficiency' in operating and capital expenditure 'as a result of more informed decision making' enabled by AMI. The use of smart meter data to allow phase balancing or transformer tap adjustment to solve local network stresses avoiding network augmentation is provided as an example of how AusNet Services is using AMI to improve both opex and capex efficiency.

21. Further, AusNet Services' proposal makes clear that these benefits are only beginning to be realised by AusNet and that 'potential future network benefits could be even more impressive'.[17] The proposal states:

> This discussion illustrates that AusNet Services has begun to significantly integrate the smart meter network and data into its broader network management. This integration will only become deeper through the forthcoming regulatory control period.

22. These aspects of AusNet Services' proposal do not appear to have been considered by the AER in its final determination in relation to forecast productivity growth, which concluded:

> We are satisfied that the majority of the benefits of the AMI rollout that relate to AusNet Services' standard control services opex are already reflected in its base opex. We are satisfied that the future benefits of the AMI rollout will primarily relate to capex, rather than opex…We do not think the available information provides a basis to make any adjustment for these minor [opex] benefits.[18]

23. CUAC also draws the Tribunal's attention to evidence of AMI-associated productivity benefits raised in relation to the introduction of metering contestability in Victoria. CUAC has been actively engaged as a consumer advocate in relation to the AMI rollout in Victoria since it was first proposed.[19] Most recently, CUAC has been involved in the Victorian Government's consultation process regarding metering contestability. CUAC is currently preparing a submission in response to the *Transition to Metering Competition in Victoria Options Paper October 2016* (**Options Paper**). A copy of the Options Paper is provided to the Tribunal as an annexure to these submissions.

24. As part of its advocacy in relation to metering contestability, CUAC has participated in formal and informal meetings with the Victorian DNSPs, in which they have raised the need to protect the future efficiency benefits expected from the rollout of AMI. Indeed, this has been a critical part of the Victorian DNSPs' discussions with consumer groups in relation to the Options Paper.

25. CUAC supports the Minister's submissions at paragraphs 213 to 215 of their written outline to the effect that whatever option is selected for the transition to metering contestability, Victorian DNSPs will still be able to realise efficiency benefits from the installation of AMI and these should be passed on to consumers through the application of a positive productivity factor.

26. CUAC notes the following relevant matters from the Options Paper:

    a. The Victorian DNSPs are realising or commencing to realise an extensive range of distribution network benefits derived from smart meter functionality and data, listed on page 17 of the Options Paper;

    b. The need to protect the realisation of these benefits in any transition to metering competition is a key priority for the Victorian Government and will inform the option chosen;[20]

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[15] CitiPower, *Regulatory Proposal* (30 April 2015), at 267; Powercor, *Regulatory Proposal* (30 April 2015), at 277.
[16] AusNet Services, *Regulatory Proposal* (30 April 2015), at 397-398.
[17] AusNet Services, *Regulatory Proposal* (30 April 2015), at 398.
[18] AER, *Final AusNet Distribution Determination Final Decision 2016*, Attachment 7, 7-78.
[19] See, eg, CUAC, *Submission on AER draft determination Victorian advanced metering infrastructure review 2009-2011 AMI budget and charges applications* (11 September 2009).
[20] Options Paper, 8-9.

c. Measures can be taken to ensure that Victorian DNSPs are able to realise the benefits from AMI in the event that metering competition is adopted, including the leveraging of exit fees and the development of a Victorian 'access framework' to protect DNSPs' ability to access data collected from the new meters;[21]

d. Even if Victorian DNSPs are replaced as the Metering Coordinator and are not able to reach an agreement with the new Metering Coordinator, they will still be able to use the meters installed as part of the AMI rollout or other alternative technology as network devices to maintain distribution network benefits;[22]

e. Only Option 1 would result in the full adoption of metering competition. Under Options 2, 3 and 4, full metering competition will be deferred to after the current regulatory period; and

f. Any shift to metering competition (either full or partial) under Options 1-3 will not occur until 1 December 2017 at the earliest.

27. Taken together with the benefits outlined in the DNSP's own regulatory proposals, these matters are broadly indicative of an error in the AER's decision not to apply a positive productivity factor.

A materially preferable NEO decision

28. If the Tribunal accepts the submissions of the Minister and CUAC that the AER erred in failing to apply a positive productivity factor, CUAC submits that it is manifestly clear that the correction of this error would result in a materially preferable NEO decision.

29. CUAC notes the Minister's submission that if the benefits of the AMI program were not passed on to consumers through reduced expenditure forecasts, the DNSPs would retain 30% of the benefits through the operation of the expenditure incentive schemes.[23]

30. This is clearly inconsistent with the statutory scheme as a whole, which is targeted to ensuring that efficiency benefits are achieved for the long term interest of consumers. In this respect, CUAC embraces the Minister's submission that the legislative scheme provides 'a deliberate distributional tilt, whereby the benefits of regulation are tilted towards the consumer.'[24]

31. In CUAC's submission, the implementation of a positive productivity factor would clearly favour the long term interests of consumers in respect of the price paid for electricity. The need for productivity incentives to ensure DNSPs leverage improvements in infrastructure to provide cost effective services to consumers was reflected in the consumer submissions and the submissions made by the Consumer Challenge Panel (**CCP**) before the AER, which were uniform in arguing for a positive productivity factor.[25]

32. In its final report to the AER, the CCP stated:

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[21] Options Paper, 19.

[22] Options Paper, 18.

[23] Minister for Energy, Environment and Climate Change for the State of Victoria, *Outline of Submissions* (10 October 2016) at [148].

[24] Minister for Energy, Environment and Climate Change for the State of Victoria, *Outline of Submissions* (10 October 2016) at [44].

[25] See, eg, CCP, *Submission to the AER: Response to proposals from the Victorian electricity distribution network service providers* (5 August 2015), at 30-31; CCP, *Submission to the AER: Response to the AER Preliminary Decisions and revised proposals from Victorian electricity distribution network service providers* (25 February 2016), at 25-31.

> Consumers have already funded the roll out of "smart meters"…[and] are now surely entitled to see some pay back for all this funding in greater productivity and reduction in operating costs, at least for ongoing activities.[26]

33. Importantly, the adjustment of the productivity factor has no significant impact on other aspects of the NEO. There are no benefits to consumers by way of improving the quality, safety, reliability and security of electricity distribution which can be said to support the retention of the AER's determination a productivity factor of zero.

Relevance of consumer submissions to the Tribunal's decision-making process

34. CUAC supports the Minister's submission that the NEL requires the Tribunal to undertake a two-stage decision making process in relation to the grounds of review in the present applications.[27]

35. CUAC notes that the comments of the Tribunal in *Application by SA Power Networks* [2016] ACompT 1 to the effect that consumer submissions would be relevant in determining the materially preferable NEO decision in accordance with s 71P(2a) and (2b) of the NEL.[28] CUAC endorses these comments as a correct interpretation of the NEL, consistent with the increased importance of consumer input in the Tribunal's decision making process following the 2013 amendments.

36. However, CUAC also considers that consumer submissions may also have relevance at the first stage of the Tribunal's reasoning in relation to the establishment of one or more of the grounds of review under s 71C of the NEL. CUAC therefore urges the Tribunal to consider its submissions regarding both labour costs and productivity factor at the first, as well as the second stage of its decision-making.

CUAC is not prohibited from raising this material by either s 71R or s 71O of the NEL

37. On 9 November 2016 CitiPower and Powercor lodged submissions with the Tribunal in respect of CUAC's first written submission, and oral submissions at the Tribunal's community consultation process. In essence, these submissions contained two contentions:

    a. That any material raised by CUAC that was not review related matter could not be taken into account by the Tribunal in determining whether a ground of review had been established, pursuant to s71R(1)(a) and s71R(6) of the NEL; and

    b. That, as CUAC had not raised in detail before the AER the material it relied upon at the community consultation, it was prohibited from raising it at the community consultation, pursuant to s 71O(2).[29]

38. CUAC rejects these contentions. Section 71R of the NEL relevantly provides:

> (1) Subject to this section, the Tribunal, in acting under this Division with respect to a reviewable regulatory decision –
>
> (a) Must not consider any matter other than review related matter (and any matter arising as a result of consultation under paragraph (b)); and
>
> (b) Must, before making a determination, take reasonable steps to consult with (in such manner as the Tribunal thinks appropriate) –

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[26] CCP, *Submission to the AER: Response to the AER Preliminary Decisions and revised proposals from Victorian electricity distribution network service providers* (25 February 2016), at 14.

[27] Minister for Energy, Environment and Climate Change for the State of Victoria, *Outline of Submissions* (10 October 2016) at [53].

[28] *Application by SA Power Networks* [2016] ACompT 1 at [103].

[29] CitiPower and Powercor, Joint outline of submissions in reply on labour price growth, 9 November 2016 [121].

(i) network service users and prospective network service users of the relevant services; and

(ii) any user or consumer associations or user and consumer interest groups

that the Tribunal considers have an interest in the determination, other than a user or consumer association or a user or consumer interest group that is a party to the review.

39. In CUAC's submission, the words in the parentheses of s 71R(1)(a) make clear that matters "arising as a result of consultation under paragraph (b)" are matters which are separate from "review related matter" (**RRM**). RRM is defined at s 71R(6) as:

(a) the application for review; and

(b) a notice raising new grounds for review filed by an intervener; and

(c) the submissions made to the Tribunal by the parties to the review; and

(d) decision related matter under s 28ZJ; and

(e) any other matter properly before the Tribunal in connection with the relevant proceedings.

40. On a plain reading of this section, it is clear that matters may arise out of (and, in CUAC's submission, be raised) in the consultation which are separate from matters contained within RRM but which nevertheless may be considered by the Tribunal in accordance with s 71R(1)(a).

41. In relation to CitiPower and Powercor's second contention, and as will be detailed further below, CUAC maintains that in its case, the material it has put before the Tribunal as part of the community consultation clearly arises out of matters that it fairly raised before the AER in the determination process, and therefore falls squarely within what is required by s 71O.

42. However, the question of whether s 71O restricts the matters that can be raised during the Tribunal's consultation under s 71R(1)(b) is a question of statutory interpretation that is of some importance to consumers more generally. For this reason, CUAC's submissions below offer some guidance as to how the two provisions should be read together.

43. Section 71O(2) relevantly provides:

(2) In a review under this Subdivision, the following provisions apply to a person or body, other than the AER (and so apply at all stages of the proceedings before the Tribunal):

…

(c) An affected or interested person or body (other than a provider under paragraph (a) or (b)) may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised by the person or body in a submission to the AER before the reviewable regulatory decision was made.

44. CUAC submits that there is a prima facie incongruity in applying the restriction in s 71O(2)(c) to consultation under s 71R(1)(b). This is because s 71R(1)(b) requires the Tribunal to consult with a range of individuals, associations and groups representing consumer interests, some or many of whom may not have made submissions or comments during the AER's determination process and may therefore not fall within the definition of "reviewable regulatory decision process participants" or "affected or interested persons".[30]

45. In CUAC's submission, this is entirely appropriate, and represents recognition by the legislative drafters that there may be many such entities that, while being fundamentally affected by the nature of the

[30] As defined by s 71A of the NEL.

decision, may not have the resources, capacity or knowledge to engage with the AER's determination processes in the time required by the Law or the Rules.

46. If CitiPower and Powercor's contentions were to be accepted, the somewhat curious result would be that the Tribunal, in making a determination, would be obliged to consult with a range of participants, some of whom could say nothing at all. In CUAC's submission, the better view is that this cannot be the case.

47. Further, in CUAC's submission, the interpretation of this section that best accords with s 71R, and with the statutory purpose of the legislation more broadly, is that the consultation process undertaken by the Tribunal does not fall within the scope of s 71O, because the consultation is not a 'stage of the proceedings before the Tribunal', but a separate and parallel process undertaken by the Tribunal under statute. In these matters, this has been evidenced by:

    a. The fact that the Protocol developed by the Tribunal for the consultation and circulated on 21 September 2016 confirms that consultation was to be "informal". The informality of the consultation was reiterated in the information in the Explanatory Information the Tribunal provided to participants;

    b. Parties to the proceedings were not allowed to participate in the consultation, beyond being able to attend the forum and being provided with copies of any written submissions made. Part 1.1 of the Protocol stipulated that only a participant would be able to make oral submissions and that the parties would not be allowed to actively participate. Part 2.6 of the protocol, concerning the role of the parties stated: "Parties to, and interveners in, the proceedings will not be permitted to speak at the public forum, save for when a member of the Tribunal directs a question to the adviser's client"; and

    c. The Tribunal's instructions about what issues could be raised by the participants were open ended so long as they were relevant to the issues raised in the applications. The Explanatory Information for participants stated: "Participants may raise any matter that is relevant to the Tribunal's functions in the reviews (which, in this case, are set out in the applications of the regulated businesses linked to above)".

48. If, in the alternative, the Tribunal's consultation process should be considered as part of the 'proceedings' to which s 71O relates, the necessary corollary is that, CUAC, as an affected or interested person or body (and a reviewable regulatory decision process participant) is constrained to only raising matters that it raised in a submission to the AER before the reviewable decision was made.

49. In CUAC's submission, this too would be a curious outcome, since, as noted above, not all participants appearing in the Tribunal's consultation process will be an 'affected or interested person or body' within the meaning of s 71O(2)(c). If the alternative construction is the correct one, it would mean that CUAC would be constrained from raising particular matters, which other consumers and users that had not participated in the AER's determination process would not be so constrained from raising.

50. In any event, and as noted above, CUAC maintains that while it has put new materials before the Tribunal in the consultation process, each broadly arises out of matters that it fairly raised before the AER in its determination process.[31] CUAC has provided clear references in each of its submissions to the matters raised before the AER in the VECUA submissions, to which CUAC contributed as a member.

51. CUAC further submits that the Tribunal must not take the same approach when considering whether a matter has been raised by a consumer participant to the consultation as it would when reviewing a Network applicant's grounds of review. It is clear from previous decisions of the Tribunal that the word

[31] As required by the Tribunal per *Re Energy Australia* [2009] ACompT 8 [312(f)]; see also, *Applications by PIAC Ltd and Ausgrid* [2016] ACompT 1 at [699].

'matter' relates to a topic of contention or issue raised during the AER's determination process.[32] It is a practical assessment to be made taking account of the relevant circumstances.[33]

52. In *Applications by PIAC Ltd and Ausgrid* [2016] ACompT 1 at [692], the Tribunal observed:

> *s 71O(2) envisages a less stringent standard is to be applied to non-network applicants and interveners as regards the nexus between the matters addressed in the submissions of a non-network applicant or an intervener to the AER during the regulatory decision- making process and the matters which that applicant is permitted to raise in its application for review.*

53. As the above comments of the Tribunal confirm, the words of s 71O clearly establish a hierarchy in relation to the extent to which parties are required by the legislation to raise with specificity the matters they later wish to agitate before the Tribunal on a review. In CUAC's submission, it is the case that (to the extent that the Tribunal finds that s 71O applies to non-parties before the Tribunal's consultation process at all) an even less stringent standard should apply to non-parties to the review appearing before the consultation process than it does to non-network applicants and interveners.

54. In large part, this is because the 'relevant circumstances' in question to be considered when construing the term 'matter' in this context are the very issues that underpinned the legislative amendments which established the consultation process itself. Specifically, as was noted in the Second Reading speech upon the introduction of the NEL to Parliament, the primary reason for the implementation of the consultation process was to 'address current barriers to user and consumer participation in the limited merits review process.'[34]

55. In *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8 the Tribunal noted the important policy considerations underlying s 71O are to ensure efficiency in the process of regulatory determinations, by limiting the matters that can properly be the subject of merits review;[35] and to ensure fairness in the decision making process, by allowing the Network Service Provider, the AER and interested parties the opportunity to make submissions on matters raised during the determination process.[36]

56. In CUAC's submission, neither purpose is undermined by allowing consumer groups affected by the decision to put on materials of the nature referred to in this review. Further, in CUAC's submission, to the extent that they conflict, both policy considerations must be considered subordinate to the Tribunal's ultimate task, which is to determine whether the decision made by the AER, or an alternative decision, is the decision that best advances the NEO.

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[32] *Applications by PIAC Ltd and Ausgrid* [2016] ACompT 1 at [694] and [698].
[33] Ibid at [699].
[34] South Australia, *Parliamentary Debates*, House of Representatives, 26 September 2009 (J R Rau, Deputy Premier).
[35] *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8 at [28] citing *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] A CompT 14 at [42].
[36] *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8 at [28].