The Commercial Bar Association of Victoria (CommBar) is pleased to make the enclosed submission to the COAG Energy Council’s consultation and review regarding the limited merits review regime that applies under the National Electricity Law and National Gas Law.

We recommend that the COAG Energy Council should not replace the current limited merits review process in the Australian Competition Tribunal with a different and novel form of merits review, or remove merits review entirely so as to leave network revenue determinations reviewable only through judicial review in the Federal Court of Australia. We recommend an amendment in relation to one particular facet of the 2013 amendments to the limited merits review provisions, namely the *prima facie* “materially preferable decision” threshold for leave to review in the Competition Tribunal.

Please do not hesitate to contact Sam Horgan QC (horgan@vicbar.com.au; 03 9225 8419) if you wish to discuss this submission.

Yours sincerely

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Submission to COAG Energy Council:  
Review of the limited merits review regime

A. Introduction

1. The Commercial Bar Association of Victoria (CommBar) is pleased to make this submission to the COAG Energy Council’s consultation and review paper (Consultation Paper) regarding the limited merits review regime that applies under the National Electricity Law (NEL) and National Gas Law (NGL).

2. This submission has been prepared by, and with input from, barristers who have acted for network operators, regulators, consumer organisations and Ministers in limited merits review proceedings in the Competition Tribunal both before and since the 2013 LMR amendments, and under the review regimes that preceded the limited merits review regimes under the NEL and the NGL.

3. While recognising the importance of all stakeholders’ contributions to the this consultation, it is important that any proposed amendments to the existing limited merits review arrangements be informed by input of practitioners with insights both as to the legal and practical consequences of various reform proposals, derived from their experience representing clients in merits and judicial reviews of network revenue determinations.

4. Our submission starts from the premise that the over-riding objective of any proposed reforms developed through this consultation process should be to facilitate the advancement of the national electricity and gas objectives – that is, promoting efficient investment, operation and use for the long-term interests of consumers with respect to price, quality, safety, reliability and safety of supply.

5. The way in which merits and/or judicial review processes facilitate the achievement of the national energy objectives is:

   a. by encouraging the primary decision-makers (the AER and the ERA) to make sound and well-reasoned network revenue determinations; and

   b. by providing a means for review and correction of error in those determinations,
without either:

c. introducing a source of bias in regulatory outcomes; or

d. unduly undermining regulatory certainty, both in relation to particular network revenue
determinations and over the medium-to-long term.

6. As the High Court of Australia has previously observed, uncertainty and unpredictability in the
regulatory process will result in increased perceived risk of investment, which will in turn lead to
increases in the returns sought by network owners.¹ For the reasons we outline below, we
consider that making fundamental amendments to the limited merits review framework, so soon
after the amendments introduced in 2013 (the 2013 LMR amendments), will undermine the
quality of regulatory decision-making and will likely increase the regulatory uncertainty and
unpredictability that the High Court has warned against.

7. We therefore recommend that the COAG Energy Council should not replace the current limited
merits review process in the Australian Competition Tribunal with a different and novel form of
merits review, or remove merits review entirely so as to leave network revenue determinations
reviewable only through judicial review in the Federal Court of Australia. We recommend an
amendment in relation to one particular facet of the 2013 LMR amendments, namely the prima
facie “materially preferable decision” threshold for leave to review in the Competition Tribunal.

B. Context to the 2013 LMR amendments

8. It is important to recall that the 2013 LMR amendments were made in parallel with a broader
package of reforms – the “Better Regulation” program – regarding the AER’s making of network
revenue determinations. That program was directed to:

a. providing balanced incentives for efficient expenditure;

b. balancing greater certainty in the regulatory rate of return with the need to respond to
changing market conditions; and

c. enhancing the framework for consumer engagement prior to, and during, the
determination-making process.²

9. The “Better Regulation” program produced very substantial amendments to the NER and the
NGR,³ and the development of new regulatory guidelines by the AER.⁴ Each of those rule
changes and guidelines were the product of extensive stakeholder consultations. They resulted

¹ East Australian Pipeline Pty Ltd v ACCC (2007) 233 CLR 229 at [50].
² AER, Overview of the Better Regulation reform package, April 2014.
³ Most significantly, the National Energy Amendment (Economic Regulation of Network Service Providers) Rule 2012 (the
Economic Regulation rule change).
⁴ Including, most significantly, the Expenditure Forecast Assessment Guideline and the Rate of Return Guideline. The
preparation and publication of those guidelines was mandated by the Economic Regulation rule change.
in the AER developing substantial new or modified regulatory approaches to some of the revenue building block components (most notably, opex benchmarking and the return on debt), and to network representatives proposing other new or modified regulatory approaches that the AER adopted to only a limited extent (in particular, for return on equity).

10. Those new regulatory approaches, and the substantially rewritten Rules, fell to be applied for the first time in 2015, in the network revenue determinations that were also the first to be subject to review in the Competition Tribunal under the 2013 LMR amendments.

11. In considering the effectiveness of the 2013 LMR reforms, it is important to appreciate that the early Tribunal reviews under the new LMR provisions were also the first cases in which the AER, networks, consumers and the Tribunal itself had to engage with those new (and often complex) regulatory methods, and the new Rules that underpinned them.

12. A related challenge has been one of time. The Better Regulation program resulted in a heavy programme of rule changes and guidelines that were developed, consulted on, and put in place during 2012 and 2013. As a result, it became necessary to delay the subsequent round of network revenue determinations by up to 12 months, in order to enable the networks to formulate their regulatory proposals to take account of the new regulatory methods and framework. This has had two further consequences, which are also relevant to a proper assessment of the early results of the 2013 LMR amendments:

   a. In some respects, there was insufficient time for the AER to consult fully with networks and other stakeholders in relation to significant aspects of its new regulatory methods, which resulted in a greater degree of challenge during the determination processes and Tribunal proceedings than might have occurred with greater lead time.

   b. The shortening of the regulatory control periods (below the standard 5 years) increased the need for a prompt determination of Tribunal reviews, and has the potential to produce more pronounced price shocks if the final result of Tribunal review of the AER’s revenue determinations produces increases to the networks’ revenue allowances, due to the limited number of remaining years in the current regulatory periods.

13. The Consultation Paper requests that submissions should be informed by a strong evidence base, referring to the Tribunal’s decisions since the introduction of the 2013 LMR reforms. We agree. The Energy Council’s consideration of potential further reforms should start from an empirical foundation, and should not be reactive to a single review process. The difficulty is that, at the time of making this submission, the Tribunal has heard and determined only 2 sets of merits.

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5 For an overview of the new and modified regulatory approaches, as applied to the various revenue building blocks, see Geoff Petersen, Morelle Bull, Catherine Dermody, *Access Regulation in Australia* (2016), at pp 195-221 and 249-257.

6 These time constraints were acknowledged by the Tribunal in *Re PLAC and Ausgrid* [2016] ACompT 1 at [1230].
reviews (one involving 5 NSW and ACT networks; the other involving one WA gas network, ATCO Gas).

14. In addition, during the same period, it is to be noted that 3 electricity transmission networks and 2 electricity distribution networks have opted not to pursue merits review of their AER revenue determinations. And, for completeness, there is one further Tribunal proceeding that has been heard but not yet determined (SA Power Networks) and two further Tribunal proceedings that are yet to be heard (one involving 6 Victorian and ACT networks; the other involving one WA gas network, DBNGP).

15. The two decided proceedings contrast starkly with each other, in terms of the scale of the proceedings and the extent to which the challenges to the regulators’ decisions succeeded before the Tribunal.

16. The first set of reviews related to the revenue determinations of 5 NSW/ACT electricity and gas networks (the NSW/ACT Tribunal review).

a. The determinations were made on 30 April 2015 (for the electricity networks) and 3 June 2015 (for Jemena Gas Networks).

b. Those networks’ applications covered 10 subject areas within those determinations and, in many instances, several sub-issues within those broad areas.

c. A consumer organisation was granted leave to review and leave to intervene in relation to the 3 NSW electricity networks, and advanced its own grounds of review in relation to 3 broad areas (return on debt, return on equity, opex).

d. The applications for leave to review were heard over 2 days in early July 2015.

e. Two groups of interstate networks (8 networks in total) also intervened, advancing submissions on many of the NSW/ACT networks’ primary grounds of review.

f. The Commonwealth Minister intervened, to advance submissions on the construction and operation of the limited merits review provisions of the NEL.

g. The Tribunal held a consumer consultation forum over 2 days, and received submissions from 23 user and consumer representatives.

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7 TransGrid, TasNetworks and Directlink, being the 3 transmission networks; and Ergon Energy and Energex, the 2 Queensland distribution networks.

8 Return on debt, return on equity, value of imputation credits, opex, capex, metering services classification, metering services expenditure, the service target performance incentive scheme, the efficiency benefit sharing scheme, and the control mechanism.

h. The Tribunal sat for 3 weeks in September/October 2015, and received voluminous written submissions, which in turn referred to a very large base of documentary material.

i. In its decisions in early February 2016, the Tribunal upheld grounds of review advanced by the NSW/ACT networks in relation to 3 broad issues, namely the return on debt, the value of imputation credits, and opex. The Tribunal ordered that the determinations should be remitted to the AER, to be made in accordance with the Tribunal’s reasons.10

j. The AER has sought judicial review of the Tribunal’s decision in each of those reviews. Each of the aspect of the Tribunal’s decisions that will be considered by the Full Federal Court relates to complex questions of regulatory method and approach that arise as a direct consequence of the Economic Regulation rule change.

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

17. The second review related to the ERA’s access arrangement decision for ATCO Gas.

a. The access arrangement decision was made in September 2015.

b. ATCO’s application for review covered 6 areas of the access arrangement decision: certain sustaining capex projects, depreciation, certain aspects of opex, tariff variation mechanism, return on equity (later narrow to one aspect of the return on equity), and the value of imputation credits.

c. ATCO was granted leave to review, on the papers (that is, without an oral hearing being required).11

d. No party applied to intervene in the Tribunal review.

e. The Tribunal sat for 6 days in February and April 2016.

f. In its decision, in July 2016,12 the Tribunal dismissed each of ATCO’s grounds of review, save in relation to the value of imputation credits: on that issue, ATCO and the ERA agreed that the Tribunal should follow the decision on that issue in the NSW/ACT Tribunal review.


11 The Tribunal’s decision on leave to review is Application by ATCO Gas Australia Pty Ltd [2015] ACompT 7.

12 Application by ATCO Gas Australia Pty Ltd [2016] ACompT 10.
g. No application has been made for judicial review of the Tribunal’s decision.

18. In view of the distinctly differing courses of the 2 Tribunal proceedings decided to date, it is too early to be able to draw firm, evidence-based, conclusions as to whether the 2013 LMR reforms have achieved the policy objectives for which they were made.

19. In particular, given the procedural focus of the 2013 LMR reforms, their effect (and ultimately their success or failure) is properly to be judged by how those procedural reforms are put into practice, over a course of Tribunal decisions, in response to the varying circumstances of different Tribunal reviews. There are aspects of the 2013 LMR reforms that were quite novel – for example, the requirement that the Tribunal must consider the “materially preferable NEO decision” requirement before deciding whether to make any variation or remitter of a revenue determination – and how this additional criterion is to be applied in connection with the (unchanged) grounds of reviewable error, is a matter that can only be worked out through a succession of Tribunal decisions, in response to the particular facts and arguments advanced by the parties in those cases.

20. Given that the revenue determination regimes are intended to promote efficiency, and to enhance regulatory certainty, over the long term, it is positively undesirable, and would be detrimental to regulatory certainty, that the regulatory framework should be subject to repeated programmes of substantial legislative change, before the effects of previous legislative amendments can properly be judged. We are concerned that the Energy Council’s expedited timeframe for the present consultation and review risks producing an outcome that might in fact be antithetical to the stated objective of increasing regulatory certainty.

21. The Consultation Paper notes that policy makers intended that the merits review framework would provide greater predictability in decision-making. To the extent that recent decisions might be seen as having produced unexpected or unpredictable outcomes, we would observe that predictability, and the building up of a body of regulatory precedent, is also critically dependent on legislative stability – both as to the underlying regulatory methodology, and to the framework for regulatory review. In particular, given the significance and complexity of the underlying Economic Regulation rule changes in 2012, the continuation of the Competition Tribunal’s limited merits review function will positively assist in bedding down regulatory practice and precedent in the application of those new rules and methodologies.

22. In our view, there is also an important, inter-related question of whether there may be scope to simplify and streamline some of the underlying regulatory approaches that are imposed (or left open) under the NER and the NGR. Whether such simplification may be required is a question that can only be properly be addressed after an adequate period of time has been allowed for the 2012 Economic Regulation rule changes to become bedded down, through a series of regulator and Tribunal decisions. (For example, it is conceivable that much of the controversy that has historically attended the return on debt might dissipate very substantially, once a 10-year trailing average method is fully implemented.) We recognise that such changes are properly the preserve of the Australian Energy Markets Commission and are outside the scope of the present
consultation. However, we do think it is important to recognise that any current perception of regulatory uncertainty is very much a product of recent amendments to the underlying rules that create the complex regulatory framework in which network revenue decisions are made.

23. In the current circumstances, and especially in view of the very limited opportunity to respond to and build on the extensive substantive and procedural reforms that were introduced in 2012 and 2013, we consider that the Energy Council should be very cautious indeed before accepting the suggestion that further substantial legislative change will somehow bring about more, rather than less, regulatory uncertainty.

24. However, on the relatively limited evidence base of Tribunal reviews commenced and completed since the 2013 LMR reforms came into effect, we are able to offer some provisional conclusions and recommendations regarding particular aspects of the 2013 LMR reforms. We address those matters in section D below. In section C immediately below, we offer some general remarks about the nature of, and relationship between, the limited merits review regime and judicial review of network revenue determinations.

C. Judicial and merits review of AER determinations

25. The fundamental starting point of any consideration of possible regimes for review of network revenue determinations is that the primary avenue must either be some form of merits review or judicial review. Since the High Court’s decision in *Kirk v Industrial Court (NSW)*, it has been firmly established that it is constitutionally impossible to exclude judicial review of administrative decision-making, whether the decisions be made under Commonwealth or State/Territory legislation.

26. Although the NEL and NGL are enacted principally as uniform State/Territory legislation, judicial review of the AER’s decisions (including, but not limited to, network revenue determinations) lies to the Federal Court, rather than to the Supreme Courts of the States and Territories. There is no suggestion that the vesting of judicial review jurisdiction in the Federal Court, in relation to this uniform legislative scheme, should be altered. Plainly, it would undermine regulatory certainty if judicial review were instead to lie to the various State and Territory Supreme Courts.

27. In considering, at a general level, whether the policy objectives of the network revenue determination regime are better served by having limited merits review or judicial review as the primary avenue of review, the key question is which form of review is likely to be more effective in both encouraging the AER and the ERA to make economically sound and clearly-reasoned network revenue determinations, and in providing stakeholders with the prospect of obtaining effective review and correction of those decisions in cases where the primary decision-makers fall short of realising those objectives.

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14 By paragraphs 2(d), (daa), (dab) and (da) of Schedule 3 to the *Administrative Decisions (Judicial Review) Act 1977*. 

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28. It needs hardly to be restated that the issues dealt with by the AER and ERA in the course of making network revenue determinations are very substantial in their financial impact – both on consumers and industrial users, and on the network service providers. The need to ensure practically effective review and oversight of those decisions is therefore very significant indeed, given the broad economic impact of electricity and gas network prices.

29. It is therefore important to note that, in multiple reviews recently initiated by the federal government, the quality and expert nature of the Competition Tribunal’s decision-making has been very firmly endorsed.

a. In the final report of the Harper Review of competition policy, that committee wrote:15

The Tribunal performs a very significant role in Australia’s competition and regulatory framework.

The particular strength of the Tribunal lies in its composition. For the purposes of hearing and determining a matter before it, the Tribunal must be constituted by a presidential member (who is a Federal Court judge) and two members who are not presidential members. A person appointed as a member of the Tribunal must be qualified by virtue of his or her knowledge of, or experience in, industry, commerce, economics, law or public administration. In practice, the Tribunal is usually constituted with at least one member who is an economist.

In its first submission, the ACCC recognises the important role of the Tribunal:

The ACCC supports the OECD assessment that: ‘The Australian Competition Tribunal plays an important role as a merits review body, and the economic content in its determinations has made a significant contribution to both the legislative and judicial development of the law.’

b. In the Vertigan committee’s review of regulatory arrangements for the National Broadband Network, the committee wrote:16

Bad decisions taken quickly are not preferable to ensuring good decisions are taken, especially given the role those decisions play in determining the future of Australian telecommunications. Moreover, the panel believes that even were there reviews, and associated delays, the decisions reached in those review would help guide the process from then on, so that delays would not persist. Finally, the absence of appropriate control mechanisms may reduce regulators’ incentives to ensure the quality of their decisions, underscoring the importance of ensuring effective oversight of the regulators themselves.

All of these factors have contributed to the quality of decisions made under the competition provisions of CCA, which have long been subject to full merits review (for instance, in respect of merger authorisation). The precedents set in those review have been of great importance in enhancing the predictability and effectiveness of those provisions.

It is therefore appropriate that decisions of enduring impact be subject to regulatory oversight and decisions in relation to access determinations should be subject to merits review.

30. The essential difference between merits and judicial review lies in both the intensity and focus of review. Merits review is a more intensive form of review, in that a merits review is given responsibility to review and evaluate the merits of the original decision; whereas a court exercising judicial review is astute not to second-guess the merits of the primary decision, save in cases of extreme unreasonableness or irrationality. Relatively, the focus of judicial review is directed more to the process by which the decision was made, rather than the intrinsic merits of the decision. That focus is reflected by many of the grounds of judicial review for which the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) provides: Were the statutory procedures followed? Did the decision-maker fail to accord natural justice (procedural fairness)? Did the decision-maker take account of an irrelevant (i.e. prohibited) consideration? Or did it fail to take into account a relevant (i.e. mandatory) consideration?

31. An important consequence of the lesser intensity and procedural focus of judicial review is that, even if one or more grounds of judicial review are established, it will not uncommonly be open to the original decision-maker to remake in substance the same decision, but in a procedurally proper fashion. Thus, even a successful application for judicial review may produce no effect in altering the economic outcome of the successfully-challenged decision.

32. At this stage, we should also note two aspects of the relationship between judicial review and limited merits review under the current review framework.

33. First, although it has been common for networks to initiate applications for limited merits review and judicial review of a network revenue determination simultaneously, in practice this has not detracted at all from the Tribunal’s role as the primary forum for review of network revenue determinations. Because both forms of review are subject to very tight time periods for the commencement of proceedings, it is necessary for a party to commence a judicial review application at the same time as its merits review application in the Tribunal, in order to preserve its rights of judicial review in relation to any complaints that the Competition Tribunal might not have power to address (in particular, failure to accord natural justice).

34. However, there has not been a single case (either before or after the 2013 LMR amendments) when a party has obtained relief through judicial review of the AER’s determination beyond or in addition to the relief granted by the Tribunal. In essence, this is because the Tribunal has been able to provide effective relief for applicants’ successfully-established complaints, and thus it has not proven necessary for applicants to prosecute applications for judicial review of network revenue determination following conclusion of the Tribunal’s limited merits review.

35. In the one case where a network applicant sought to apply for judicial review instead of seeking limited merits review in the Tribunal, the Federal Court dismissed the claim for judicial review,

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17 See, eg, Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 37; Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 at [115]-[131].

18 See, eg, United Energy Distribution Pty Ltd v Australian Energy Regulator (2012) 213 FCR 576.
on the ground that the applicant should have pursued its complaint via limited merits review in the Tribunal, which was an adequate avenue of review of the underlying revenue determination.\(^{19}\)

36. Secondly, under the current review framework, decisions of the Competition Tribunal are themselves subject to judicial review by the Full Federal Court.

37. However, prior to the Tribunal’s recent NSW/ACT decision, there had previously been only one Competition Tribunal decision made under the NEL or the NGL that was judicially reviewed by the Full Federal Court since 2008.\(^{20}\) Given the very large financial impact of many Tribunal decisions, the pursuit of Full Federal Court challenges from a Tribunal decision has been a remarkably rare occurrence.

38. In large part, this may be explained by the Full Court’s explanation (in the course of a judicial review from a decision of the Competition Tribunal exercising its infrastructure access review jurisdiction) that it is not the Court’s function to resolve the difficult and complex matters of economic judgment that are vested in the Competition Tribunal as an expert merits review body.\(^{21}\) This clear signal of the Full Federal Court’s limited role reflects the practical experience that parties have avoided using judicial review in the Full Court as a general avenue of appeal, or reargument, of the matters determined by the Competition Tribunal.

D. **Observations on the effectiveness of the 2013 LMR amendments**

39. The key objectives of the 2013 LMR amendments were:

   a. to instil a greater focus on the long-term interests of consumers, through the National Electricity and Gas Objectives;

   b. to improve the accessibility of the limited merits review process to consumer and other stakeholders; and

   c. to impose limitations both on the commencement of the review process, and on the Tribunal varying or setting aside network revenue determinations, in order to give effect to the long-term interests of consumers and to reduce scope for perceived “cherry-picking” or “gaming” of the merits review process.\(^{22}\)

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19 ActewAGL Distribution v AER (2011) 195 FCR 142.
20 SPI Electricity Pty Ltd v Australian Competition Tribunal (2012) 208 FCR 151.
21 Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2011) 193 FCR 57 at [15]-[16]. The Full Court was comprised of Keane CJ, and by Mansfield and Middleton JJ (the current and immediate past Presidents of the Tribunal).
40. Those objectives were given effect through three main aspects of the amendments to the limited merits review provisions of the NEL and the NGL:

   a. **Improving accessibility for user/consumer stakeholders:** broadening the scope of “affected or interested persons or bodies” who have standing to apply for merits review (NEL, s 71A; NGL, s 244); requiring the Tribunal to engage in community consultation, in parallel with the formal hearing process (NEL, s 71R(1)(b); NGL, s 261(1)(b)); and enhancing the costs protections for small/medium user or consumer parties who participate in the formal hearing process (NEL, s 71Y(2); NGL, s 269(2)).

   b. **Imposing an additional threshold for the grant of leave:** requiring an applicant to show a prima facie case that it application, if upheld, will result in a “materially preferable decision”: NEL, s 71E(b); NGL, s 248(b).

   c. **Restricting the Tribunal’s power to vary or set aside a network revenue determination:** in each case where a reviewable error has been found, requiring the Tribunal to be satisfied that correcting the error will result in a decision that will contribute to the achievement of the national energy objectives in a way that is materially preferable to the original determination (a materially preferable decision): NEL, s 71P(2a)(c); NGL, s 259(4a)(c).

41. We address each of those amendments separately below.

**Improving accessibility for user/consumer stakeholders**

42. Prior to the 2013 LMR reforms, the Yarrow review found compelling evidence that consumer and user groups were systematically excluded from participation in limited merits review proceedings in the Tribunal, not least by the risk of having potentially ruinous adverse costs orders made against them.23 SCER agreed with that finding, and accepted that the lack of consumer representation was evidence of regulatory failure.24 That risk was addressed by the insertion of new provisions that limit the amount of costs that might be claimed against small/medium user and consumer participants to the reasonable administrative costs incurred by a party seeking an order for costs.25

43. Additionally, in a novel requirement for a merits review tribunal, the Competition Tribunal is now required to hold public consultation forums with user and consumer representatives. That forum offers a wholly non-adversarial, and low cost, forum by which those stakeholders are given the opportunity to address the Tribunal in relation to the matters raised in the formal applications for review.

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24 SCER, Regulatory impact statement, June 2013, at pp 7-8, 43.
44. It should be noted that these measures to increase the user and consumer accessibility of the Tribunal’s proceedings have been introduced in parallel with the very significant initiatives by the AER, through its Better Regulation regime, both to enhance consumer accessibility to its own regulatory processes (including by the establishment of Consumer Challenge Panels), and to encourage networks to improve their own consumer engagement. Importantly, the improved engagement of both networks and regulator has contributed to an increasing sophistication on the part of user and consumer organisations, which has enhanced those organisations’ ability to make informed and meaningful contributions throughout the regulatory process.

45. We consider that the increased accessibility to, and engagement by, user and consumer stakeholders is a very important improvement to the Tribunal’s processes, and to the regulatory process as a whole.

46. Prior to the 2013 LMR reforms, the Tribunal’s processes involved an asymmetric, essentially unilateral, contest between the networks and the regulator. Under that process, Tribunal reviews of network revenue determinations only ever resulted in networks’ revenue allowances being decreased, and offered no real likelihood of the Tribunal making a decision that would reduce network revenues.

47. Although participation by user and consumer representatives in the Tribunal’s formal hearings is not without its difficulties, particularly as to the disparity in resources relative to network applicants, both the fact of, and the potential for, consumer participation have significantly mitigated the asymmetric, “closed shop” dynamic that were characteristic of pre-2013 Tribunal hearings.

48. The way in which the dynamic of contests in the Tribunal has been changed by consumer participation is shown most clearly by the experience in relation to the AER’s decisions on the return on equity since the 2013 LMR amendments.

a. In the NSW/ACT Tribunal reviews, each of the 5 network applicants argued for substantial increases to the return on equity set by the AER, relying on 2012 amendments to the rate of return provisions in the NER. They were supported by the 8 interstate networks who intervened in those proceedings. The Public Interest Advocacy Centre, intervening, argued that the AER had set the return on equity too high and that the networks’ revenue allowance should be reduced. The AER maintained that its decision was correct and did not involve any reviewable error.

b. The Tribunal considered the arguments on each side in detail, and ultimately dismissed both the networks’ and PIAC’s grounds of review, and affirmed the AER’s decision on the return on equity.26

c. In the next Tribunal review of an AER determination (and before the Tribunal’s NSW/ACT decision had been given), both SA Power Networks and SACOSS issued

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26 Applications by PIAC & Ausgrid [2016] ACompT 1, at [632]-[814].
applications for review, respectively seeking an increase and a decrease to the return on equity set by the AER, on the same grounds as had been advanced in the NSW/ACT reviews. After the NSW/ACT decision was published, SA Power Networks indicated that it no longer wished to pursue its application on the return on equity, and then SACOSS followed suit in relation to its own application.

d. In the next set of Tribunal reviews (for the Victorian electricity distributors and ActewAGL), none of the networks, and no consumer group, has applied to review the AER’s decision on the return on equity.

49. Although it is impossible to tell whether the outcome of the NSW/ACT Tribunal decision on the return on equity would have been any different without PIAC’s involvement, we consider that the prospect of intervention by consumer groups arguing for a decrease to the networks’ revenue allowances at least offers a potential disincentive against marginal challenges by networks of revenue determinations in the Tribunal, by introducing a material prospect of downside risk to network applicants, which had not previously been present prior to the 2013 LMR reforms.

50. The Consultation Paper notes that it is unclear how views aired during the consumer consultation process have been taken into account in review decisions. That comment relates solely to the Tribunal’s decision in the NSW/ACT reviews, which was the first time a community consultation had been held in parallel with the Tribunal merits review process. The Tribunal gave a high-level overview of the various matters raised by consumers in that consultation process, and concluded that it was not necessary to address each of those matters individually (in part because of PIAC’s active participation in the merits review hearings). We think it is fair to observe that, in the following community consultation (for the SA Power Networks Tribunal review), the participating stakeholders showed a clearer acknowledgement of the need to address their submissions to the particular issues that were to be dealt with by the Tribunal in the merits review hearings. In this respect, the effectiveness of the consumer participation reforms remains a work in progress, and an ongoing learning process for both consumer stakeholders and the Tribunal.

51. However, in our view, the fact that user and consumer representatives now have the ability to participate either in the Tribunal merits review hearings or through the community consultation forums is a significant achievement. If nothing else, the mere fact that user and consumer representatives now habitually appear before, and are heard by the Tribunal, serves to reinforce that the Tribunal’s decision-making must be oriented to promoting the long-term interests of consumers.

52. In this regard, we note that the funding that Energy Consumers Australia has contributed towards advancing consumer representation in the regulatory process, including in Tribunal hearings and consultation processes, has been integral in enabling effective consumer participation. It is important that this, and other, sources of funding, advice and assistance to consumer groups

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27 Re PLAC and Ausgrid [2016] ACompT 1 at [50]-[64].
should be maintained or increased, so as to ensure that substantial consumer participation becomes a continuing feature of the regulatory landscape.

The *prima facie* “materially preferable decision” threshold at the leave stage

53. Prior to the 2013 LMR amendments, there were 2 key thresholds that applied for the grant of leave to review, at the start of the Tribunal’s merits review process. They were:

a. First, the applicant must satisfy the Tribunal that there is a “serious issue to be heard and determined” as to whether a ground for review exists. This leave filter is considered by the Tribunal separately in respect of each ground of review.28

b. Secondly, the amount of revenue in issue must exceed either $5,000,000 or 2% of the network’s average annual regulated revenue (whichever is the lower). This limitation is considered by reference to the aggregate revenue impact of all of an applicant’s grounds of review.29

54. Both of those leave filters remain in place. Although the Tribunal has confirmed that the intention of the “serious issue” threshold was to provide an early mechanism to prevent frivolous or non-serious grounds from being raised in the Tribunal,30 we note that there is only one reported case of the Tribunal having refused leave to review on the basis that an applicant has not advanced a serious issue to be heard or determined.31 In our view, that reflects the fact that applicants have generally advanced applications for review that are substantial and properly arguable. The “serious issue” threshold nonetheless preserves an important discipline on parties considering applying for leave, to ensure that their arguments are properly formulated and are at least reasonably arguable.

55. A further filter was added by the 2013 LMR reforms: now, an applicant is required to establish a *prima facie* case that, if its grounds of review are established, varying or setting aside the original decision is likely to result in a “materially preferable decision” with regard to the advancement of the national electricity or gas objectives: NEL, s 71E(b), NGL, s 248(b).

56. At the time of introducing the 2013 LMR amendments, this additional leave filter was heavily emphasised by policy-makers. SCER considered that this additional requirement would impose a higher threshold at the leave stage, would reduce the use of the review as a routine part of the regulatory process, and would address concerns regarding “cherry picking” of issues for review.32

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28 Re Energex (No 4) (2011) 247 FLR 318 at [46].
29 Re Energex (No 4) (2011) 247 FLR 318 at [50]-[53].
30 Re Energex (No 4) (2011) 247 FLR 318 at [45]-[46].
31 Application by South Australian Council of Social Service Incorporated [2016] ACompT 8. The Tribunal reached that conclusion because the applicant did not establish that its ground of review was a matter that it had raised in submissions to the AER, and was therefore not permitted to raise that ground before the Tribunal, under s 71O(2)(c) of the NEL.
32 SCER, Regulatory impact statement, June 2013, at pp 40-41.
In our view, this new leave threshold has not had any discernible effect of providing an additional “filter” for the granting of leave two review. There are two basic reasons why this is so:

a. First, the new provision states that the threshold will be satisfied if the applicant establishes that correction of error “on the basis of 1 or more grounds raised in the application, either separately or collectively” will be likely to result in a materially preferable decision. Thus, an applicant will clear this threshold if it establishes that only one of its proposed grounds of review satisfies this test; or if it establishes that all of its grounds of review will satisfy the test collectively (even if none of them would, individually). In practice, this sets a very low bar for applicants to clear.

b. Secondly, the new “materially preferable decision” criterion (which the Tribunal is required to consider at the conclusion of a review), constructed upon the national electricity and gas objectives, is itself open-ended and contestable. When it is applied at a lower, *prima facie*, level at the leave stage, it is virtually impossible for the Tribunal to form a clear view that, if any one or more grounds of review are established, it is not reasonably arguable that it is at least likely that correcting the error might result in a “materially preferable” decision.33 This is especially the case, given that the leave mechanism is supposed to operate as a quick, and essentially administrative, step in the Tribunal’s processes. It is both impracticable and inappropriate to require the Tribunal, at the leave stage, to engage in the detailed economic evaluation that would be required to form any firm view about whether the correction of any one or more grounds of review will not at least arguably result in a materially preferable decision.

If it was policy-makers’ intention that, through this additional leave threshold, the Tribunal might apply a starting presumption against granting leave for grounds of review that would result in a network obtaining an increased revenue allowance – on the premise that an increase in short-term revenues is not *prima facie* a decision that advances the national energy objectives – that assumption has proved incorrect, and for sound reasons. The national energy objectives are directed to consumers’ long-term interests, and to matters including the quality, safety, reliability and security of supply, in addition to price.34

We therefore recommend that it is appropriate to consider a legislative amendment to this leave requirement at this time, by:

a. deleting the *prima facie* “materially preferable decision” leave requirement entirely; or, if it is to be retained, by making it apply to each ground of review individually (rather than to any or all grounds, individually or collectively, as at present); and/or

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33 See the discussion by the Tribunal in granting leave to review in the NSW/ACT Tribunal reviews: *Re PLAC, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2 at [15]-[32].

34 See the discussion by the Tribunal in its final decision in those matters: *Re PLAC and Ausgrid* [2016] ACompT 1 at [77]-[78], [89]-[96].
b. increasing the financial threshold that applies at the leave stage, for example, by providing clearly that the financial threshold should apply to each individual ground of review that relates to the amount of revenue to be earned. At the leave stage, it is appropriate that any threshold should be cast in terms that the Tribunal will be able to determine without requiring extensive argument or evaluation.

**The “materially preferable decision” requirement at the final stage**

60. The 2013 LMR reforms added a requirement that, before deciding to vary or set aside a network revenue determination, the Tribunal must be satisfied that doing so will, or is likely to, result in a decision that contributes in a materially preferable way to achieving the national energy objectives. The clear intent of that reform was to ensure that the Tribunal’s role is not simply confined to correcting errors in the network revenue determination, but to ensuring that such corrections are made only in a way that is likely to be conducive to advancing the national electricity and gas objectives in a materially better or more effective way than the original determination.35

61. As we have noted, this was a novel element in the overall scheme of review, and one that raises potentially complex matters of economic evaluation against the multi-faceted (and often cross-cutting) aspects of the national energy objectives.36 The complexity of that task is added to by the fact that the Tribunal is also directed, in considering the “materially preferable decision” requirement, to take account of the various inter-relationships between constituent components of the revenue determination as a whole.

62. Overall, we consider that, as applied at the stage of the Tribunal’s final decision, the “materially preferable decision” requirement is an important element in achieving the policy objective of the 2013 LMR reforms, and has a significant role to play in ensuring that the Tribunal remains focussed on efficiency for the long-term interests of consumers as the overarching objective of the merits review process. Even in cases where it does not become necessary for the Tribunal to address the “materially preferable decision” requirement in its reasons, the fact that the parties are required to direct arguments to whether correction of an error will, or will not, better advance the national energy objectives assists in keeping the Tribunal focussed on that overarching objective of the limited merits review regime.

63. Yet, because of the novelty of the “materially preferable decision” requirement, how it applies, and when it will justify the Tribunal from declining to correct a proven error, is a matter that will fall to be worked out by the Tribunal over time.

64. The Consultation Paper refers to the Tribunal having given few details as to its considerations of the arguments that were addressed to it regarding the “materially preferable decision” requirement. It is important to note that the Tribunal is only required to undertake the “materially

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35 SCER, Regulatory impact statement, June 2013, at p 41.
36 Applications by PLAC and Ausgrid [2016] ACompT 1 at [1180]-[1183].
preferable decision” evaluation under s 71P if it decides that one or more grounds of review have been established.

65. In its decision in the NSW/ACT reviews, the Tribunal upheld grounds of review relating to opex (particularly, the weight placed by the AER on its opex benchmarking model), the return on debt and the value of imputation credits. Each of those matters is potentially very significant, both in their immediate revenue impact, and in establishing the correct regulatory practices under the wide-ranging changes made to the NER in 2012. The Tribunal correctly observed that the “materially preferable decision” requirement involves a balancing of factors relevant to the long-term interests of consumers, and that a revenue determination may fail to advance consumers’ long-term interests both by providing too low or too high a revenue allowance.37 We do not consider that it can reasonably be suggested that the errors identified by the Tribunal are of such a nature that correcting those errors would be unlikely to result in a materially preferable decision, having regard to consumers’ long-term interests.38

66. In the only other decided Tribunal review, ATCO Gas, the Tribunal held that no ground of review had been established, save in relation to the value of imputation credits, in which the parties were agreed that the Tribunal should follow its decision in the NSW/ACT reviews. The Tribunal accepted that the materially preferable decision requirement was established in relation to that matter, including because to do so would be conducive to regulatory certainty.39

67. It is fair to say that neither decided case has presented an issue that has required the Tribunal to undertake a close assessment of the materially preferable decision requirement. Such issues might be presented by reviews that are presently before the Tribunal, or in future reviews. As such, we consider that it is premature to draw any firm conclusions about the effectiveness of the “materially preferable decision” requirement, as it applies to the Tribunal’s final decisions.

68. The “materially preferable decision” requirement does, however, pose a procedural challenge to the Tribunal. A proper evaluation of whether correcting the original determination for the errors found be the Tribunal would be likely to result in a materially preferable decision (including by taking account of relevant inter-relationships) is a matter that, by definition, can only be properly evaluated once the Tribunal has decided which, if any, of the grounds of review have been established. But, as the Tribunal is under a tight statutory timeline to give its determination within 3 months after granting leave to review, it has thus far received arguments from the parties on the “materially preferable decision” question at the conclusion of its primary hearing. At that stage, when the Tribunal’s decision on whether grounds of review have been established is unknown, those submissions can necessarily only be made in general terms.

37 Applications by PIAC and Ausgrid [2016] ACompT 1 at [1176]-[1183].

38 Although the AER, through its applications for judicial review of the Tribunal’s decision, has challenged the Tribunal’s conclusions as to whether grounds of merits review under s 71C were made out, it has not raised any challenge with respect to the Tribunal’s reasoning or conclusions on “materially preferable decision”.

39 Application by ATCO Gas [2016] ACompT 10 at [685], [690]-[692].
69. A more focussed evaluation would be facilitated by the Tribunal convening a further hearing, if required, to receive submissions on the “materially preferable decision” requirement once it has given its decision on whether any reviewable errors have been found. However, this is a matter within the Tribunal’s procedural powers to consider adopting in a suitable case, balancing the benefit to be gained from making its final decision as promptly as reasonably practicable.

70. We now address 2 further aspects of the Tribunal’s current procedures that have been raised in the consultation paper.

**Review timelines**

71. The consultation paper has raised a question regarding the extended timeframes for completing reviews under the 2013 LMR reforms. We do not know what the basis for this question is; although, as we have noted above, the need for timely conclusion of the regulatory process has been heightened significantly by the delays to the regulatory timetable that were imposed following both the 2012 amendments to the NER and NGR, and the 2013 LMR reforms.

72. If the question is intended to refer to the delay in finalising the NSW/ACT network determinations because of the applications for judicial review of the Competition Tribunal’s decision to the Federal Court, then that is not a delay that has been brought about by the 2013 LMR reforms. As we have noted, the possibility of further judicial review applies in relation to any form of merits review. And, prior to that case, applications for judicial review of the Tribunal’s decision have been very rare.

73. We do not see that there is any reason to assume that applications for judicial review of the Tribunal’s decision will become significantly more commonplace under the 2013 LMR reforms than before. As we have noted, the NSW/ACT Tribunal review required all parties and the Tribunal to grapple with wide-ranging amendments to the AER’s underlying determination-making powers, and the pending judicial review proceedings are directed very much to those substantive changes, rather to the amendments made by the 2013 LMR reforms.

74. Another potential source of delay in finalisation of the regulatory process arises in cases where the Tribunal remits a decision back to the AER for redetermination in accordance with the Tribunal’s reasons. None of the limited merits review provisions, nor the NER and NGR, stipulate any time within which the AER must remake its determinations upon remitter from the Tribunal. If that stage of the process is a source of delay, the reason for it is not to be found in the 2013 LMR amendments.

**Should limited merits review be more investigatory, and less adversarial, in nature?**

75. The Consultation Paper suggests that one of the objectives of the 2013 LMR reforms was to make limited merits review more investigative, and less judicial, in nature. Yet the SCER regulatory impact statement recognised that a real risk of establishing a new merits review body

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40 Including the Tribunal’s power, of its own motion, to extend the 3-month deadline, if required.
with an investigatory mandate would risk undermining the procedural and substantive limitations of limited merits review, and instead reverting to untrammelled merits review, involving full reconsideration of the original revenue determination. SCER expressly decided against adopting that course, and instead opted to retain limited merits review, but adopting the amendments we have outlined above.

76. A further reason not to replace the existing form of limited merits review with a more expansive, inquisitorial process is that the AER and ERA, as primary decision-makers, have broad information-gathering and monitoring powers that sit alongside the procedures for making network revenue determinations. Erecting an additional layer of “investigative” or “inquisitorial” merits review presents real risks of regulatory overlap, uncertainty and inefficiency; those risks are avoided by maintaining a clear delineation between the regulators’ role as primary decision-maker, and the limited purview of the Competition Tribunal as the body charged with review of those decisions, within tightly-confined constraints.

77. Replacing the existing limited merits review regime with a new (and necessarily novel) form of merits review will provide a new source of regulatory uncertainty and risk, less than 18 months after the 2013 LMR reforms have been put into practice. It is not an initiative that can properly be developed in the limited time afforded by the current consultation process. In the absence of any concrete proposal, it is not a suggestion that we can usefully comment on any further in this submission.

78. However, because it is constitutionally impossible to exclude judicial review, if the Competition Tribunal’s limited merits review jurisdiction were to be replaced by some other investigative merits review body, that body would also necessarily be subject to judicial review. Thus, the introduction of some new form of merits review that will not avoid the possibility of further judicial review of that merits review body’s determinations.

E. Observations on reverting to judicial review alone

79. As we have noted in section C above, judicial review provides a less intensive, and more procedurally-oriented, form of review than merits review. At a general level, we consider that abolishing the current limited merits review regime, and leaving only the possibility of judicial review, would weaken the scheme of review as a whole, because it provides only limited scope to review the economic substance of network revenue determinations. In turn, that weaker form of external review will impose a weaker discipline on the regulators to make sound, transparent and well-reasoned determinations.

80. The consultation paper identifies only two potential disadvantages of abolishing limited merits review. However, for the reasons we set out below, we consider that many of the advantages offered by the existing limited merits review regime – including some of the key objectives of the 2013 LMR reforms – will be lost if judicial review becomes the sole avenue of review. In large

41 SCER, Regulatory impact statement, June 2013, at pp 34, 36-37.
measure, these disadvantages of judicial review are products of the constitutional limitations associated with the Federal Court’s exercise of the judicial power of the Commonwealth.

Composition of the Court and conduct of the hearing

81. Firstly, unlike the Competition Tribunal, the Federal Court is unable to sit as a bench comprising a judge and lay members.\textsuperscript{42} The combined effect of s 8(1) of the ADJR Act and s 20(1) of the \textit{Federal Court of Australia Act 1976} is that an application for judicial review shall be exercised by a single judge of the Federal Court, unless otherwise provided by an Act. In turn, section 79 of the Constitution requires that federal jurisdiction may be exercised “by such number of judges as the Parliament provides”. Section 6(2) of the \textit{Federal Court Act} requires that only legally-qualified persons may be appointed as judges of the Federal Court; and, once appointed, they may not be removed prior to retirement, except for proved misbehaviour or incapacity. Thus the Federal Court is incapable of sitting as a mixed bench of judicial and lay members (appointed for fixed terms) as, for example, the New Zealand High Court is able to in appeals from decisions of the Commerce Commission.\textsuperscript{43}

82. Therefore, even to the extent that the economic basis of a network revenue determination might be amenable to some degree of substantive review, under the rubric of the unreasonableness ground, a Federal Court judge would be required to determine the matter alone, without the assistance of any “lay” judges with specialist economic expertise.

83. That, in turn, has an important consequence as to how such a judicial review proceeding would be required to be conducted. Under the limited merits review framework, the Tribunal’s review is conducted wholly by reference to the documentary record of the regulator’s determination-making process, including expert economic and technical reports that are submitted to, or obtained by, the regulator. The Competition Tribunal is able to receive and consider those reports directly, without oral evidence, because of the Tribunal’s expert composition.

84. That position would not pertain in a judicial review proceeding in the Federal Court. The restrictions as to the giving of economic and other expert opinion evidence under the \textit{Evidence Act 1995} would apply, which will in turn lead to the authors of expert reports having to give oral evidence and be cross-examined.\textsuperscript{44} This carries with it the potential that judicial review proceedings in the Federal Court may be considerably more protracted than limited merits review hearings in the Competition Tribunal.

85. The consultation paper has also referred to the removal of access to merits review in the telecommunications sector. We note that, following the ACCC’s making of a fixed line services access determination in October 2015, Telstra initiated a judicial review of that decision in the

\textsuperscript{42} James Allsop (now Chief Justice of the Federal Court), “The judicial disposition of competition cases”, paper presented at the 7th annual Trade Practices Workshop, University of South Australia, 17 October 2009, at [30].

\textsuperscript{43} Under s 77 of the \textit{Commerce Act 1986} (NZ).

\textsuperscript{44} The admissibility of expert opinion evidence in judicial review proceedings is well established: \textit{Australian Retailers Association v Reserve Bank of Australia} (2005) 148 FCR 446 at [275]-[283], [467]-[471]; \textit{CKI Utilities Development Pty Ltd v Australian Energy Regulator} [2016] FCA 17 at [128] (Mansfield J).
Federal Court in November 2015. That judicial review proceeding was heard in early March 2016, and judgment remains outstanding, nearly 11 months after the commencement of that review proceeding. That compares poorly with the Competition Tribunal’s established track record of prompt decision-making. And the Federal Court’s decision of course remains subject to potential appeal to the Full Federal Court.

86. We do not think it can properly be suggested that judicial review offers the prospect of a speedier review process than the existing limited merits review framework.

Re-erecting barriers to consumer participation

87. At present, medium/small user and consumer interveners have the benefit of substantial protection against adverse costs orders in proceedings in the Competition Tribunal, which are conferred by provisions of the NEL and the NGL. These protections were strengthened through the 2013 LMR reforms.

88. Those cost protection provisions do not apply to proceedings in the Federal Court. If judicial review were to become the only avenue for review of network revenue determinations, then the only way that similar protections against adverse costs could be conferred on user and consumer interveners would be through amendments to the applicable Commonwealth Acts – either the Federal Court Act or the ADJR Act. It would not be constitutionally permissible to provide for such cost protections in the Federal Court through the provisions of the NEL and the NGL, as those laws take effect as State/Territory legislation.

89. We think that it is unrealistic to suppose that the Commonwealth government will be willing to enact adverse cost protection provisions, specific to user and consumer representatives in relation to judicial review of network revenue determinations alone, in Commonwealth legislation. That would likely create a precedent for claims for equivalent costs protections by public interest claimants in other areas of judicial review, such as the Federal Court’s environmental and migration jurisdictions.

90. In the absence of such legislative protections against adverse costs, the position is that user/consumer groups would enjoy no right to obtain protective costs orders from the court on a case-by-case basis, and nor would there be any starting presumption against the award of adverse costs in cases pursued in the interests of users and consumers generally.45

91. It is therefore all but inevitable, in our view, that the end result of reverting to judicial review alone will be that user and consumer organisations will once again be precluded, for all practical purposes, from pursuing any review of a network revenue determination, because of the risk of attracting a potentially crippling adverse costs order. Thus, the possibility of any review of a network revenue determination would once again be solely accessible to the network service providers themselves – with the result that judicial review would operate as an asymmetric

corrective, offering only the possibility of increased network revenues and increased prices for users and consumers. That would be a return to the key regulatory failure that SCER identified in relation to the pre-2013 review regime.

92. In addition, a reversion to judicial review would also see the loss of the user/consumer consultation mechanism, which was also initiated by the 2013 LMR reforms, and which offers user and consumer representatives the opportunity to contribute to the Tribunal’s decision-making in an informal and low-cost way. While the consultation forum is a novel and useful addition to the Tribunal’s merits review processes, such a process is wholly alien to the judicial processes of the Federal Court.

93. A non-party seeking to make submissions in relation to a judicial review proceeding must apply to the Court to be joined as a party or as an intervener.46 If joined to the proceeding in that way, the intervener must make written or oral submissions to the Court and adduce relevant evidence, in the same way that the parties do. The Federal Court simply does not enjoy the Competition Tribunal’s ability to conduct its procedure in an informal way, unconstrained by the rules of evidence.47

94. Therefore, reverting solely to judicial review will result in the loss of both avenues of consumer participation that have been established by the 2013 LMR reforms – that is, direct participation in review hearings, and participation through the informal, low-cost consultation forums. That would see the undoing of the clearest achievement of the 2013 LMR reforms so far.

F. Recommendations

95. For the reasons given above, we consider that there is no sound case for replacing the existing limited merits review function of the Competition Tribunal with either some new form of merits review, or judicial review alone. In particular, reverting to judicial review alone would undermine the quality of regulatory decision-making, and sacrifice the important progress that has been made since 2013 in improving users’ and consumers’ ability to participate in reviews of network revenue determinations.

96. It cannot properly be concluded, at this early stage, that the 2013 LMR reforms have failed to achieve their intended purpose. To make fundamental further legislative changes at this time would add to regulatory uncertainty, in addition to weakening the effectiveness of the review framework.

97. For the reasons stated at paragraphs 53 to 59 above, we consider that the prima facie “materially preferable decision” requirement, under s 71E(b) of the NEL and s 248(b) of the NGL, does not

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46 Under s 12 of the ADJR Act, or r 9.12 of the Federal Court Rules.
47 Cf s 103(1)(b) & (c) of the Competition and Consumer Act 2010 (Cth), which empower the Competition Tribunal to conduct its proceedings informally, and thereby enable the Tribunal to conduct informal user/consumer consultation forums.
operate as an effective threshold for the grant of leave to review by the Tribunal. We recommend
that it is appropriate to consider amending that leave requirement, by:

a. deleting the *prima facie* “materially preferable decision” leave requirement entirely; or, if it is
to be retained, by making it apply to each ground of review individually (rather than to any
or all grounds, individually or collectively, as at present); and/or

b. increasing the financial threshold that applies at the leave stage, for example, by providing
clearly that the financial threshold should apply to each individual ground of review that
relates to the amount of revenue to be earned.

3 October 2016