AUSTRALIAN COMPETITION TRIBUNAL

Appeal by SPI Electricity Pty Ltd [2012] ACompT 11

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| Citation: | Appeal by SPI Electricity Pty Ltd [2012] ACompT 11 |
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| Review from: | Australian Energy Regulator |
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| Parties: | **SPI ELECTRICITY PTY LTD ABN 91 064 651 118 (TRADING AS SP AUSNET)**  |
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| File number: | ACT 9 OF 2011 |
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| Tribunal: | **MANSFIELD J (PRESIDENT)****MR ROD SHOGREN****PROFESSOR KEVIN DAVIS** |
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| Date of decision: | 26 April 2012  |
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| Catchwords | **COMPETITION LAW** –review of determination by the Australian Energy Regulator (AER) – determination of budgets for the roll out of ‘advanced metering infrastructure’ in Victoria – whether AER made error of fact in a material respect – whether components of forecast expenditure “prudent” – whether substantial departure from the commercial standard that a reasonable business would exercise – determination of commercial standard discussion of nature of departure from commercial standard – whether removal of forecast expenditure where departure from commercial standard in circumstances involved error of fact in a material respect |
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| Date of hearing: | 27 – 29 February 2012 |
|  |  |
| Place: | Adelaide (via videolink with Melbourne) |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 261 |
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| Counsel for SPI Electricity Pty Ltd: | S Horgan SC and C Furnell |
|  |  |
| Solicitor for SPI Electricity Pty Ltd: | Johnson Winter Slattery |
|  |  |
| Counsel for the Australian Energy Regulator: | P Hanks QC with C Horan |
|  |  |
| Solicitor for the Australian Energy Regulator: | Australian Government Solicitor |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 9 OF 2011 |

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| RE: | APPEAL BY SPI ELECTRICITY PTY LTD (ABN 91 064 651 118) (TRADING AS SP AUSNET) AGAINST A FINAL DETERMINATION OF THE AUSTRALIAN ENERGY REGULATOR MADE PURSUANT TO AN AMI ORDER UNDER SECTIONS 15A AND 46D OF THE ELECTRICITY INDUSTRY ACT 2000 (VIC) |
| BY: | SPI ELECTRICITY PTY LTD (ABN 91 064 651 118) (TRADING AS SP AUSNET)Appellant |

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| tribunal: | **MANSFIELD J (PRESIDENT)****MR ROD SHOGREN**PROFESSOR KEVIN DAVIS  |
| DATE OF ORDER: |  26 march 2012  |
| WHERE MADE: | adelaide (via video link with melbourne) |

THE TRIBUNAL ORDERS THAT:

1. The Tribunal sets aside the Final Determination of the Australian Energy Regulator entitled “Victorian Advanced Metering Infrastructure Review 2012-2015 budget and charges applications” dated October 2011 insofar as it relates to the budget application by SPI Electricity Pty Ltd for the period 1 January 2012 to 31 December 2015 for the purposes of the Australian Energy Regulator revising its said Determination by:

1. allowing the sum agreed between SPI Electricity Pty Ltd and the Australian Energy Regulator to be included in the said Determination in respect of its costs of foreign exchange contracts;
2. amending the said Determination in such manner as it considers appropriate after considering the claim of SPI Electricity Pty Ltd in relation to meter supply expenditure (addressed in the submissions to the Tribunal and in the reasons for decision of the Tribunal under the heading “WiMAX Communications”) in accordance with the reasons for decision of the Tribunal; and
3. allowing the sum agreed to be calculated between SPI Electricity Pty Ltd and the Australian Energy Regulator to be included in the said Determination in respect of the assessment of labour costs.

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| IN australian competition tribunal |  |
|  | act 9 of 2011 |
| RE: | APPEAL BY SPI ELECTRICITY PTY LTD (ABN 91 064 651 118) (TRADING AS SP AUSNET) AGAINST A FINAL DETERMINATION OF THE AUSTRALIAN ENERGY REGULATOR MADE PURSUANT TO AN AMI ORDER UNDER SECTIONS 15A AND 46D OF THE ELECTRICITY INDUSTRY ACT 2000 (VIC)Appellant |

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| tribunal: | **MANSFIELD J (PRESIDENT)****MR ROD SHOGREN**PROFESSOR KEVIN DAVIS |
| DATE: | 26 MARCH 2012  |
| PLACE: | ADELAIDE (VIA VIDEO LINK WITH MELBOURNE) |

**REASONS FOR DECISION**

# introduction

1. The Appellant in these proceedings, SPI Electricity Pty Ltd, trading as SP AusNet (SP AusNet), owns and operates an electricity generation distribution network in Victoria.
2. On 30 November 2011 SP AusNet filed a Notice of Appeal in this Tribunal. SP AusNet appeals pursuant to s 29(2) of the *National Electricity (Victoria) Act 2005* (Vic) (the NEV Act). SP AusNet appeals against the decision of the Australian Energy Regulator (AER) entitled *Victorian Advanced Metering Infrastructure Review 2012-2015 budget and charges applications* (Final Determination).
3. SP AusNet has also sought judicial review of the Final Determination pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). On 28 November 2011, SP AusNet filed an Originating Application for Judicial Review in the Federal Court of Australia. The relief sought in the Originating Application for Judicial Review is alternative to the relief sought on this application.

Note: This redacted copy of the Reasons for Decision is a revised version of the version previously published (which reflected the parties’ original claims to confidentiality) which redacts more limited confidential material. The final version may not be inspected except by leave of the President of the Tribunal.

# background

1. The appeal concerns a decision made by the AER assessing the continued funding for the roll-out of advanced metering infrastructure (AMI). SP AusnNet is an AMI distributor.
2. In July 2004 the Essential Services Commission of Victoria (ESCV) mandated the installation of manually read interval meters. It considered that “replacing the existing stock of basic accumulation meters with meters that can record electricity use in half hour intervals would enable more efficient pricing and would assist Victorians to better manage their energy consumption.” In 2005 a cost/benefit analysis was commissioned to assess adding advanced functionality to the interval meter. The resulting report projected a net benefit and accordingly the Victorian Cabinet approved the AMI in 2006, under which “smart meters” were to be installed in all residential properties and small businesses (that is, customers consuming less than 160MWh per year) over the period 2005-2015.
3. As the name suggests, smart meters have a number of features and functionalities not available on accumulation meters. The information recorded by smart meters includes customers’ use of electricity on a half hourly basis and information regarding the reliability of the electricity supplied. Further, two-way communications between the meter and the electricity supply system allows electricity distributors to access such information in real time, which in turn is provided to retailers. The AMI system has been described by Oakley Greenwood in *Benefits and Costs of the Victorian AMI Program, for Department of Primary Industries (Vic),* August 2010 at page 10 as follows:

[t]he combination of smart meter and two-way communications and supporting IT systems – and the additional capabilities this provides for electricity distributors, retailers and customers to respond to information on electricity demand levels, price or quality – is what constitutes advanced metering infrastructure. As such, AMI can provide a much better base of information to help the customer understand and control their use of electricity and, therefore, how much they spend on electricity and the impact of that consumption on greenhouse gas emissions.

The introduction of electronic, interval meters for residential and small non-residential customers was first considered by governments to support mechanisms for reducing the growth in daily and seasonal peak demand. When demand increases, additional electricity generation, transmission and distribution infrastructure must be built, which increases the cost customers pay for their electricity.

1. The Distribution Network Service Providers (DNSPs) are responsible for the installation of the smart meters. Consumers ultimately pay the costs of this installation through metering service charges, incorporated into customers’ electricity bills over time.
2. There are five AMI distributors in Victoria: Citi Power Pty Ltd; Powercor Australia Ltd; Jemena Electricity Network; United Energy Distribution and SP AusNet, each responsible for separate geographical areas.

## Smart meters

1. The Final Determination was made in the exercise of a power conferred by a regulatory regime established in connection with a program for the roll-out in Victoria of advanced metering infrastructure. In the roll-out, which commenced in 2009 and is due to be completed in 2015, accumulation meters are being replaced with smart meters in around 2.6 million homes and small businesses. In excess of 630,000 smart meters had been installed in Victoria by the end of April 2011.

# The regulatory regime

1. It is necessary to put the final determination into its regulatory context. As can be seen, the regulatory regime imposes significant constraints on how the AER performs its role. The AMI rollout is a major project affecting electricity customers in Victoria. A convenient summary of the regulatory context is contained in the Tribunal’s decision in *Application by United Energy Distribution Pty Ltd* [2009] ACompT 10 (*United Energy*) at [2] to [11].
2. The specifics of the regulatory structure of the AMI program are identified in certain Orders in Council made by the Victorian Governor in Council under sections 15A and 46D of the *Electricity Industry Act 2000* (Vic) (the EI Act). The orders relevant to this matter are:
3. Victoria Government Gazette No. S200 – 28 August 2007 (Original AMI Cost Recovery Order);
4. Victoria Government Gazette No. S286 – 12 November 2007 (AMI Specifications Order);
5. Victoria Government Gazette No. S314 – 25 November 2008 (Amendments to AMI Cost Recovery Order);
6. References in these reasons to the AMI Order are to the Order in Council of 28 August 2007 as amended from time to time.
7. The amendments to the AMI Order revised specifications setting out the minimum functionality and service level specifications for the AMI rollout. Provisions of the AMI Order which are of particular relevance to the current matter are clauses 5C.2, 5C.3, 5C.4, and 5I.8. References to the Commission are to be read as references to the AER: NEV Act ss 23(3) and 27A. A DNSP must hold a licence under the EI Act to distribute or supply electricity. The obligation on the part of DNSPs to install smart meters was created by the imposition of a new licence condition. The charges which may be made by DNSPs for the installation of the smart meters are regulated by the AMI Order.
8. The AMI Order imposed on the AER and on the DNSPs a two-stage process, but with the potential amendment to the decisions of the AER from time to time in the interim period. The role of the AER is critical because the AMI Order effectively provides for the pass through of the costs of a DNSP for regulated services associated with the AMI rollout, once the AER has determined what those costs are. In other words, the function of the AER to provide the safeguard to consumers of electricity from the DNSPs against the pass through of the costs of the AMI rollout program being excessive is significantly constrained by the terms of the AMI Order.
9. Clause 5A of the AMI Order describes the two stages:

5A.1 Applications by a distributor:

* + - 1. A budget application with respect to the initial AMI budget period (‘Initial AMI budget period budget application’) must be made not later than 27 February 2009.
			2. A charges application with respect to setting initial charges for each of the years commencing 1 January 2010 and 2011 (‘2010-11 initial charges’) must be made not later than 1 June 2009.
			3. An application with respect to:
				1. the subsequent AMI budget period (‘subsequent AMI budget period budget application’); and
				2. setting initial charges for each of the years commencing 1 January 2012, 2013, 2014 and 2015 (‘2012-15 initial charges’),

must be made not later than 28 February 2011.

5A.2 Determinations by the Commission:

1. The Final Determinations of:
	1. the initial AMI budget period Approved Budget; and
	2. the 2010-11 initial charges,

must be made no later than 30 October 2009.

1. The Final Determinations of:
	1. the subsequent AMI budget period Approved Budget; and
	2. the 2012-15 initial charges,

must be made no alter than 31 October 2011.

5A.3 If the Commission does not make a determination before the applicable date specified in clause 5A.2, the Commission is taken to have approved the Submitted Budget or charges (as the case may be).

1. SP AusNet (and the other DNSPs for their respective supply areas) have already taken the step contemplated by cl 5A.1(a). The AER in October 2009 made a final determination in respect of the initial AMI budget period and the 2010-11 initial charges for SP AusNet (the earlier final determination).
2. The present matter concerns the AER’s final determination of SP AusNet’s application for the subsequent AMI budget period budget application in 2012-15 initial charges made under cl 5A.1(c) and 5A.2(b) respectively of the AMI Order. In addressing the issues raised on this appeal, it will be necessary to refer back to the earlier final determination of the AER made under cl 5A.2(a).
3. In addition, it should be noted that cl 5B.3 enables a DNSP to revise its initial AMI budget period budget application within a limited time after that application was first made.
4. For the purposes of this decision, it is also useful to set out in detail the relevant provisions in the AMI Order addressing how the final determination was to be made. They demonstrate the starting point for the AER’s consideration and the limit on the discretionary role that is given. Clauses 5C.1 to 5C.4 provides:

5C.1 The Commission shall review the initial AMI budget period budget application or the subsequent AMI budget period budget application (as the case may be) and may determine to approve or reject the Submitted Budget giving reasons.

5C.2 The Commission must approve the Submitted Budget unless the Commission establishes that the expenditure (or part thereof) that makes up the Total Opex and Capex for each year:

1. is for activities outside scope at the time of commitment to that expenditure and at the time of the determination; or
2. is not prudent.

5C3. For the purposes of clause 5C.2(b), expenditure is prudent and must be approved:

* 1. where that expenditure is a contract cost, unless the Commission establishes that the contract was not let in accordance with a competitive tender process; or
	2. where that expenditure:
		1. is not a contract cost; or
		2. is a contract cost and the Commission establishes that the contract was not let in accordance with a competitive tender process,

unless the Commission establishes that:

* + 1. it is more likely than not that the expenditure will not be incurred; or
		2. the expenditure will be incurred but incurring the expenditure involves a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances.

5C.4 For the purposes of clause 5C.3(b)(iv), the Commission must take into account and give fundamental weight to the matters referred to in clause 51.8, with all necessary changes being made.

1. As can be seen, the AER was required to review the subsequent AMI budget period application of SP AusNet, and had the power to approve or reject it. However, as with its consideration of the initial AMI budget period application of SP AusNet, the AERhad to approve the submitted budget unless it established that the expenditure (or part thereof) that made up the total operational expenditure and capital expenditure for each year was for activities outside scope at the time of commitment to that expenditure and at the time of the determination, or was not prudent.
2. The second of those matters, namely that the AER must approve the submitted budget unless it established that the expenditure was not prudent was the basis of the decision under review.
3. Clause 5C.3 then indicates that there was a further onus required or imposed on the AER on the topic of prudency if it was to disallow the proposed expenditure or part of it. It provides that expenditure is prudent and must be approved if it is a contract cost, unless the AER establishes that the contract was not let in accordance with a competitive tender process: cl 5C.3(a). Even if the expenditure is not a contract cost or the contract was not let in accordance with a competitive tender process, the expenditure will still be prudent unless the AER establishes that it is more likely than not that the expenditure will not be incurred, or the expenditure will be incurred but incurring the expenditure involves a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances: cl 5C.3(b).
4. Moreover, in determining whether expenditure involves a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances, the AER must take into account and give fundamental weight to the matters set out in clause 5I.8 of the AMI Order: cl 5C.4.
5. Clause 5I.8 also applies to the process of decision-making by the AER. It does not do so in its terms but by some incorporation by reference in the AMI Order. For present purposes, cl 5I.8 relevantly provides:

… the [AER] shall take into account and give fundamental weight to:

1. the circumstances of the distributor;

…

at the time the commitment was made to incur or manage (as the case may be) the expenditure … including:

* + - 1. the information available at that time;
			2. the nature of the provision, installation, maintenance and operation of advanced metering infrastructure and associated services and systems;
			3. the nature of the roll out obligation;
			4. the state of the technology relevant to the provision, installation, maintenance and operation of advanced metering infrastructure and associated services and systems;
			5. the risks inherent in a project of the type involving the provision, maintenance and operation of advanced metering infrastructure and associated services and systems;
			6. the market conditions relevant to the provision, installation, maintenance and operation of advanced metering infrastructure and associated services and systems; and
			7. any metering regulatory obligation or requirement.
1. The purpose of clause 5I.8 is to focus the AER’s attention on the circumstances of the DNSP whose budget application is being considered. It does not make reference to the costs of other DNSPs or to a hypothetical efficient DNSP. As SP AusNet submitted, the AER is to consider a reasonable, hypothetical, business in the circumstances of the particular DNSP in question.
2. These matters include the circumstances of the distributor or the person incurring and managing the expenditure, the information available at the time of the expenditure, the nature of the AMI and associated services, the nature of the rollout obligation, the state of the technology, the risks inherent in the project, the market conditions, and any metering regulatory obligation or requirement: cl 5I.8.
3. The AER has described its role under the AMI Order as follows:

[the AER] must approve expenditures unless they are for activities outside scope or are not prudent … expenditures are prudent by default, and can only be rejected where the regulator establishes that costs arise out of contracts that were not subjected to competitive tendering processes, where expenditure is unlikely to be incurred, or where incurring expenditure would involve a “substantial departure from the commercial standard that a reasonable business would exercise in the circumstances.

1. Metering services, being “Regulated Services”, are regulated under the AMI Order: AMI Order cl 2(1)(g) and 3.1. Metering services include the installation of meters and metering data services.
2. Part 2 of Schedule 2 to the AMI Order defines activities that are within scope for SP AusNet for the purposes of the AMI Order. Clause S2.6 of the AMI Order provides that activities within scope for SP AusNet are those activities reasonably required for the provision of regulated services (as defined) and to comply with a metering regulatory obligation or requirement. Pursuant to the same clause, these activities include the procurement of meters required to provide metering services defined in the definition of regulated services. In addition, foreign exchange hedging is deemed to be part of the provision and operation of certain meters required by the AMI Order to be installed.
3. The relevant process for an appeal from a decision of the AER begins at section 29 of the NEV Act. Subsection 29(1)(d) provides that that section applies if the AER makes a decision or determination under the AMI Order, as is the case in this matter. Pursuant to subsection 29(2), a person who is aggrieved by such a decision or determination may appeal to the Tribunal.
4. Subsection 29(3) of the NEV Act provides that sections 55 and 56 of the *Essential Services Commission Act 2001* (Vic) (ESC Act) apply to an appeal under section 29 of the NEV Act subject to some modifications set out in that subsection. Taking into account these modifications, sections 55 and 56 of the ESC Act apply as if this were an appeal under subsection 55(1)(c) of the ESC Act.

# The AER’s Decision

1. SP AusNet submitted a budget application to the AER on 28 February 2011 for the 2012 to 2015 period. Pursuant to the AMI Order, on 28 July 2011 the AER made a draft determination in respect of SP AusNet’s budget application (Draft Determination).
2. On 26 August 2011 SP AusNet responded to the Draft Determination by a detailed submission together with amended budget templates. That process is contemplated by cl 5C.5 and cl 5C.6 of the AMI Order. Clause 5C.7 requires the AER, if it decides to reject the amended submitted budget, to determine the Approved Budget.
3. The Final Determination of the AER, acting under Clause 5C.7 of the AMI Order, removed several items of expenditure from SP AusNet’s approved budget. The budget in question related to the rollout of “smart meters”.
4. The items of expenditure that were removed by the AER that SP AusNet complains about are:
5. expenditure under foreign exchange contracts;
6. expenditure to be incurred in the roll out of the WiMAX communications system and IT system;
7. communications infrastructure maintenance and backhaul operating expenditure;
8. IT operating expenditure; and
9. Meter unit supply capital expenditure.
10. Project management operational expenditure;
11. Customer service operational expenditure; and
12. Meter maintenance operational expenditure.
13. The meter maintenance operational expenditure ground of appeal was not pursued by SP AusNet and as such is not considered by the Tribunal. The grounds of appeal in (2), (3), (4) and (5) above were addressed together in submissions and are addressed below together under the heading “WiMAX Communications”.

# grounds of appeal

1. As this appeal relates to a decision of the AER under the AMI Order, the only grounds of appeal available to SP AusNet are that there has been bias (presumably on the part of the AER) or that the determination is based wholly or partly on an error of fact in a material respect: ESC Act s 55(2)(c) as applied by the NEV Act s 29; see United Energy at [32]-[44].
2. It was not contended by SP AusNet that there had been bias on the part of the AER in making the final determination. As to the scope of the ground of review that the determination was based wholly or partly on an error of fact in a material respect, there is little benefit in expanding upon the observations of the Tribunal in United Energy referred to in the preceding paragraph. The expression in s 55(2)(c) of the ESC Act is to be applied according to its terms. It is not sufficient for there to be shown to be an error of fact which is material. It is necessary to also show that the determination is based wholly or partly upon that material error of fact. As the discussion in United Energy indicates, an error of fact in a material respect may have that character, that is maybe a matter upon which the determination is based wholly or partly, even though it is not itself the ultimate fact. If a fact is a material one to the ultimate conclusion of the AER that will be a sufficient error to warrant intervention on the part of the Tribunal.
3. The Tribunal will now address in sequence the several matters which were dealt with separately in the course of submissions by the parties.

# Foreign exchange contracts

1. SP AusNet entered into foreign exchange contracts associated with the purchase of meters and associated equipment. The AER determined that this expenditure should not be approved and determined an approved budget that did not contain this expenditure. SP AusNet contended that this determination rested on several errors of fact in a material respect, including the finding that the foreign exchange contracts were not let in accordance with a competitive tender process.
2. The AER now accepts that the contracts were let in accordance with a competitive tender process and, thus, that its determination in respect of the foreign exchange contracts was based on an error of fact in a material respect.
3. Accordingly it is agreed by both SP AusNet and the AER that the AER’s final determination should be varied to correct this error by incorporating the additional amount of $15.85 million in the appellant’s approved budget. The parties did not wish to make substantive submissions in respect of this matter. Nevertheless, the Tribunal should explain why it accedes to that common position.
4. The forward foreign exchange contracts were entered into by SP AusNet in 2009 to lock in the Australian dollar cost of meters which were to be purchased internationally and where the contract price is expressed in US dollars. This was consistent with the FX risk management policy of SP AusNet which requires full hedging of an exposure once it is recognised.
5. On the basis that the contracts were let in accordance with a competitive tender process, the particular expenditure is prudent by operation of the AMI Order. The Tribunal has also reviewed the material to be satisfied that the agreed quantum is also correct. It is not necessary in the circumstances to explain in detail how that figure was arrived at.

# WIMAX communications

1. SP AusNet alleges that several aspects of the AER’s determination regarding the rollout of AMI technology involved errors of fact in material respects.

## Background

1. The AMI program has been underway since at least 2007, with meter installation due to commence in January 2009 and for completion in December 2013. As at 23 September 2011 SP AusNet had installed over 174,000 meters.
2. There are four main technical components of the AMI program. They comprise the smart meter, the network management system (NMS), the communications system between the meter and an electricity distributor’s NMS, and the interface between the meter and devices and appliances in a consumer’s home. The NMS handles the data and associated processes. The home interface component is not part of the current AMI rollout.
3. There are several possible communications technologies that may be used to connect smart meters to a distributor’s meter management system (MMS), including mesh radio, WiMAX and 3G: Final Determination, page 2. SP AusNet chose to use WiMAX (worldwide interoperability for microwave access) as its primary communications technology. For all distributors, regardless of their primary communications solution, some locations would require use of other methods such as 3G. While that choice principally relates to the communication system component of the program it also has implications for the meter and NMS components.
4. While SP AusNet chose WiMAX as its communications solution for the AMI rollout, all of the other distributors engaged in such a rollout selected mesh radio.
5. WiMAX is an open standard broadband wireless digital communications system designed to provide fixed and mobile internet access and is intended for wireless metropolitan area networks. It can provide broadband wireless access of up to 50 kilometres for fixed stations and 5 to 15 kilometres for mobile stations.
6. The interface between WiMAX and SP AusNet’s NMS is through the MMS. The data derived through that interface then impacts on a number of other business systems of SP AusNet, such as its Meter Data Management System (MDMS), customer information system, enterprise application integration and data warehousing.

## The AER’s decision

1. The AER established that incurring meter capital expenditure of [redacted], maintenance operational expenditure of [redacted] and IT operational expenditure of [redacted] involved a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances: Final Determination, pages 41, 69 and 81.
2. According to the AER that commercial standard was one which required reconsideration of the expenditure proposed to be incurred in connection with SP AusNet’s adoption of WiMAX and of the alternatives to WiMAX: Final Determination, pages 53, 74 and 85.
3. The AER considered that SP AusNet had departed from this commercial standard. According to the AER, in the context of meter capital expenditure, this was because there had been “a failure to reconsider ... [SP AusNet’s] technology solution”, a failure which constituted a failure to “exercise appropriate levels of governance or risk management” and, thereby, “a substantial departure from the commercial standard”: Final Determination, pages 53-54.
4. Further, in the context of maintenance operational expenditure, the AER considered that SP AusNet had departed from the commercial standard in that it had chosen “to continue to implement a costly communications solution”: Final Determination, page 74.
5. The AER determined that SP AusNet had not met the commercial standard by failing to reconsider “its position when the capability gaps demonstrate that its total AMI solution was not appropriate and/or is not providing value for money” and had not reconsidered “...despite the cost increases”: Final Determination, page 85.
6. Having purported to establish a departure from the commercial standard, the AER moved on to identify the expenditure that would be incurred were the commercial standard exercised by a reasonable business in the circumstances. According to the AER such a commercial standard would reflect certain benchmark costs.
7. In the case of meter capital expenditure, these benchmark costs comprised “the average of all Victorian DNSPs (excluding SP AusNet’s) meter unit costs”: Final Determination, page 54. The AER determined that the commercial standard would reflect that average because “matters of topography and geography which affect a DNSP’s network and customer size and urban and rural factors are not relevant to an assessment of meter unit costs”: Final Determination, page 54.
8. The AER determined that the benchmark costs for maintenance operational expenditure comprised the “equivalent costs of” another distributor, Powercor. This is because its “network size and its customer base are comparable” with that of SP AusNet: Final Determination, page 74.
9. With respect to IT operational expenditure, the AER determined that the benchmark costs comprised costs based on those applicable to Powercor. This is because “all DNSPs would require similar systems” as they are all “required to provide daily interval data for each meter and provide other AMI services”: Final Determination, pages 38 and 86. While costs would vary “because of customer numbers ... Powercor’s customer numbers are similar to those of SP AusNet’s” and, hence, the AER considered Powercor to be a “comparable DNSP to benchmark SP AusNet against for IT opex”: Final Determination, page 86.
10. Having identified the benchmark costs, the AER then simply adopted the benchmark costs for IT and maintenance operational expenditure and determined that allowing communications infrastructure maintenance expenditure of $19 million and IT operational expenditure of $27 million were consistent with the commercial standard: Final Determination, pages 69 and 81.
11. When it came to consider meter capital expenditure, however, the AER adopted a different process, though it led to the same result. The AER compared the chosen benchmark with SP AusNet’s meter supply costs, a comparison which, according to the AER, showed that “... all SP AusNet’s meter unit costs, except for WiMAX Multiphase CT connected and Multiphase 1 contactor meters, involve a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances”: Final Determination, page 55.
12. The AER considered that “meter supply expenditure of [redacted] is consistent with the commercial standard”, an amount derived by applying an averaging process to the meter unit costs of SP AusNet and the other distributors: Final Determination, pages 41, 54 and 55.

## The parties’ submissions

1. SP AusNet submits that the AER adopted a four part process in its treatment of meter capital expenditure, maintenance operational expenditure and IT operational expenditure. These steps were the identification of the commercial standard as being one that required a reconsideration of the use of WiMAX, the identification of a departure from that standard, the identification of benchmark expenditure that would reflect the commercial standard and the adoption of the benchmark expenditure to replace SP AusNet’s proposed expenditure.
2. It is submitted by SP AusNet that the AER made errors of fact in a material respect in each of the first three parts of that process and that the fourth, in effect the AER’s ultimate decision, was based, in part, on each of those errors.

### Determination of commercial standard

1. The AER, in the Final Determination, identified as the commercial standard one that required the reconsideration of the use of WiMAX, of the proposed expenditure arising from such use and of alternatives. The AER did so on the basis that “a reasonable business would be expected to have reconsidered the proposed expenditure and considered alternatives”: Final Determination, page 53.
2. In support of this determination the AER concluded that, there had been “significant cost increases” and “significant difficulties in meeting operational targets” in the context of the meter capital expenditure: Final Determination, page 53. Further, in the context of maintenance operational expenditure, the AER found that the “primary AMI solution does not provide adequate coverage” and that there had been “cost increases”, with additional resourcing being required to “address problems with its communications solution”: Final Determination, page 74. Finally, in the context of IT operational expenditure, the AER determined that the AMI solution chosen by SP AusNet resulted in “capability gaps” and that there had been “cost increase”: Final Determination, page 85.
3. In SP AusNet’s submission, the AER concluded that the use of WiMAX needed to be reconsidered because there had, as a matter of fact, been a rapid escalation in costs associated with the use of WiMAX, that the use of WiMAX had resulted in capability gaps, WiMAX was causing SP AusNet to fail to meet operational targets and that WiMAX would provide inadequate coverage.
4. The AER submits that in each category of expenditure, an aspect of the commercial standard that a reasonable business would exercise in the circumstances included the reassessment and reconsideration of the WiMAX communications solution against other available alternatives. In reaching this determination, the AER submits, it carried out its obligations and functions in accordance with the AMI Order.

### Increase in WiMAX costs

1. In the Final Determination the AER stated that as at 3 October 2011 “the estimated cost of WiMAX was [redacted]” so that the “overall cost for WiMAX will be $320 million higher than SP AusNet’s [2008] business case for WiMAX at [redacted], and $220 million greater than the proposed cost of [redacted] in June 2010”: Final Determination, page 50. The AER also states that certain information provided by SP AusNet reveals that as at 19 May 2011 “65% of the target outcome for WiMAX communications systems has been achieved and 126% of allocated budget spent”: Final Determination, page 44.
2. SP AusNet submits that, while these statements were made in the context of meter capital expenditure, it appears that they also form the basis for the AER’s conclusions about cost increases in maintenance and IT operating expenditure. The parties’ submissions on these issues are dealt with separately below.
3. SP AusNet contends that the AER’s conclusions and statements are factually incorrect in four respects. First, SP AusNet maintains that the estimated cost of WiMAX at 3 October 2011 was not [redacted], rather that figure reflects an estimate provided by SP AusNet for the entire AMI program. Secondly, SP AusNet submits that its 2008 business case did not put forward a cost for WiMAX of [redacted], rather the business case, as presented to the board of SP AusNet in July 2008 dealt with the AMI program costs. Thirdly, SP AusNet submits that its proposal of June 2010 suggested a cost of [redacted] for the entire AMI program, rather than merely WiMAX. Finally, SP AusNet contends that information provided by it did not suggest that 65% of the target outcome for WiMAX communications systems had been achieved and 126% of the allocated budget spent but, rather, that this information related only to WiMAX towers.
4. SP AusNet submits that the AER’s error arises through its attribution to WiMAX of the forecast costs of the entire AMI program. Further, SP AusNet submits that the AER is implicitly attributing to WiMAX responsibility for all increase in the AMI program budget, a position that it maintains is factually incorrect. SP AusNet submits that less than 15% of the increase in the AMI program budget from June 2010 to May 2011 was attributable to communications, with 60% attributable to the IT budget.
5. SP AusNet suggests that the reasoning of the AER discloses a concern that inherent in the adoption of WiMAX is a requirement to incur certain costs that need not be incurred if an alternative technology, mesh radio, were adopted instead. SP AusNet accepts that this is the case, but submits that the AER was aware at all relevant times that the use of WiMAX entailed relatively higher capital expenditure, yet still accepted, in the 2009-11 budgeting process, it as being an appropriate technology. SP AusNet submits that the inclusion of a cost that was always inherent in WiMAX’s adoption does not form a basis for the conclusion that SP AusNet should have reconsidered its use of the technology.
6. The AER submits that it did not mistakenly attribute to WiMAX the costs of the entire AMI rollout. The AER does, however, maintain that it can be inferred that WiMAX related costs are the principal cause or contributor to the significant cost increase in SP AusNet’s AMI rollout. The AER submits that it determined that the primary cause of cost increases in meter supply capital expenditure, communications infrastructure maintenance and IT operational expenditure was SP AusNet’s decision to proceed with WiMAX.
7. The AER submits that WiMAX is more than “simply an aspect of only one of the four technical components of the” AMI program. Rather, it says, the WiMAX solution has a direct impact on other components of the program and, thus, it was not factually inaccurate for the AER to have regard to the effect of WiMAX on cost increases in the AMI program. In addition the AER submits that, by adopting and proceeding with WiMAX, SP AusNet necessarily incurred greater costs in order to implement its AMI program, including the purchase of communications towers and associated leases.
8. The AER says that it did not find that the need to reconsider the use of WiMAX arose as a result of SP AusNet incurring a cost that was always inherent in WiMAX’s adoption, but rather that good corporate governance should have triggered a review of the communications solution.
9. The AER submits that it had no information to suggest that SP AusNet, in the May 2011 report, had split WiMAX electronics equipment from WiMAX tower costs and, as such, its attribution to the whole WiMAX communications system of cost increases associated with the towers only was not in error.

### Capability gaps

1. SP AusNet maintains that the AER erred in concluding that there were capability gaps resulting from the use of WiMAX technology. In particular, SP AusNet submits that the AER determined that there were capability gaps resulting in increased maintenance and IT operational expenditure. SP AusNet submits that the AER reached this conclusion by wrongly attributing to WiMAX issues concerning the IT system and that the impact of any capability gaps was on IT capital expenditure, not operational expenditure.
2. The AER submits that the information before it at the time it made the Final Determination indicated that there were integration issues between the MDMS software and the MMS software. This, the AER submits is an issue of integration between WiMAX and the IT system that represented a software flaw that in the short term would require increased IT operational expenditure.

### Failure to meet operational targets

1. The AER, in SP AusNet’s submission, suggested that the use of WiMAX was causing SP AusNet to fail to meet operational targets. SP AusNet submits that it did so on the basis of an internal SP AusNet presentation of 19 May 2011. SP AusNet submits that the AER’s conclusion regarding a failure to meet operation targets was based on an erroneous attribution to WiMAX of concerns that arise out of IT systems. These concerns, according to SP AusNet, should largely be resolved through the engagement of an IT systems integrator.
2. The AER denies that it erred by attributing to WiMAX concerns that arose out of the IT systems. In addition, the AER submits that, as at October 2011, at best 76.1% of installed meters were able to communicate with SP AusNet. This, in the AER’s submission, raised valid concerns about whether SP AusNet could meet its 1 January 2012 deadline for having fully operational remotely read interval meters.

### WiMAX provides inadequate coverage

1. The AER, in the Final Determination “notes that WiMAX has only a 70% coverage … with the a [sic] further 15% connected by 3G and the other 15% through ‘complex solutions’” before characterising this as inadequate: Final Determination, page 72. SP AusNet makes two points regarding this. First, it submits that the AER was aware that SP AusNet always intended to use 3G communications technology for customers in remote locations. Specifically, SP AusNet submits, the AER was aware that WiMAX coverage was intended to be in the order of 85%. Secondly, SP AusNet submits that it is factually incorrect to assert that WiMAX is to have coverage of only 70%.
2. SP AusNet points to other instances in the Final Determination where the AER appears to accept that intended WiMAX coverage was 85%: Final Determination, page 44. SP AusNet also suggests that Impaq, the AER’s consultants, felt able to analyse comparative pricing based on an assumed WiMAX coverage of 85%.
3. The AER submitted that the information provided to it by SP AusNet indicated that WiMAX, without the use of complex solutions, would only result in 70% coverage. Taking this into account, the AER submits, suggests that a reasonable business acting in accordance with the commercial standard would reconsider tits decision “if its primary AMI solution does not provide adequate coverage.”

### Mesh radio

1. SP AusNet submits that the AER maintains that it “has received no information to substantiate the concerns risks and impediments raised by SP AusNet” to the use of mesh radio as an alternative to WiMAX. This is despite, in SP AusNet’s submission, its provision of evidence to the AER that mesh radio was not a technology solution capable of delivering the performance levels mandated by the Victorian Government in clause 4.4(a) of the Functionality Specifications, as defined in the AMI Order. It is SP AusNet’s contention that metering that uses mesh radio as its communications technology cannot satisfy the requirements of clause 4.4 of the *Advanced Metering Infrastructure Minimum AMI Functionality Specifications* (Functionality Specifications) that load control commands be performed at 99% of meters within one minute.
2. SP AusNet points to several sources of information that the AER has been provided with or had access to that, it says, support its submission that the AER was aware of the inadequacies of mesh radio.
3. SP AusNet submits that the AER has been provided with a copy of a of a letter of 23 July 2009 from the provider of the mesh radio technology, Silversprings, indicating that the meter data to market requirement would not be met by the use of its technology; suggesting that it “was not technically feasible”. Further, SP AusNet submits that the AER was provided with a copy of a letter of 7 August 2009 from two other distributors seeking a review of the relevant meter data to market requirement because of limitations in the mesh radio communications technology solution. In particular, according to that letter, Silversprings had advised that “unacknowledged messages can be delivered to at least 90% of meters in 8 minutes, but not the target noted above.”
4. SP AusNet submits that the AER also received a report from one of its consultants which confirmed that other distributors had sought a relaxation of the requirement and which implicitly accepts that the requirement could not be met by the use of mesh radio, while nevertheless asserting that it was imprudent to use WiMAX as, essentially, the requirement would be relaxed. Such relaxation would occur because, when the requirement was adopted, it was understood that “relaxation would be considered if it proved too onerous”, that relaxation “is an item pending resolution with the ISC” and that Victoria would be seeking to align with a national specification ”where appropriate”.
5. In relation to the prospect of a relaxation of the standard, SP AusNet submits that the AER was aware that the requirement had not been relaxed despite its being more than two years since a 6 October 2009 resolution of the AMI Industry Steering Committee (on which a representative of the AER sits) to approve a recommendation that the relevant requirement be relaxed (so as simply to require performance at 90% of meters within 10 minutes). In addition, SP AusNet submits that the AER has been provided with an ISC discussion paper which records advice of the functionality working group to the effect that the relevant requirement was not achievable and received the minutes from the ISC meeting of 1 December 2009 in which other participants in the electricity industry, particularly retailers, voiced their opposition to any relaxation of the requirement.
6. SP AusNet submits that, for these reasons, it was apparent to the AER that mesh radio was incapable of meeting the required specifications. The AER’s setting of a commercial standard that required assessment of mesh radio as a viable alternative ignores the fact that mesh radio does not meet the Functionality Specification. SP AusNet submits that, insofar as the AER’s commercial standard encompassed this requirement, it was based on a material error of fact.
7. SP AusNet submits that it undertook detailed analysis and testing of the available technology solutions including mesh radio, WiMAX and 3G technology solutions when first selecting its technology solution. According to SP AusNet, this assessment informed SP AusNet in its further consideration of the suitability of WiMAX including in its reassessment which culminated in the 19 May 2011 Executive Committee Analysis. The original assessment found that mesh radio did not meet the specific requirements of SP AusNet and that a communications system primarily using WiMAX was considered to be the best solution for SP AusNet. SP AusNet maintains that the AER had in its possession evidence of the assessment undertaken by SP AusNet in selecting WiMAX as its primary communications technology.
8. SP AusNet maintains that the AER had no evidence on which to form a view that implementing the mesh radio solution as an alternative to the WiMAX solution at this point in the AMI project would provide SP AusNet with a lower cost solution able to meet regulatory requirements and that there was no evidence for the AER to determine that mesh radio was a viable alternative for SP AusNet in SP AusNet’s circumstances.
9. The AER does not explicitly challenge SP AusNet’s submission that mesh radio was incapable of meeting the regulatory requirements. Rather, the AER submits, its conclusion that SP AusNet’s expenditure did not meet the commercial standard test was not based on a conclusion that mesh radio was the only viable alternative to WiMAX. Rather, the AER submits, it undertook a qualitative analysis of SP AusNet’s decision making and governance processes and concluded that there had not been a comprehensive reassessment of its AMI program in light of cost increases and operational difficulties.
10. The AER maintains that it did not conclude that SP AusNet should change technologies, but rather that SP AusNet departed from the commercial standard by not reconsidering its decision to use WiMAX in circumstances where it should have been apparent to SP AusNet that there were suitable proven alternatives.
11. The AER submits that, even taking into account cost and time implications, it may well have been feasible for SP AusNet to change technologies. In support of this submission, the AER relies on expert reports prepared by Energia and Impaq. The fact that it was feasible reinforced, in the AER’s submission, the requirement to reconsider the use of WiMAX.
12. It is conceded by the AER that SP AusNet did give consideration to alternatives, but the AER says such reassessment was limited and insufficient in the context of significant cost increases and the fact that the meter roll out was only 24.1% complete as at 1 June 2011.
13. The AER submits that it was never provided with any conclusive or current information that mesh radio cannot meet the Functionality Specifications and that it is possible that WiMAX will not meet the specifications in any event.
14. The AER submits that it never expressed a conclusion as to whether or not SP AusNet should change technologies. Rather, the AER submits, it noted that mesh radio was an alternative solution available to SP AusNet that a distributor acting reasonably and in SP AusNet’s circumstances would have considered fully along with other technology options.

### Departure from the commercial standard

1. As was noted earlier, the AER, having determined the relevant commercial standard, identified a departure from it taken by SP AusNet through its failure to reconsider the use of WiMAX. It stated that there had been “a failure to reconsider ... [SP AusNet’s] technology solution” and that SP AusNet had “not reconsidered its position”: Final Determination, pages 53 and 85. Moreover “SP AusNet’s decision to proceed with its AMI rollout by adopting WiMAX is examined as part of these circumstances...”, circumstances which were “...such that it should have reconsidered its decision to proceed with WiMAX and this forms part of the relevant commercial standard test...”: Final Determination, page 40. Further, the AER said, “despite requests by the AER for such information, SP AusNet did not present the AER with evidence that it had undertaken a comprehensive re-assessment of its communications solution since July 2008”: Final Determination, page 53.
2. SP AusNet submits that each of these statements is factually incorrect for three reasons.
3. First, SP AusNet submits the AER did not request it to provide the AER with evidence that it had undertaken a comprehensive re-assessment of its communications solution since July 2008.
4. Secondly, SP AusNet contends that it conducted a detailed review of the entire AMI program in 2011. The report described the background to it as follows:

Recent AMI status reviews identified that the Smart Meter Program was not on track to meet its January 2012 objectives ... In response, SP AusNet’s management commenced a detailed Program review and re-planning effort to address key Program gaps and risks.

1. According to SP AusNet, one of the key findings from the review was that, “[o]n balance, the overall direction of the solution should be maintained and can be implemented ... The alternative of moving to a new solution at this point would have more significant time and cost impacts than remediating the current solution.”
2. Thirdly, SP AusNet submits that it continued to consider alternative solutions after its selection of WiMAX in 2008.
3. For these reasons, SP AusNet submits, it is clear that it did reconsider the use of WiMAX and concluded that WiMAX was the preferred solution, mesh radio was not a viable alternative and there were cost, time and risk implications which dictated against a change to an alternative technology.
4. SP AusNet submits that these reasons establish that the AER’s finding that were was a departure from the commercial standard was, or was based on, material errors of fact.
5. The AER submits that its findings as to SP AusNet’s departure from the commercial standard were not in error.
6. According to the AER, SP AusNet’s submission that it did conduct a detailed review of the AMI program in 2011 is incorrect. In support of this the AER submits that the report relied on by SP AusNet did not provide evidence that a detailed assessment of alternatives to WiMAX had been carried out and the AER’s requests to SP AusNet that it provide its analysis that supported the conclusion that it was more cost efficient to fix the WiMAX solution that move to an alternative were not met.
7. The AER submits that no information was provided to it to demonstrate that the increased cost of proceeding with WiMAX was outweighed by the cost of implementing mesh radio, or that there was a net benefit resulting from the proposed increase in capital expenditure. Further, the AER submits, SP AusNet provided no information to displace the view that it had formed that SP AusNet’s board of directors or executive management had not undertaken a comprehensive reassessment of the AMI rollout.

### Identification of benchmark expenditure as reflective of the commercial standard

1. The third part of the AER’s process entailed identifying certain benchmark expenditure as the meter capital expenditure, maintenance operating expenditure and IT operating expenditure that the commercial standard would reflect.
2. In establishing a departure from the commercial standard the AER is required to take SP AusNet’s circumstances into account and give them fundamental weight: AMI Order cl 5I.8. Hence, SP AusNet submits, expenditure reflective of the commercial standard ought necessarily be expenditure that would be incurred by the hypothetical reasonable business were it to be placed in SP AusNet’s circumstances. SP AusNet submits that in adopting the benchmarks it did, the AER is implicitly stating that the expenditure inherent in them is expenditure properly referable to SP AusNet’s circumstances. SP AusNet contends that this is factually inaccurate, for at least four reasons.
3. First, SP AusNet says the expenditure inherent in the benchmarks is reflective of the use of a communications technology not in fact used by SP AusNet (mesh radio) and is not reflective of the use of a communications technology in fact used by SP AusNet (WiMAX). Secondly, SP AusNet submits that the expenditure inherent in the benchmarks is reflective of the use of a communications technology the use of which would place the hypothetical reasonable business in breach of the Functionality Specifications. Thirdly, SP AusNet, submits the expenditure inherent in the benchmarks is reflective of scale efficiencies not available to SP AusNet. Finally, SP AusNet suggests that, at least in terms of meter capital expenditure, benchmark expenditure is compared to that of SP AusNet often without regard to the fact that an element of the circumstances applicable to SP AusNet is that it had entered into specific exchange rate hedging contracts that materially impact on the comparability of its costs to those of the other distributors.
4. The AER submits that, in determining a budget once it has determined that there has been a departure from the commercial standard, it is open to it to determine the amount of expenditure that is prudent by reference to a benchmark. The AER submits that this approach is not inconsistent with the requirement to take into account and give fundamental weight to the circumstances of SP AusNet.
5. In oral submissions, counsel for the AER submitted that, in determining benchmark expenditure, the AER determined what would meet the relevant commercial standard. This commercial standard, for the purposes of determining the benchmark expenditure was, however, a different standard to the one that SP AusNet had failed to meet.
6. For example, the AER submits, the circumstances of other distributors may be relevantly comparable to those of SP AusNet. The mere fact that other distributors have adopted a different communications solution does not, in the AER’s submission, preclude reference to their levels of expenditure in order to determine a benchmark.
7. The AER submits that, in so far as it used the expenditure of Powercor as a benchmark, it had found that the circumstances of Powercor were relevantly comparable to those of SP AusNet: Final Determination, pages 74, 84 to 86. To the extent that Powercor’s costs reflected any cost sharing or efficiencies of scale, the AER submits that these were not likely to account for any substantial difference: Final Determination, pages 38, 40 and 85.
8. The AER maintains that it did take into account exchange rate risk in the way the meter unit costs are reported. The AER submits, however, that because all purchases of meters were made in US dollars, it was the correct technique to determine the benchmark based on other service providers’ US dollar meter costs.

## Decision

1. SP AusNet’s case in relation to the AER’s decision about increased costs proceeded on the basis that the AER had, in determining that “WiMAX costs” had increased substantially, fallen into error because the components of the AMI rollout that were directly and explicitly attributable to WiMAX had not increased in price dramatically. It became clear in the course of oral argument, as well as in written submissions, that SP AusNet and the AER were at something of cross purposes. It was put for the AER that, in determining that there had been substantial increases in “WiMAX costs” it had in fact determined that there had been a substantial increase in the costs of the AMI program, of which the WiMAX technology is a crucial component.
2. It appears clear from the Final Determination that the AER did use the term WiMAX as a proxy for the AMI rollout. This is made clear in the context of the increase in costs where the AER said “SP AusNet’s circumstances reveal that the internal estimates of expenditure required for the AMI roll-out have increased” before going on to describe the specific increases in “the estimated cost of WiMAX”: Final Determination, pages 49-50. The “estimated cost of WiMAX” the AER described was, as SP AusNet submitted, the cost of the whole program.
3. It is apparent that the AER did not make an error of fact in attributing to WiMAX the increases in costs for the whole program. What it did was describe the program as WiMAX on the basis that the choice of technology was crucial to the program structure and cost. This is clearly the case.
4. In a similar vein, SP AusNet submitted that the AER erred in attributing to WiMAX costs associated with capability gaps. SP AusNet maintained that these costs were IT capital expenditure and were not WiMAX costs. SP AusNet has not been able to persuade the Tribunal that the AER made an error in concluding that the increase in costs that were a result of the capability gaps were due to the choice of WiMAX technology. Thus, no material error of fact has been made out. Further, it is not apparent that any error that was made as to the attribution of cost increases had a material effect on the AER’s decision.
5. The Tribunal is not satisfied that the AER made a material error of fact in determining that the choice of WiMAX technology meant that SP AusNet’s AMI roll-out was not meeting operational targets. The AER did not determine that difficulties could not be overcome, nor that the WiMAX technology itself was causing the failure. SP AusNet has not successfully established that the AER made an error of fact in determining that the shortfalls were attributable to the choice of technology. Further, the determination that SP AusNet’s roll-out was having difficulty in meeting operational targets was not of great significance to the AER’s decision.
6. The AER’s determination that WiMAX does not provide adequate coverage is not incorrect. It is clear from SP AusNet’s own documents and submissions that alternative technologies will need to be utilised. In particular, 3G technology will need to be used in remote areas. The AER fell into no error of fact in determining that WiMAX could not meet the coverage requirements without resort to other technologies.
7. The AER did not make an material error of fact in determining that there were other technologies, in particular mesh radio, that were viable alternatives to WiMAX. While it appears to be true that mesh radio is incapable of meeting the performance and functionality standards mandated by the Victorian Government, it also appears to be the case that SP AusNet’s mix of technologies will fail to fully comply. Further, it is clear that the AER never laboured under the misapprehension that mesh radio, or other technologies, did meet the performance and functionality standards. The AER’s determination was based on the view that no technology or mix of technologies could fully comply with the standards. The Tribunal is not persuaded that this is in error.
8. As was mentioned above, clause 5C.4, through clause 5I.8, of the AMI Order mandates consideration of, and the giving of fundamental weight to, the circumstances of SP AusNet. In determining what would constitute expenditure that is prudent for the purposes of determining the Approved Budget, the AER appears to have not had any consideration to the fact that SP AusNet has already installed approximately 178,000 meters with WiMAX technology. The Approved Budget does not contain any allowance for the costs already incurred in installing these meters and other aspects of the WiMAX solution already installed or committed to, nor the costs which would be involved in modifying or replacing meters or other equipment already installed to adopt the alternative technology on which the approved budget is premised.
9. Clause 5C.8 provides that the AER is limited in what expenditure it may remove from the Submitted Budget. That clause provides that:

In making a determination under clause 5C.5(a) or clause 5C.7 (as the case may be), the [AER]’s discretion is limited to stating the new Submitted Budget or determining an Approved Budget (as the case may be) that removes not more than the expenditure it has established under clause 5C.2 as being:

* + - 1. for activities outside scope at the time of commitment to that expenditure and at the time of the determination; or
			2. not prudent.
1. It is clear from this provision that the amount that the AER removed from the budget submitted by SP AusNet constitutes, at least implicitly, the amount that the AER determined to be not prudent. The question then becomes whether the AER made an error of fact in determining that a reasonable business, in the circumstances of SP AusNet, would have incurred no more than the benchmark expenditure.
2. Without determining this matter, for the purposes of this discussion it may be assumed that the benchmarks determined by the AER are reflective of the costs of an AMI roll out using mesh radio, if that technology were chosen from the outset. That is not the circumstances of SP AusNet, however. SP AusNet has embarked on its roll out using WiMAX. It has already installed over 170,000 meters and incurred significant expenditure. The commencement of the roll out using WiMAX technology was undertaken in light of the AER’s earlier determination in which it accepted the higher costs associated with WiMAX as being prudent.
3. The AER has determined, implicitly at least, that on reconsideration, a reasonable business in the circumstances of SP AusNet would have switched to mesh radio. This may or may not be accurate. What is undoubtedly correct, however, is that such a business would have to incur the costs of the complete roll out of mesh radio, as well as the costs already spent in the partial roll out of WiMAX. The AER’s determination does not take account of the costs already incurred by SP AusNet in its WiMAX roll out or other costs associated with SP AusNet switching to a different technology at that stage, whether mesh radio or some other technology. As a result of this failure, the determination by the AER of what costs of SP AusNet are not prudent constitutes an error of fact.
4. As discussed above, the Tribunal is not satisfied that SP AusNet has demonstrated that the AER made a material error of fact in determining that the commercial standard a reasonable business would exercise in the circumstances of SP AusNet included a serious and thorough reconsideration of the use of WiMAX technology and the possibility of using an alternative. Nor is the Tribunal satisfied that the AER had made a material error of fact in determining that SP AusNet had departed from that standard.
5. At this point it bears reiterating that the AER explicitly denies determining that the commercial standard it determined a reasonable business would exercise required the abandonment of the WiMAX technology and the adoption of mesh radio. Nevertheless, at one point in its contentions, it was asserted that the AER had considered the “sunk costs” of making such a change by reference to two experts reports available to it. The Tribunal concludes that the AER did not do so, as was its first position.
6. The proper construction of clause 5C.8 of the AMI Order requires that where expenditure has been determined to be “not prudent”, the proposed expenditure is to be reduced by no more than the amount determined to be “not prudent” under clauses 5C.3 and 5C.4 of the AMI Order.
7. Here, the commercial standard set by the AER did not require SP AusNet to incur any less expenditure than it proposed to. As the AER put it, the commercial standard was one of corporate governance procedures and practice. The corollary of this is that there was no expenditure that was, in and of itself, found to be “not prudent”.
8. This means that the AER in determining that the proposed expenditure should be reduced by $72.2 million made an error of fact in a material respect. The error lies in the finding that the proposed budget should be reduced by $72.2 million. Had the AER determined that the application of the commercial standard would have led to a decision on the part of SP AusNet to switch AMI technologies, then some part of the proposed expenditure may not have been prudent. That amount, however, would not have been calculated solely by reference to the benchmark companies, for whom switching costs were not applicable. As the Tribunal is entitled to assume that the AER correctly understood the regulatory regime, it is necessarily the case that the AER determined that the $72.2 million was the amount of expenditure found to be “not prudent” under clauses 5C.3 and 5C.4. This is clearly an error of fact because, as is discussed above, the AER’s findings under clauses 5C.3 and 5C.4 were behavioural in nature and did not determine that any amount of expenditure was “not prudent”.
9. The decision of the Tribunal in relation to the ground of review addressing WiMAX communications is that the AER erred in fact by adopting the sum of $72.2 million as the appropriate reduction for the proposed expenditure, and that fact was a material fact.
10. There is a need to determine the extent to which incurring the proposed expenditure is not prudent, that is that the proposed expenditure involves a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances. The emphasis is on incurring the proposed expenditure. It is but part of the process to conclude (correctly, as the Tribunal has accepted) that the proposed expenditure with the ongoing commitment to WiMAX communications should have been carefully reconsidered by SP AusNet. The necessary next step is to determine whether, upon such a reconsideration, prudency required that the proposed expenditure not be incurred when measured against the commercial standard that a reasonable business would exercise in the circumstances. Unless that second step were taken, the AER could not establish that *incurring* that expenditure would involve a substantial departure from the commercial standard prescribed.
11. The reconsideration may have led to a commercial decision to incur that expenditure. It may have led to a commercial decision to go down some other route. That is not a matter for the Tribunal to determine. In addition, unless that second step were taken, the AER could not – for the same reason – establish how much of the proposed expenditure could or should be removed in fixing the Approved Budget, and (as clause 5C.8 requires) no more than that amount. The reconsideration would have had to consider the various options, as the AER says, including the costs already incurred to the date of the new Submitted Budget being reconsidered if an alternative technology was to be adopted, the costs of switching to the new selected technology, as well as the delays involved in retreating from the WiMAX communications technology which the AER had first mandated, before the AER could have been satisfied in terms of clause 5C.3(b) of the AMI Order, and could have made the determination required by clause 5C.8. To proceed as the AER did, in our view, involved it proceeding under the AMI Order on the basis of a mistake or mistakes of fact of a material character.
12. In the circumstances, the Tribunal considers that the matter should be remitted to the AER to further consider the Submitted Budget of SP AusNet on this aspect.

# maintenance, it and communications backhaul operating expenditure

1. SP AusNet submits that the AER made material errors of fact in reaching its determinations regarding communications infrastructure maintenance, IT and communications backhaul operating expenditure.

## Background

1. Communications infrastructure maintenance operating expenditure and backhaul operating expenditure relate to the AMI communications network and were assessed together by the AER. For IT operational expenditure, the issues in dispute relate to IT support for the AMI network.
2. It is useful here to explain some of what is entailed in the use of smart meters, as set out in the Minimum AMI Functionality Specification (Victoria), September 2008 (Functionality Specifications). The meters are required to be able to record energy use for each half-hour trading interval and also accumulated usage. They must be able to be remotely read to collect this information at least once every 24 hours. Further, meters have the capability to disconnect and reconnect electricity supply, with this command being remotely communicated to the meter. Meters are also required to be able to store “turn on” and “turn off” times (separately for weekdays and weekends), and these times can be set remotely (this is part of what is called “load control”). These are only a subset of the required functions.
3. Included in the Functionality Specifications are required performance levels relating to the various capabilities. They deal with communications between the meters and the distributor’s NMS. Both interval and accumulated energy usage data for a trading day must be collected from 99% of meters by 4am of the following day, and from 99.9% of meters by the following midnight (i.e. within 24 hours). Remote disconnects/reconnects must be performed for 90% of meters within 10 minutes, for 99% within one hour, and for 99.9% within six hours (though the total number of connect/disconnect commands to individual meters in any 24 hour period can only be up to 2% of the installed, operational meter population). Similarly for load control commands. Again these are only a subset of the performance level requirements.
4. In addition, the *Minimum AMI Service Levels Specifications* (Service Levels Specifications) deal with communication of data to the market. For interval and accumulated energy usage, no less than 95% of actual data from meters (with the remainder substituted), must be available by 6am the following day, no less than 99% within 24 hours, and no less than 99.9% within ten business days. SP AusNet points out that this means that 21.9 hours of downtime is allowed per calendar year with respect to the six hour requirement.
5. As a result of these requirements SP AusNet, like other distributors, has the four hours between midnight and 4am to collect, validate and substitute the previous day’s data from 99% of meters and the six hours between midnight and 6am to make available to the market the previous day’s actual data from 95% of meters.
6. In order to achieve these (and other) prescribed time lines, and given its view that the AMI system will not be in a true operational state for some time,SP AusNet proposed communication infrastructure maintenance operating expenditure and communications backhaul operating expenditure and IT operating expenditure that provided for expenditure “to support a 24 x 7 environment”.
7. It is useful to note that, in SP AusNet’s AMI solution, meters communicate with WiMAX towers, and that the communication between the towers and the NMS is called backhaul. The same is true of the 3G part of the network, with mobile telecommunications towers in place of WiMAX towers.

## The AER’s decision

1. As outlined above, the AER, in determining the Approved Budget and applying the statutory test, decided that incurring communications infrastructure maintenance operational expenditure of [redacted] and IT operational expenditure of [redacted] was not prudent as it involved a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances. The reasoning was similar, but not identical, in the two cases.
2. In both cases the AER complained that information by SP AusNet in its Amended Submitted Budget did not sufficiently explain the expenditure proposed, and did not include an opex model that would allow the AER to conduct a bottom up review of costs. In this it echoed both of its consultants, Impaq and Energeia. It claimed that SP AusNet should have been able to provide full time equivalent (FTE) staffing numbers supported by a detailed bottom-up analysis.
3. Impaq considered that in the light of this lack of information, Powercor’s costs provided an appropriate benchmark and hence commercial standard of prudent costs, a standard that SP AusNet did not meet. Energeia also compared SP AusNet’s proposed expenditure to that of the other Victorian distributors and found that it was substantially higher. In the case of communications infrastructure maintenance opex, Energeia found that SP AusNet’s costs did not meet the commercial standard test, on the ground that they were so much higher than Powercor’s and not attributable to SP AusNet’s specific circumstances other than its decision to adopt a WiMAX/3G solution. In the case of IT opex, Energeia found that SP AusNet’s proposal partially met the commercial standard. It is unclear what that means, or indeed exactly what Energeia considered the commercial standard to be. However, Energeia said it could not identify why SP AusNet’s proposed expenditure was so high.
4. The AER determined that the commercial standard for communications infrastructure maintenance operational expenditure would include that a reasonable business would not overbuild its systems beyond the Functionality Specifications and Service Levels Specification, that it would build an algorithm into its systems to decrease the resourcing required for manual intervention, that it would reconsider its decision if its primary AMI solution does not provide adequate coverage, and that it would reconsider its decision because of cost increases.
5. As is evident, this view of the commercial standard that should apply was based partly on findings about an overbuild and the need for an algorithm, as discussed shortly.
6. It can be seen, however, that the decision regarding communications infrastructure maintenance opex (and backhaul) was not based solely on the overbuild and algorithm findings. Rather, it also relied on the AER’s findings regarding the WiMAX solution and its associated cost increases. For SP AusNet to succeed on this ground, the Tribunal needs to be convinced not only that the AER made errors of fact regarding the overbuild and/or the algorithm, but also that it could not rightly have reached its decision in the light of those errors, despite the existence of other elements in the basis for its decision.
7. In his oral submissions, counsel for SP AusNet stated that the WiMAX grounds and the overbuild and algorithm grounds need to be decided together as the facts led to the same commercial standard, the same departure and the same substitution of costs. It is not necessary to separately address that question because the Tribunal is not satisfied that the AER made an error, or the errors, of the character ascribed to it by SP AusNet. It accepts the general proposition that an error or errors of fact must be material (as that expression has been explained elsewhere) for a ground of review to be made out.
8. In the case of IT opex, the AER expressed the commercial standard in different, but partly similar, terms to those it determined for communications infrastructure maintenance opex. It considered that the commercial standard for IT opex that a reasonable business would exercise would encompass a full reassessment of its position and alternative available solutions considering the capability gaps and the high costs compared to other AMI solutions; and that SP AusNet had departed from the commercial standard because it had overbuilt its systems beyond the AMI specification and thereby increased its resourcing requirements as a result of that overbuild or to fix problems associated with the decision to proceed with an unproven technology, had not reconsidered its position when the capability gaps demonstrated that its total AMI solution was not appropriate and/or was not providing value for money, and had not reconsidered its position despite the cost increases.
9. There is some looseness and lack of consistency in the way the commercial standard for IT opex, and departures from it, are expressed, but the AER’s decision is nevertheless plain. It is based on findings about an overbuild, about capability gaps that are discussed above in these reasons in relation to the WiMAX ground and on cost increases and the need to reconsider the WiMAX solution consequent on those matters. The algorithm issue does not enter the consideration of IT opex.
10. For SP AusNet to succeed in relation to IT opex requires the Tribunal to find both that the AER was in error regarding the overbuild, and that its decision was so dependent on that finding that, the finding being in error, it could not rightly have reached its decision on IT opex.
11. The Tribunal now considers the overbuild issue in more detail, followed by the algorithm issue.

## The Tribunal’s consideration

### Overbuild

1. It is not in dispute that SP AusNet’s availability specifications are 99.995% or 99.99% for backhaul, depending on the backhaul technology used; 99.999% for core network components in data centres; and 99.999% for core IT systems in data centres. The AER commented that these requirements are aligned to those in the banking sector where constant access to the infrastructure is essential. In its submissions to the Tribunal, SP AusNet did not dispute that characterisation. The AER considered that the AMI service level specifications do not require such high levels of availability.
2. SPI AusNet argued, and the AER agreed, that the communications network and IT systems must be designed to exceed the service levels of the most restrictive service level. Nevertheless it did not present evidence of the need for the specific availability levels in its network. Rather it submitted by way of example that if on any particular day the metering component of the AMI system were only to be available to a 95% level, SP AusNet’s communications and NMS would need to be 100% available to achieve the requirement for 95% of actual data.
3. This argument demands careful assessment. It would be true of a continuous flow process. For example, suppose that water is required to flow in pipes from point A to point B and on to point C, and that there is sufficient water available at all times at point A to fill the pipes to capacity. Then it is true that if the pipe between points A and B were only available 95% of the time while the pipe between points B and C were available 100% of the time, the overall capacity would be only 95% of its potential.
4. But this is not true of data communications. Data flows only irregularly, and most of the time in relatively small amounts compared to the capacity of the network. It is not a continuous process. In the specific instance of AMI, the requirements for data transmission from meters to the NMS between midnight and 4am do not appear onerous. Each meter would be transmitting a tiny amount of stored data; when multiplied by a factor of some hundreds of thousands it would still not be very substantial.
5. Nor do the functional specifications relating to the ability of the meters to connect and disconnect or manage loads appear to require such high levels of availability, and no evidence was presented relating to those requirements.
6. The Tribunal is not able to say what availability requirements would be prudent. But it can say that neither the AER nor the Tribunal was presented with any cogent justification of the apparently exceedingly high availability levels that SP AusNet has chosen.
7. SP AusNet further disputed that excessive resourcing requirements resulted from overbuilding. It said that in its response to the draft determination it had made it clear that its resourcing requirements were formulated in response to the demands of the Functionality and Service Level Specifications. However, in terms of justifying specific levels of labour resourcing, that document exhibits no more than a statement that costs relate to labour resources to operate, monitor and maintain the communications network equipment. That response is referred to again below in these reasons.
8. At an “in principle” level, SP AusNet submitted that it is illogical to conclude that overbuilding by requiring excessive availability results in excessive operational resourcing: excessive labour resourcing would not follow from an excessively reliable AMI system. The AER responded by suggesting that an overbuild may require more equipment, and hence more equipment to maintain; and that an overbuilt IT solution may be more technically complicated and require more ongoing operational expenditure.
9. This is not a disagreement able to be resolved at an “in principle” level. The Tribunal considers that SP AusNet did not at any stage provide the AER with information, even in response to requests for further information, sufficient to reasonably explain why its levels of opex were so comparatively high. In this light, given the advice of its consultants, and the inexplicably high availability levels decided upon by SP AusNet, the AER was entitled to reach the view that it did on an overbuild.
10. Moreover, the Tribunal considers that the AER’s findings with regard to an overbuild were substantially supported by its findings regarding a capability gap and other elements in SP AusNet’s WiMAX solution, considered in the discussion of the “WiMAX ground” above in these reasons.

### Algorithm

1. Turning now to the algorithm issue, the AER stated in its Final Decision that it expected “that SP AusNet’s MMS design would be more robust by integrating [an] algorithm that will automate and resolve meter management data issues” and “that SP AusNet would have a secondary backup system in place should faults or outages occur” with the result that “some of the proposed FTEs would be on call in case of emergencies rather than being rostered on...”. The AER submitted to the Tribunal that its reference to the MMS was incorrect. It should have referred to the MDMS.
2. Further, in the context of communications infrastructure maintenance opex, the AER considered that

SP AusNet’s resources are greater than required to meet the requirements of the Order. This is because it is attempting to address problems with its communications solution and this requires additional resourcing well beyond the quantum that would be appropriate in the circumstances.

1. SP AusNet’s submission was that the problems at issue arise “in the field environment”. While the NMS can assist in the efficient identification of such problems, and where necessary the MDMS will use an algorithm to turn to notional, substituted data, these systems cannot fix the problems in the field.
2. What is meant by problems in the field environment and whether they could be automatically and remotely addressed (i.e. by an algorithm in the MDMS) only became clear in oral submissions by counsel for SP AusNet. He spoke of “meter broken, meter not reporting, tampering and the like” and pointed out that an algorithm “...cannot get the meter back online if it has been knocked off the wall by a car”.
3. The Tribunal accepts that line of argument so far as it goes. However, the underlying question is what labour resources are required. The AER relied on information from SP AusNet that after bedding down the systems in 2011 it anticipated that the long–term level of meter read exceptions in 2012 and beyond would be 5%, with resources required to support any manual intervention to deal with that ongoing issue reducing from their previous higher level in the implementation phase.
4. Impaq stated in its report that a 5% exception level of meter reads after systems had been bedded down would be a concern. It compared this with the Functionality Specification performance level requirement for daily collection of readings from 99% of meters by four hours after midnight and stated that the performance level could not be met with a 5% exception level.
5. The Tribunal notes that the MDMS would handle substitution of data. However, it is not at all clear how the service level requirement that 99% of actual (not substituted) data be provided to the market within 24 hours could be met with such a high ongoing level of meter read exceptions. Indeed, SP AusNet addressed this very issue in response to an AER question and stated that “[w]ithin 24 hours the support organisation must identify the meters not communicating and...escalate/dispatch resources to remediate the problem” and “[d]epending on the location of the fault, infrastructure engineering may be required to visit any network communications infrastructure locations or dispatch the field meter teams to investigate individual meters”. Further, “[g]iven the above example if the next day another 5% of meters stop providing data to market by 6am then even a well-managed and resourced support organisation will be overwhelmed relatively quickly”.
6. The Tribunal sees no other reading of these passages but that they contemplate a potentially significant number of site visits to either customer premises or IT infrastructure sites on a daily basis. It notes also that material provided to the AER regarding 24/7 support in SP AusNet’s response to the Draft Determination suggests a substantial resource requirement. This is curious, as counsel for SP AusNet submitted that the reference to 24/7 support meant that the service desk would be manned on that basis while resources for site visits would merely be on-call. The implication was that the 24/7 requirement would not be heavily demanding of resources. The Tribunal is unable to understand a suggestion that resources dispatched on a routine basis would be relatively small while the 24/7 rostered-on staff would relate purely to a service desk.
7. The Tribunal is not convinced that the AER’s concern about a missing algorithm is well based, given the need to manually fix meters and/or IT infrastructure. However, it also considers that no evidence has been adduced by SP AusNet to justify labour resourcing out of line with that of comparable distributors. All have to meet the same performance levels and service levels. No evidence was provided why SP AusNet’s meters or communications system should perform poorly compared to those of other distributors. No evidence was provided to justify comparatively high levels of opex for communications infrastructure maintenance and backhaul.
8. In these circumstances, the Tribunal finds that the AER’s view about the need for an algorithm was not material to its decision regarding communications infrastructure maintenance and backhaul opex.

### Tribunal Conclusions

1. The Tribunal finds that the AER’s determination in respect of communications infrastructure maintenance opex, backhaul opex and IT opex was not based wholly or partly on an error of fact in a material respect. The determinations are sufficiently based on the AER’s findings of an overbuild and the deficiencies of the WiMAX solution and its cost overruns.
2. In determining the Approved Budget for SP AusNet, the AER substituted amounts for each of these categories of expenditure based on Impaq’s recommended use of Powercor’s costs as the appropriate benchmark. As alluded to above, Energeia’s approach was consistent with Impaq’s. This benchmark was arrived at by considering the nature and size of SP AusNet’s business.
3. The Tribunal considers that the Impaq and Energeia reports evidence careful analyses of the limited information provided by SP AusNet. It is clear that both Impaq and Energeia reached their conclusions in the context of having formed the view that SP AusNet ought to have chosen, or switched to, an AMI communications solution other than WiMAX. This issue is discussed earlier in the Tribunal’s reasons. Both essentially considered the commercial standard to be determined by a comparable distributor’s prudent costs. Neither Impaq nor Energeia used the terms “overbuild” or suggested the need for an algorithm, as raised in the AER’s Final Determination.
4. The Tribunal is satisfied that the AER’s substitution of costs based on Powercor as a benchmark was appropriate in the case of communications infrastructure maintenance opex, backhaul opex and IT opex.

# project management

## Background

1. SP AusNet’s 2012-15 Budget Application sought approval for project management and meter services operating costs which covered a range of activities it said were required to implement the AMI program. SP AusNet identified that the operating expenditure included in the Project Management costs encompassed all streams of the AMI project and identified the different streams of work, including solution, media and communications, testing, operations, business transformation, PMO – general, PMO – industry and PMO – finance.
2. SP AusNet submitted to the AER that the AMI program required ongoing program governance and management through both the implementation of infrastructure to 2013 and services to 2015, and that SP AusNet’s structure “is to ensure the AMI obligations from an end to end solution and delivery perspective are maintained whilst relative functional components are managed through the business as usual structure”.

## The AER’s determination

1. In the Draft Determination, the AER rejected SP AusNet’s forecast for Project Management costs on the basis that the AER expected that project management costs would reduce significantly in the subsequent budget period, between 2012 and 2015, as the project will then be in a mature implementation phase and that there was not sufficient detail for the AER to assess whether the magnitude of the resources forecast for project management is prudent in the 2012–2015 period: Draft Determination, pages 117 to 118.
2. Instead, in the Draft Determination, the AER substituted SP AusNet’s project management costs with costs estimated by Impaq Consulting: Draft Determination, pages 118 to 119.
3. In its response to the Draft Determination, SP AusNet provided further information in relation to the different functions included within the project management costs. This identification included a breakdown of the meter service costs of $4,391,102 as a separately itemised cost which had previously been bundled into the total project management costs.
4. In SP AusNet’s response to an information request by the AER it provided further detailed descriptions of the costs encompassed within project management, including descriptions of various positions and streams of work. In a response to another information request, SP AusNet identified that the cost estimates developed for its project management/meter services costs were based on salary and contractor rates currently in place and on actual roles in existence, therefore providing an evidence based and accurate forward estimate.
5. In the Final Determination, the AER purported to establish that SP AusNet incurring project management expenditure of [redacted] would involve a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances: Final Determination, page 75. The AER substituted an amount of [redacted] in respect of project management costs as being consistent with the commercial standard. In arriving at the substituted amount, the AER relied upon estimates given by Impaq Consulting which removed all project management costs in 2014 and 2015 and reduced the forecast costs in 2012 and 2013 by 30%: Final Determination, pages 78 to 79.

## The Parties’ submissions

1. SP AusNet submits that in the Final Determination the AER formed its view that it had established that incurring project management expenditure of [redacted] involved a substantial departure from the commercial standard on the following basis.
2. First, Some of the function descriptions were for activities outside scope, such as for developing meter procurement strategy and developing and implementing meter deployment strategy, which the AER considered to be new expenditure: Final Determination, page 77.
3. Secondly, according to SP AusNet, the AER determined that some of the function descriptions were for activities that should have taken place at the start of the project: Final Determination, page 77.
4. Thirdly, SP AusNet submits, Impaq, the AER’s consultant, considered that SP AusNet’s staffing costs were excessive and that the “costs appeared to be 20% higher”: Final Determination, page 77.
5. Finally, SP AusNet contends that the AER’s decision was based on the finding that the expenditure was not supported by plans or detailed job descriptions that would reveal appropriate levels of internal governance, such as an AMI organisational structure, operating model, divisional and branch business plans and key business descriptions: Final Determination, pages 77 to 78.

### New expenditure

1. Under clause 5B.3 of the AMI Order, a budget application can only be revised to include new expenditure where it results from a contract entered into by the distributor after the budget application, or where there is a material change in a metering regulatory obligation or requirement.
2. The AER removed $4.4 million of SP AusNet’s project management costs relating to meter services, on the basis the expenditure was new expenditure and therefore was beyond scope: Final Determination, page 75. The AER said that any such new expenditure constituted a budget application revision which was precluded by clause 5B.3 of the AMI Order: Final Determination, page 75.
3. SP AusNet submits that the meter services costs were not new expenditure and were not outside scope. According to SP AusNet those costs were included in its proposed project management costs in the SP AusNet Budget Application. SP AusNet submits that $4.4 million of forecast costs relating to meter services were included within the ‘Project Management” line item in SP AusNet’s budget template, which amounted to [redacted].
4. In its response to the Draft Determination SP AusNet reallocated $4.4 million of meter services costs from Project Management to “Metering & Equipment Communications purchase- Meters” in its budget template of August 2011. In addition, SP AusNet provided the following breakdown of the updated project management costs and separately identified the meter services costs in the following table:

1. SP AusNet’s revised total project management costs, including the Meter Services identified above, amounted to [redacted].SP AusNet submits that the change from the SP AusNet Budget Application in February 2011 was the result of actual costs figures available in August 2011 and was unrelated to the re-allocation of the Meter Services Costs.
2. Accordingly, SP AusNet submits, it was an error of fact for the AER to find that the amount of $4.4 million in project management costs constituted new expenditure and was precluded by clause 5B.3 of the AMI order.
3. The AER submits that SP AusNet did not provide it with any information to suggest that the reallocation had occurred, nor, necessarily, any rationale for any reallocation. The AER submits that in the absence of adequate information from SP AusNet, it performed its own variance analysis in order to establish the differences between the initial submitted budget and the amended submitted budget. This analysis, in the AER’s submission, established that $4,391,102 was new expenditure.
4. Further, the AER submits that it made an error in adopting Impaq’s assessment of project management costs, which did not take into account the removal of the $4.4 million that the AER had identified as new expenditure. It submits that the result of this error was that it only removed $2.9 million of the amount that was classified as new expenditure.

### Late tasks

1. In relation to the AER’s determination to reduce project management costs in 2012 and 2013 by 10% the AER acknowledged that its decision to reduce the forecast costs for 2012 and 2013 by 10% was based on an assumption made by its consultant: Final Determination, page 78. The AER relied upon advice from Impaq Consulting which assumed this amount reflected design activities which should have already been completed. SP AusNet submits that assumption was not supported by any evidence or justification and none can be found in the AER’s decision or the Impaq Consulting reports. SP AusNet submits that the 10% reduction was arbitrary.
2. SP AusNet submits that there was no evidence on which the AER could rely to establish that the incurrence of any of the project management costs in 2012 and 2013 were a substantial departure from the commercial standard required. Further, SP AusNet submits that it will continue to incur design costs relating to the 3G solution for its secondary network, which is yet to be deployed.
3. SP AusNet submits that the AER’s finding that some of the activities included in the project management costs should have taken place at the start of the project and that the relevant activities of the project should have been completed, which the AER “assumed to be about 10% of the costs”, was or was based on an error of fact.
4. The AER submits that the reduction that it determined was based on advice from Impaq. The AER submits that it was entitled to rely on that advice and that the advice did not constitute an error of fact.
5. The AER removed all forecast PMO costs in 2014 and 2015 “as not appropriate as project costs for a project that finishes in 2013”: Final Determination, page 78.
6. SP AusNet submits that it provided detailed information in respect of the resources included in the project management costs and the various roles and responsibilities, including in 2014 and 2015. According to SP AusNet, the project management roles continuing into 2014 and 2015 related to ‘meter data management support’ and ‘meter services’. Both of these streams of work support ongoing activities necessary for the business as usual operation of the smart meters. SP AusNet submits that the AER relied upon unfounded assertions by Impaq that costs in 2014 to 2015 were “not appropriate as project costs for a project that finishes in 2013”, which it relied upon without further consideration. The rollout may be scheduled to finish in that timeframe, but SP AusNet submits it will continue to incur costs related to the ongoing operation of the meters.
7. SP AusNet maintains that the AER failed to establish that incurring such costs over the course of the 2012-2015 budget period involved a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances.
8. For this reasons, SP AusNet says the AER’s removal of the forecast PMO costs for 2014 and 2015 on the basis the costs were not appropriate for a project ending in 2013, was or was based on an error of fact.
9. Similarly to the reduction of 10% discussed above, the AER submits that it acted correctly, and committed no error of fact, in relying on the advice of Impaq in determining that the PMIO costs for 2014 and 2015 should be removed.

### Full time equivalent costs

1. The AER reduced SP AusNet’s Project Management costs in years 2012 and 2013 by a further 20%, because the overhead levels and the FTE costs “were too high by at least 20%”: Final Determination, page 78.
2. In arriving at this reduction in the forecast project management costs the AER relied on the advice of Impaq Consulting: Final Determination, pages 77 to 78. SP AusNet submits that the Impaq Consulting report did not provide sufficient evidence that the costs estimated for project management were in fact 20% too high. There was no sufficient evidence, in SP AusNet’s submission, on which the AER could rely to establish that SP AusNet’s project management cost forecast was a substantial departure from the commercial standard.
3. Impaq Consulting formed the view that the salary costs of the resources listed in SP AusNet’s forecast would be in the range of $90,000 to $150,000 per annum based on salary surveys. A link to a news article on salary reviews by Hays was given, but no explanation was given as to how Impaq’s range was arrived at. The article referenced also referred to salaries, for example for IT program directors of $140,000 to $170,000 per annum.
4. Impaq Consulting adopted an average FTE salary “of about [redacted]” and stated “Hence the FTE costs appear to be about 20% too high”. SP AusNet submits that it was on this basis that the AER found itself satisfied that SP AusNet’s forecast project management costs were a departure from the commercial standard. SP AusNet submits, however that the Impaq Consulting opinion expresses only a view that the “costs appear to be about 20% too high”, which calculation is in any event incorrect.
5. In relation to the calculation by Impaq Consulting that the forecast costs were 20% too high, as noted above Impaq arrived at an average FTE salary cost of [redacted] per annum. SP AusNet submits that Impaq and the AER then incorrectly compared this amount to what it said to be an overall average of SP AusNet’s project management FTE costs over 2012 to 2013 of [redacted]: Final Determination, page 78. SP AusNet submits that this latter amount was incorrect. SP AusNet contends that its overall average FTE costs for 2012 and 2013 was [redacted]. Accordingly, SP AusNet submits, the AER’s finding that the overhead levels in the FTE costs were too high by “at least 20%” was or was based on an error of fact. IT is SP AusNet’s submission that the overall average FTE costs for 2012 and 2013 were only 9% higher than the Impaq average FTE salary cost of [redacted].
6. For the reasons set out above, SP AusNet submits that it was an error of fact for the AER to find that it had established that incurring project management expenditure of [redacted] involved a substantial departure from the commercial standard that a reasonable business would exercise in the circumstances.
7. The AER concedes that Impaq adopted the overall average FTE cost for 2012-2013 as [redacted] and that the overall average FTE cost for 2012-2013 is [redacted], only 9% higher than the AER’s preferred benchmark. The AER submits that, taking into account this error, the approved budget for PMO expenditure should be increased by $871,844.

## Decision

### New Expenditures

1. The AER submits that $4.4 million of expenditure in the SPI AusNet revised budget submission labelled as Meter Services is new expenditure and therefore, under clause 5B.3 of the AMI Order outside scope. The AER points to a comparison of the original budget for 2015, for example, in which projected expenditures for both project management and meter equipment purchases totalled zero with the amended budget containing an amount of $1 million for meter services (meter equipment purchases) in that year. Unless expenditures were transferred between years, this must imply that the meter services amount for that year constitutes new expenditure. In years 2012, 2013, 2014, the reduction between the initial and amended budget in the project management expenses is either greater than or approximately equal to the increase from $0 to $1 million allocated to meter service in those years. It is conceivable that the $4.4 million allocated to meter services did involve a reallocation of expenditure between categories and across years.
2. SP AusNet’s revised budget submission did not show a positive expenditure classified as meter services for actual expenditures for 2009 and 2010 (relative to a prior figure of zero), but it did have such a change for forecast expenditures for 2011. The AER argues that SP AusNet did not provide adequate information in response to requests to convince the AER that this was not new expenditure. On the basis of the information available to it at the time of making its determination, the AER did not make an error of fact in removing the $4.4 million for meter services as being new expenditure.

### Late Tasks

1. The AER relied upon the advice of expert consultants Impaq to determine that some part of the projected expenditure for 2012 and 2013 related to tasks, referred to as late tasks, which should have been completed before the start of the budget period. The AER asserts that a commercial standard to which a prudent business would work would involve such activities and costs being undertaken before the current budget period. Expenses associated with those activities would thus be deemed as not prudent and removed.
2. The AER removed 10 per cent of PMO costs in 2012 and 2013, based on Impaq’s advice –on the grounds of the expenditure not being prudent rather than being outside scope (although it acknowledges that the final determination mistakenly referred to scope), and SP AusNet does not challenge the reason. It does, however, challenge the basis for the decision to remove 10 per cent, on the grounds that this is arbitrary. The issue would thus appear to revolve around whether (a) the AER has appropriately determined the commercial standard (b) whether Impaq provided sufficient rationale for its assessment (c) whether SP AusNet provided sufficient information to counter that assessment, and (d) if not, whether the AER was able to rely on such expert advice.
3. Impaq provide in its September 2011 report a list of activities which it regards as what the AER refers to as “late activities” which should have been completed before 2012. While there is no quantitative modelling provided by Impaq to generate an estimate of 10 per cent of the budget as being for late tasks, there is presentation in the report (based on SP AusNet data) of total budget application expenditures in those activities. In particular, supplier management and sourcing totalling around [redacted] was argued to be an activity which “should have been completed about 2 years ago”. For service operations comprising a number of activities and with a budget total of around $4.4 million, Impaq argue that several components should have been completed before 2012. Since 10 per cent of the total budget amount is in the order of [redacted], the Impaq assessment of that quantum as reflecting “late activities” does not appear unreasonable. SP AusNet does not appear to have provided adequate information to the AER to counter that assessment. Provided that the AER is entitled to rely on specialist technical advice, it would not appear to have made an error of fact in not allowing expenses for such “late tasks”.

### 2014-15 expenditures

1. The AER, on the advice of Impaq, removed PMO expenses for 2014 and 2015 on the grounds that the completion of the project in 2013 implies that PMO expenses should terminate at that time. SP AusNet contends that it will “continue to incur cost related to the ongoing operation of the meters”. Whether any such costs are part of PMO or reflected in other budget items is unclear.
2. While the AER allowed project management office costs in 2014 and 2015 for some other distributors, several factors make direct comparison difficult. First, not all distributors have adopted the same cost allocation formats. In particular, some have included some project management costs as being part of capital expenditure – which Impaq argues is a more appropriate situation. Second, at least some part of the allowed 2014 and 2015 expenditure for some other distributors takes the form of amortisation of capital expenditures.
3. The Tribunal has considered those matters. The different treatment identified by SP AusNet does not of itself demonstrate that the AER made an error of fact that is material. The Tribunal is not persuaded that there is any further material which then demonstrates such an error in this respect on the part of the AER.

### Incorrect Assessment of labour costs

1. The AER concedes that it made an error of fact in accepting Impaq’s calculation of excessive labour costs of SP AusNet of 20 per cent higher than benchmark rates. In its submission the AER states that the revised excess rate of 9% implies an increase in approved budget for PMO expenditure of $871,844. SP AusNet in its reply submission (Attachment 3, para 11) states that the parties have agreed (on 25 February) that the correct adjustment to make is $2,650,223.
2. It is not clear how these figures are derived. There are several alternative calculations upon which the adjustment could be based. First, the adjustment might be calculated using the expenditures contained in SP AusNet’s budget including the Meter Services amount of $4.4 million, which implies total expenditure of [redacted]. Assuming that all expenses are labour costs (although meter services do not appear to be) an assumption that these were 20 per cent inflated would lead to an adjusted figure of [redacted], while an assumption that they were [redacted] per cent inflated would lead to an adjusted figure of [redacted] which is a difference of $2.3 million. If the base figure on which the adjustment is calculated is the SP AusNet budget figure of [redacted] (excluding the meter services amount) the corresponding figures are [redacted] and [redacted] million for a difference of $1.93 million. If the adjustment is based on expenses allowed by the AER in its final determination of [redacted], the adjustment would be calculated by noting that the SP Budget application equivalent (ie for allowed activities) is 120 per cent of this figure which is [redacted]. Since that is agreed to be [redacted] per cent higher than comparable market labour costs, the AER revised determination would be [redacted] which is an adjustment of $1.7 million.
3. The AER also notes that if its removal of $4.4 million for meter service costs had been correctly incorporated into calculations, its final determination on labour costs for PMO would have been lower by around $1.5 million – although how this figure is arrived at is again not clear.

# customer service

## Background

1. In the SP AusNet Budget Application, SP AusNet sought approval for customer service costs amounting to $4,372,000 over the 2012-2015 period. These costs encompassed customer queries handling, customer complaints handling, customer claims handling and training and telephone handsets.
2. The estimate was arrived at on the basis of three assumptions. First, it was assumed that, on average, 2.5% of installations, in 2012 and 2013, would result in complaints and that one full time employee could handle 7.5 complaints per day. Secondly, for the period from 2012 to 2015, it was assumed that there would be queries arising from 10% of installations each year, with a full time employee capable of dealing with 30 queries a day. Finally, it was assumed that 0.1% of installations in 2012 and 0.08% of installations in 2013 would result in claims being made against SP AusNet and that a full time employee could deal with 4 claims per day.
3. SP AusNet’s February forecasts were based on the data in respect of customer queries, complaints and claims available at the time. Customer queries for February 2011 were 12.7% and showing an upward trend. Customer complaints for February 2011 were 5.1%. Claims in February 2011 amounted to 0.11% of installations and showing a similar upward trend.
4. In the Draft Determination, the AER concluded that SP AusNet’s forecast customer service operating expenditure met the commercial standard test and approved the forecast costs: Draft Determination, page 104.
5. In its response to the Draft Determination, SP AusNet revised its customer service costs estimates for the period 2012 to 2015. SP AusNet stated in the SP AusNet Draft Determination Response, at page 50:

The increase in public interest in, and anxiety about, the AMI rollout has led to a large number of customer enquiries and complaints. SP AusNet’s experience of query, complaint and claim volumes in 2011 is even above that forecasted in the February submission. This interest in the AMI program – and associated elevated volume of queries, complaints and claims – is expected to continue into 2012, tapering off into 2013.

1. SP AusNet provided the following figures in the SP AusNet Draft Determination Response showing the level of customer enquiries and customer complaints during the period from November 2010 to July 2011.

1. SP AusNet noted that in line with its actual experiences as identified over the period November 2010 to July 2011 in Figures 6.1 and 6.2, the assumed instances for customer queries, complaints and claims used in the forecasts for 2012 to 2015 had been increased. The revised forecasts for customer service costs was as follows:

1. The estimates were arrived at using revised assumptions. It was now assumed that there would be complaints arising from 5% of installations in 2012, 3% in 2013 and 1.5% in 2014 and 2015, with full time employees capable of attending to 5 complaints per day. As at the end of July 2011, there had been, on average, complaints from 6% of installations per year. It was now assumed that there would be customer queries arising from 15% of installations in 2012, falling to 12.5% in 2013 and 10% in 2014 and 2015. As at the end of July 2011, there had been queries associated with, on average, 12.5% of installations per year. Lastly, it was assumed that there would be claims arising from 0.2% of installations in 2012, 0.1% of installations in 2013 and 0.02% of installations in 2014 and 2015. As at the end of July 2011, there had been, on average, claims associated with 0.1% of installations per year.
2. SP AusNet provided further information in relation to its estimate of customer service operating expenditure in response to an information request from the AER of 20 September 2011. In particular, SP AusNet provided an extract from an internal customer service planning document dated September 2011. That extract identified the increase in the volume of AMI related claims and noted that:

The volume of AMI related claims has increased noticeably in the past four months. It is suggested that the number of AMI related claims will further increase once the political uncertainty of a smart meter rollout is resolved and the deployment of the program is back in full swing.

Challenges are also envisaged when the smart meter rollout commences in rural areas with defects, customer complaints and claims that amount is expected to increase due to access issues, older infrastructure and older, less maintained customer – side installations creating further claims – especially in relation to alleged property damage.

With the increased volume and complex nature of AMI claims now taking up a large amount of time and resource, a full time claims consultant is to be engaged to manage all AMI claims related matters.

1. The AMI Claims document also included the following graph showing the increase in the numbers of claims received during the period January 2010 to July 2011.

1. In the Final Determination, the AER noted the proposed increase in customer service costs of $1.2 million over the amount approved by the AER in the Draft Determination. The AER stated at pages 68 to 69 that:

Impaq commented that the increase in enquiries and complaints has occurred at the same time as media attention for the Victorian Government’s review of the AMI rollout. The AER considers SP AusNet’s analysis of customer service costs is placing more weight on recent June and July customer enquiry and complaints quantities than those experienced over the entire of the AMI rollout date. The AER considers that the long term level of customer queries and complaints would be reflected in the commercial standard as the short term increase in customer complaints and enquiries may not be sustained in the long term. SP AusNet’s initial customer service expenditure was soundly based upon the long term trend for customer complaints and enquiries.

1. The AER went on to find that SP AusNet’s initial customer service expenditure proposal was consistent with the commercial standard and that the amended proposal was not based on the long term level of customer queries and complaints and is accordingly a substantial departure from that standard: Final Determination, page 69.

## SP AusNet’s submissions

1. SP AusNet’s main contention with respect to this issue is that the AER’s findings that SP AusNet’s revised estimate of its customer service operating expenditure was not based on the long term level of customer queries and complaints and was a substantial departure from the commercial standard was, or was based on, an error of fact.
2. In support of this contention, SP AusNet submits that the evidence provided by it in figure 6.1 and 6.2 set out above shows that there was an upward sloping trend during 2011 which increased sharply from May 2011 in respect to both customer enquiries and customer complaints. The revised estimate submitted by SP AusNet in August 2011 took into account the longer term data over that period.
3. SP AusNet also submits that it provided, on the basis of its past experience, evidence that the complexity of claims and queries was increasing and, given the further work to be done over the coming period with respect to the rollout of the smart meters, it was expected that AMI related claims would further increase in the coming period
4. Further, SP AusNet submits that the AER’s statement that “SP AusNet’s analysis of customer service costs is placing more weight on recent June and July customer enquiry and complaints quantities than those experienced over the entire of the AMI roll out date” was an error of fact. SP AusNet maintains that the longer term data available over the 2010 and 2011 period showed an increasing trend in customer complaints, queries and claims which were likely to continue into the 2012 to 2015 period.
5. SP AusNet submits that the AER failed to establish that the incurrence of the revised forecast customer service operating expenditure was a substantial departure from the commercial standard. The Impaq Consulting Report, in SP AusNet’s submission, provided no evidence to support its statement that the increase in claims and enquiries based on the information as at July 2011 was a short term increase that was expected to decline over the 2012-2015 period. Impaq stated that “Given that the results of the Government review will be announced later this year, it would be expected that the level of angst in the community will reduce for 2012 and 2013.” Contrary to this, SP AusNet submits that it provided evidence of its actual experiences to support its proposition that the complaints, claims and enquiries would continue to be at higher levels and be more complex over the coming period.
6. The AER submits that the handling of customer claims represents a relatively small proportion of the increase in expenditure from the initial budget application. It is the AER’s contention that customer complaints and enquiries are the main drivers of customer service expenditure, and represent most of the increase in expenditure claimed in the amended submitted budget.
7. The AER submits that it is unclear as to what methodology SP AusNet employed in reaching the conclusion that the evidence of customer enquiries and complaints between November 2010 and July 2011 reveals an upward sloping trend during 2011 which increased sharply from May 2011. The AER submits that it appears as though this finding was based upon an average of customer complaints and enquiries over the relevant period and that using a simple average would place too much weight on the June and July 2011 results, which the AER considers to be outliers.

## Decision

1. The issue in dispute turns on the appropriate use of historical data for forecasting of future labour costs for servicing of customer complaints, queries and claims. Whereas the AER draft decision was based on data provided in SP AusNet’s original budget application which covered the period from November 2010 until May 2011, SP AusNet’s revised budget submission incorporated data up to July 2011. That data showed a substantial increase in the ratios of complaints and queries to new meter installations in the months of June 2011 and July 2011. SP AusNet’s revised submission placed greater weight upon these observations whereas the AER final decision gave them less weight – placing greater emphasis on the data provided at the time of the draft decision.
2. While use of more recent data is generally valuable in forecasting, appropriate use of that data requires assessing whether the changes in a data series are transitory or longer lasting. In this case the AER viewed the June and July changes as being primarily transitory while SP AusNet viewed them as longer lasting. The AER submitted that public uncertainty and publicity about the AMI rollout at that time could potentially help to explain a transitory increase.
3. Also important is whether the data series being analysed are suitable for forecasting of future values of a different variable. In this instance, the forecast variable of interest is labour costs of dealing with the number of complaints and queries in each month, whereas the data series being used were ratios of complaints or queries to new installations in the month. It would be expected that complaints or queries would be related to new installations with some time lag. Statistical modelling of complaints or queries in any month would then need to take into account either the total of past installations or installations in recent months as well as installations in the current month. It is, for example, conceivable that there could be no installations in a particular month, but a significant number of complaints or queries in that month arising from past installations. While it is not suggested that this explains the increase in the June and July ratios, it indicates that relying on monthly movements in those ratios to forecast total complaints or queries may be unreliable.
4. While both parties refer to the possible evidence of “trends” in the data, the very short period for which data is available make identification of trends difficult. Moreover, given the limited period over which new installations are to occur, it is inappropriate to assess the issue in terms of trends – which refer to consistent tendency towards increase or decrease (or no change in the absence of a trend). Rather, to the extent that the ratios under consideration provide any valuable information, it is more appropriate to attempt to forecast the future average value for the ratio, based on some measure of its past value and other available information.
5. In this regard, the AER argues that the median value of the monthly ratios is, when there are outliers, a more reliable estimate of a longer term average, because of the greater sensitivity of a mean value to such outlier values. SP AusNet argues for the use of a mean value which gives equal weight to all observations in its calculation. While the mean and median will tend towards equality if there are many observations and the statistical distribution of observations is symmetric, that is not the case in this situation of few observations and a skewed distribution.
6. The reduced sensitivity of the median value to a small number of extreme value observations provides support for its usage in this situation where there is a small number of observations available and where the variable being analysed is a ratio which could fluctuate significantly because of variations in either of its numerator or denominator. Against this, the time pattern exhibited by the ratios, involving largest values in most recent months could be indicative of likely future experience suggesting that use of the mean value which accords equal weight to those observations is more appropriate. To support that view, however, it is necessary to provide some evidence that those observations are not transitory outliers.
7. SP AusNet has not demonstrated that the AER made an error of fact in adopting the median value of the ratios in question for forecasting of future labour costs for handling of complaints and queries because the possibility that interpretation of the June and July ratio values as being the result of transitory factors has not been shown to be inappropriate and the potential variability of the ratio used for forecasting the future value of its numerator (the level of complaints or queries) given the small number of observations available does not provide support for use of the mean rather than the median value in this case.
8. In the case of customer claims, SP AusNet asserted that the complexity of claims had increased over time, and provided information about an increase in the average number of days taken before final resolution of claims occurred. The time taken to resolve claims will reflect a number of factors in addition to their complexity including the intensity of effort applied to their resolution. There was no evidence provided to the AER on the amount of time spent dealing with claims, rather than the time to resolution. Hence, it was not possible for the AER to determine whether there was an increase in complexity of claims on the basis of the evidence available to it. Thus, SP AusNet has not demonstrated that the AER made an error of fact in rejecting the SP AusNet revised budget application for increased costs for resolution of claims.

# CONCLUSION

1. In the result, the Tribunal concludes that the AER made errors which are reviewable in respect of three of the grounds of review.
2. The first concerns the topic of Foreign Exchange Contracts. It is accepted that there was an incorrect disallowance of some $15.85 million in respect of contracts let in accordance with a competitive tendering process for foreign exchange contracts by SP AusNet.
3. The second concerns the decision to reduce the proposed expenditure in the Submitted Budget of SP AusNet by $72.2 million in relation to the expenditure to be incurred in the roll out of the WiMAX communications system. For the reasons given, it is the Tribunal’s view that this matter should be remitted to the AER for further consideration, in the light of the reasons of the Tribunal.
4. The third concerns one element under the Project Management umbrella of issues. In particular, it is accepted that there was an incorrect assessment of labour costs and that there is to be an adjustment in favour of SP AusNet of some $1.7 million.
5. In the circumstances, the Tribunal considers that the matter should be remitted to the AER to further consider the Submitted Budget of SP AusNet. The Tribunal does not consider that it should itself form that series of judgments necessary to properly consider that question.

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| I certify that the preceding two hundred and sixty-one (261) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield (President, Mr R Shogren (Member) and Professor K Davis (Member). |

Associate:

Dated: 26 April 2012