AUSTRALIAN COMPETITION TRIBUNAL

Application by United Energy Distribution Pty Limited (No 2) [2012] ACompT 8

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| Citation: | Application by United Energy Distribution Pty Limited (No 2) [2012] ACompT 8 |
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| Review from: | Australian Energy Regulator  |
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| Parties: | **UNITED ENERGY DISTRIBUTION PTY LIMITED (ABN 70 064 651 029)****SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776)****CITIPOWER PTY (ABN 76 064 651 056)****powercor australia limited (abn 89 064 651 109)****JEMENA ELECTRICITY NETWORKS (VIC) lTD (ACN 064 651 083)** |
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| File numbers: | ACT 6 of 2010ACT 7 of 2010ACT 8 of 2010ACT 9 of 2010ACT 10 of 2010 |
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| Tribunal: | **FOSTER J (DEPUTY PRESIDENT), MR G LATTA AM AND PROFESSOR D ROUND** |
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| Date of decision: | 5 April 2012  |
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| Legislation: | *National Electricity Law*, ss 71A, 71B, 71C,71D, 71E, 71F, 71G, 71H, 71I, 71K, 71N, 71O, 71P, Part 6 Div 3A  |
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| Cases cited: | *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 related *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9 cited*Application by EnergyAustralia et al* [2009] ACompT 8 cited*Application by Jemena Gas Networks (NSW) Ltd (No 4)* [2011] ACompT 8 cited*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 cited  |
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| Date of hearing: | 27 March 2012 |
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| Date of last submissions: | 27 March 2012 |
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| Place: | Sydney (Heard in Melbourne) |
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| Category: | No Catchwords |
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| Number of paragraphs: | 94 |
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| Solicitor for Citipower Pty and Powercor Australia Limited:  | DLA Piper Australia |
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| Counsel for the Australian Energy Regulator: | Mr C Scerri SC |
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| Solicitor for the Australian Energy Regulator: | Corrs Chambers Westgarth |
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| Counsel for the Minister for Energy and Resources for the State of Victoria (Intervener): | Mr G McCormick |
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| Solicitor for the Minister for Energy and Resources for the State of Victoria (Intervener): | Minter Ellison |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | NO: ACT 6 of 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to UNITED ENERGY DISTRIBUTION PTY LIMITED pursuant to clause 6.11.1 of chapter 6 of the national electricity rules |
| by: | UNITED ENERGY DISTRIBUTION PTY LIMITED (ABN 70 064 651 029) |

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| TRIBUNAL: | JUSTICE foster (deputy PRESIDENT),MR G LATTA AM AND PROFESSOR D ROUND |
| DATE OF ORDER: | 5 april 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL:

1. Vacates the orders made on 6 January 2012.
2. Pursuant to s 71P(2)(a) of the *National Electricity Law,* hereby varies the Final Distribution Determination dated October 2010 in respect of the 2011–2015 regulatory control period applicable to the applicant (United Energy Distribution Pty Limited) (**the final determination**) by:
	1. Replacing the figure “3.74%” for the debt risk premium in Table 13 of the final determination with the figure “3.89%”; and
	2. Replacing the figure “0.5” as the value for gamma with the figure “0.25” as the value for gamma when used as an input into the calculation of the cost of corporate income tax.
3. Pursuant to s 71P(2)(b) of the *National Electricity Law,* remits the final determination to the Australian Energy Regulator to be remade upon a basis which does not involve the application of the methodology for closing out the ESCV “S” Factor Scheme devised by the Australian Energy Regulator and applied by it in arriving at the final determination but which, subject to the variations made in par 2 above, otherwise proceeds upon the basis of the final determination as published by the Australian Energy Regulator in October 2010.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | NO: ACT 7 of 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to spi electricity pty limited pursuant to clause 6.11.1 of the national electricity rules |
| BY: | SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776) |

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| TRIBUNAL: | JUSTICE foster (deputy PRESIDENT),MR G LATTA AM AND PROFESSOR D ROUND |
| DATE OF ORDER: | 5 APRIL 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL:

1. Vacates the orders made on 6 January 2012.
2. Pursuant to s 71P(2)(a) of the *National Electricity Law,* hereby varies the Final Distribution Determination dated October 2010 in respect of the 2011–2015 regulatory control period applicable to the applicant (SPI Electricity Pty Limited) (**the final determination**) by:
	1. Replacing the figure “4.05%” for the debt risk premium in Table 14 of the final determination with the figure “4.22%”; and
	2. Replacing the figure “0.5” as the value for gamma with the figure “0.25” as the value for gamma when used as an input into the calculation of the cost of corporate income tax.
3. Subject to the variations made in par 2 above and subject to the remitter in par 2 of the relief granted by the Tribunal in *Application by SPI Electricity Pty Limited* [2012] ACompT 2, pursuant to s 71P(2)(a) of the *National Electricity Law,* otherwise affirms the final determination.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | NO: ACT 8 of 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to CITIPOWER PTY pursuant to clause 6.11.1 of the national electricity rules |
| by: | CITIPOWER PTY (ABN 76 064 651 056) |

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| TRIBUNAL: | JUSTICE foster (deputy PRESIDENT),MR G LATTA AM AND PROFESSOR D ROUND |
| DATE OF ORDER: | 5 APRIL 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL:

1. Vacates the orders made on 6 January 2012.
2. Pursuant to s 71P(2)(a) of the *National Electricity Law,* hereby varies the Final Distribution Determination dated October 2010 in respect of the 2011–2015 regulatory control period applicable to the applicant (CitiPower Pty) (**the final determination**) by:
	1. Replacing the figure “3.74%” for the debt risk premium in Table 14 of the final determination with the figure “3.89%”; and
	2. Replacing the figure “0.5” as the value for gamma with the figure “0.25” as the value for gamma when used as an input into the calculation of the cost of corporate income tax.
3. Pursuant to s 71P(2)(b) of the *National Electricity Law*, remits the final determination to the Australian Energy Regulator to be remade in light of a reconsideration by the Australian Energy Regulator of the applicant’s claims in accordance with the *National Electricity Rules* in respect of the vegetation management opex step change claimed by the applicant, such reconsideration to, subject to the variations made in par 2 above, otherwise proceed upon the basis of the final determination as published by the Australian Energy Regulator in October 2010.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | NO: ACT 9 of 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to powercor australia limited pursuant to clause 6.11.1 of the national electricity rules |
| by: | powercor australia limited (abn 89 064 651 109) |

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| TRIBUNAL: | JUSTICE foster (deputy PRESIDENT),MR G LATTA AM AND PROFESSOR D ROUND |
| DATE OF ORDER: | 5 april 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL:

1. Vacates the orders made on 6 January 2012.
2. Pursuant to s 71P(2)(a) of the *National Electricity Law,* hereby varies the Final Distribution Determination dated October 2010 in respect of the 2011–2015 regulatory control period applicable to the applicant (Powercor Australia Limited) (**the final determination**):
	1. By replacing the figure “3.74%” for the debt risk premium in Table 14 of the final determination with the figure “3.89%”;
	2. By replacing the figure “0.5” as the value for gamma with the figure “0.25” as the value for gamma when used as an input into the calculation of the cost of corporate income tax;
	3. By replacing the annual revenue requirements for 2011–2015 set out in Table 6 of the final determination with annual revenue requirements for 2011–2015 that have been recalculated by excluding therefrom the 2001–2005 negative carryover arising under the Office of the Regulator-General (Vic)’s 2001–2005 efficiency carryover mechanism applied in respect of the applicant and also by excluding therefrom the 2006–2010 efficiency carryover amount under the Essential Services Commission of Victoria’s 2006–2010 electricity efficiency carryover mechanism applied in respect of the applicant; and
	4. Also otherwise as required in order to give effect to the variations made in subpars (a) to (c) above.
3. Pursuant to s 71P(2)(b) of the *National Electricity Law*, remits the final determination to the Australian Energy Regulator to be remade in light of a reconsideration by the Australian Energy Regulator of the applicant’s claims in accordance with the *National Electricity Rules* in respect of the vegetation management opex step change claimed by the applicant, such reconsideration to, subject to the variations made in par 2 above, otherwise proceed upon the basis of the final determination as published by the Australian Energy Regulator in October 2010.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | NO: ACT 10 of 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to JEMENA ELECTRICITY NETWORKS (VIC) LTD pursuant to clause 6.11.1 of chapter 6 of the national electricity rules |
| BY: | JEMENA ELECTRICITY NETWORKS (VIC) lTD (ACN 064 651 083) |

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| TRIBUNAL: | JUSTICE foster (deputy PRESIDENT),MR G LATTA AM AND PROFESSOR D ROUND |
| DATE OF ORDER: | 5 april 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL:

1. Vacates the orders made on 6 January 2012.
2. Pursuant to s 71P(2)(a) of the *National Electricity Law,* hereby varies the Final Distribution Determination dated October 2010 in respect of the 2011–2015 regulatory control period applicable to the applicant (Jemena Electricity Networks (Vic) Ltd) (**the final determination**) by:
	1. Replacing the figure “3.70%” for the debt risk premium in Table 14 of the final determination with the figure “4.34%”; and
	2. Replacing the figure “0.5” as the value for gamma with the figure “0.25” as the value for gamma when used as an input into the calculation of the cost of corporate income tax;
	3. Including in the forecast capital allowance for the applicant for the 2011–2015 regulatory control period an allowance in the amount confidentially agreed between the Australian Energy Regulator and the applicant in respect of the Broadmeadows project, such amount being recorded in confidential Joint Submissions made to the Tribunal in writing by the solicitors for the Australian Energy Regulator and the solicitors for the applicant and dated 11 July 2011; and
	4. Allowing the amounts claimed by the applicant in its revised regulatory proposal in the enterprise support function cost centres described as:
		1. Energy Investment;
		2. Financial Strategy; and
		3. Investment Analysis

as allowances in the forecast operating expenditure of the applicant.

1. Pursuant to s 71P(2)(b) of the *National Electricity Law,* remits the final determination to the Australian Energy Regulator to be remade upon a basis which conforms to the requirements of the *National Electricity Rules* in respect of the indexation of the regulatory asset base of the applicant for inflation in accordance with these Reasons for Decision but which, subject to the variations made in par 2 above, otherwise proceeds uupon the final determination as published by the Australian Energy Regulator in October 2010.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | nO: act 6 OF 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to UNITED ENERGY DISTRIBUTION PTY LIMITED pursuant to clause 6.11.1 of chapter 6 of the national electricity rules |
| by: | UNITED ENERGY DISTRIBUTION PTY LIMITED (ABN 70 064 651 029) |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | nO: act 7 OF 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to spi electricity pty limited pursuant to clause 6.11.1 of the national electricity rules |
| BY: | SPI ELECTRICITY PTY LIMITED (ABN 91 064 235 776) |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | nO: act 8 OF 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to CITIPOWER PTY pursuant to clause 6.11.1 of the national electricity rules |
| by: | CITIPOWER PTY (ABN 76 064 651 056) |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | nO: act 9 OF 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to powercor australia limited pursuant to clause 6.11.1 of the national electricity rules |
| by: | powercor australia limited (abn 89 064 651 109) |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | nO: act 10 OF 2010 |

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| RE: | application under section 71B of the national electricity law for a review of a distribution determination made by the australian energy regulator in relation to JEMENA ELECTRICITY NETWORKS (VIC) LTD pursuant to clause 6.11.1 of chapter 6 of the national electricity rules |
| BY: | JEMENA ELECTRICITY NETWORKS (VIC) lTD (ACN 064 651 083) |

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| tribunal: | foster j (deputy president), mr g latta am and professor d round |
| DATE: | 5 april 2012 |
| PLACE: |  |

**REASONS FOR DECISION**

# Introduction

1. On 6 January 2012, the Tribunal, as presently constituted, published Reasons for Decision (**the principal Reasons**) and made orders in five review applications (Nos ACT 6, 7, 8, 9 and 10 of 2010) by which the five registered electricity distribution network service providers (**DNSPs**) for the State of Victoria sought to challenge various aspects of final determinations made by the Australian Energy Regulator (**the AER**) on 29 October 2010 as to the basis upon which electricity distribution services in the State of Victoria will be provided by the DNSPs for the period 2011–2015. The Tribunal published one set of reasons (as to which see *Application by United Energy Distribution Pty Limited* [2012] ACompT 1), but made five sets of orders, one set of orders in each review application. As a matter of practicality and convenience, the Tribunal hearing of those five review applications took place at the same time. Matters were considered by reference to particular issues with individual parties addressing each issue of interest to them at more or less the same time. Notwithstanding this approach, all participants in the reviews (correctly) conducted themselves upon the basis that each review application was a separate matter independent of all of the other review applications and had to be treated as such, particularly when orders needed to be made to give effect to the Tribunal’s Reasons for Decision.
2. By the orders made on 6 January 2012, certain matters were reserved for further consideration by the Tribunal. The AER, the DNSPs and the Minister for Energy and Resources for the State of Victoria (**the Minister**) had submitted to the Tribunal when the review applications were heard that the Tribunal should defer for further consideration the question of the impact (if any) of certain conclusions in particular review applications upon DNSP/applicants in other review applications and upon the AER’s final determination. The Tribunal acceded to those submissions. Subsequently, some of the parties have sought to raise matters which were not the subject of any liberty to apply granted by the Tribunal on 6 January 2012.
3. These Reasons for Decision determine all outstanding issues in the five review applications currently before the Tribunal. As was the case with the principal Reasons and the orders made on 6 January 2012, there will be one set of Reasons for Decision and five sets of orders.
4. The principal Reasons are lengthy. We intend to refer to those Reasons only to the extent necessary to decide the outstanding issues. We will proceed upon the assumption that the contents of the principal Reasons are within the body of knowledge possessed by a reader of these Reasons. In order to assist the reader of these Reasons, we will, as necessary, use the same acronyms in these reasons which we used in the principal Reasons. Attached to these Reasons as Attachment “A” is a list of those acronyms arranged alphabetically with a reference in each case to the paragraph in the principal Reasons where the acronym is first mentioned.
5. In correspondence sent to the Tribunal after the Tribunal published the principal Reasons, the AER submitted to the Tribunal that the Tribunal had no power to make the orders which it made on 6 January 2012 because its only power to make orders in the review applications with which the Tribunal has been dealing was to make final determinations pursuant to s 71P of the NEL. The AER submitted that the 6 January 2012 orders were, in part, interlocutory and, in any event, did not finally dispose of the review applications before the Tribunal. The AER proposed that the Tribunal vacate the 6 January 2012 orders and make fresh orders when finally disposing of all outstanding matters. The AER referred the Tribunal to *Application by Jemena Gas Networks (NSW) Ltd (No 4)* [2011] ACompT 8 and *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9in support of its submissions. The AER suggested that the Tribunal vacate its 6 January 2012 orders and make fresh orders in light of these Reasons and the principal Reasons. With the exception of SP AusNet, the DNSPs more or less agreed with the AER’s approach.
6. We will vacate the 6 January 2012 orders, as requested, and make final orders when publishing these Reasons for Decision. By doing so, we do not wish to be thought to be agreeing with the AER’s submissions on this point. We will reserve for consideration on another occasion the correctness of those submissions.

# The Outstanding Issues

## Issue 1—The ESCV S Factor Closeout Decision

1. At the hearing before the Tribunal, the AER’s ESCV S Factor Scheme closeout methodology was challenged by UED and by SP AusNet. It was defended by the AER and by the Minister. At [247] of the principal Reasons, the Tribunal held that the AER did not have power to include that methodology within its final decision in respect of UED and therefore did not have the power to make the consequential decision directed to the closing out of the ESCV S Factor Scheme.
2. In light of the Tribunal’s decision in respect of UED on this point, the AER, SP AusNet, CitiPower and Powercor have all sought to have the Tribunal’s decision applied more widely. The AER submits that the Tribunal’s decision should be applied to all DNSPs. The Minister opposes that course. He submits that the Tribunal’s decision on this point should be confined to UED. SP AusNet, CitiPower and Powercor all submit that they should have the benefit of the Tribunal’s decision in relation to this matter. JEN submits that the Tribunal cannot and, in any event, ought not apply to JEN its decision in respect of UED on this point.
3. The issues in relation to the Tribunal’s ESCV S Factor Closeout Decision are:
4. In respect of each of SP AusNet, CitiPower and Powercor:
	1. Did each of those DNSPs contend to the AER during the regulatory process that the AER should not apply its proposed closeout methodology to the particular DNSP? If so, what was the basis upon which that contention was advanced?
	2. Is the present challenge to the AER’s decision to apply its closeout methodology:
		1. Within the scope of the particular DNSP’s review application; and
		2. Within the scope of the leave granted to that DNSP pursuant to s 71K of the NEL?
	3. Did each of the DNSPs argue before the Tribunal that the AER should not have applied its closeout methodology to the particular DNSP? If so, what was the basis upon which that argument was put?
	4. What are the consequences of the failure on the part of any particular DNSP to contend that the AER should not apply or should not have applied its closeout methodology to that DNSP:
		1. During the regulatory process;
		2. In its review application;
		3. At the time when leave pursuant to s 71K of the NEL was sought and obtained; and
		4. At the hearing before the Tribunal.

In particular, should leave now be granted by the Tribunal to each of CitiPower and Powercor to amend its Application for Leave and Application for Review in order to raise a challenge to the Application by the AER of its closeout methodology to each of them?

* 1. In light of the conclusions reached in respect of the matters referred to in subpars (i) to (iv) above and, in any event, should the Tribunal’s decision in relation to the AER’s ESCV S Factor Closeout methodology be applied to SP AusNet, CitiPower and Powercor.
1. Should the Tribunal’s ESCV S Factor Closeout Decision be applied to JEN?

## Issue 2—The RAB Indexation Decision

1. By the time the AER made its final decision, only JEN had maintained a contention that the AER had erred in its approach to the indexation of its RAB for inflation in its draft decision. JEN argued before the Tribunal that the AER’s approach reflected in its final decision was flawed. Only JEN raised this ground before the Tribunal.
2. At [384] of the principal Reasons, the Tribunal concluded that the decision made by the AER in respect of the indexation of the RAB of JEN for inflation was erroneous and unreasonable in all the circumstances.
3. In light of the Tribunal’s decision in respect of JEN, UED, SP AusNet, CitiPower and Powercor have applied to have the Tribunal’s decision in respect of the indexation of the RAB for inflation applied more widely. The AER and the Minister oppose that course. They submit that the Tribunal’s decision on this point should be confined to JEN. UED, SP AusNet, CitiPower and Powercor all submit that they should have the benefit of the Tribunal’s decision in JEN’s review application in relation to this matter.
4. None of UED, CitiPower or Powercor contended before the AER during the regulatory process that its RAB should be escalated in the manner and on the basis upon which JEN succeeded before the Tribunal. UED included a challenge to the AER’s decision on this point in its review application but CitiPower and Powercor did not. The Tribunal granted leave to UED to run this point before the Tribunal. Neither CitiPower nor Powercor had leave to do so. None of UED, CitiPower or Powercor argued for such an outcome before the Tribunal. SP AusNet contends that the matter is within the scope of its review application and of the leave granted to it by the Tribunal pursuant to s 71B of the NEL although it concedes that it did not advance this contention to the AER during the regulatory process.
5. The ultimate issue now raised, therefore, in respect of the indexation of the RAB for inflation is whether, at this very late stage in the process, any of UED, SP AusNet, CitiPower or Powercor should be permitted to seek to obtain the benefit of the Tribunal’s decision on this point in respect of JEN. As was the case with the Tribunal’s decision on the closeout of the ESCV S Factor Scheme, each of CitiPower and Powercor seeks leave to amend its Application for Leave and Application for Review in order to raise a challenge to the application by the AER of its methodology for the indexation of the RAB for inflation. The arguments and considerations which arise in relation to this issue are essentially the same as those which arise in respect of Issue 1.

## Issue 3—The 2001–2005 Accrued Negative Carryover Decision (Powercor)

1. The only challenge to any part of the AER’s final decision in respect of the carryover into the regulatory control period 2011–2015 of a 2001–2005 accrued negative carryover was made by Powercor. Powercor was the only DNSP in respect of whom an accrued negative carryover from the 2001–2005 regulatory period was sought to be imposed by the AER in respect of the 2011–2015 regulatory control period. The issue raised before the Tribunal by Powercor in its review application concerned only the carryover from the 2001–2005 regulatory period. The impact of the Tribunal’s decision in respect of Powercor was agreed in advance between the AER and Powercor. That agreement is relevantly recorded at [16] and [17] of Attachment “F” to the principal Reasons.
2. No other DNSP raised any issue concerning the carryover into the 2011–2015 regulatory control period of amounts from either the 2001–2005 regulatory period or the 2006–2010 regulatory period.
3. At [614]–[617] of the principal Reasons, the Tribunal concluded that the AER had no power to carry over into the 2011–2015 regulatory control period accrued negative carryover amounts in respect of Powercor’s performance in the 2001–2005 regulatory control period. As was the case with the closeout of the ESCV S Factor Scheme, the approach of the AER was not authorised either by the NEL or the NER.
4. In light of the Tribunal’s decision in respect of Powercor, the AER, SP AusNet and CitiPower have applied to have the Tribunal’s decision applied more widely. The AER submits that the Tribunal’s decision should be applied to all DNSPs. The Minister opposes that course. He submits that the Tribunal’s decision on this point should be confined to Powercor. SP AusNet and CitiPower both submit that they should have the benefit of the reasoning which underpins the Tribunal’s decision in relation to this matter. JEN submits that the Tribunal cannot and, in any event, ought not apply its decision on this point to JEN.
5. The issue now raised, therefore, in respect of the carryover into the regulatory control period 2011–2015 of a 2001–2005 accrued negative carryover is whether, at this very late stage in the regulatory process, any of the AER, SP AusNet and CitiPower should be permitted to seek to obtain the benefit of the reasoning behind the Tribunal’s decision on this point in respect of Powercor. The AER, SP AusNet and CitiPower all argue that the reasoning behind that decision should be applied to the subsequent regulatory period viz the 2006–2010 regulatory period. This is a matter which was agitated before the AER by CitiPower and Powercor. However, it was not litigated before the Tribunal. As was the case with the Tribunal’s decision on the closeout of the ESCV S Factor Scheme, each of CitiPower and Powercor seeks leave to amend its Application for Leave and Application for Review in order to raise a challenge to the application by the AER of its methodology for the carry over into the regulatory control period 2011–2015 of a 2006–2010 accrued negative carryover. As was the case with Issue 2, the arguments and considerations which arise in relation to this issue are essentially the same as those which arise in respect of Issue 1.

## Issue 4—Debt Risk Premium

1. In their Applications for Review, each of the DNSPs challenged the AER’s decision not to annualise the Bloomberg fair bond yield date. That challenge was ultimately disposed of by consent (as to which see [387]–[389] of the principal Reasons and Attachment “C” to those Reasons). In addition, JEN also argued that it was unreasonable for the AER to make any use of the yields from a bond issued by APT to estimate the DRP for the JEN averaging period. At [461]–[462] of the principal Reasons, the Tribunal concluded that the AER should not have used the yields from the APT bond at all.
2. The additional point upon which JEN succeeded before the Tribunal was taken by all of the DNSPs in a joint submission made to the AER in October 2010. Thereafter, only JEN continued to press it. No other DNSP argued this point before the Tribunal. However, in light of the Tribunal’s decision on this point, each of UED, SP AusNet, CitiPower and Powercor now submit that they should have the benefit of that decision. As was the case with the Tribunal’s ESCV S Factor Scheme closeout decision, should it be necessary, each of CitiPower and Powercor has applied to amend its Application for Leave and Application for Review in order to raise this point. UED also applies to amend its application in order to raise this point
3. The AER and the Minister oppose the applications made by UED, SP AusNet, CitiPower and Powercor in respect of this point.
4. It should also be noted that no liberty to apply in respect of this matter was granted by the Tribunal in the orders which it made on 6 January 2012. The parties which have raised this matter do so without any prior leave or liberty from the Tribunal. As was the case with Issues 2 and 3, the arguments and considerations which arise in relation to this Issue are essentially the same as those which arise in relation to Issue 1.

# Issue 1—The AER’s Decision to CloseOut the ESCV S Factor Scheme

1. In the principal Reasons, this issue was addressed at [200]–[247].
2. At [200], the Tribunal said:

200 The protagonists in respect of this issue are the AER and the Minister, on the one hand, who both seek to defend the AER’s decision on this matter, and SP AusNet and UED, on the other hand, who both seek to overturn that decision. The single ground of challenge is that the AER did not have power to do what it did. If that ground is made out, there may be consequences for other DNSPs. The remaining DNSPs (CitiPower, Powercor and JEN) were content with the AER’s decision on this point and will argue, if it becomes necessary to do so, that the Tribunal cannot interfere with the distribution determinations in respect of them on this ground because no challenge to those determinations on this ground has been made by any of those three DNSPs.

1. The ESCV S Factor Scheme was explained at [202]–[213] of the principal Reasons. The Scheme built incentives and disincentives into the regulatory system for which the ESCV had been responsible in order to encourage DNSPs to exceed forecast performance criteria and to discourage DNSPs from failing to meet those criteria.
2. The last ESCV price determination expired, according to its terms, on 31 December 2010.
3. In its Framework and Approach Paper, the AER flagged that it proposed to carry over into the 2011–2015 regulatory control period appropriate adjustments arising from the ESCV S Factor Scheme being such adjustments as would have applied in that period had the Scheme continued. The AER said that it would address these adjustments through the revenue building block approach in accordance with Ch 6, Pt C of the NER.
4. In its Draft Decision, the AER proposed a methodology for closing out the ESCV S Factor Scheme in the regulatory control period 2011–2015 whereby, in each of the years within that period, an amount would be added or subtracted from the building blocks as part of the proposed closeout mechanism.
5. UED challenged this approach in its revised regulatory proposal and in subsequent correspondence which it sent to the AER.
6. One of the principal arguments advanced by UED was that the AER did not have the power to make the adjustments which it had indicated it would make.
7. During the regulatory process, SP AusNet also criticised the approach of the AER although it did not raise, in late 2010, the argument that the AER did not have the power to include the proposed adjustments in the building blocks. Ultimately, the AER made the adjustments in respect of all DNSPs which it had foreshadowed it would make.
8. At [218]–[225], the Tribunal explained the AER’s final decision in respect of its proposed closeout of the ESCV S Factor Scheme.
9. UED argued before the Tribunal that, because the AER had no power to implement its closeout methodology in respect of the ESCV S Factor Scheme, the AER’s decision to do so was an incorrect exercise of discretion or an unreasonable decision in all of the circumstances (as to which see s 71C(1)(c) and (d)).
10. At [241]–[242] of the principal Reasons, the Tribunal said:

241 The essence of the issue confronting the Tribunal in respect of the AER’s decision to implement a methodology to close out the ESCV S Factor Scheme is one of interpretation. The critical question is whether cl 6.4.3(a)(6) and cl 6.4.3(b)(6) of the NER, upon their true interpretation, permit the carrying forward into the current regulatory control period 2011–2015 of the ESCV S Factor Scheme being a scheme which was in operation only in respect of the State-based last ESCV price determination up to 31 December 2010. That question is answered favourably to the position of the AER and the Minister if the subclauses to which we have referred contemplate the carrying over of such a State-based regulatory regime.

242 In our view, however, the subclauses referred to do not permit such a course. This is essentially for the reasons advanced by UED. The draftsman of the NER intended, in our view, to start with a clean slate in respect of incentive schemes as at 1 January 2011. This is no accident. Had the draftsman wished to authorise that which the AER has in fact done in the present case, he or she could have done so by prescribing appropriate transitional provisions, as was done in the case of South Australia. This was not done. Instead, the AER was required to propound its own incentive scheme (STPIS) and to do so in respect of the first regulatory control period for which it was charged with the responsibility of making the relevant determination.

1. At [247], the Tribunal went on to say:

247 For these reasons, the Tribunal is of the opinion that the AER did not have power to include within its final decision the methodology and consequential decision directed to the closing out of the ESCV S Factor Scheme. The year-by-year penalty sought to be imposed on UED by the AER’s adoption of its close-out methodology cannot be imposed on UED. We propose to deal with UED’s position now. The consequences of this conclusion on other DNSPs are reserved for further consideration in light of further submissions which we will invite the parties to make.

1. In the orders which it made on 6 January 2012 in the review application made by UED (No ACT 6 of 2010), the Tribunal remitted the final determination made by the AER in respect of UED with (*inter alia*) a direction that the AER remake that final determination upon a basis which did not involve the application of the methodology for closing out the ESCV S Factor Scheme devised by the AER and applied by it in arriving at that final determination. At the same time, in each of the review applications brought by SP AusNet, CitiPower, Powercor and JEN, the Tribunal granted liberty to apply to the parties to those determinations, to the AER and to the interveners in those applications to apply to the Tribunal in respect of the consequences of the Tribunal’s decision in respect of the ESCV S Factor Scheme made in UED’s review application.
2. The AER, SP AusNet, CitiPower and Powercor each propose that the Tribunal now make an order in each of the review applications made by SP AusNet, CitiPower and Powercor (Nos ACT 7–9 of 2010) in terms substantially the same as the order made by the Tribunal in UED’s review application requiring the AER to remove its closeout methodology from the final determination made in respect of each of those DNSPs. The Minister submitted that the terms of s 71O(2) of the NEL prevent SP AusNet, CitiPower and Powercor from seeking to take advantage of the Tribunal’s decision in UED’s review application on this point. JEN resists the order which the AER seeks to have made in its review application.

## The Submissions of the AER, SP AusNet, CitiPower and Powercor

1. The AER submits that it follows, as a matter of logic, from the Tribunal’s conclusions and reasoning on this point in UED’s review application that the AER had no power to make ***any*** of the adjustments to the DNSPs’ respective annual revenue requirements by reason of the application of its closeout methodology in respect of the ESCV S Factor Scheme. The AER submits that, by making those adjustments, it purported to exercise a jurisdiction which it did not possess. For this reason, the AER submits that its decision on this point is infected by jurisdictional error.
2. The AER submits that the question for the Tribunal now is whether a finding in UED’s proceeding in respect of the AER’s closeout of the ESCV S Factor Scheme (being a constituent decision made as part of the decision-making process leading to the final determination in respect of UED) to the effect that it was a decision which the AER did not have power to make should apply to the counterpart constituent decisions made in respect of each of the other DNSPs, notwithstanding that the issue was not the subject of the leave granted by the Tribunal in respect of each of the other DNSPs nor a matter raised by the Minister.
3. The AER submits that each of the relevant constituent decisions was *“no decision at all”*.
4. The AER recognises that it may be prevented from advancing the submissions which we have summarised above by s 71O(2) of the NEL. However, it goes on to submit that the Tribunal should not affirm a distribution determination in circumstances where it is aware that the distribution determination under review includes one or more constituent decisions that the Tribunal has, in effect, found is properly to be regarded as *“no decision at all”*. That being so, the Tribunal should make a direction along the lines of the direction made in respect of UED on this point in the orders of 6 January 2012.
5. SP AusNet submits that the Tribunal did grant it leave to argue this matter before the Tribunal. It submits that the point is squarely raised in its Application for Leave. These submissions are correct.
6. SP AusNet concedes that, at [238] of the principal Reasons, the Tribunal held that it had not argued this point before the AER during the regulatory process and that, for this reason, it is now prevented by s 71O(2) from doing so before the Tribunal.
7. Nonetheless, SP AusNet now contends that it can have the benefit of the Tribunal’s decision on this point made in the UED review application. SP AusNet says that the AER may raise in SP AusNet’s review application the circumstance that, in UED’s review application, the Tribunal has decided that the AER could not apply its methodology for closing out the ESCV S Factor Scheme and that the AER may therefore seek an order in SP AusNet’s review application in terms similar to that made in respect of UED. SP AusNet argues that this may occur notwithstanding the terms of s 71O(1) of the NEL. It says that this outcome arises as a necessary implication from the terms of s 71P(2)(a) and (3) of the NEL. Because the AER has raised the matter in the way that it has, so it is submitted, the Tribunal is properly seised of the point and is therefore empowered to make the order sought.
8. CitiPower and Powercor did not seek the Tribunal’s leave to argue that the methodology adopted by the AER for closing out the ESCV S Factor Scheme was an incorrect exercise of discretion or unreasonable in all of the circumstances nor did either of those DNSPs include such a contention in their review applications. They did not challenge that methodology during the regulatory process. CitiPower and Powercor contend that the Tribunal has power to correct the AER’s error notwithstanding that the matter was not raised in their review applications and was not the subject of the Tribunal’s leave under s 71B(1) of the NEL. Those DNSPs submit that, once leave is granted, the Tribunal’s power under s 71P(2)(a) is not subject to any express or implied limitation. They submit that:
9. The language of s 71P of the NEL is unfettered;
10. For the purposes of s 71P, the Tribunal may perform all of the functions and exercise all of the powers of the AER;
11. Because the regulatory regime contemplates the making of constituent decisions and because some of those constituent decisions may be interconnected, it is most unlikely that the legislature would have intended that the Tribunal should not have the power to vary the determination in respect of matters not specifically raised in the review application or the subject of leave; and
12. Any implied limitations on the Tribunal’s power under s 71P would facilitate the perpetuation of wrong decisions contrary to the spirit and intendment of the NEL and the NER.

## The Submissions of JEN and the Minister

1. The essence of the submissions made by JEN in respect of this issue (and generally) is that the Tribunal does not have the power under the NEL to make a determination in JEN’s application in respect of issues which were not before the Tribunal in that application. JEN submits that the Tribunal is a creature of statute and that its powers in the present case are circumscribed by the NEL. It submits that the Tribunal does not have jurisdiction outside the boundaries of the statutorily prescribed merits review framework. JEN argues that the AER is not entitled to raise new issues not raised by JEN or an intervener in JEN’s review application. It also submits that, in the circumstances of the present case, the AER is not obliged to treat what was done by it in respect of the closeout of the ESCV S Factor Scheme as a decision which has no legal effect at all.
2. The Minister submits that there is no jurisdictional error as contended for by the AER and that therefore the AER’s decision to apply its ESCV S Factor closeout methodology was not a nullity. The Minister submits that s 71O(2) prevents SP AusNet, CitiPower and Powercor, as well as the AER, from arguing that they should have the benefit of the Tribunal’s decision in respect of the ESCV S Factor Scheme.

## Consideration

### The Scope of Review

1. Part 6, Div 3A of the NEL deals with merits review and other non-judicial review of regulatory decisions. Subdivision 2 deals with merits review of reviewable regulatory decisions (as defined in s 71A of the NEL). At [45]–[61] of the principal Reasons, we explained the process of merits review mandated by the NEL and the way in which the NEL and the NER are required to be interpreted. At [62]–[83] of those Reasons, we explained the building block methodology. At [84]–[90] of those Reasons, we said:

84. The regulatory process is a “propose/response” process. Each DNSP must lodge a regulatory proposal with the AER and the AER must consider that proposal and pronounce a draft decision in respect of that proposal. Clause 6.12 of the NER lays down very specific requirements in relation to the AER’s consideration of a DNSP’s regulatory proposal.

85. First, the AER is required to make a decision on the DNSP’s current *building block proposal*. By that decision, the AER is either to approve or to refuse to approve the *annual revenue requirement* for the DNSP, as set out in its *building block proposal*, for each *regulatory year* of the *regulatory control period*. In addition, the AER is required either to accept the total of the forecast capital expenditure for the *regulatory control period* that is included in the current *building block proposal* or not to accept the total of the forecast capital expenditure for the *regulatory control period* that is included in the DNSP’s current *building block proposal*, in which case the AER must set out its reasons for that decision and provide an estimate of the total of the DNSP’s required capital expenditure for the *regulatory control period* that the AER is satisfied reasonably reflects the *capital expenditure criteria*, taking into account the *capital expenditure factors*. The AER is also required to make a decision in which it either accepts the total of the forecast operating expenditure for the *regulatory control period* that is included in the DNSP’s current *building block proposal* or does not accept the total of the forecast operating expenditure for that *regulatory control period* in which case the AER must set out its reasons for that decision and provide an estimate of the total of the DNSP’s required operating expenditure for the *regulatory control period* that the AER is satisfied reasonably reflects the *operating expenditure criteria*, taking into account the *operating expenditure factors*. (See cl 6.12.1(2), (3) and (4) of the NER).

86. Other constituent decisions are required to be made by the AER. These are:

(a) A decision in relation to the rate of return (cl 6.12.1(5));

(b) A decision on the regulatory asset base as at the commencement of the *regulatory control period* in accordance with cl 6.5.1 and Sch 6.2 (cl 6.12.1(6));

(c) A decision on the control mechanism (including the X factor) for *standard control services* (to be in accordance with the relevant *framework and approach paper*) (cl 6.12.1(11)); and

(d) A decision on the additional *pass through events* that are to apply for the *regulatory control period* (cl 6.12.1(14)).

87. Clause 6.12.2 of the NER is in the following terms:

**6.12.2 Reasons for decisions**

The reasons given by the *AER* for a draft distribution determination under rule 6.10 or a final distribution determination under rule 6.11 must set out the basis and rationale of the determination, including:

(1) details of the qualitative and quantitative methods applied in any calculations and formulae made or used by the *AER*; and

(2) the values adopted by the *AER* for each of the input variables in any calculations and formulae, including:

(i) whether those values have been taken or derived from the provider’s current *building block proposal*; and

(ii) if not, the rationale for the adoption of those values; and

(3) details of any assumptions made by the *AER* in undertaking any material qualitative and quantitative analyses; and

(4) reasons for the making of any decisions, the giving or withholding of any approvals, and the exercise of any discretions, as referred to in this Chapter 6, for the purposes of the determination.

88. Clause 6.12.3 of the NER provides:

**6.12.3 Extent of AER’s discretion in making distribution determinations**

(a) Subject to this clause and other provisions of this Chapter 6 explicitly negating or limiting the *AER’s* discretion, the *AER* has a discretion to accept or approve, or to refuse to accept or approve, any element of a *regulatory proposal*.

(b) The classification of services must be as set out in the relevant *framework and approach paper* unless the *AER* considers that, in the light of the *Distribution Network Service Provider’s regulatory proposal* and the submissions received, there are good reasons for departing from the classification proposed in that paper.

(c) The control mechanisms must be as set out in the relevant *framework* *and approach paper*.

(d) The *AER* must approve the *total revenue requirement* for a *Distribution Network Service Provider* for a *regulatory control period,* and the *annual revenue requirement* for each *regulatory year* of the *regulatory control period*, as set out in the provider’s current *building block proposal*, if the *AER* is satisfied that those amounts have been properly calculated using the *post-tax revenue model* on the basis of amounts calculated, determined or forecast in accordance with the requirements of Part C of this Chapter 6.

(e) The *AER* must approve a proposed *regulatory control period* if the proposed period consists of *5 regulatory years*.

(f) If the *AER* refuses to approve an amount or value referred to in clause 6.12.1, the substitute amount or value on which the distribution determination is based must be:

(1) determined on the basis of the current *regulatory proposal*; and

(2) amended from that basis only to the extent necessary to enable it to be approved in accordance with the *Rules*.

(g) The *AER* must approve a proposed negotiating framework if the *AER* is satisfied that it adequately complies with the requirements of Part D.

(h) If the *AER* refuses to approve the proposed *negotiating framework*, the approved amended *negotiating framework* must be:

(l) determined on the basis of the current proposed *negotiating framework;* and

(2) amended from that basis only to the extent necessary to enable it to be approved in accordance with the *Rules*.

89. The AER may, but is not required to, consider any submission made pursuant to an invitation for submissions after the time for making the submission has expired (cl 6.14).

90. In the present case, each DNSP submitted a *regulatory proposal* to the AER. The AER published a draft decision in June 2010. Each DNSP had an opportunity to respond to the AER’s draft decision. As mentioned at [1] above, the AER published its final decision on 29 October 2010.

1. Under s 71B of the NEL, an affected or interested person or body, with the leave of the Tribunal, may apply to the Tribunal for a review of a reviewable regulatory decision. Subsection (2) of s 71B provides:
2. An application must—

(a) be made in the form and manner determined by the Tribunal; and

(b) specify the grounds for review being relied on.

1. In the present case, each of the DNSPs applied to the Tribunal for leave to apply for a review of the final determination made by the AER in respect of the particular DNSP. In each case, the decision sought to be reviewed was the final determination itself, not constituent decisions made under the NEL or the NER or other decisions made during the process leading to the ultimate determination. Whilst it is true that each DNSP brought forward for consideration by the Tribunal a set of specific complaints about the AER’s final determination, it is the final determination nonetheless which must be reviewed. The requirement that the leave of the Tribunal be sought and granted before an application for review can be made is an important filter imposed by the NEL itself on the process of review authorised by s 71B of the NEL. The Tribunal must not grant leave unless the requirements of s 71E and s 71F are satisfied. Leave must be refused if the provisions of s 71G or s 71H are engaged.
2. Pursuant to s 71I of the NEL, an application under s 71B(1) does not stay the operation of a determination under review nor does it stay the operation of any other reviewable regulatory decision unless the Tribunal otherwise orders. Parties may intervene in a review application with the leave of the Tribunal. No DNSP sought leave to intervene in any review application brought by any of the other DNSPs. The Minister has an entitlement pursuant to s 71J(b) to intervene in a review application.
3. The only available grounds for review are specified in s 71C of the NEL as follows:

**71C—Grounds for review**

(1) An application under section 71B(1) may be made only on 1 or more of the following grounds:

(a) the AER made an error of fact in its findings of facts, and that error of fact was material to the making of the decision;

(b) the AER made more than 1 error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;

(c) the exercise of the AER’s discretion was incorrect, having regard to all the circumstances;

(d) the AER's decision was unreasonable, having regard to all the circumstances.

(2) It is for the applicant to establish a ground listed in subsection (1).

1. An application for leave to apply for a review of a reviewable regulatory decision must be made by no later than 15 business days after the reviewable regulatory decision is published in accordance with the NEL or the NER (s 71D). In the present case, the AER published its final determinations on 29 October 2010 so that the DNSPs were obliged to make their applications for leave to apply for a review by no later than the third week of November 2010.
2. Sections 71N, 71O and 71P are in the following terms:

**71N—Parties to a review under this Subdivision**

The parties to a review under this Subdivision are—

(a) the applicant; and

(b) AER; and

(c) an intervener.

**71O—Matters that parties to a review may and may not raise in a review**

(1) The AER, in a review under this Subdivision, may raise—

(a) a matter not raised by the applicant or an intervener that relates to a ground for review, or a matter raised in support of a ground for review, raised by the applicant or an intervener;

(b) a possible outcome or effect on the reviewable regulatory decision being reviewed that the AER considers may occur as a consequence of the Tribunal making a determination setting aside or varying the reviewable regulatory decision.

(2) A party (other than the AER) to a review under this Subdivision may not raise any matter that was not raised in submissions to the AER before the reviewable regulatory decision was made.

**71P—Tribunal must make determination**

(1) If, following an application, the Tribunal grants leave in accordance with section 71B(1), the Tribunal must make a determination in respect of the application.

**Note**—

See section 71Q for the time limit within which the Tribunal must make its determination.

(2) A determination under this section may—

(a) affirm, set aside or vary the reviewable regulatory decision;

(b) remit the matter back to the AER to make the decision again, in accordance with any direction or recommendation of the Tribunal.

(3) For the purposes of making a determination of the kind in subsection (2)(a), the Tribunal may perform all the functions and exercise all the powers of the AER under this Law or the Rules.

(4) In deciding whether to remit a matter back to the AER to make the decision again, the Tribunal must have regard to the nature and relative complexities of—

(a) the reviewable regulatory decision; and

(b) the matter the subject of the review.

(5) A determination by the Tribunal affirming, setting aside or varying the reviewable regulatory decision is, for the purposes of this Law (other than this Part), to be taken to be a decision of the AER.

1. Section 71R provides that the Tribunal, in reviewing a reviewable regulatory decision, must not consider any matter other than review related matter.
2. In our view, in order to qualify as a valid application made to the Tribunal pursuant to s 71B(1) of the NEL, that application must *“… specify the grounds for review being relied on …”* by the applicant for leave. The requirement that the grounds be so specified is fundamental to the proper working of the review process. The grounds for review which must be specified are those grounds which are described in s 71C of the NEL. The leave applicant’s complaints must be able to be characterised as falling within one or more of the grounds specified in s 71C. The leave applicant’s s 71B application must identify with precision the errors about which complaint is made. The requirements of ss 71E, 71F and 71G cannot be met in the absence of a clear specification of the grounds of review to be relied upon. These are all effectively threshold requirements.
3. It is quite clear that the merits review which the NEL permits under Subdiv 2 of Pt 6, Div 3A of the NEL is a limited merits review circumscribed by the provisions of that subdivision.
4. The relief which the Tribunal is empowered to grant in respect of a review application is set out in s 71P of the NEL. That relief is relief directed to the reviewable regulatory decision in respect of which leave to apply for a review has been granted by the Tribunal. Although the relief is directed to the ultimate decision made by the AER, the basis upon which that relief might be granted is restricted to those grounds for review which have been the subject of leave granted by the Tribunal and which otherwise meet the requirements of s 71C of the NEL.
5. It would make a nonsense of this carefully drawn review framework were the Tribunal to allow persons who were not parties to a review application and who had not been granted a right to intervene in that application to raise matters in respect of the reviewable regulatory decision under consideration which had not been raised by the review applicant and which were not legitimately raised by the AER under s 71O(1) of the NEL.
6. In the review applications with which the Tribunal is presently dealing, notwithstanding that the AER itself considered the entire market for distribution services in Victoria as a whole before making the five final determinations in respect of the DNSPs which it ultimately made and notwithstanding that the Tribunal has itself, as a practical matter, programmed the hearing of the issues raised in the individual review applications by reference to the issues raised in those applications in order to conveniently and sensibly dispose of those issues, the Tribunal is nonetheless obliged to consider each review application in accordance with the requirements of Subdiv 2 of Pt 6, Div 3A of the NEL. For example, in respect of JEN’s application for review, only JEN and the Minister (pursuant to s 71M) are entitled to raise grounds of review. In addition, the AER is entitled to raise matters in accordance with s 71O(1) of the NEL. That is to say, the AER may raise a matter not raised by the applicant or an intervener that relates to a ground of review, or a matter raised in support of a ground of review, raised by the applicant or an intervener, or may raise a possible outcome or effect of a likely outcome in the course of a review. However, the AER’s entitlement to bring forward new material in a review application is very limited indeed.
7. The essence of the Tribunal’s decision in respect of the ESCV S Factor Scheme closeout methodology in UED’s review application was that the approach taken by the AER in its final determination in respect of UED was not authorised by the NEL or the NER.
8. Neither CitiPower nor Powercor disagreed during the regulatory process with the AER’s approach in respect of the closeout of the ESCV S Factor Scheme. Neither of those parties sought the leave of the Tribunal to challenge the final determinations made by the AER in respect of them on this ground. SP AusNet had criticised the AER for seeking to apply its ESCV S Factor Scheme closeout methodology but did so on a different ground from that which was argued by UED. JEN had a different approach altogether.
9. Notwithstanding these circumstances, the AER, SP AusNet, CitiPower and Powercor now argue for the outcomes which we have summarised at [7]–[8] above.
10. The only grounds for review available to a review applicant under the relevant merits review framework found in Subdiv 2 of Pt 6 Div 3A of the NEL are those specified in s 71C. Whilst it is true that the Tribunal held that the application of the AER’s ESCV S Factor Scheme closeout methodology was not authorised by the NEL or the NER, relief was granted to UED in light of that conclusion because the Tribunal accepted that UED had made out the grounds of review specified in s 71C(1)(c) and (d) of the NEL. That is to say, UED had established that, by applying that methodology, the AER had wrongly exercised a discretion, having regard to all the circumstances, and that its decision in this regard was unreasonable, having regard to all the circumstances. It must be remembered that there is no separate ground for review characterised by the expression *“jurisdictional error”*.
11. Neither CitiPower nor Powercor sought or was granted leave to raise a ground of review that the AER had wrongly exercised a discretion or made an unreasonable decision in their final determinations because it had applied to those final determinations the ESCV S Factor Scheme closeout methodology which it had foreshadowed during the regulatory process. Indeed, to the contrary, those corporations were satisfied with that methodology. The review applications made by them did not include such a ground. Nor did they attempt to bring forward such a ground at the hearing conducted by the Tribunal in respect of their review applications. Although SP AusNet had raised some criticism of the approach during the regulatory process, that criticism was not based upon the ground now sought to be agitated and, in any event, was not pressed beyond the regulatory process.
12. In our view, none of SP AusNet, CitiPower or Powercor can raise as a ground of review in their review applications the current challenge which they seek to make to the application of the ESCV S Factor Scheme closeout methodology by the AER. They are prevented from doing so by the fact that they did not seek or obtain leave to raise that matter in those applications and therefore did not in fact raise that matter in those applications.
13. Even if those DNSPs were entitled to raise this point now, we would not accede to it in the exercise of our discretion. The maintenance of the integrity of the review system by requiring a review applicant to articulate its case with precision at the earliest opportunity must be given significant weight. The need for consistency as between decisions cannot overcome the importance of this factor. Parties are presumed to act carefully in their own interests. They may have very good reason for not challenging a particular decision or for not putting a particular argument. It is for the parties to set the agenda for the review process and to do so at the start of that process. Except to the limited extent provided for in the NEL, the process does not permit the officious interference in that process by third parties, especially at the very end of that process. The Tribunal’s power to review a reviewable regulatory decision is not at large. It is limited by the requirements of Pt 6, Div 3A, Subdiv 2 of the NEL. The need for finality and certainty in the regulatory process militates very strongly against allowing late applications of the kind now sought to be made.
14. In addition, the AER has not satisfied us that the application of its closeout methodology relates to some other ground already legitimately raised by SP AusNet, CitiPower and Powercor in their review applications in respect of which leave was sought and granted. Nor has it satisfied us that there was a basis under s 71O(1)(b) to raise the matter.
15. Finally, we think that the provisions of s 71O(2) also prevent SP AusNet, CitiPower and Powercor from agitating this matter at this stage.
16. For the same reasons, we would not be disposed to grant leave to amend either to CitiPower or to Powercor in order to permit them to raise this issue. We doubt very much whether we have the power to grant such a leave but, in the exercise of our discretion, would not be disposed to do so in any event.
17. The AER has also failed to persuade us that it can legitimately raise this issue in JEN’s review application. It has not satisfied s 71O(1) of the NEL. There is no other basis upon which it can now legitimately bring forward fresh material or fresh issues in JEN’s application.
18. For these reasons, we would reject all of the applications made in respect of the ESCV S Factor Scheme closeout methodology.
19. Before leaving this topic, we should briefly address the question of jurisdictional error.
20. As the Minister correctly submitted, the gravamen of the submissions made by the AER and some of the DNSPs to the effect that the application by the AER of its ESCV S Factor Scheme closeout methodology was not authorised by the NEL or the NER is that, because the Tribunal so held, that finding is to be equated to a finding that the AER exercised a jurisdiction which it did not possess at all and thus committed jurisdictional error. It was then submitted that its decision to apply that methodology was a nullity.
21. At [91] (pp 388–389) of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the plurality (McHugh, Gummow, Kirby and Hayne JJ) said:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied (*Howard v Bodington* (1877) 2 PD 203 at 211, per Lord Penzance); there is not even a ranking of relevant factors or categories to give guidance on the issue.

1. At [93] (pp 390–391), their Honours said:

A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales (*Hatton v Beaumont* [1977] 2 NSWLR 211 at 213, 226; *Attorney-General (NSW); Ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 965; *Tasker v Fullwood [1*978] 1 NSWLR 20 at 24; *National Mutual Fire Insurance Co Ltd v The Commonwealth* [1981] 1 NSWLR 400 at 408; *TVW Enterprises Ltd v Duffy [No 3]* (1985) 8 FCR 93 at 102; *McRae v Coulton* (1986) 7 NSWLR 644 at 661 and see A*ustralian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457-460; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1 at 24-26. See also two recent decisions of the Court of Appeal of the Supreme Court of the Northern Territory: *Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR 1 at 5; *Collins Radio Constructions Inc v Day* (1997) 116 NTR 14 at 17; and *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 at 1294, 1296; [1995] 1 All ER 367 at 375, 377). In determining the question of purpose, regard must be had to “the language of the relevant provision and the scope and object of the whole statute” (*Tasker v Fullwood* [1978] 1 NSWLR 20 at 24).

1. As submitted by the Minister, there are strong indications in the NEL that the legislature did not intend that any constituent decision made by the AER during the regulatory process and reflected in the final determination which was not authorised by a correct interpretation of the NEL or the NER would be a nullity.
2. The relevant constituent decision is required to be made pursuant to r 6.12.1(9) of the NER. There is no concept of *“constituent decision”* in the NEL: the concept appears only in the NER. An error in a constituent decision does not in and of itself necessarily in every case make a reviewable regulatory decision unreasonable. This is so, even if the error is properly characterised as resulting from the adoption of an approach which was not authorised by the NEL or the NER. This proposition was endorsed by the Tribunal in *Application by EnergyAustralia et al* [2009] ACompT 8 at [316(c)].
3. For an argument along the lines now being sought to be advanced by the AER and some of the DNSPs to succeed, those parties must demonstrate that the ultimate reviewable regulatory decision was not determined by reference to applicable criteria in the NEL and the NER. They have failed to do so.
4. For these reasons, we are not at all persuaded that the error which we found the AER committed in relation to the closeout of the ESCV S Factor Scheme is properly characterised as jurisdictional error. It follows that the decision which the AER made to apply its closeout methodology was not a nullity.

# Issue 2—The RAB Indexation Decision

1. For the same reasons as we have rejected the applications made in respect of the ESCV S Factor Scheme closeout decision, we reject the applications made in respect of the RAB indexation decision.
2. We should add that, in our view, the fact that a party (JEN) raised this matter in its review application, the fact that the AER gave one set of reasons in support of its five separate reviewable regulatory decisions made in respect of the DNSPs and the fact that, as a matter of practicality and convenience, the Tribunal heard the issues raised by the various review applications at more or less the same time, make no difference to the outcome. Each review application must be considered on its merits according to the legislative regime governing its consideration. Case management issues cannot override or negate those requirements.
3. The AER also submits that it has no power within the remitter on the RAB indexation issue to carry out any consequential reindexation on the remitter of other PTRM inputs. The Tribunal agrees with this submission. All that the AER is required to do is to give effect to the Tribunal’s decision in respect of the indexation of JEN’s RAB for inflation—no more and no less. This will be the effect of the orders which we propose to make.

# Issue 3—The 2001–2005 Accrued Negative Carryover Decision (Powercor)

1. Once again, for the same reasons as we have rejected the applications in respect of the ESCV S Factor Scheme closeout methodology and the indexation of the RAB for inflation, we would reject the applications made in respect of this matter.
2. The present applications seek to extrapolate the reasoning behind the decision which the Tribunal made in respect of Powercor (which concerned the carry over of its performance in the 2001–2005 regulatory period into the 2011–2015 regulatory period with some consequential adjustments in respect of the 2006–2010 regulatory period) to an entirely different regulatory period, namely, the 2006–2010 regulatory period.
3. No such contention was ever advanced to the AER or litigated before the Tribunal.
4. These applications must be rejected.

# Issue 4—Debt Risk Premium

1. No liberty to apply in respect of DRP was granted by the Tribunal on 6 January 2012.
2. For that reason, we will not entertain the applications now sought to be made.
3. In any event, for the same reasons as we have rejected the other applications, we would reject the applications made as a result of the Tribunal’s decision in the JEN review application concerning the DRP.

# Conclusions

1. We are not disposed to grant any of the relief sought by the AER and the DNSPs in relation to the four issues with which these Reasons for Decision deal.
2. We have not thought it necessary to address in detail every single submission made by the AER and the DNSPs in relation to the applications with which these Reasons for Decision deal. Those submissions were made both in writing and orally. The Written Submissions will remain with the Tribunal file.
3. For all of the above reasons, the present applications will all be refused.

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| I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Foster (Deputy President), Mr G Latta AM and Professor D Round. |

Associate:

Dated: 5 April 2012

# Attachment “A”

**LIST OF ACRONYMS**

| **Term** | **Definition** | **Para** |
| --- | --- | --- |
| **2001–2005 ECM** | ECM that applied to Powercor’s expenditure in the 2001–2005 regulatory period  | 594(a)(i) |
| **2006–2010 ECM** | ECM that applied to Powercor’s expenditure in 2006–2010  | 594(a)(iii) |
| **AEMA** | Australian Energy Market Agreement  | 23 |
| **AEMC** | Australian Energy Market Commission | 43 |
| **AER** | Australian Energy Regulator | 1 |
| **AMPCI** | AMP Capital Investors Limited  | 135 |
| **APT** | Australian Pipeline Trust  | 387 |
| **bushfire mitigation amendment regulations** | *Electricity Safety (Bushfire Mitigation) Amendment Interim Regulations 2010*  | 559 |
| **CitiPower** | CitiPower Pty  | 5(i) |
| **COAG** | Council of Australian Governments  | 23 |
| **Corporations Act** | *Corporations Act 2001* (Cth)  | 496(b) |
| **DNSPs** | Registered distribution network service providers in Victoria  | 1 |
| **DRP** | Debt Risk Premium  | 387 |
| **DRP annualisation ground** | The challenge made by each of the DNSPs in their applications for review to the AER’s decision not to annualise the Bloomberg fair bond yield date  | 387 |
| **EBSS** | “electricity distribution network service providers Efficiency Benefit Sharing Scheme June 2008”  | 594(a)(iv) |
| **ECM** | efficiency carryover mechanism | 540 |
| **ESCV** | Essential Services Commission of Victoria  | 2 |
| **ESCV S Factor Scheme** | The formula and cl 2.3.9 to cl 2.3.11 of the last ESCV price determination in accordance with which the service adjustment (St) was calculated | 207 |
| **ESCVs ECM** | The ECM set out by the ESCV in the last ESCV price determination to be applied to the DNSPs in respect of expenditure incurred in the 2011–2015 regulatory period | 604(b) |
| **ESFs** | enterprise support functions  | 466 |
| **ESV** | Energy Safe Victoria  | 549(c) |
| **gamma ground of review** | The ground of review raised by each of the DNSPs in their review applications relating to the AER’s decision on the value of gamma  | 512 |
| **GIS** | geographical information system  | 100(c)(ii) |
| **HBRA** | hazardous bushfire risk area  | 560 |
| **JAM** | Jemena Asset Management Pty Limited  | 133 |
| **JEN** | Jemena Electricity Networks (Vic) Ltd  | 5(iii) |
| **LBRA** | low bushfire risk area  | 653(c) |
| **NEL** | *National Electricity Law*  | 1 |
| **NEM** | National Electricity Market  | 15 |
| **NEO** | national electricity objective  | 33 |
| **NER** | *National Electricity Rules(Version 39)*  | 1 |
| **NERegs** | National Electricity Regulations | 15 |
| **NESA** | *National Electricity (South Australia) Act 1996*  | 15 |
| **NEVA** | *National Electricity (Victoria) Act 2005*  | 26 |
| **OMR** | operations, maintenance, repair and replacement  | 91 |
| **ORG** | Office of the Regulator-General (Vic)  | 21 |
| **ORGs ECM** | The ECM set out by the ORG in its 2001–2005 price determination to be applied to the expenditure incurred in the 2001–2005 regulatory period in order to calculate the 2001–2005 ECM carryover amounts to be included in the DNSP’s revenue requirements for the 2006–2010 regulatory period  | 600(b) |
| **PE cells** | photoelectric cells  | 110(c) |
| **PIES** | Pacific Indian Energy Services Pty Ltd  | 135 |
| **PLC** | Victorian Public Lighting Code | 100(e) |
| **Powercor** | Powercor Australia Limited  | 5(ii) |
| **PTRM** | post tax revenue model  | 341 |
| **RAB** | regulatory asset base  | 110(d) |
| **related party margins** | related party profit margins  | 248 |
| **RFM** | roll forward model | 68 |
| **RIN** | Regulatory Information Notice | 133 |
| **RPP** | revenue and pricing principles  | 33 |
| **Safety Act** | *Electricity Safety Act 1998* (Vic)  | 559 |
| **SCO** | Standing Committee of Officials of the Ministerial Council on Energy  | 306 |
| **SGC** | Streetlight Group of Councils | 7 |
| **SP AusNet** | SPI Electricity Pty Limited  | 5(iv) |
| **STPIS** | service target performance incentive scheme  | 220 |
| **SWER** | single-wire earth return  | 549(a) |
| **the 2005 clearance regulations** | *Electricity Safety (Electric Line Clearance) Regulations 2005* | 622 |
| **the 2010 clearance regulations** | *Electricity Safety (Electric Line Clearance) Regulations 2010* | 625 |
| **the APT bond** | A bond issued by Australian Pipeline Trust  | 387 |
| **the Competition Act** | *Competition and Consumer Act 2010* (Cth)  | 40 |
| **the disallowed ESF costs** | the remaining three cost centres referred to in subpars (a) to (c) of [468]  | 470 |
| **the final decision** | AER’s final determination and its reasons for that determination published on 29 October 2010 | 1 |
| **the insurance event** | the rider excluded from the scope of the additional nominated *pass through event* concerning insurance  | 532 |
| **the JEN DRP methodology ground** | The argument made by JEN that it was unreasonable for the AER to use yields from a bond issued by APT to estimate the DRP for the JEN averaging period  | 387 |
| **the last ESCV price determination** | a price determination made by the ESCV on 18 October 2005  | 202 |
| **the Minister** | The Victorian Minister for Energy and Resources | 7 |
| **the relevant VBRC recommendations** | The principal recommendations of the Victorian Bushfires Royal Commission which affect the DNSPs | 549(c) |
| **the UEDH costs** | An item in UED’s audited regulatory accounts for the 2009 calendar year dated 30 April 2010 and described as follows on p 36 of those accounts | 131(a) |
| **TNSPs** | transmission network service providers  | 526(e) |
| **UED** | United Energy Distribution Pty Limited  | 5(v) |
| **UED direct costs** | Costs incurred by UED itself directly  | 131(a) |
| **VBRC** | Victorian Bushfires Royal Commission | 548 |
| **VEMCO** | Vemco Pty Ltd | 633 |
| **WACC** | weighted average cost of capital  | 110(d) |
| **WOBCA** | whole of business cost allocation  | 467 |