Federal Court of Australia

ActewAGL Distribution v The Australian Energy Regulator [2011] FCA 639 (8 June 2011)

Last Updated: 10 June 2011

FEDERAL COURT OF AUSTRALIA

ActewAGL Distribution v The Australian Energy Regulator [2011] FCA 639

Citation:	ActewAGL Distribution v The Australian Energy Regulator [2011] FCA 639
Parties:	**ACTEWAGL DISTRIBUTION, A PARTNER BETWEEN ACTEW DISTRIBUTION LIMI JEMENA NETWORKS (ACT) PTY LIMITE AUSTRALIAN ENERGY REGULATOR**
File number(s):	NSD 1252 of 2010
Judge:	**KATZMANN J**
Date of judgment:	8 June 2011
Catchwords:	**ADMINISTRATIVE LAW** – Application for re

under s 5 of the *Administrative Decisions (Judici*
Act 1977 (Cth) – National Electricity Law – Nati
Electricity Rules – decisions relating to the regul
the wholesale price of electricity in the ACT – wh
Australian Energy Regulator had the power to va
decision about the averaging period to be used to
the nominal risk-free rate of capital after the peri
been specified – application filed well outside sta
period – whether extension of time should be gra
whether discretion should be exercised under s 1(
of the *Administrative Decisions (Judicial Review*
refuse to grant the application

Legislation:

Acts Interpretation Act 1901 (Cth) s 33(1)
Administrative Decisions (Judicial Review) Act 1
ss 5, 5(2)(j), 10(1)(a), 10(2)(b), 10(2)(b)(ii), 11
Competition and Consumer Act 2010 (Cth) ss 37,
Electricity (National Scheme) Act 1997 (ACT) s 5
Federal Court of Australia Act 1976 (Cth) ss 37M
Federal Court Rules O 54 r 7(2)
Judiciary Act 1901 (Cth) ss 37, 39B, 42
National Electricity (South Australia) Act 1996 (S
National Electricity Law ss 9, 34, 71B(1), 71C, 7
71P(2) 71P(5), 71Q(1), Sch 1 cll 7, 7A(2)
National Electricity Rules cll 6.13(a), 6.5.2

Cases cited:

Aerolineas Argentinas v Federal Airports Corpor
(1995) 63 FCR 100
Application by EnergyAustralia [2009] ACompT
Associated Provincial Picture Houses Ltd v Wedn
Corporation [1947] EWCA Civ 1; [1948] 1 KB 2
Australian Competition and Consumer Commissi
(ACCC) v Australian Competition Tribunal [2006
83; (2006) 152 FCR 33
British Oxygen Co v Board of Trade [1970] UKH
[1971] AC 610
Bragg v Secretary, Department of Employment, E

and Training (1995) 59 FCR 31
Chapman v Reilly, unreported, Federal Court of A
December 1983
Comcare v A'Hearn [1993] FCA 498; (1993) 45
Dickson v Whiddett [2001] FCA 585
Re Drake and Minister for Immigration and Ethn
(No. 2) (1979) 2 ALD 634
Edelsten v Minister for Health (1994) 58 FCR 41
FAI Insurances Ltd v Winneke [1982] HCA 26; (
CLR 342
Federal Airports Corporation v Aerolineas Arger
[1997] FCA 723; (1997) 76 FCR 582
Hunter Valley Developments Pty Ltd v Cohen [19
176; (1984) 3 FCR 344
Kelly v Coats [1981] FCA 58; (1981) 35 ALR 93
Kimberly-Clark Ltd v Commissioner of Patents (
ALR 714
Lucic v Nolan (1982) 45 ALR 411
McGowan v Migration Agents Registration Autho
[2003] FCA 482; (2003) 129 FCR 118
Minister for Aboriginal Affairs v Peko-Wallsend
HCA 40; (1986) 162 CLR 24
Minister for Immigration and Ethnic Affairs v Wu
Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration and Multicultural Affai
Bhardwaj [2002] HCA 11; (2002) 209 CLR 597
Minister for Immigration and Multicultural Affai
Kurtovic [1990] FCA 22; (1990) 21 FCR 193
Neat Domestic Trading Ply Ltd v AWB Ltd [2003
(2003) 216 CLR 277
Nominal Defendant v GLG Australia Pty Limited
HCA 11; (2006) 228 CLR 529
Saitta Pty Ltd v Commonwealth of Australia [200
1546; (2000) 106 FCR 554
Seiler v Minister for Immigration, Local Governn
Ethnic Affairs [1994] FCA 878; (1994) 48 FCR 8
SS Constructions Pty Ltd v Ventura Motors Pty L
VicRp 32; [1964] VR 229

Sunshine Coast Broadcasters Ltd v Duncan (198
121
Swan Portland Cement Ltd v Comptroller-Gener
Customs (1989) 25 FCR 523
Swan Portland Cement Ltd v Comptroller-Gener
Customs (1989) 17 ALD 551
Telstra Corporation Limited v Australian Compe
Tribunal [2009] FCAFC 23
Wedesweiller v Cole [1983] FCA 94; (1983) 47 A
Yarmirr v Australian Telecommunications Corpo
(1990) 96 ALR 739
Zizza v Federal Commissioner of Taxation (1999
4711

Dates of hearing:	16, 17, 29 and 30 March 2011
Date of last submissions:	6 April 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	198
Counsel for the Applicant:	Mr A Robertson SC with Ms RCA Higgins
Solicitor for the Applicant:	Mallesons Stephen Jaques
Counsel for the Respondent:	Mr S Lloyd SC with Mr S Balafoutis
Solicitor for the Respondent:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1**

BETWEEN: **ACTEWAGL DISTRIBUTION, A PARTNERSHIP I**
ACTEW DISTRIBUTION LIMITED AND JEMENA
NETWORKS (ACT) PTY LIMITED
Applicant
AND: **THE AUSTRALIAN ENERGY REGULATOR**
Respondent

JUDGE: **KATZMANN J**
DATE OF ORDER: **8 JUNE 2011**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1**

BETWEEN: **ACTEWAGL DISTRIBUTION, A PARTNERSHIP I**
ACTEW DISTRIBUTION LIMITED AND JEMENA
NETWORKS (ACT) PTY LIMITED
Applicant
AND: **THE AUSTRALIAN ENERGY REGULATOR**
Respondent

JUDGE: **KATZMANN J**
DATE: **8 JUNE 2011**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1. This case is concerned with decisions made in 2008 and 2009 relating to the regulation of the wholesale price for the distribution of electricity in the Australian Capital Territory ("ACT") in the five-year period from 2009 to 2014.
2. The decision-maker is the respondent ("AER"), the body responsible for the economic regulation of electricity distribution and transmission services in the National Electricity Market, a wholesale electricity exchange for those Australian States and Territories that are electrically connected, that is to say, all except Western Australia and the Northern Territory.
3. The AER is established as a body corporate under s 44AE of the *Competition and Consumer Act 2010* (Cth) (formerly s 44AE of the *Trade Practices Act 1974* (Cth)). Its functions and powers are defined by the National Electricity Law ("NEL") and the National Electricity Rules ("NER"). The NEL is a schedule to the *National Electricity (South Australia) Act 1996* (SA) and is applied as a law of the Australian Capital Territory by s 5 of the *Electricity (National Scheme) Act 1997* (ACT). The NER consist of rules made initially by the Minister, and thereafter by the Australian Energy Market Commission ("AEMC"), pursuant to s 34 of the NEL, and which (by s 9 of the NEL) have the force of law.
4. The regulatory scheme determines the allowed revenue of a regulated business. For this purpose, the costs of the business must be calculated by reference to the rate of return on capital.
5. The AER's chief regulatory function is the setting of annual revenue requirements that a transmission network service provider and a distribution network service provider can recover from the provision of direct control services in a regulatory control period. The regulatory control period, in substance, is a period of no less than five years during which the controls are in place.
6. The applicant ("ActewAGL") is a distribution network service provider registered under cl 2.5.1 of the NER, and the owner and operator of the ACT electricity distribution network.
7. In the period between July 2008 and April 2009 the AER made a series of decisions relating to ActewAGL culminating in the publication on 28 April 2009 of its distribution determination for the five-year regulatory control period from 1 July 2009 to 30 June 2014: *Final Decision, Australian Capital Territory distribution*

determination, 2009-10 to 2013-14 ("Final Decision"). The Final Decision is 274 pages long and documents the processes that the parties undertook in the lead-up to the distribution determination, the submissions made by ActewAGL (and, where relevant, other network service providers), and the reasons for the various decisions made by the AER. At the same time the AER published distribution determinations affecting other network service providers.

8. ActewAGL is aggrieved by the AER's decisions concerning one variable in an equation used to calculate the rate of return on capital specified in August 2008 and applied in the Final Decision. At the heart of ActewAGL's grievance is its perception (shared by other service providers) that it has been unfairly disadvantaged by the imposition of a rate that did not account for the impact of the global financial crisis.

9. It was open to ActewAGL to challenge the Final Decision on its merits in the Australian Competition Tribunal ("the Tribunal"), as other network service providers did, but it chose not to. The other providers succeeded in their challenges, which included challenges to the rate of return. The Tribunal made a decision upholding the approach they had tried to persuade the AER to adopt: *Application by EnergyAustralia* [2009] ACompT 8 ("*EnergyAustralia*"). After ActewAGL became aware of their success, it tried to persuade the AER to alter its decision in conformity with the approach taken by the Tribunal. Those attempts failed and on 24 September 2010 ActewAGL filed an application in this Court for an order of review pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act") setting aside the relevant parts of the Final Decision and referring the matter back to the AER for reconsideration. Clause 2(da) of Schedule 3 of the ADJR Act relevantly provides that the *National Electricity (South Australia) Act 1996* (SA) is an enactment for the purposes of the ADJR Act. As the application was filed well outside the prescribed time, ActewAGL seeks an extension of time.

10. The AER opposes both the application and the extension of time. It also argues that the Court should exercise its discretion under s 10(2)(b) of the ADJR Act to refuse to grant the application because of ActewAGL's entitlement to seek a review of the decision in the Tribunal.

11. Although the application as filed challenged only the Final Decision, it referred to an earlier decision and, over the objection of the AER, I granted leave to ActewAGL to amend the application to make it clear which decisions it wished the Court to review. In the result, ActewAGL challenges three decisions of the AER made in July and August 2008 and April 2009.
12. The decisions were made under the transitional rules contained in transitional chapter 6 of the NER. The transitional rules specify a formula for calculating the rate of return for the five-year regulatory control period. One component of that formula is what is known as "the nominal risk-free rate". That is determined by reference to the yield on 10 year Commonwealth Government bonds and an agreed or appointed period ("averaging period") over which the rate will be calculated. The averaging period that is chosen affects the weighted average cost of capital, which, in turn, affects the annual revenue requirement, and, ultimately, the prices a distribution network service provider can charge its customers.
13. Under the terms of the NER, the distribution network service provider must first propose an averaging period. The AER may either agree with that proposal or not, but its agreement may not be unreasonably withheld.
14. ActewAGL proposed one period, with which the AER did not agree. After the AER had specified a different period, ActewAGL then submitted a revised proposal which the AER declined to accept. ActewAGL contends that the AER unreasonably withheld its agreement to the two proposals and its decisions to do so were reached or affected by reviewable error.

THE LEGISLATIVE SCHEME

1. The NER commenced on 1 July 2005, replacing the National Electricity Code which previously regulated electricity and gas distribution. Division 2 contains special transitional provisions applying to NSW and the ACT for the 2009-2014 regulatory control period. Those special provisions appear in Chapter 11. In substance they adopt a varied form of chapter 6 of the NER for the NSW and ACT distribution network service providers. The prices ActewAGL was entitled to charge its customers and the revenue it was able to generate for the five-year period from 1 July 2009 were determined

by those transitional rules and the decisions under review were made under them.

2. Under the transitional rules, the annual revenue requirement for the distribution network service providers for each regulatory year of a regulatory control period had to be determined using a "building block" approach that employed defined building blocks. They included the indexation of the regulatory asset base of the provider (that is, the value of the assets used to provide the distribution service but only to the extent that they are so used: cl 6.5.1(a)) and a return on capital for that year: cl 6.4.3(a). ActewAGL, as a distribution network service provider, was obliged to submit a regulatory proposal (that included a building block proposal) for the 2009-2014 regulatory period on or before 2 June 2008: cl 6.8.2.

3. Subject to the provisions in the NEL and the NER about confidentiality, the AER was required to publish the regulatory proposal and invite written submissions on the proposal and other matters within a prescribed period: cl 6.9.3. The AER was obliged to consider those submissions and then make and publish a draft distribution determination, which included its reasons for making the determination and its various constituent decisions (defined in cl 6.12.1): cll 6.10.1, 6.10.2. One of those constituent decisions was a decision in relation to the rate of return on capital: cl 6.12.1(5). In addition to making a written submission, a provider was entitled to submit a revised regulatory proposal to the AER within 30 business days after the publication of the draft determination, but only "so as to incorporate the substance of any changes required to address matters raised by the draft distribution determination or the AER's reasons for it": cl 6.10.3(a) and (b). The AER was entitled, but not bound, to invite written submissions on the revised proposal: cl 6.10.3(e). It was required to consider any submissions made on the draft determination or any revised proposal and then make a distribution determination in relation to the provider: cl 6.11.1.

4. The regulatory framework was described by the Tribunal in the *EnergyAustralia* case at [10]-[14]:

[10] The NEL and the National Electricity Rules ('the Rules') provide the economic and legal framework for the regulation of the revenues of the Applicants operating in the national electricity market.

[11] The NEL requires that in performing or exercising its economic regulatory functions or powers the AER must:

- do so in a manner that will, or is likely to, contribute to the achievement of the national electricity objective (s 16(1)); and
- take into account the revenue and pricing principles (s 16(2)).

[12] The national electricity objective, found in s 7 of the NEL, is:

... to promote efficient investment in, and efficient operation and use of, electricity services for the long term interest of consumers of electricity with respect to:

(a) price, quality, safety, reliability and security of supply of electricity; and

(b) the reliability, safety and security of the national electricity system.

[13] The revenue and pricing principles set out in s 7A of the NEL are:

(2) A regulated network service provider should be provided with a reasonable opportunity to recover at least the efficient costs the operator incurs in –

(a) providing direct control network services; and

(b) complying with a regulatory obligation or requirement or making a regulatory payment.

(3) A regulated network service provider should be provided with effective incentives in order to promote economic efficiency with respect to direct control network services the operator provides. The economic efficiency that should be promoted includes –
(a) efficient investment in a distribution system or transmission system with which the operator provides direct control network services; and

(b) the efficient provision of electricity network services; and

(c) the efficient use of the distribution system or transmission system with

which the operator provides direct control network services.

(4) Regard should be had to the regulatory asset base with respect to a distribution system or transmission system adopted –

(a) in any previous –

(i) as the case requires, distribution determination or transmission determination; or

(ii) determination or decision under the National Electricity Code or jurisdictional electricity legislation regulating the revenue earned, or prices charged, by a person providing services by means of that distribution system or transmission system; or

(b) in the Rules.

(5) A price or charge for the provision of a direct control network service should allow for a return commensurate with the regulatory and commercial risks involved in providing the direct control network service to which that price or charge relates.

(6) Regard should be had to the economic costs and risks of the potential for under and over investment by a regulated network service provider in, as the case requires, a distribution system or transmission system with which a regulated network service provider provides direct control network services.

(7) Regard should be had to the economic costs and risks of the potential for under and over utilisation of a distribution system or transmission system with which a regulated network service provider provides direct control network services.

[14] The national electricity objective provides the overarching economic objective for regulation under the NEL: the promotion of efficient investment and efficient operation and use of, electricity services for the long term interests of consumers. Consumers will benefit in the long run if resources are used efficiently, that is if resources are allocated to the

delivery of goods and services in accordance with consumer preferences at least cost. As reflected in the revenue and pricing principles, this in turn requires prices to reflect the long run cost of supply and to support efficient investment, providing investors with a return which covers the opportunity cost of capital required to deliver the services.

Calculating the rate of return on capital: clause 6.5.2

1. Clause 6.5.2 of the transitional rules prescribes the method for calculating the rate of return on capital for the regulatory control period.
2. Clause 6.5.2(a) provides that the return on capital for each regulatory year must be calculated by applying a rate of return for the relevant distribution network service provider for the five-year regulatory control period to the value of the regulatory asset base as at the beginning of the regulatory year. The rate of return is calculated in accordance with cl 6.5.2(b).
3. Clause 6.5.2(b) contains both a conceptual definition of the rate of return and a mandatory requirement to use a particular formula to ascertain it. The rate of return is defined as "the cost of capital as measured by the return required by investors in a commercial enterprise with a similar nature and degree of non-diversifiable risk as that faced by the *distribution* business of the provider" (original emphasis). A non-diversifiable risk is one that relates to market-wide risk factors as distinct from a diversifiable risk, which is a unique risk specific to an asset and which can be eliminated by investors who hold a well-diversified portfolio of assets. The clause stipulates that the rate of return must be calculated as a nominal post-tax weighted average cost of capital ("WACC"), by a statutory formula.
4. The formula is complex. It involves multiple equations. The relevant equation is that which determines the return on equity (k_e), which paragraph (b) provides must be determined using the Capital Asset Pricing Model ("CAPM") and certain defined parameters. The CAPM yields the expected return on equity having regard to the return on the market portfolio, the volatility of the market and the systematic risk of holding equity in the particular business. It specifies a relationship between the expected return of an individual risky asset or business and the level of systematic (or non-diversifiable) risk.

5. The equation for determining the return on equity involves adding the multiple of the equity beta (âe) and the market risk premium (MRP) to the nominal risk-free rate for the regulatory control period, which is determined in accordance with the process described in paragraph (c) of the clause. That calculation appears as:

$r_f + âe \times MRP$

where:

r_f is the nominal risk free rate for the regulatory control period determined in accordance with paragraph (c);

âe (the equity beta) is deemed to be 1.0; and

MRP (the market risk premium) is deemed to be 6.0%

1. The risk-free rate is the rate of return an investor receives from holding an asset with guaranteed payments, that is, where there is no risk of default. The AER described the nominal risk-free rate (r_f) in this way in its August 2008 issues paper on the review of the WACC parameters (at 26):

Where a risk free rate is calculated in nominal terms (actual cash flows) the risk free rate will compensate investors for the opportunity cost of not being able to invest in the next best equivalent 'riskless' investment. This includes compensation for:

- the time value of money
- the expected cost of inflation which is expected to decrease the purchasing power of the certain cash flows to be received and
- other possible premiums for certain risks, which might include liquidity and inflation risk.

1. The equity beta (âe) is a measure of the sensitivity of the return of a particular asset or business to the return on the market portfolio. An equity beta higher than 1.0 indicates that the asset has a higher systematic (non-diversifiable) risk relative to the rest of the market and, correspondingly, an equity beta of less than 1.0 signifies the asset has a lower systematic risk than the market.
2. The market risk premium (MRP) refers to the additional return (or premium) over the risk-free rate that investors require in order to be

induced to invest in a well-diversified portfolio of risky assets. Unlike the equity beta, it is common to all assets in the economy. Both the equity beta and the MRP are fixed under paragraph (b). The equity beta is deemed to be 1.0 (that is, level with the rest of the market) and the MRP is fixed at 6.0%.

3. Clause 6.5.2(c) defines the method for determining the nominal risk-free rate that is to be factored into the calculation of the return on equity prescribed by paragraph (b). Paragraph (c) provides for a proxy for the risk-free rate, as well as a means of determining the period over which the rate is to be calculated (namely, the averaging period).
4. First, it mandates the method for determining the nominal risk-free rate: by using "a moving average" (that is, an average of share prices over a period that moves forward regularly) from the annualised yield on Commonwealth Government bonds with a maturity of 10 years. Commonwealth Government bonds or securities are generally considered to be the best proxy for the nominal risk-free rate in this country as they are essentially free of the risk of default, are highly liquid assets and their yields are transparent. The Capital Asset Pricing Model requires the use of the most current information for deriving the rate of return. This in theory involves the use of the risk-free rate on the day that required returns are to be estimated (in this case, the beginning of the regulatory period) ("on-the-day rate"). Nevertheless, there are recognised problems with the use of an on-the-day rate which an averaging period is intended to address. In particular, deploying an averaging period will minimise day-to-day volatility in the market.
5. Secondly, paragraph (c) prescribes the way in which the nominal risk-free rate is to be calculated, namely, by using the indicative mid rates published by the Reserve Bank of Australia ("RBA").
6. Thirdly, paragraph (c) provides that the period of time over which the rate is determined is either a period proposed by the distribution network service provider (and agreed to by the AER) or a period specified by the AER (and notified to the provider within a reasonable time before the commencement of the period). In the former case, where the provider proposes a period, it stipulates that the agreement of the AER is "not to be unreasonably withheld". It is the operation of this discretion with which this case is concerned.

7. Clause 6.5.2(c) provides:

Meaning of nominal risk free rate

(c) The nominal risk free rate for a regulatory control period is the rate determined for that *regulatory control period* by the *AER* on a moving average basis from the annualised yield on Commonwealth Government bonds with a maturity of 10 years using:

(1)

the indicative mid rates published by the Reserve Bank of Australia; and

(2) a period of time which is either:

(i) a period ('the **agreed period**') proposed by the relevant *Distribution Network Service Provider,* and agreed by the *AER* (such agreement is not to be unreasonably withheld); or

(ii) a period specified by the *AER,* and notified to the provider within a reasonable time prior to the commencement of that period, if the period proposed by the provider is not agreed by the *AER* under subparagraph (i), and, for the purposes of subparagraph (i):

(iii) the start date and end date for the agreed period may be kept confidential, but only until the expiration of the agreed period; and

(iv) the *AER* must notify the *Distribution Network Service Provider* where or not it agrees with the proposed period within 30 *business days* of the date of submission of the *building block proposal*.

[original emphasis]

1. All the italicised terms are defined in a lengthy glossary in chapter 10 of the NER.
2. A "*regulatory control period*" in respect of a distribution network service provider is defined as:

A period of not less than 5 *regulatory years* for which the provider is subject to a control mechanism imposed by a distribution determination.

1. A "*regulatory year*" is defined as "each consecutive period of 12 calendar months in a *regulatory control period*", the first 12 month period starting at the beginning of the regulatory control period and the last ending at the end of the period.
2. "*Building block proposal*" is defined for a distribution network service provider as "the part of the provider's *regulatory proposal* relevant to the regulation of *standard control services*". Clause 6.2.3C(a) deems a distribution service provided by ActewAGL to be

classified as both a direct control service and a standard control service. Clause 6.8.2 of the transitional rules provides that a "regulatory proposal for *direct control services* classified as standard control services" must include a building block proposal. As I mentioned earlier, the contents of the building blocks are set out in cl 6.4.3(a).

BACKGROUND TO THE DECISIONS UNDER REVIEW

1. On 2 June 2008 ActewAGL lodged with the AER its regulatory proposal for the five-year regulatory control period commencing 1 July 2009. In that regulatory proposal, ActewAGL proposed that the period of time to be used to determine the nominal risk-free rate be the period of 20 business days ending on 30 June 2008 ("the original proposed averaging period").
2. On 8 July 2008 the AER wrote to ActewAGL rejecting its original proposed averaging period.
3. The letter stated, amongst other things:

The AER does not agree with the averaging period proposed by ActewAGL as the starting date of ActewAGL's proposed averaging period is almost 12 months prior to the commencement of the regulatory control period. In this regard, the AER considers that the starting date of the proposed period is too far removed from the date by which the AER is likely to publish ActewAGL's final determination, which is expected to be in April 2009, and the commencement of the 2009—14 regulatory control period. The averaging period proposed by ActewAGL is contrary to accepted regulatory practice as reflected in previous AER and ACCC determinations; the ACCC's Statement of Regulatory Principles and previous jurisdictional AER's determinations, all of which apply a nominal risk free rate averaging period considerably closer to the final determination date.

The AER's regulatory practice is supported by accepted expert views in the economics and finance literature. Capital Asset Pricing Model (CAPM) theory suggests that, ideally, the nominal risk free rate input will be calculated on the day of the final determination. The CAPM is an ex ante model and therefore the most up to date information should be used if available.

Further, applying an averaging period which is closely aligned to the date of the final determination provides an unbiased rate of return that is consistent with the market conditions at the time of the final determination.

1. I interpolate that the reference to "an unbiased rate of return" involves making a prediction about interest rates which although too high or too low at any particular point in time, is on average correct.
2. In its letter, the AER proposed a different period (20 days starting on 23 February 2009 and ending on 20 March 2009) and went on to invite ActewAGL to nominate an alternative averaging period between 1 February 2009 and 20 March 2009 if it disagreed with the AER's proposal.
3. On 14 August 2008 ActewAGL responded by proposing a period of 20 business days commencing 2 February 2009 and the AER agreed to the proposal on 20 August 2008. This is the period the AER referred to in the Final Decision as "the agreed averaging period". More accurately (and this appears to be common ground), it involved the AER specifying the period in accordance with cl 6.5.2(c)(2)(ii) (so from now on I will refer to this period as the "specified" averaging period).
4. On 7 November 2008 the AER released its draft distribution determination in accordance with its obligation under cl 6.10.2. That determination included its draft constituent decision on the rate of return in accordance with cl 6.5.2 (see cl 6.12.1(5)). In the draft determination, the AER noted that the risk-free rate would be updated, based on the specified averaging period, at the time of the final decision.
5. The averaging period was not disclosed in the draft determination because of a request from ActewAGL to keep the period confidential.
6. On 16 January 2009 ActewAGL submitted a revised regulatory proposal in which, amongst other things, it proposed a different averaging period, namely the period of 20 business days starting on 11 August 2008 and ending on 5 September 2008 ("the revised averaging period proposal"). The reason it gave was that, since its correspondence with the AER in July/August 2008, the global financial crisis ("GFC") had begun, its impact in Australia was

"extreme", and it depressed yields for Commonwealth Government securities used by the AER in determining the risk-free rate. It was concerned to avoid the inclusion of "abnormal market observations" which, it contended, would result from an averaging period that started after 5 September 2008 when the GFC began to worsen. It attached to its revised proposal a report by Competition Economists Group ("CEG") concerning the selection of an averaging period for the risk-free rate. The report recommended that the AER set an averaging period before September 2008 because of the effect of the GFC. At the time the AER did not question ActewAGL's entitlement to submit a revised averaging period proposal (and therefore the AER's obligation to consider it), although now it does.

7. On 28 April 2009 the AER published the Final Decision. It rejected ActewAGL's revised proposed averaging period, standing by the period of 20 business days commencing 2 February 2009 that it specified in August 2008. It applied the same approach to the proposals of all the network service providers, each of whom had made similar requests. Consequently, it also rejected the revised proposals of those other network service providers.

THE DECISIONS UNDER REVIEW

1. The first decision ActewAGL challenges is the decision made (or communicated) on 8 July 2008 to reject ActewAGL's original proposed averaging period, namely, the period of 20 business days ending on 30 June 2008. The second was the decision made (or communicated) on 20 August 2008 that the period of 20 business days commencing on 2 February 2009 would be used for the purpose of the final determination.
2. The third and final decision under challenge was the decision made on 28 April 2009 to reject the revised averaging period proposal.

THE REASONS FOR THE DECISIONS

1. The AER set out its reasons for disagreeing with ActewAGL's original proposal in its letter of 8 July 2008, part of which is extracted above at [38]. In short, its reasons were:

(a) The starting date for the proposed averaging period (20 business days ending 30 June 2008) was too far removed from the start of the regulatory control period (1 July 2009) and too far removed from the date the AER is

likely to publish its final determination (April 2009), and such an approach was contrary to accepted regulatory practice, which, it noted, was supported by recognised experts. It footnoted the letter with references to examples of articles and reports.

(b) Applying an averaging period closely aligned to the date of the final determination provides an unbiased rate of return consistent with market conditions at the time of the final determination.

1. The AER noted ActewAGL's concern about the volatility in debt markets and the need for certainty in order to manage its commercial risks. But it voiced its disagreement that certainty is relevant to applying an averaging period, the purpose of which, it stated, is to address the possible daily volatility in financial markets. It asserted that the publication of the regulatory determination provides a distribution network service provider with certainty about the rate of return which would apply during the ensuing regulatory control period and, in any event, that information is provided before the start of the regulatory control period.
2. In the letter to ActewAGL of 20 August 2008 the AER merely accepted the period nominated by ActewAGL in its letter of 14 August 2008 and, accordingly, specified the period to be used in the final determination as the 20 business days commencing 2 February 2009.
3. The reasons for the decision not to accept the revised averaging period proposal are summarised in Chapter 12 and detailed in Appendix I of the Final Decision. The AER referred to the arguments of both ActewAGL and all other network service providers who had made similar revised proposals. All were providers caught, like ActewAGL, by the transitional provisions of the NER. They were the applicants in the proceedings in the Tribunal. The AER said that it had considered the key arguments put forward in the revised regulatory proposals and the additional material, that is to say, the submissions and the consultants' reports furnished with them. In rejecting them, it also defended the decision it had made in August 2008.
4. In summary the AER made the following points:

(a) As the CEG report was applicable to the NSW distribution network

service providers, Transgrid and Transend, it should be taken into account in connection with their proposals.

(b) The decision to withhold agreement was reasonable and the averaging period specified in August 2008 is consistent with finance theory, regulatory practice, the NER and the NEL. The use of an averaging period "as close to the start of the next regulatory control period as practically possible is consistent with the forward looking nature of the capital asset pricing model (CAPM) and is correct in finance theory".

(c) "[G]iven the evidence at the time, the additional material contained in the revised regulatory proposal does [*scil.*] not justify a conclusion that the AER's decision to withhold agreement ... was inconsistent with regulatory practice". (No doubt this was a response to a point CEG had made and to which the AER had referred on the previous page of its report that previous regulatory decisions in Australia, the UK and the US had adjusted the averaging period for the risk-free rate to account for specific events.)

(d) ActewAGL's argument that there was an insufficient return on equity was based on the view that the market risk premium (MRP) of 6 per cent, which is prescribed in the rules, is out of line with current variations in the MRP and for that reason there should be adjustments to the risk-free rate. The AER maintained that this would "circumvent WACC parameters prescribed ... in the NER [and] would undermine the intended certainty under the regulatory regime which results from these values being prescribed".

(e) The fact that the Commonwealth Government Securities ("CGS") are at or close to historical lows does not of itself mean that they cannot be used. Interest rates move all the time and reflect the market's assessment of the price of money at a particular time. If ActewAGL can lock in an averaging period that it considers provides the most advantageous rate of return early in the regulatory process based on its view about future interest rates "then it may create opportunities for 'gaming' the regulator if its view transpires to be disadvantageous".

(f) The material provided by ActewAGL in support of its revised regulatory proposal does not reasonably justify the conclusion that an

averaging period before September 2008 is better than a period as close as practically possible to the start of the next regulatory control period. The averaging period specified in August 2008 did not exclude the downward movement of the CGS yield and was not abnormal. Setting the risk-free rate using this period (that is, the period commencing 2 February 2009) is consistent with the NEL objective of efficient investment, with the forward looking nature of the CAPM and with economic theory.

THE GROUNDS OF REVIEW

1. The amended application for review challenges the decisions on several grounds, although there is a degree of overlap. They are that:

(1) The decisions involved an error of law in that the AER misconceived its task under cl 6.5.2(c)(2)(i) of the transitional rules.

The particulars of this ground were as follows:

With respect to the July-August decision:

i. The reasons for decision stated in the 8 July 2008 letter do not evidence any consideration by it of:

(a) the merits of ActewAGL's original proposed averaging period; or

(b) whether the AER's agreement to the original proposed averaging period would be, or was being, withheld on grounds that were capable of being characterised as reasonable.

ii. Instead, the AER considered only:

(a) whether there existed a period which it preferred to the original proposed averaging period for use in determining the risk free rate within clause 6.5.2(c);

(b) which period it would specify under clause 6.5.2(c)(2)(ii), without recognising that the power under that clause could only arise for exercise where the legislative priority afforded to the period ActewAGL proposed had been displaced by a not unreasonable withholding of agreement by the AER.

With respect to the April 2009 decision:

i. The AER never conducted any analysis which would have allowed it to assess whether it would be reasonable or not to withhold agreement to the original or the revised proposed averaging period.

(2) The April 2009 decision involved an error of law in that the AER failed to act on "reliable, up to date and material information", adopting the decision it had made nine months earlier, and used the fact of having made that decision as the basis for refusing to use reliable, up to date and material information at the later date.

In the particulars to this ground ActewAGL relied on the AER's statement in the Final Decision that its decision to withhold agreement to the averaging period contained in the original proposal of 2 June 2008 was reasonable and consistent with finance theory, regulatory practice, the NEL and the NER.

(2A) It was an error of law for the AER in its April 2009 decision to rely on the July/August 2008 decision which was, itself, invalid.

This ground rested on the same particulars as ground 1.

(3) The AER did not have jurisdiction to make the Final Decision nor the July/August decision with respect to the averaging period.

This ground also rested on the same particulars as ground 1.

(4) The decisions were not authorised by the enactment in pursuance of which they were purported to be made.

ActewAGL repeated here too the particulars to ground 1, and also repeated grounds 2 and 3.

(5) The making of the decisions were an improper exercise of the power conferred by the enactment in that the AER exercised a discretionary power in accordance with a rule or policy without regard to the merits of the case. The rule or policy cited was "that the averaging period to be used in calculating the nominal risk-free rate should always be the period as close as possible to the commencement of the regulatory control period"

(regardless of whether that was reasonable having regard to the particular characteristics of the period).

(6) The making of the decisions was an improper exercise of the power conferred by the enactment in that the AER failed to take into account certain relevant considerations. They were:

i. whether ActewAGL's proposals were likely to result in an unbiased risk-free rate, given that the equity beta and market risk premium were deemed (under cl 6.5.2(b)) to be 1.0 and 6.0% respectively;
ii. whether the original or revised proposal promoted the national electricity objective prescribed by s 7 and the revenue and pricing principles prescribed by s 7A of the NEL;
iii. "the exceptional and anomalous conditions" arising from the global financial crisis, and
iv. any "forward-looking analysis" of whether the periods proposed by ActewAGL would provide a reasonable proxy for the risk-free rate that would be expected to apply either on 1 July 2009 or on 1 July in each of the five years of the regulatory period.

(7) Not pressed.

(8) The making of the decisions was an improper exercise of the power conferred by the enactment in that its exercise of the power was so unreasonable that no reasonable person could have so exercised it.

ActewAGL repeated the particulars to grounds 1, 2 and 3 and added:

i. Further, the [AER] could withhold agreement to the period proposed by [ActewAGL] only if it were satisfied that it was not unreasonable to do so. For that purpose the [AER] would have required but did not have, access to a forward looking analysis of whether the period of 20 business days ending 30 June 2008 or 5 September 2008 would provide a reasonable proxy for the risk free rate that would be expected to apply either on 1 July 2009 or on 1 July in each of the years between 2009 and 2013 inclusive.
ii. In making the [April 2009 decision], the [AER] had regard to yields for bonds of different maturities during the period June 2008 to which the [AER] referred in the [April 2009 decision], in circumstances in which [ActewAGL's] revised proposed averaging

period at that time was the period of 20 business days ending 5 September 2008 and not any period in June 2008, and the [AER's] averaging period was the period of 20 business days commencing on 2 February 2009 and not any period in June 2008.

1. ActewAGL seeks an order setting aside the decisions under review pursuant to s 16(1)(b) of the ADJR Act and referring the matter to the AER for further consideration according to law.
2. In support of its application, ActewAGL relied on an affidavit affirmed by David Graham, its Director of Regulatory Affairs and Pricing, who was cross-examined, and documents exhibited to that affidavit. ActewAGL also tendered two expert reports. The AER called no lay evidence, relying on the documents that were before it at the time it made its decisions, but proffered expert evidence to meet the reports presented by ActewAGL. The experts collaborated on the preparation of a joint report and gave evidence concurrently. On the question of their expertise there was little to choose between them.
3. The two experts were economists: Gregory Houston for ActewAGL, and Associate Professor Martin Lally for the AER, upon whose writings the AER had relied in reaching its decisions. Mr Houston is a director of the firm NERA Economic Consulting. He has 20 years experience in the economic analysis of markets and in providing expert economic advice in litigation, business strategy and policy contexts. He has worked in the private sector and government in the United Kingdom and New Zealand respectively, and has advised on regulatory and competition matters in various countries including Australia. He was a member of the expert panel convened to advise the Ministerial Council on Energy on achieving harmonisation of the approach to regulation of electricity and gas transmission and distribution infrastructure in Australia. Dr Lally is Associate Professor of Economics and Finance at the Victoria University of Wellington, New Zealand. Over the last 20 years he too has advised a wide range of public and private sector entities on financial issues, and over the last 10 years he has provided advice to regulatory bodies in Australia and New Zealand.
4. Ultimately, the dispute between the experts was of a narrow compass. To the extent to which it is relevant I will deal with it when I come to discuss the merits of the application.

THE POWER TO VARY THE AVERAGING PERIOD DECISION

1. Logically, the first question to be considered is whether the Court should permit ActewAGL to apply for a review of any or all of the various decisions although they were brought outside the time prescribed under the ADJR Act. There is, however, a threshold question that affects ActewAGL's application to set aside the decision to reject the revised averaging period proposal in April 2009. It is convenient to deal with it first.
2. The AER argued that, despite what it appears to have assumed in the Final Decision, once it had specified the averaging period in August 2008, it had no power to alter it.
3. Thus, in order for ActewAGL to challenge the Final Decision, it must prove that under the NER it could present a revised proposal on the averaging period, and establish that the AER had the power to accept it.

Was ActewAGL entitled to submit a revised averaging period proposal?

1. ActewAGL argued that it was entitled to submit a revised averaging period proposal because of the terms of cl 6.10.3(b) of the NER. This provision, it will be recalled, authorises a distribution network service provider to make revisions to its regulatory proposal within 30 days of the publication of the draft determination but only "so as to incorporate the substance of any changes required to address matters raised by the draft determination or the AER's reasons for it".
2. ActewAGL submitted that the subject of the averaging period was raised in the draft determination, referring to a definition of "raise" from the *Oxford Pocket Dictionary of Current English*, namely, "to cause to be heard, considered or discussed; to cause to occur, appear or be felt". It submitted that the averaging period was considered and discussed in the draft determination and so the AER could revise the period. I reject the submission.
3. Firstly, it is doubtful whether it can be said that the averaging period was discussed in the draft determination. It was certainly not considered. The draft determination did include a section entitled "AER considerations" under the topic of "the risk-free rate". But all that was included there was an account of the history and a brief

reference to the reasons the AER had previously given ActewAGL for withholding its agreement to the original proposal.

4. Secondly, even if it can be said that the AER considered or discussed the averaging period in the draft determination, in my opinion that is not the relevant meaning of "raised" in cl 6.10.3(b). Rather, the relevant meaning in this context is "brought up (a question, a point, etc.)" or "put forward (an objection, a difficulty, etc.)": See *Oxford English Dictionary*. The clear intention of the paragraph is to afford a distribution network service provider procedural fairness; to enable it to address concerns the AER has *before* it makes its decision, not to give the service provider the opportunity to reverse a decision already made. No question or point concerning the averaging period was brought up by the AER in the draft determination and no objection or difficulty was put forward. The AER was not foreshadowing a decision it would make or expressing a provisional view. It was merely reporting on its previous decision and the reasons for it, consistently with its statutory obligation under cl 6.12.2 to set out the basis and rationale of the determination, including the values it adopted for each of the input variables in any calculations and formulae. One of those input variables was the risk-free rate.

5. The next question is whether the AER had the power to vary the averaging period specified in August 2008 in any event.

Did the AER have the power to agree to or specify a revised averaging period?

1. ActewAGL contended that the power to vary the decision derives from cl 19(1) of Schedule 2 of the NEL which provides:

19—Performance of statutory functions

(1) If this Law confers a function or power on a person or body, the function may be performed, or the power may be exercised, from time to time as occasion requires.

1.

It also referred to clause 20:

20—Power to make instrument or decision includes power to amend

or repeal

If this Law authorises or requires the making of an instrument, decision or determination—

(a) the power includes power to amend or repeal the instrument, decision or determination; and

(b) the power to amend or repeal the instrument, decision or determination is exercisable in the same way, and subject to the same conditions, as the power to make the instrument, decision or determination.

1. Clause 41 applies Schedule 2 to a statutory instrument (including the NER), "except so far as the context or subject matter otherwise indicates or requires". This qualification is critical.
2. Here, the NEL conferred on the AER a power or function in cl 6.5.2(c)(2): to agree with, or to withhold its agreement to, the averaging period ActewAGL originally proposed and specify another. The decision to agree or disagree with ActewAGL's proposal is also a "decision" authorised by the NEL in the sense of cl 20. Thus, ActewAGL contends that the AER could amend or repeal that decision and make a new one in the same way and subject to the same conditions as before. In this case, however, I am of the opinion that the context or subject matter of that provision indicates or requires otherwise.
3. In *Minister for Immigration and Ethnic Affairs v Kurtovic* [1990] FCA 22; (1990) 21 FCR 193 at 211 Gummow J said of s 33(1) of the *Acts Interpretation Act 1901* (Cth), which is similar in form to cl 19(1) as read with cl 41:

[I]n any given case, a discretionary power reposed by statute in the decision maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statute

conferring the particular power in issue.

1. The question of whether the AER had the power to vary its decision turns, then, on the proper interpretation of cl 6.5.2(c)(2) in its context and having regard to its general purpose and policy, accepting, however, the paramount significance of the words themselves: *Nominal Defendant v GLG Australia Pty Limited* [2006] HCA 11; (2006) 228 CLR 529 at [22].
2. Clause 6.8.2 of the transitional rules required a distribution network service provider to submit its original regulatory proposal (including the building block proposal) by 2 June 2008. Clause 6.5.2(c)(2) stipulates the use of an averaging period, which is either agreed between the parties or specified by the AER and notified to the service provider within a reasonable time before the specified period begins. Clause 6.5.2(c)(2)(iv) requires the AER to notify the provider whether or not it agrees with the period proposed within 30 business days of the date of submission of the building block proposal. One of the building blocks is the return on capital for each regulatory year of the regulatory control period calculated in accordance with cl 6.5.2. Thus, one of the ingredients of a building block proposal is a proposal about the averaging period for determining the nominal risk free rate used to determine the rate of return. If the provider put forward a proposal about the averaging period after the building block proposal had been submitted, the AER could not provide the requisite 30 days' notice. If the AER did not agree with the provider's proposal and specified a period, the AER had to notify the provider within a reasonable time *before the period commenced*. The clear legislative intention is to set an averaging period a reasonable time before the commencement of the period. In this particular case ActewAGL's revised proposal was for a period that had already concluded. Not only could the requisite 30 days' notice not be given but, if the AER disagreed with the proposal, it could not specify a period within the prescribed time.
3. ActewAGL's case rests on a construction of the rules that would entitle a distribution network service provider to renege on an agreement or to submit a new proposal after the times set in the clause.
4. ActewAGL submitted that the requirement of 30 days' notice in

paragraph (iv) is for the benefit of the provider and can therefore be waived. The Tribunal was of the same opinion: *EnergyAustralia* at [312(a)]. The AER argued otherwise, contending that paragraph (iv) does not confer a right on ActewAGL; it imposes a constraint on the AER's powers. That is true, but it does not answer ActewAGL's point. If the constraint is imposed for the benefit of the network service provider, then, provided observance of the condition is not a condition precedent to the exercise of statutory power, it is accepted that it can be waived: *SS Constructions Pty Ltd v Ventura Motors Pty Ltd* [1964] VicRp 32; [1964] VR 229 at 245.

5. Nevertheless, ActewAGL's construction overlooks the notification period set by paragraph (ii). That is the requirement that the AER notify the provider within a reasonable time *prior to the commencement of the period* if it does not agree with its proposal.
6. In my view, the transitional rules do not contemplate that a different proposal for an averaging period might be put after a period has been specified and certainly not after the proposed period has passed.
7. An examination of the purpose of the provision and the historical context in which it was introduced confirm the interpretation conveyed by the ordinary meaning of the text.
8. The following extrinsic materials bear upon this question:

(a) The AEMC's *Rule Determination, National Electricity Amendment (Economic Regulation of Transmission Services) Rule 2006 No. 18* ("Rule Determination") made on 16 November 2006. The Rule Determination inserted clause 6A.6.2 ("Transmission Revenue Rules") into the NER. The Transmission Revenue Rules were used as a basis for drafting the transitional rules. Clause 6.5.2 in the transitional rules is in substantially the same form as cl 6A.6.2 (a)-(e) of the Transmission Revenue Rules.

(b) The ACCC's *Statement of principles for the regulation of electricity transmission revenues* ("SRP"), including the Background Paper to the SRP, published on 8 December 2004. In the Rule Determination, the AEMC stated that the methodology for estimating the WACC "was incorporated into the ACCC's Statement of Regulatory Principles (SRP) and has been codified in the Revenue Rule through this Review process".

1. These materials meet the description of "Rule extrinsic material" in clause 8(1) where that expression is defined as:

(a) a draft Rule determination; or
(b) a final Rule determination; or
(c) any document (however described)—
(i) relied on by the AEMC in making a draft Rule determination or final Rule determination; or
(ii) adopted by the AEMC in making a draft Rule determination or final Rule determination.

1. The Background Paper to the SRP included the following statement (emphasis added):

In determining the risk free rate to apply to the WACC calculation it is theoretically correct to use the on-the-day rate as it fully reveals the latest information available.
However, using the on-the-day rate exposes the TNSP [transmission network service provider] to day-to-day volatility. For this reason, an averaging period methodology is used to smooth out the volatility...

[T]he ACCC considers that ... the ability of TNSPs to game with the length of period used in calculating the moving average is minimal because **a TNSP has to specify the averaging period at the time of submitting its application for a revenue reset and can not** [*sic*] **change it afterwards.**

Professor Davis has similarly stated on this issue:

Provided that the averaging period is it **well specified in advance**, there is little risk of 'gaming' behaviour...

Therefore, the ACCC considers the period (between 5 to 40 days) used to calculate the moving average of the bond rate should be left to the discretion of the TNSP when making its application. **However, the TNSP will not be allowed to change the averaging period after the application is lodged.**

1. This makes it clear that the intention was that the averaging period would be fixed at an early stage and, once fixed, not altered.
2. ActewAGL submitted that none of the extrinsic material deals with a situation in which the AER rejects a proposed averaging period,

specifies a period in lieu and then decides to amend the period. That is true. But it does not detract from the conclusion that the extrinsic materials support a construction of cl 6.5.2(c) which envisages that the distribution network service provider's proposal for the averaging period be incorporated in the regulatory proposal and, once agreement is reached with the AER or the AER has specified a period, there is no scope for varying the period.

3. ActewAGL argued that other material supported its position. Specifically, it referred to passages in paragraph 5.5.1 of the Rule Determination (at 82-83) which emphasise the importance of taking into account current evidence concerning the accuracy of parameters within the WACC calculation. That is also true, but without qualification it is misleading. The AEMC was referring to the need for the regulator to review the methodology and the parameters of the WACC "periodically". The reason given was to provide flexibility and to give the regulator the discretion to take account of changes in financial market conditions and developments in financial theory and practice. But the context provides no support for ActewAGL's argument. The context is obvious from the next passage (emphasis added):

For this reason the Revenue Rule [cl 6A.6.2(f)-(j) in the case of determinations concerning the cost of capital for transmission network service providers and cl 6.5.4 in the case of distribution network service providers] gives the AER the discretion to vary the WACC methodology or parameters at **subsequent five-yearly reviews following the consultation process in the Rules**.

1. The AEMC was not concerned to give the AER the discretion to change its decision about the appropriate averaging period for a particular regulatory control period.
2. Accordingly, the AER's submission should be upheld. The purpose of the rule was to lock in an averaging period early in the consultation process. The rule does not contemplate a revision of the averaging period where agreement had earlier been reached or the AER had specified a period. Once the AER specified a period, which it did in August 2008, its discretionary power to agree (or not) to a provider's proposal or to specify an alternative period was spent. As the AER submitted in this proceeding, the decision it made on the

revised proposal was beyond power and therefore in law no decision at all: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597. It follows that the only decisions open to be challenged are the July/August 2008 decisions.

3. I now turn to consider the application for an extension of time.

THE APPLICATION FOR AN EXTENSION OF TIME

1. The ADJR Act imposes a 28-day time limit from the date of a decision in which an aggrieved party may apply for a review: s 11(3)(a). The Court may, however, extend the period: s 11(1)(c). Notwithstanding the view I have taken about the extent of the AER's powers, in case I am wrong I intend to consider whether an extension of time should be granted to challenge all the decisions, including the April 2009 decision to reject the revised averaging period proposal.

The relevant principles

1. The Court's discretion under s 11 of the ADJR Act is a broad one. There are no preconditions to be satisfied before it can be enlivened. Nevertheless, the discretion is to be exercised judicially and in accordance with the objects of the statute. Wilcox J summarised the applicable general principles, which his Honour drew from the case law, in the frequently cited judgment in *Hunter Valley Developments Pty Limited v Cohen* [1984] FCA 176; (1984) 3 FCR 344 at 348-349 ("*Hunter Valley Developments*"). I do not suggest, however, that these considerations are exhaustive. Indeed, his Honour was at pains to point out that they were not. Those principles are:

(a) There is no need to show special circumstances but the Court cannot ignore the statutory period. The starting point is that the legislature has prescribed a period. An extension of time will not be granted unless the Court is "positively satisfied that it is proper to do so". Any applicant for an extension must provide an acceptable explanation for the delay and establish that it is "fair and equitable in the circumstances" to extend time.

(b) Any action the applicant has taken apart from the proceedings is relevant to the question of whether an acceptable explanation for the delay has been furnished. A distinction is to be made between the case of a person who, by non-curial means, has continued to make the decision-maker aware that she or he contests the finality of the decision (that she or he has not "rested on his [sic] rights") and a case where the decision-maker

was allowed to believe that the matter was finally concluded. The reasons for this distinction are not only the "need for finality in disputes" but also the "fading from memory" problem referred to in *Wedesweiller v Cole* [1983] FCA 94; (1983) 47 ALR 528.

(c) Any prejudice to the respondent, including any prejudice in defending the proceedings occasioned by the delay, is a material factor militating against the grant of an extension.

(d) Still, the mere absence of prejudice is not enough to justify the grant of an extension. In this context, public considerations often intrude. A delay which may result, if the application is successful, in the unsettling of other people or of established practices is likely to prove fatal to the application.

(e) It is proper to take into account the merits of the substantive application.

(f) Considerations of fairness as between the applicants and other persons otherwise in a similar position are relevant to the way in which the discretion should be exercised. Here, his Honour referred to *Wedesweiller* again. I note that in *Wedesweiller*, at 534, Sheppard J expressed the view that, but for the fact that there were pending before the Court about 190 similar applications, all arising out of similar incidents as those in the case before him, he would have thought that an application brought almost 12 months after the expiry of the prescribed time, was too late to be entertained.

(g) Decisions affecting only the immediate parties are to be distinguished from those involving public administration, where the public interest may well dictate refusal of an extension, even after only a short delay.

1. I accept ActewAGL's submission that "the basal principle guiding the Court's discretion is the justice of the case" or, as Kenny J put it in *Dickson v Whiddett* [2001] FCA 585 at [34] the period may be extended "where the justice of the case requires it". But each of the matters to which Wilcox J referred in *Hunter Valley Developments* bears on the question of where the justice of the case lies.

The explanation for the delay

1. The explanation for the delay was provided by Mr Graham. In summary, his evidence was that ActewAGL had decided against making an application to the Tribunal but that, after the success in the Tribunal of the claims by the other network service providers, it had opted for non-litigious methods to achieve the same result and, after those attempts failed, it brought this proceeding.
2. Mr Graham testified that after the AER's Final Decision he and his team, in consultation with the General Manager Networks and the Commercial Manager Networks, considered applying to the Tribunal. The application had to be made no later than 15 business days after the AER's decision was published: NEL, s 71D. ActewAGL knew that. The time limit is inflexible. There is no provision for an extension. ActewAGL knew that too.
3. In his affidavit Mr Graham gave four reasons for ActewAGL's decision not to seek a review of the decision in the Tribunal. He listed them as:

(a) the expected high costs of an appeal;

(b) the expectation that the AER would allocate substantial resources to defend their position in respect of the WACC as it had also recently conducted an extensive but separate review on the WACC to apply to all upcoming network distribution decisions for the next five years. The approach recommended in that review to determine the averaging period was the same approach taken by the AER in determining ActewAGL's averaging period and I expected that the AER would vigorously defend that approach;

(c) the resources of my team were already being fully utilised in relation to a range of key regulatory matters, including:
(i) preparing the regulatory proposal in respect of ActewAGL's gas network, which was due to be submitted to the AER on 30 June 2009;
(ii) preparing the final submission to the AER on the 2009/10 pricing proposal for the electricity network, which was due to be submitted to the AER on 21 May 2009;
(iii) responding to a major regulatory review by the ICRC into the ACT retail electricity transitional franchise tariff to apply for 2009/10, which was at a critical phase in May 2009; and
(iv) preparing 2009/10 prices for gas distribution, electricity and gas retail,

water and wastewater prices and Queanbeyan bulk water, and the accompanying reports demonstrating compliance with the relevant regulatory requirements;
(d) awareness that the NSW Electricity Distribution Businesses were considering appeals against the AER's determination in relation to the AER's decision to withhold agreement to their proposed averaging period, as well as other parts of the AER's determinations affecting them. I entertained a hope that, in the event that these applications were successful in relation to the averaging period, there could be some scope for the AER to amend its decision in relation to ActewAGL's averaging period to ensure consistent treatment between ActewAGL, the NSW Electricity Distribution Businesses and Transgrid and Transend, which the AER had indicated they considered appropriate in the Final Decision.

1. He then elaborated on the final point. On 18 May 2009, he said, he had a conversation with the then General Manager Network Regulation North Branch of the AER, Mike Buckley. He said that Mr Buckley mentioned a case in which Transgrid had applied to the AER to correct a material error and that correction was then applied to another utility (EnergyAustralia) which had not appealed the error. He went on to say (and this evidence was not contradicted) Mr Buckley had told him that this might be a decision for ActewAGL to investigate "but noted that a similar outcome would not be automatic".
2. On 19 May 2009 time to apply to the Tribunal for review expired: NEL, s 71D.
3. On 26 May 2009 time to apply for judicial review under the ADJR Act expired: ADJR Act, s 11.
4. In cross-examination Mr Graham acknowledged that ActewAGL had made a commercial decision neither to appeal nor to seek any other form of review of the decision. The gist of his evidence was that the cost to ActewAGL was too high to justify a legal challenge, having regard to the "small probability" of success, although he professed to be unaware of the mechanism for judicial review at the time. He said he did not remember whether he sought legal advice before November 2009.
5. On 19 June 2009 the Tribunal granted leave pursuant to s 71B(1) of the NEL to the other five network service providers to apply for

review of the final decision. The review provided for in the statute is limited by the terms of s 71C, but it is certainly wider than the review provided for under the ADJR Act and permits a reconsideration of the merits.

6. On 1 July 2009 ActewAGL wrote to the AER, first expressing its appreciation for its "constructive approach" during the price review process for the 2009-2014 regulatory period and acknowledging that the AER gave "appropriate consideration to most aspects" of its proposal. It then went on, however, to record "one significant concern" with the decision. It claimed that it did not believe that the final decision on the weighted average cost of capital adequately addressed the arguments in its submissions and, in particular, adequately took into account the implications of the GFC and the provisions in the transitional Rules. The letter, written by Michael Costello, ActewAGL's Chief Executive Officer, included this admonition:

While we did not formally seek leave to appeal the final decision, we noted we had a very strong case in our deliberations on this matter. Our decision not to appeal should not be taken as any form of acceptance or satisfaction with this outcome.

1. Still, at this stage ActewAGL did nothing to challenge it or to seek by informal means to have it reversed.
2. On 12 November 2009 the Tribunal handed down its decision, varying the AER's decision on the averaging period in favour of all the applicants: *EnergyAustralia*. By s 71P(5) of the NEL, the decision of the Tribunal became the decision of the AER. ActewAGL hoped to secure the benefit of the decision, despite not having been a party to it.
3. Soon afterwards ActewAGL sought legal advice from Stephen Skehill, Special Counsel, Mallesons Stephen Jaques.
4. On 25 November 2009 Mr Graham spoke to Mr Buckley about an intended application to revoke the determination and substitute a new determination under the existing rules. Mr Buckley said that, if the AER did not accept a request to amend the determination under the existing rules, a further option ActewAGL could consider to achieve consistency would be to apply to the AEMC for a change to the NER.

5. Mr Skehill's legal advice was furnished on 21 December 2009. A copy of it was in evidence. It related solely to the question of whether the AER had the power to amend a determination previously made under the NEL. Mr Skehill's advice was that it had the power to revoke and replace its previous decision. Somewhat surprisingly, the advice was based on the opinion that the AER's determination was affected by a material error or deficiency of each of the following kinds and therefore susceptible to revocation and substitution under cl 6.13(a) of the transitional rules (an argument not made on this application):

(1) a clerical mistake;(2) an accidental slip or omission;(3) a miscalculation or misdescription; and(4) a defect in form.

1. On 23 December 2009 Mr Costello wrote to the AER on behalf of ActewAGL asking that the AER revoke its determination in relation to the averaging period and substitute the revised proposed averaging period and provided it with a copy of Mr Skehill's advice.
2. On 16 February 2009 Mr Costello sent another letter to the AER making further submissions in support of its case for a revocation of the averaging period decision and the substitution of a new decision accepting its revised averaging period proposal. It attached an additional advice from Mr Skehill providing further reasons in support of the points made in the previous advice and emphasising those points.
3. On 19 February 2010 the AER wrote to inform ActewAGL that while "there are sound reasons for applying a consistent WACC", its position was that it did not have the power under cl 6.13(a) of the NER to amend the ACT distribution determination as ActewAGL had sought, on the ground that the clause does not allow the AER to revisit the substance of a decision unaffected by inadvertent errors.
4. ActewAGL then sought further legal advice. On 3 March 2010 Mr Graham instructed Mr Skehill to seek advice from Alan Robertson SC, a pre-eminent administrative lawyer. On 15 April 2010 Mr Graham and Mr Skehill conferred with Mr Robertson. Mr Robertson's advice was not in evidence but Mr Graham said that at this stage ActewAGL decided to "concurrently" explore two "options": to try to persuade the AEMC to change the rules to give the AER the power to make the changes ActewAGL sought, and also

to apply for judicial review of the AER's decision. But the intention to apply for judicial review (or to explore that option) was not then flagged to the AER.

5. Mr Graham further said that he received legal advice from Mr Skehill on 27 April 2010 and in May and June (the details of which were not disclosed), and "there was further consideration and refinement of the application for judicial review by [his] team and [him], Mallesons Stephen Jaques, counsel and NERA [presumably Mr Houston]". Mr Graham also said he attended another conference with Mr Robertson on 13 July 2010 and received "further legal advice" from Mr Robertson through Mr Skehill on 26 July 2010. Once again, neither Mr Skehill's nor Mr Robertson's further advice found its way into evidence.
6. On 11 August 2010 Mr Graham, Mr Costello and Mr Skehill (with Ms Holmes) met with the new Chairman of the AER and other AER personnel. At this meeting, and for the first time, ActewAGL informed the AER that it intended to seek judicial review of its decision. It also provided the AER with a draft of the application. ActewAGL was still pressing for a rule change and, when Mr Costello told the AER representatives of its intention, the AER Chairman said they would prefer to have the matter dealt with by a rule change. By 14 September 2010 it became clear that there were "very limited prospects" that the AEMC would accept the proposal for a rule change. It was then that Mr Costello instructed Mr Skehill to finalise the application for judicial review. On 21 September 2010 ActewAGL made a courtesy call to the AER to advise it of the decision.

The arguments

1. ActewAGL argued that the following considerations favour an extension of time:

(a) The merits of the case, pointing to the outcome in *EnergyAustralia,* which, it argued, showed that the claim has "substantive strength";

(b) The fact that ActewAGL protested the making of the decision at the time it was made;

(c) After the decision in *EnergyAustralia* it continued, by various non-curial means, to make clear to the AER that it was contesting the finality

of the averaging period decision (being the decision on that question made in the Final Decision) and the AER "cooperatively participated in these discussions";

(d) The exercise is of an annual nature and ActewAGL does not seek to adjust its charges for any past period;

(e) The fact that the effect of a successful challenge will be to put ActewAGL in the same or an equivalent position to those of the network providers who successfully obtained merits review in the Tribunal and will therefore secure the consistency of treatment that the AER said was the aim of its approach and accords with sound principle; and

(f) There is no prejudice.

The merits

1. Taking these matters in order, the first point to make is that when Wilcox J in *Hunter Valley Developments* referred to the merits he cited *Lucic v Nolan* (1982) 45 ALR 411 ("*Lucic*") at 417 and *Chapman v Reilly*, unreported, Federal Court of Australia, 9 December 1983 at 6, where Neaves J also referred to *Lucic*. What those cases make clear is that it is inappropriate for this purpose to fully investigate the merits, although an obvious strength or weakness in the applicant's case is a factor for or against the exercise of the discretion. It seems to me that the proper approach is that which French J (as his Honour then was) described in *Seiler v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 878; (1994) 48 FCR 83 at 98:

The question of the merits of a substantive application has to be approached with some caution in any consideration of a claimed extension of time. If an application has no reasonable prospect of success, then the discretion to refuse an extension on that basis reduces to a decision to strike it out. To say a substantive application has a reasonable prospect of success is to say no more than that there is a finite non-trivial probability that it will succeed. The statement of its merits is then stochastic. It is based upon necessarily incomplete evidence or consideration of the case. It is difficult to imagine any case which appeared weak but not hopeless in which it would be proper to refuse an extension on that account. On the

other hand, the stronger the case appears to be, the higher may be the probability that an injustice will be done if an extension is refused. So a strong case may be a positive factor in favour of the grant of extension, but an apparently weak case cannot be treated as a factor weighing against it.

1. As I have already mentioned, ActewAGL argued that this was a strong case "made manifest" by the outcome of the appeals in *EnergyAustralia*. That brings me to the second point.
2. The decision in *EnergyAustralia* was based on the application of a different test and does not speak to the strength of ActewAGL's application for judicial review. The Tribunal proceeded on the basis that, if it was of the view that the AER unreasonably withheld its agreement, this could amount to either an incorrect exercise of the discretion in all the circumstances or the decision being unreasonable in all the circumstances, each of which is an available ground of review in the Tribunal: *EnergyAustralia* at [69(k)]. It went on to find (at [100]) that in July 2008 the AER had unreasonably withheld its agreement. The task confronting this Court on judicial review, however, is quite different from the task the Tribunal faced. This Court is not concerned to determine whether the AER unreasonably withheld agreement to ActewAGL's proposals. The Tribunal's views about the merits of that decision, or mine for that matter, are irrelevant. While the exercise of the AER's discretion is reviewable under the ADJR Act, the mere fact that it was exercised incorrectly or unreasonably will not be enough to set a decision aside. While unreasonableness is also a ground of judicial review, the ADJR Act does not authorise the correction of unreasonable decisions, only those where the exercise of the discretion was so unreasonable that no reasonable person could have so exercised it (*Wedenesbury* unreasonableness, so-called, after *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 at 223-234). Cf. *Australian Competition and Consumer Commission (ACCC) v Australian Competition Tribunal (*[2006] FCAFC 83; 2006) 152 FCR 33 (*"ACCC v Australian Competition Tribunal"*) at [176]. The Tribunal recognised this distinction at [60]-[63] of its decision in *EnergyAustralia*.
3. Nevertheless, the decision in *EnergyAustralia* does show that another tribunal considered that the AER's discretion to withhold agreement

to the original proposals of the network service providers miscarried. On this basis it may reasonably be supposed that the application with respect to the 2008 decisions would be unlikely to be futile.

4. For the following reasons I am not, however, persuaded that ActewAGL's case is a strong one, such that it should count in favour of a grant of an extension. If I am right in the view I have taken about the power of the AER to change its mind, then this is an obvious weakness in ActewAGL's application to set aside the 2009 decision. Indeed, that circumstance alone would be sufficient to deny ActewAGL an extension of time to apply to review it.
5. The grounds of review appear at [53] above. In its submissions, ActewAGL grouped the grounds into categories of error and I will deal with them in the same way.

Grounds 1, 3 and 4: Did the AER misconceive its task?

1. ActewAGL submitted that the AER's statutory task under cl 6.5.2(c)(2) involved "focusing reflectively on whether there was a reasonable basis upon which it could reject ActewAGL's original proposed averaging period". It submitted that the AER ignored the correct purpose of its statutory task which, by its own account, was to generate an unbiased risk-free rate to derive an unbiased estimate of the regulated rate of return.
2. Dealing first with the 8 July decision, ActewAGL argued that the AER *assumed* that a period as close as possible to the commencement of the regulatory control period was the optimal period and therefore rejected the original proposed averaging period. It argued that the decision did not reveal any consideration of the merits of ActewAGL's proposal or whether the AER's agreement would be, or was being withheld on grounds that were capable of being characterised as reasonable. It submitted that the letter should have "identified reasons which were objectively reasonable; which were relevant to the parties to the regulatory interaction; and which were not based upon erroneous premises. This in turn directs attention to the purpose of setting a rate of return and within that, of establishing the risk-free rate, and of the broader statutory objectives".
3. I disagree. The letter informed ActewAGL that it did not agree with its proposal and provided reasons before nominating an alternative

averaging period. The reasons are set out at [38] above. They were relevant, not based upon erroneous premises, and were objectively reasonable. There was no dispute between the experts that the CAPM theory "suggests that, ideally, the nominal risk-free rate input will be calculated on the day of the final determination". The AER believed that applying an averaging period that is closely aligned to the date of the final determination provides an unbiased rate of return that is consistent with the market conditions at the time of the final determination. It had support for that view from experts in the field. Contrary to ActewAGL's submission, the letter does show that the AER considered the merits of ActewAGL's proposal. That is clear from the passage cited in [38]. The reasons given in the draft decision confirm that there was no misunderstanding of the statutory task. At 135 of its draft report, the AER stated:

The AER did not agree with the period proposed by [ActewAGL] on the basis that it considered the proposed dates of the period were too far removed from the final determination date and the commencement of the next regulatory control period. A period that is too far removed from the final determination date may not provide the most relevant information. This is consistent with past practice by the AER and other state regulators, and supported by CAPM theory.

1. Contrary to ActewAGL's submissions, the AER did not withhold consent merely because it preferred another averaging period. It first found that ActewAGL's proposal was inappropriate and then specified an alternative period for apparently sound reasons.
2. I now turn to the April 2009 decision on the premise that the AER had the power to vary its decision.
3. I see no justification for the contention that the AER never conducted an analysis which would have allowed it to assess whether or not it was reasonable to withhold agreement to ActewAGL's proposal. The AER said it considered the key arguments in the revised regulatory proposals and the additional material. It referred to them at some length, analysed them and rejected them.
4. ActewAGL submitted that the AER asked itself the wrong question when it said at 262-263 of the Final Decision:

The NSPs' key argument in their revised regulatory proposals is one that suggests an obligation on the AER to move away from the agreed

averaging period if that period is set in abnormal times. The alleged abnormality affecting the agreed averaging period was not manifest at the time of the AER's July 2008 decision to withhold agreement. The issue therefore is whether the averaging periods in the revised regulatory proposals are reasonable compared with the agreed averaging periods.

1. ActewAGL submitted that if the averaging period ActewAGL proposed was otherwise appropriate, the AER was not permitted to withhold consent only on the basis that it preferred another period. It argued that, in effect, the AER assumed that the risk-free rate at a date closer to the start of the regulatory control period would give a better estimate but that "it should not have made that assumption". Rather, it submitted, "a principled adoption of this position required examination of the evidence regarding expected future rates". According to ActewAGL the question the AER had to ask itself was (quoting the Tribunal decision) whether it had "sufficient reason to believe that the proposed averaging periods [that is, those proposed by the distribution network service providers] were unlikely to produce an unbiased estimate of CGS rates in the regulatory control period". But in its Final Decision the AER made it plain that its purpose was to set an unbiased risk-free rate in order to derive an unbiased estimate of the regulated rate of return over the next regulatory control period. In my view ActewAGL has approached the AER's reasons in an "over-zealous" way, looking for inadequacies in the expression of the reasons, and contrary to the High Court's directive in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259.
2. The Tribunal said that the only clear basis on which the AER might reasonably withhold consent to an averaging period proposed by a network service provider was if the period proposed would be likely to generate a rate of return that was inappropriate, either too high or too low, having regard to the period in which it was to be applied. Of course, the Tribunal's remarks need to be read in the context of the review it was conducting; it was not answering the same questions that are raised here.
3. The extent of the discretionary power to withhold consent is determined by reference to the scope and purpose of the enactment: *FAI Insurances Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342

at 368 per Mason J. The statutory scheme does place some limits on the AER's discretion, most notably in the requirements in s 16 of the NEL.

4. The AER did not accept that the rules preclude it from choosing a period which it prefers, so long as it does not do so unreasonably.

5.

The Full Court explained in *ACCC v Australian Competition Tribunal* at [178]:

The concept of "unreasonableness" imports want of reason. That is to say the particular discretion exercised ... is not justified by reference to its stated reasons. There may be an error in logic or some discontinuity or non sequitur in the reasoning. It may be that the decision has an element of arbitrariness about it because there is an absence of reason to explain the discretionary choices made ... in arriving at its conclusion.

1. I agree with the Tribunal that consent could not be withheld only on the basis that the AER had a preference for a different period. But, in my view, provided that the decision to withhold consent is not arbitrary, is based on reasonable grounds and is justified by reference to the AER's stated reasons, the AER discharges its statutory task. Here, the decision to withhold consent was not arbitrary, was based on reasonable grounds and is justified by reference to the AER's stated reasons. It may be that the result is that its preferred position prevails. But that is not necessarily the same thing.

Grounds 2, 2A and 6: Failing to take into account relevant considerations

1. ActewAGL submitted that the AER failed to act on reliable, up to date and material information when it made its final decision because it adopted the decision it had made some nine months earlier and used that fact as the basis for refusing to use reliable, up to date and material information as at the later date.
2. ActewAGL also submitted that the AER failed to take into account the following considerations:

(a) whether ActewAGL's original or revised proposed averaging periods were likely to result in an unbiased risk-free rate, given that the equity beta and market risk premium were deemed to be 1.0 and 6.0% respectively;

(b) whether ActewAGL's original or revised proposed averaging periods

promoted the national electricity objective prescribed by s 7 of the NEL and the revenue and pricing principles prescribed by s 7A of the NEL;

(c) the exceptional and anomalous conditions which arose from mid-September 2008 as a result of the global financial crisis; and

(d) any forward looking analysis of whether the period of 20 business days ending 5 September 2008 would provide a reasonable proxy for the risk-free rate that would be expected to apply either on 1 July 2009 or on 1 July in each of the years 2009-2013.

1. This ground of review is only made out if the AER was bound to take into account one of these matters. Whether that will be so is determined by construing the terms of the NER, as the legislative instrument conferring the discretion. Where the relevant considerations are not expressly stated they must be determined by implication from the subject matter, scope and purpose of the Act. Here, therefore, unless that implication can be found in the subject matter, scope and purpose of the NEL or the NER, the AER cannot be said to have been bound to consider it. Moreover, if the factor is one which could not have materially affected the decision, the Court is not justified in setting it aside on this account. The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 ("*Peko-Wallsend*") at 39-40.

Failing to act on reliable, up-to-date information

1. It may be accepted that the AER was obliged to consider the most recent material available: *Peko-Wallsend* at 45.
2. But I am not persuaded that the AER failed to discharge its obligation. In the first place, it discussed at length the reports from the four consultants submitted to it on behalf of the service providers. See the Final Decision at 93-97 and 262-274. It also considered the statement made by the RBA on monetary policy released in February 2009 and the RBA's cash rate announcement on 7 April 2009, only a short time before publication.

Failing to consider whether ActewAGL's original or revised proposed averaging periods were likely to result in an unbiased risk-free rate

1. Neither do I accept that the AER did not consider whether ActewAGL's proposals would set an unbiased risk-free rate (assuming, in ActewAGL's favour that it was bound to do so). It asserted at 263 of the Final Decision that setting the averaging period close to the start of the next regulatory control period was designed to achieve that end. Implicit in that assertion is the proposition that ActewAGL's proposal to set the averaging period so early would not.

Failing to consider whether ActewAGL's original or revised proposed averaging periods promoted the national electricity objective and the revenue and pricing principles

1. The AER was certainly bound to have regard to the national electricity objective and the revenue and pricing principles but I do not accept that it did not. At I.8 of Appendix I its Final Decision, it expressly adverted to the NEL objective of promoting efficient investment. It said that the specified period was consistent with that objective. It also expressly adverted to the revenue and pricing principles. It observed (at 272) that:

[R]evenue and pricing principles in the NEL state that an NSP [network service provider] should be provided with a reasonable opportunity to recover at least the efficient costs incurred in providing direct control services and complying with a regulatory obligation or making a regulatory payment.

1. This principle was the only revenue and pricing principle upon which ActewAGL relied.
2. The AER then referred to the submission made by the network service providers that it should have regard to whether the selection of the averaging period in determining the rate of return provides a reasonable opportunity to recover at least their efficient costs. It stated (emphasis added):

[T]he determined WACC is consistent with the NER and as intended moves commensurate with interest rate changes in the Australian economy which is also consistent with the NEL objective of promoting efficient investment. **The fact that the risk-free rate is at (or close to) historical lows does not by itself mean that the resulting WACC does not provide a reasonable opportunity to recover the efficient costs of**

capital.

The AER notes that the WACC parameters are based on benchmarks and are part of the incentive framework. Therefore, the NSPs have an opportunity to achieve a higher rate of return by better managing their operating costs.

1. As the fact that the risk-free rate was at (or close to) historical lows was the reason behind ActewAGL's revised proposal and as the only revenue and pricing principle that was apparently relevant was the one to which the AER referred, it would be wrong to conclude that the AER did not consider whether the proposal promoted the NEL objective and the revenue and pricing principles.

Failing to take into account the exceptional and anomalous conditions which arose from mid-September 2008 as a result of the global financial crisis

1. Contrary to ActewAGL's submission, there is no doubt that the AER considered the "exceptional and anomalous conditions" resulting from the GFC. Chapter I.3 of Appendix I of the Final Decision is entitled "Historically low nominal risk-free rate". The AER's consideration commenced with these observations:

CEG stated that the weight of the regulatory precedent from overseas and Australia supports a view that if the most recent averaging period overlaps with abnormal levels of the risk-free rate or periods of economic crisis then such a period should not be adopted.

The AER notes that this is a continuation of the argument for a variable MRP given the alleged abnormally low CGS yields. However, given the dramatic changes in circumstances within the economic environment the AER has considered whether in fact the agreed averaging periods will result in an unreliable estimate of the risk-free rate such that it no longer reflects a reasonable forward looking estimate.

1. The AER concluded, however, that the legislative intent was that the rate should vary with general economic conditions. It based that view on the degree of prescription in the terms of cl 6.5.2, which fixes a proxy for the risk-free rate (the yield from Commonwealth

Government Securities) and the maturity period, which requires the observed rates to be averaged and defines the debt risk premium in terms of a margin between the CGS yield and a benchmark corporate bond with a credit rating of BBB+. It also noted, however, that the specified averaging periods "do not exclude the downward movement of the CGS yields commensurate with an easing in monetary policy and a softening in economic growth". This is another way of saying that the AER did take into account the impact of the GFC. In other words, although it did not agree to vary the averaging periods to mitigate the effects of the GFC, it did have regard to them.

Failing to undertake a forward looking analysis

1. The final matter upon which ActewAGL relied for this ground of review was an alleged failure to undertake a "forward looking analysis" of whether the period ActewAGL proposed in its revised proposal would provide a reasonable proxy for the risk-free rate that would be expected to apply either on 1 July 2009 or on 1 July in each of the years of the regulatory period.
2. ActewAGL submitted that it was required to have regard to forward interest rates because of what the Tribunal said in *EnergyAustralia* at [90]:

Rather than assume that the rate at a closer date would give a better estimate, the AER should have examined the evidence regarding expected future rates. Such evidence of forward interest rates, ie, rates that will apply at some future time for a prospective period, is available from market data. Comparisons could be made between rates expected to prevail during the averaging period proposed by the NSP and rates expected at later periods. But it follows from the Tribunal's reasoning that it would be insufficient and inappropriate to only compare with rates expected to prevail close to the time of the final determination.

1. I am not concerned with whether this conclusion is right or wrong. The threshold question is whether or not the AER was bound by some implication in the subject matter, scope and purpose of the relevant legislation to use forward interest rates.
2. Expert evidence was given on the utility and benefits of using forward (or forward looking) rates. The experts agreed that economic

theory states that the required rate of return to be used in valuing an investment decision is the forward looking rate estimated as at the date of the decision. In this context, they said, the relevant required rate of return is the forward looking rate estimated "as at the commencement of the regulatory period". The experts also agreed that forward looking risk-free rates can be measured with a high degree of precision. Nevertheless, the evidence from Dr Lally was that forward interest rates have not been used by any Australian regulator to guide the selection of an averaging period for the risk-free rate. Mr Houston did not dispute this. There was also evidence from both experts that forward interest rates are not satisfactory predictors of future on-the-day rates. Mr Houston made it plain that he was not advocating that a regulator should look at forward rates when making the averaging period decision. His point was that if the AER was looking to set an unbiased risk-free rate, as it said it was, then it could only do so by examining forward rates. In his oral evidence Dr Lally signified his agreement. Whether or not the criticism of the AER's decision is valid, I very much doubt that the AER is bound by the statutory scheme to deploy forward rates to make the averaging period decision.

3. Moreover, it is also doubtful whether expert evidence on this question is admissible. The authorities have limited the receipt of expert evidence on an application for judicial review to the explanation of technical meanings or trade usage and where the ground of review is *Wednesbury* unreasonableness. The AER sought an order pursuant to s 136 of the *Evidence Act 1995* (Cth) limiting the use to which the expert evidence could be put to these two matters. In my view, it would be appropriate to make that order. In the result, the evidence concerning the need to consider forward interest rates could only bear on the *Wednesbury* unreasonableness ground of review.

Ground 5: The AER's treatment of regulatory precedent

1. By ground 5 ActewAGL contends that the AER exercised its discretion by following a rule or policy without regard to the merits of the case. That rule or policy was that the averaging period to be used in calculating the nominal risk-free rate should always be the period as close as practicable to the commencement of the regulatory

control period. ActewAGL submitted that the AER did not consider whether it was reasonable to adopt that policy having regard to the characteristics of that period compared with the characteristics of the period ActewAGL proposed.

2. Yet, the AER stated (in a passage ActewAGL criticised) that "the issue ... is whether the averaging periods in the revised regulatory proposals are reasonable compared with the agreed [i.e. specified] averaging periods". It noted (at 264) that the arguments the network service providers put forward regarding an insufficient return on equity were based on the view that the MRP of 6% in the NER (based on an historical average) was out of line with the current variations in the MRP. It also noted that the argument the network providers put (and which was supported by Mr Houston's evidence in this proceeding) was that the risk-free rate should be adjusted to take into account the variations in the MRP, since the MRP was fixed by the NER. The AER rejected the argument, not because it was blindly adhering to a rule or policy but for multiple reasons explained in the Final Decision at 264-265. It suffices to refer to one: adjusting the risk-free rate to make up for a higher MRP was an attempt to circumvent the legislation and would undermine the intended certainty provided under the regulatory regime.

3. It is true that the AER was concerned from the outset to use an averaging period "as close to the start of the next regulatory control period as practically possible". This gives every appearance of following a policy decision. Nevertheless, as the authorities indicate, there are good reasons for adopting a policy. It can, for example, focus attention on the purpose of the discretion and promote consistency in decision-making. Adopting a policy is therefore permissible, provided that it is not used to improperly fetter the exercise of the discretion, for example, by precluding consideration of relevant arguments that might reasonably be put in a particular case where they conflict with the policy and provided that the policy is consistent with the statute which confers the power. See *Re Drake and Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 ("*Drake*") at 640; *Neat Domestic Trading Ply Ltd v AWB Ltd* [2003] HCA 35; (2003) 216 CLR 277 at 289.

4. The AER's approach is consistent with the statute under which the relevant power is conferred. Clause 6.5.2 of the transitional rules

requires the use of the Capital Asset Pricing Model to determine the return on equity. The experts in this case agreed that it accorded with the theory of the Capital Asset Pricing Model to select a risk-free rate (and therefore an averaging period) "as close to the start of the next regulatory control period as practically possible". Assuming that the AER's approach was to apply a policy, ActewAGL put forward reasons why the policy should not apply to it and the AER considered what it had to say but dismissed its arguments. In the circumstances I do not believe it can be said that the AER was so wedded to a policy that it "shut its ears" to ActewAGL's proposal (*British Oxygen Co v Board of Trade* [1970] UKHL 4; [1971] AC 610 at 625).

Ground 8: Wednesbury unreasonableness

1. This brings me to the final ground of review.
2. Not every unreasonable decision will justify review under the Act. The Full Court in *Zizza v Federal Commissioner of Taxation* (1999) 99 ATC 4711 noted at [15] that "the *Wednesbury* principle", which is incorporated into the ADJR Act, "will usually be concerned with decisions lacking any logical foundation". This decision is not of that kind.
3. ActewAGL's argument was threefold. The first was that the AER could withhold agreement to the period proposed by ActewAGL only if it were satisfied that it was not unreasonable to do so. For that purpose, it submitted, the AER would have required, but did not have, access to a forward looking analysis of whether the originally proposed period would provide a reasonable proxy for the risk-free rate that would be expected to apply either on 1 July 2009 or on 1 July in each of the years between 2009 and 2013 inclusive.
4. The AER decided that it should set the averaging period close to the start of the forthcoming regulatory control period and that it was not unreasonable not to depart from that position in abnormal times. I do not think that, in so doing, the AER could be said to have exercised its discretion in a way that was so unreasonable no reasonable decision-maker would have done the same. In circumstances where forward interest rates have never been used in this country for this purpose it seems to me to be difficult to come to such a conclusion. Indeed, the AER's position was endorsed by Dr Lally and Mr

Houston agreed it was consistent with economic theory. Mr Houston departed from Dr Lally's position only because it was his view that the theory was inapplicable where the legislation set some, but not all, of the parameters in the equation.

5. The second aspect of ActewAGL's argument is that the AER had regard to yields for bonds of different maturities during the June 2008 period in the original proposal, even though ActewAGL's revised proposed averaging period was the period August-September 2008 and the period the AER favoured was in February 2009. It seems to me, however, that the argument proceeds on a false assumption. The AER did not rely on yields during the June 2008 period. It certainly referred to them but in a different context and for a different reason. Its purpose was made clear in the detailed analysis in the appendix. It was to illustrate a point to answer one of the arguments put by CEG on behalf of the network service providers. The point it was making was that setting the risk-free rate based on an averaging period at an early time in the regulatory process would lead to "systematic ex ante overcompensation of firms relative to the efficient cost of capital and would be inconsistent with the forward looking nature of CAPM" and so would not result in an unbiased risk-free rate. Even if my construction of the reasons is wrong and the proper interpretation is that the AER did have regard to the June 2008 yields in deciding to reject the revised averaging proposal, I do not think that it could be said that this consideration materially affected the AER's decision.
6. The third aspect of ActewAGL's argument is that it was central to the AER's conclusion that the regulatory control period was a single period of five years, rather than five consecutive one year periods. ActewAGL repeated its contention that this was a misunderstanding of the statutory scheme and an error of law. ActewAGL did not identify any particular part of the reasoning in either of the AER's decisions to support its contention, nor why the alleged misconstruction would make the decision so unreasonable as to fall within the terms of s 5(2)(g) of the ADJR Act.

ActewAGL's protests

1. ActewAGL's second and third submissions in support of its application for an extension of time were that it protested the

decision when it was made and continued to do so thereafter. ActewAGL relied on the last sentence of the following passage in *Seiler* at 96:

The exercise of the discretion to extend time, for which s11(1)(c) provides, must be informed by the purposes served by the statutory limitation and associated dispensing power. The limitation is directed to achieving certainty and finality in administrative decision-making. In the ordinary course, where a reviewable decision is taken, and the review procedure is not instituted within the prescribed period, the decision-maker is entitled to proceed on the basis that the decision stands and will not be called into question by way of judicial review. Finality and certainty are not ends in themselves, but means to the end of efficient administration. If the relevant decision-maker or others act upon a decision after the prescribed period expires then the objective of efficient administration may be compromised if the decision can be challenged and set aside after that expiry. Time and resources may have been expended to no effect. Where it is clear that an applicant for review of an administrative decision has, at all times, pursued the reversal of that decision administratively then the statutory purpose is less likely to be jeopardised by a liberal approach to the grant of an extension of time.

1. Here, however, ActewAGL did not at all times pursue the reversal of the decisions administratively. Nor did it do so when they were made. In the case of the 2008 decisions, no protest was offered until, at the earliest, the time the application was filed in this Court, and more accurately, ActewAGL's written submissions were served in February 2011.
2. Furthermore, there is no suggestion in the correspondence between the parties that before that date it was ever ActewAGL's position that it was unreasonable for the AER to reject the June 2008 dates ActewAGL had originally proposed and to specify dates in February 2009. The letter the AER sent ActewAGL on 8 July 2008, which contained the first decision ActewAGL now wishes to challenge, was met by Mr Costello's letter of 14 August 2008, which proposed a new averaging period within the parameters proposed by the AER. It is true that in that letter ActewAGL reiterated all the matters raised in its original proposal and asserted its belief that the AER had not "effectively addressed" them. Nevertheless, it also acknowledged

that "regulatory precedent and financial theory are important factors in the choice of averaging period which might on balance influence the AER's position". In my view it is fair to describe ActewAGL's position at this time as grudging acceptance of the AER's decision, rather than opposition to it. Up until (at the earliest) this proceeding was brought, ActewAGL's grievance was with the AER's decision in April 2009 to withhold agreement to the revised averaging period proposal.

3. The first time ActewAGL raised a concern about the Final Decision was on 1 July 2009, more than two months after it was made and more than five weeks after the time for any review (both merits and judicial) had expired. It is true that on 18 May 2009 Mr Graham spoke to Mr Buckley. I have referred to the substance of the conversation at [93] above. The evidence was sparse. Whatever was said before or after they spoke is unknown. No evidence was given that, at that point in time, ActewAGL told the AER that it did not agree with the decision or that it wanted the AER to reverse it. There is nothing in this evidence to suggest that ActewAGL informed Mr Buckley that it did not accept the averaging period decision or even that the concern he had was with that particular decision.

4. In the letter to the AER of 1 July 2009 ActewAGL informed the AER that it had decided not to seek leave to appeal. I acknowledge that in the same letter ActewAGL emphasised that the decision not to appeal "should not be taken as any form of acceptance of satisfaction with this outcome". But it did not indicate that it had any intention of challenging it or even that it would like the AER to review it. In those circumstances, the AER was entitled to conclude that the matter was finalised.

5. It was not until 25 November 2009 – seven months after the Final Decision was published – that ActewAGL next contacted the AER. The first notice the AER received that ActewAGL had any intention of seeking judicial review was on 11 August 2010, almost 16 months after the Final Decision. Although it commenced its investigation into the possibility of judicial review in March 2010, ActewAGL did not disclose its thinking to the AER. No explanation was provided for why it took five months from the time of the conference with senior counsel to file the application. It took nearly three months after the initial conference, and two and a half months after the first

legal advice was received, to make an internal request for funding "for a possible application to the Federal Court". After so much time had passed since the decisions under review were made, this rather leisurely approach to the filing of an application counts against ActewAGL.

ActewAGL does not seek to adjust its charges for any past period

1. The fact that ActewAGL does not seek to adjust its charges for any past period is relevant to the exercise of the Court's discretion because it reduces the possible impact on consumers and I take that into account in ActewAGL's favour.

The question of consistency

1. The fifth point ActewAGL makes is that if it succeeds in this challenge it would put it in the same position as the other network providers who won in the Tribunal. ActewAGL noted that the effect of s 71P(5) of the NEL is that a decision of the Tribunal is a decision of the AER. ActewAGL was critical of the AER for making submissions contrary to those findings and for departing from the aim of consistency of treatment, contrary to its stated aim and legal principle. I regard these criticisms as rhetorical flourishes. No ground of review is brought to support them, although ActewAGL referred to *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121, where the decision under review was successfully challenged as an abuse of power under s 5(2)(j) of the ADJR Act. In that case the decision-maker had competing applications before him in respect of the same area, applied a guideline against one and not another without any stated or rational justification for doing so. This is not such a case. It is clear from the Final Decision that the AER was concerned to treat the various network service providers consistently. Indeed, ActewAGL acknowledges as much.
2. I was for some time attracted to this argument but, as the AER pointed out, there are two difficulties with it. First, s 71P(5) fixes the AER with the Tribunal's decision, not its reasoning. Secondly, the inconsistency was not of the AER's making. It was the inevitable outcome of ActewAGL's considered decision not to take the same course as the other network service providers and apply for merits review in the Tribunal.

The question of prejudice

1. The final point ActewAGL makes is that there is no prejudice. To the contrary, the AER submitted that there were two species of prejudice: prejudice to it and prejudice to third parties. The prejudice to the AER was put in the following way. The AER devoted significant resources to defending the proceedings in the Tribunal, which took two weeks to be heard, involved eight parties and the AER retained four counsel. If ActewAGL had joined those proceedings in the Tribunal, which provided an adequate vehicle to agitate the issues the subject of this proceeding, the present application would have been unnecessary. This application also involves the AER incurring significant expenses and devoting its own internal resources. Accordingly, ActewAGL's failure to join the proceedings in the Tribunal has meant that it is now necessary to revisit some of those issues in this Court. The time and expense incurred by the AER in defending these proceedings is a prejudice that would not have been suffered if ActewAGL had joined the Tribunal proceedings.
2. In response to a query from the Court, ActewAGL offered to pay the AER's costs of this application on a party and party basis. That would not eliminate the prejudice to the AER but it certainly reduces its significance.
3. I turn now to consider the impact of a successful application on third parties.
4. The parties agreed that the 2011/12 period would be unaffected by any decision of the Court made after ActewAGL submitted its pricing proposal for that period, due on 30 April 2011. In that case, ActewAGL would be limited to the last two years of the 2009-2014 regulatory period. It was also agreed that in 2013/14 the average residential customer in the ACT would pay an additional sum of $55.55 in the penultimate year and $62.21 in the last year, assuming the September 2008 averaging period were applied (ActewAGL's revised proposal), or $71.39 and $117.30 respectively, assuming the June 2008 averaging period were used (ActewAGL's original proposal). Thus, the figures range from just over $1 per week to $2.25 per week.
5. ActewAGL played down the prejudice to the consumer, arguing that

these sums were minimal. Whilst that is true for many consumers, the impact of any price increase for social security beneficiaries (for whom every dollar counts) should not be underestimated. There are some additional points to be made. First, this is the figure for the average residential consumer. It follows that some residential consumers would have to bear a larger burden. How many is unknown. Then there is the absence of any evidence of the impact on business of a change in the averaging period. It is reasonable to infer that the additional costs at least for some businesses would be significantly greater. Furthermore, there is no evidence to indicate that ActewAGL warned its customers or consumers of the possibility of a price rise. As the AER submitted, the fact that any price rise will be unexpected is itself a form of prejudice. The NER obliges a distribution network service provider to maintain on its website the classes of customer subject to a particular tariff or tariffs and the constituent elements of each tariff, together with a statement of expected price trends to be updated for each regulatory year, indicating how it expects prices to change over the regulatory control period and the reasons for the expected changes: cl 6.18.9(a). The provider is required to post the information for a particular regulatory year on its website within 20 business days before its commencement where practicable or as soon as practicable thereafter: cl 6.18.9(b). The plain intention is that customers be given sufficient notice of price increases. There is at least the possibility, as the AER submitted, that some customers will have budgeted, and perhaps even made business and investment decisions, upon the basis of pricing expected under the Final Decision. An unexpected rise in the price of electricity may also have an impact on other budgetary decisions.

6. ActewAGL also argued that if ActewAGL succeeded that would "tend to equalise the position vis-à-vis New South Wales consumers and ACT consumers". Frankly, I doubt that this is a relevant consideration. Whether that was a just outcome might depend at least in part on whether electricity costs in the ACT and New South Wales were ever equal and whether the cost of living in the ACT and New South Wales is comparable, about which there is no evidence.

An acceptable explanation for the delay?

1. The AER submitted that ActewAGL had provided no acceptable explanation for the delay, pointing in its written submissions to the absence of any explanation in the affidavit evidence of the failure to seek judicial review for so long.
2. It might be said that an explanation emerged during Mr Graham's oral evidence when, under cross-examination, he said he was unaware of that option. But Mr Graham is not ActewAGL. Mr Graham did not say that ActewAGL had not received legal advice before the Tribunal's decision was published. He said he did not remember whether it had. Even if Mr Graham's ignorance can be sheeted home to ActewAGL, by February 2010 ActewAGL knew about the availability of judicial review and offered no explanation for failing to alert the AER for six months that it was considering it. I accept that at the same time that it was exploring that option it was also pressing the AEMC for a change to the rules but there is no reason why it could not have informed ActewAGL of its fallback position. Certainly none was proffered in evidence. In sum, there were significant gaps in ActewAGL's explanation. I appreciate that it is not a precondition for success that an applicant provides an acceptable explanation, let alone a full one: *Comcare v A'Hearn* [1993] FCA 498; (1993) 45 FCR 441 at 444. But it is a factor to be taken into account in the exercise of the Court's discretion.

Interpreting s 11 in accordance with the overarching purpose

1. Section s 37M of the *Federal Court of Australia Act 1976* (Cth) ("the FCA Act") declares that the overarching purpose of the Federal Court Rules and any other provision made by or under the FCA Act "or any other Act with respect to the practice and procedure of the Court" is to facilitate the just resolution of disputes "according to law" and "as quickly, inexpensively and efficiently as possible".
2. The AER argued that s 11 of the ADJR Act must be interpreted and applied in a way that best promotes the "overarching purpose", which includes the objective of the disposal of all proceedings in a timely manner. The AER submitted that it is inconsistent with this objective to grant an extension of time to bring proceedings two years after the prescribed period expired and this is a further reason to refuse the application for an extension of time.
3. It is quite clear that the effect of s 37M(3) and (4) of the FCA Act is

that the power to extend time pursuant to s 11(1) of the ADJR Act (and also I might add the discretion conferred by s 10 of that Act) must be interpreted and applied in the way that best promotes the overarching purpose. Section 11(1) of the ADJR Act is a provision with respect to the practice and procedure of the Court. It prescribes the manner in which an application to the Court under that Act must be made, what should be contained in that application, where the application is to be lodged, and the time within which to lodge it. Undoubtedly, the overarching purpose includes the disposal of all proceedings in a timely manner. That is a relevant consideration but it is not the only relevant consideration. Subsection (2) provides (emphasis added):

Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Court;

(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(c) the efficient disposal of the Court's overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

1. Nevertheless, I do not think that extending the time within which to file the application would offend against this particular objective. "Proceeding" is defined in s 3 of the FCA Act to mean "a proceeding in a court..." The relevant delay occurred before the application was filed. Before the application was filed there was no proceeding. It might be thought that to extend the time in this case would not best promote the efficient use of the judicial and administrative resources available for the purposes of the Court or the efficient disposal of the Court's overall caseload. But no submissions were directed to these questions and I therefore refrain from reaching any conclusions about them.
2. Quite apart from s 37M, however, the time limits imposed under s 71D for applications to be made to the Tribunal (15 business days) and under s 71Q(1) for the Tribunal to endeavour to deliver its decision (within three months after leave is granted) evince a clear legislative intention that electricity price determinations should be

finalised as quickly as possible. This legislative intention weighs heavily against ActewAGL where, as here, the delay is considerable.

3. What is more, the delay was not brought about by ignorance on ActewAGL's part. ActewAGL made a calculated decision not to mount a legal challenge when it had the opportunity to do so. The evidence is opaque about whether it sought legal advice before deciding not to appeal to the Tribunal, but it sought and obtained legal advice shortly after the Tribunal decision was published and yet it did not file the application until ten months later.

4. ActewAGL noted that comparable or longer delays have been excused in other cases. It relied, in particular, on the decision in *Aerolineas Argentinas v Federal Airports Corporation* (1995) 63 FCR 100 (*"Aerolineas Argentinas"*) (which was not disturbed on appeal: *Federal Airports Corporation v Aerolineas Argentinas* [1997] FCA 723; (1997) 76 FCR 582. There, Beazley J was prepared to hear an application for review of a decision which was not challenged until two years and two months after it was made. In that case the Federal Airports Corporation made a determination in June 1991 to place an impost on the operators of commercial passenger airlines using various Australian airports in order to fund the provision of counter-terrorist services at those airports. The airlines had paid the charges the Corporation had imposed (over $24 million) but, they argued, had made their disagreement with the decisions known to the Corporation. Thirty-eight commercial airlines instituted proceedings in the NSW Supreme Court for declaratory relief and for an order that the Corporation repay the monies they had paid. Those proceedings were cross-vested to this Court because the Corporation's determination was an administrative decision made under an enactment and s 9 of the ADJR Act deprived the Supreme Court of jurisdiction to hear it.

5. Although the airlines opposed the changes, the respondent submitted that the obligation to pay was not disputed in any way until August 1993, when the legal challenge was brought. The airlines claimed that they did not appreciate they had a legal means of challenging the decision until December 1992, which was not confirmed by counsel until the following year. The misconception in the Supreme Court proceedings was that the determination was legislative, not administrative, in character.

6. I should point out that *Aerolineas Argentinas* was not concerned with the exercise of the discretion under s 11(1) to extend the period prescribed in s 11(3), but with the power of the Court under s 11(4)(c) of the ADJR Act to refuse to entertain the application where no period is prescribed if it is of the opinion that the application was not made within a reasonable time after the decision was made. Here, however, ActewAGL's application was clearly outside the 28-day limitation period in s 11(3). Nevertheless, there is obviously some overlap in the relevant principles.
7. Even so, *Aerolineas Argentinas* is distinguishable on the facts. Whilst the extent of the delay is comparable, there are other circumstances that are not. Her Honour emphasised that the airlines commenced recovery proceedings two years into a six-year limitation period, which time, she observed, "could not be considered unreasonable in respect of those proceedings". Here, ActewAGL did not commence any proceedings within a statutory limitation period. The first time it communicated an intention to launch any legal challenge was more than one year and two months outside the limitation period in the ADJR Act. In *Aerolineas Argentinas,* her Honour observed that the question of whether the airlines were entitled to take those proceedings without having challenged the decisions of the Corporation in administrative law proceedings, was not free of legal difficulty. Here, the legislation is abundantly clear, ActewAGL knew it was entitled to take proceedings in the Tribunal, was aware of the time limit and, for commercial reasons, chose not to mount a legal challenge. Her Honour noted that it was a serious matter for a government authority to retain a tax or charge that had been wrongly or invalidly extracted. We are not in this kind of territory in the present case.
8. The Full Court on the appeal referred to the unique features of the case. At 602 Lehane J, with whom Beaumont and Whitlam JJ agreed, remarked:

But a decision as to what is reasonable in a particular case must, of course, be made having regard to its peculiar circumstances. Periods found reasonable in other cases offer useful and authoritative guidance, but do not determine the way in which the discretion is to be exercised in relation to different facts. This was not, after all, a relatively simple case (as are a number of the reported cases in this area) involving a decision made by a

governmental authority in relation to particular affairs of a particular individual. It was a decision of general application, the subject of substantial controversy, affecting the interests of a large (and no doubt theoretically unlimited) number of substantial corporations. There are, after all, 38 respondents to this application. The questions involved are by no means easy. It may be expected that what is reasonable in a case such as the present will involve considerations rather different from those with which most of the reported cases have been concerned.

1. At most, then, one could say that the decision in *Aerolineas Argentinas* demonstrates that a lengthy delay will not necessarily disqualify an otherwise worthy applicant from applying for judicial review.

Conclusion

1. I have carefully considered the various competing factors. On balance, I am not satisfied that it is proper to grant ActewAGL an extension of time. I am not persuaded that the justice of the case warrants accepting the application outside the prescribed period. As I have already indicated, the delay in this case is substantial. It was not caused by factors outside ActewAGL's control. At the time the decisions were made ActewAGL was in possession of all the relevant information to enable a challenge to be brought. For the reasons given above, its explanation for the delay is incomplete and to that extent unsatisfactory. There is some evidence of prejudice. This is not a case where only the immediate interests of the parties are affected. That is an important consideration. As Wilcox J said in *Hunter Valley Developments* at 351-352:

The adequacy of an explanation for delay is intimately related to the nature of the case. The distinction drawn in *Wedesweiller* between a case which is merely inter-parties and a case involving elements of public interest in relation to other people, practices or the need for finality is here relevant. The point goes beyond absence of prejudice. An applicant concerned to challenge a decision which has implications for other people or for day to day public administration may properly be regarded as being under a heavier duty to act expeditiously than is an applicant who is aware that his case has no such implications.

1. The system of regulating electricity prices relies on timely decision-making in the public interest. The time limit for applications to the Tribunal is short and there is a statutory exhortation to the Tribunal to deliver its decisions promptly. It flies in the face of the legislative scheme to permit a collateral attack on the regulator's decisions after so much time has passed. This is not a case of an aggrieved party who, from the outset, contested the decisions (*Hunter Valley Developments*) or who, at all times, pursued their reversal administratively (*Seiler*). Rather, it is a case where – months after the dispute was over – the disaffected party tried to resuscitate it. In the case of the 2008 decisions, ActewAGL made no attempt to have them reversed at any time before the commencement of this proceeding. ActewAGL first sought the reversal of the 2009 decision seven months after the decision was made. Until that time it led the AER to believe that – unlike the other network service providers – it was prepared to accept, acquiesce in, or submit to the AER's decisions. In the circumstances the AER was entitled to proceed on the basis that the dispute was finally concluded. Whilst consistency of decision-making is important, the inconsistency in this case was not brought about by the conduct of the AER, but by the calculated decision of ActewAGL not to join the other network service providers in challenging the decisions in the Tribunal. That forensic choice always carried with it a risk that the other providers would prevail and ActewAGL, alone of the affected parties, would have to wear the AER's determination. It is a risk of which ActewAGL was well aware.

DISCRETION TO REFUSE TO GRANT THE APPLICATION

1. There is an additional consideration. Section 10(1)(a) of the ADJR Act provides that the right of an aggrieved person to seek a review of a decision is in addition to any other rights that person may enjoy. However, s 10(2)(b) of the ADJR Act gives the Court a discretion to refuse to grant an application where other remedies are available. Section 10(2)(b)(ii) provides that:

the Federal Court ... may, in its discretion, refuse to grant an application ... for the reason that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of that decision,

conduct or failure.

1. "Review" is defined in subsection (3) to include "a review by way of reconsideration, re-hearing, appeal, the grant of an injunction or of a prerogative or statutory writ or the making of a declaratory or other order".
2. As Northrop J observed in *Edelsten v Minister for Health* (1994) 58 FCR 419 ("*Edelsten*") at 421-422, on one view, the discretion conferred by s 10(2)(b)(ii) should be exercised only after the applicant has otherwise made out its case. But there is ample authority for the proposition that it can be exercised at a far earlier stage. Indeed, O 54 r 7(2) of the Federal Court Rules provides that an application for an order of review to be dismissed or stayed under s 10 of the ADJR Act must be made within 14 days after the party is served with the application for an order of review. ActewAGL did not resist the application on this basis and did not oppose the grant of an extension of time in which to make it. In all the circumstances and consistently with Northrop J's approach in *Edelsten,* for present purposes, I assume in favour of ActewAGL that it would succeed on its application.
3. The AER referred to a number of cases in which the court declined to exercise its jurisdiction where merits review was available before an independent statutory tribunal with a right of appeal to, or review by, a court. Often this situation arises where an application for merits review has already been made. See, e.g. *Saitta Pty Ltd v Commonwealth of Australia* [2000] FCA 1546; (2000) 106 FCR 554 at 575 [104]. Section 10(2)(b)(i) partly deals with this situation. It permits the court to refuse to grant an application where the applicant has sought a review of the decision by the court or another court. Section 10(2)(b)(ii) also catches cases in which a review has been sought in a tribunal or by a person or authority. But the discretion to refuse relief under subsection (2)(b)(ii) is not founded on the premise that another proceeding is pending. A mere entitlement to seek a review is enough. Moreover, the power in subsection (2)(b)(ii) is not limited either (as ActewAGL submitted) to a situation in which the entitlement subsists at the time the ADJR Act application is made: *Kimberly-Clark Ltd v Commissioner of Patents* (1988) 83 ALR 714 ("*Kimberley-Clark*") at 718-719. If ActewAGL were right, as

Jenkinson J pointed out in *Kimberley-Clark*, that would mean that the entitlement might often be lost by the effluxion of time. An aggrieved party could sit on its hands, do nothing, wait for the time for an appeal to pass, and then seek judicial review. The reference to "is entitled" in subsection (2) must be read as a reference to an entitlement the applicant enjoyed when the decision under review was made.

4. Plainly, the definition of review in subsection (3) is wide enough to catch the kind of review provided for in the Tribunal, which includes review of material errors of fact, errors of fact which in combination can be said to have been material, the incorrect exercise of a discretion and where the decision is unreasonable in all the circumstances: NEL, s 71C. It is true that leave is required before an application for review can be made: NEL, s 71B(1). But ActewAGL did not contend that the leave requirement meant that ActewAGL was not entitled to seek a review. In the present case, at least, there could be no doubt that ActewAGL could have sought a review in the Tribunal. Its position concerning the averaging period was relevantly indistinguishable from those of the other network service providers who were given leave to make their applications.

5. I have no doubt that the merits review mechanism under the NEL is an adequate alternative remedy. For the purpose of hearing a review, the Tribunal is constituted by a judge of this Court, who presides and is required to determine any question of law, together with two lay members, who are appointed for their knowledge or experience in industry, commerce, economics, and/or public administration: *Competition and Consumer Act 2010* (Cth), ss 37, 42. The grounds of review are very broad, certainly far broader than those provided for in the ADJR Act. The Tribunal's powers are also greater than the powers given to the Court on an ADJR Act application; they include the power to vary the decision under review: NEL s 71P(2). Although there is no statutory right of appeal from a decision of the Tribunal, its decisions are subject to judicial review under the ADJR Act and under s 39B of the *Judiciary Act 1901* (Cth): see *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [2].

6. In *Bragg v Secretary, Department of Employment, Education and Training* (1995) 59 FCR 31 the applicant applied for judicial review

of two decisions of a delegate of the respondent made under the *Public Service Act 1922* (Cth). He could have appealed the decisions under another provision of the Public Service Act to a Disciplinary Appeal Committee. Davies J held that the appeal was an adequate review within the meaning of s 10(2)(b)(ii) and refused to grant the application in the exercise of the Court's discretion before the applicant had exercised his right to appeal, but left the door open if he were to fail on the appeal. His Honour said that the general practice of the court is not to consider a dispute for the resolution of which a satisfactory administrative remedy has been provided. Also see *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 25 FCR 523 at 530.

7. ActewAGL emphasised that the ADJR Act provides that the rights conferred by it are additional to rights available elsewhere and I accept that the starting point is that an applicant may rely on any or all of the available remedies – review in this Court or review or appeal elsewhere: *Kelly v Coats* [1981] FCA 58; (1981) 35 ALR 93 at 94. It cannot be the purpose of s 10(2)(b)(ii) to invariably require an applicant to exhaust whatever rights of review (s)he or it has before making an application under the ADJR Act because that would require everyone with alternative remedies who seeks judicial review to apply for an extension of time as a matter of course.

8. Nevertheless, in this case, having regard, in particular, to the nature of the issues to be considered, the expertise of the Tribunal (not to mention the inability of the Court to provide a review of the merits) (cf. *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739 at 750), I consider that this is an appropriate case for the exercise of the discretion vested in the Court by s 10(2)(b)(ii). The Tribunal is a more appropriate forum for the resolution of the particular dispute between the parties (cf. *McGowan v Migration Agents Registration Authority* [2003] FCA 482; (2003) 129 FCR 118 at 133).

9. As Burchett J said in *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 17 ALD 551 (and with which the Full Court agreed: (1989) 25 FCR 523 at 530), notwithstanding the terms of s 10(1)(a), "it should not be thought that it is always appropriate to bring a matter of this kind before the court. The legislation provides its own method of review". It is clear from the terms of the NEL that

parliament envisaged that in the normal course, if there were to be a challenge to the correctness of a decision of the AER, including the exercise of its discretion, then that would be heard by the Tribunal. Here, ActewAGL chose not to exercise its statutory right to apply to the Tribunal. In all the circumstances, and particularly when so much time has passed, it is fair that it be held to the consequences of that decision. I have take into account in ActewAGL's favour that merits review is no longer available (see *Kimberley-Clark* at 719). It lost that opportunity, however, not through ignorance or mistake, but by its own election for commercial reasons not to contest the decision.

CONCLUSION

1. The application should be dismissed with costs.

I certify that the preceding one hundred and ninety-eight (198) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate:Dated: 8 June 2011