



Changing the DNA of network tariff setting in Australia

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UnitingCare Australia is the national body for social services in the Uniting Church in Australia, supporting service delivery and advocacy for children, young people, families, people with disabilities, and older people

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1 Introduction

UnitingCare Australia is the national body for the UnitingCare Network, one of the largest providers of community services in Australia. With over 1,600 sites, the network employs 39,000 staff and is supported by the work of over 28,000 volunteers. We provide services to children, young people and families, Indigenous Australians, people with disabilities, the poor and disadvantaged, people from culturally diverse backgrounds and older Australians in urban, rural and remote communities.

UnitingCare Australia works with and on behalf of the UnitingCare Network to advocate for policies and programs that will improve people's quality of life. UnitingCare Australia is committed to speaking with and on behalf of those who are the most vulnerable and disadvantaged, for the common good.

UnitingCare Australia's principal interest in energy regulation arises because energy is an essential service with rising costs that are putting inordinate financial pressure on growing numbers of households in Australia.

2 Objective

Our objective for this Roadmap for network regulatory reform is:

"That regulators oversee agreement between consumers and network businesses on price and conditions for network services."

This objective is predicated on two arguments:

The first is the understanding that **the role of energy network regulation is to establish market dynamics that, as closely as possible, replicate competitive market discipline for natural monopolies**. In competitive markets, the transaction between buyer and seller informs both groups of market participants about each other's requirements, capacities and preferences. Crucial information is shared through transparent pricing, but we suggest that the actual interaction between buyer and seller, the lived dynamic of transaction, is also crucial to efficient and effective markets.

This transactional dynamic, particularly with regard to tariffs, is explored in this Roadmap for energy network regulatory reform in Australia.¹

¹ Note: Transactional economics focuses on the costs of making an economic exchange, including information costs, contract costs, bargaining costs, enforcement costs, and so on. We suggest that in energy markets,

The second argument is that **there are many features of energy markets and energy regulation, as currently configured, that can prevent the effective engagement of consumers, and particularly customers who are vulnerable or marginalised.** The result is that regulation pricing and other utility decisions do not always serve their interests fairly or effectively.

These two arguments together recognise both the need to produce a regulatory framework that corrects the inherent market failures of a monopoly business, but also one that responds to the regulatory failures that can result when regulatory focus is placed on establishing market dynamics that seek to replicate competitive market discipline.

The following section summarises observed shortcomings of recent (last 5-10 years) consumer experience in seeking efficient network prices, noting that, for most jurisdictions, network pricing has accounted for up to half of end consumer tariffs.

3 Statement of the Problem

There are four broad reasons that consumers should seek network regulatory reform:

1. Network tariffs are high
2. The nature of energy supply and use is changing
3. Regulatory decisions are difficult for consumers to understand
4. Engagement is challenging.

Each of these issues are addressed in turn below.

3.1 Network tariffs are high

Network tariffs appear high, and it is not clear that the regulatory system has protected consumers from unnecessary rises. UnitingCare Australia released a background paper in

transaction costs have generally not been fully considered in energy market regulation and have generally fallen on consumers. While we do not consider the many important aspects of transactional economics in this Roadmap, we suggest that the proposals in this paper incorporate some aspects of what have been external transaction costs and to improve economic efficiency of the regulatory process. For more on this aspect of economic theory see, for example: Williamson, Oliver E. 1979. *Transaction-Cost Economics: The Governance of Contractual Relations*. Journal of Law and Economics, 22(2): 233-261.

February, prepared by CME², where the data relating to energy network costs for consumers was presented.

Key findings included:

- The most expensive network tariff in Australia is almost four times higher than the least expensive.
- The average network charge to households in Victoria is about a third of that elsewhere in the National Electricity Market (NEM).
- The gap between least expensive and most expensive network tariff has doubled over the last seven years.
- Network service providers in Queensland have the highest charges and the greater proportion of their charge is fixed. The Queensland distributors, as well as SP Ausnet in Victoria, have recently increased their fixed charges significantly.
- Network service providers are typically increasing fixed charges more quickly than variable charges.
- International comparison shows that network tariffs in Britain are generally much lower than anywhere in Australia. The average network charges in Denmark and New Zealand are roughly comparable to those in Victoria, the lowest network cost jurisdiction in the NEM.

² See report on Network tariffs applicable to households in Australia – empirical evidence http://www.unitingcare.org.au/images/stories/publications/2015/150211_Network_tariffs_applicable_to_households_in_Australia-empirical_evidence.pdf

Figure 1 - Network charge for average consumption household

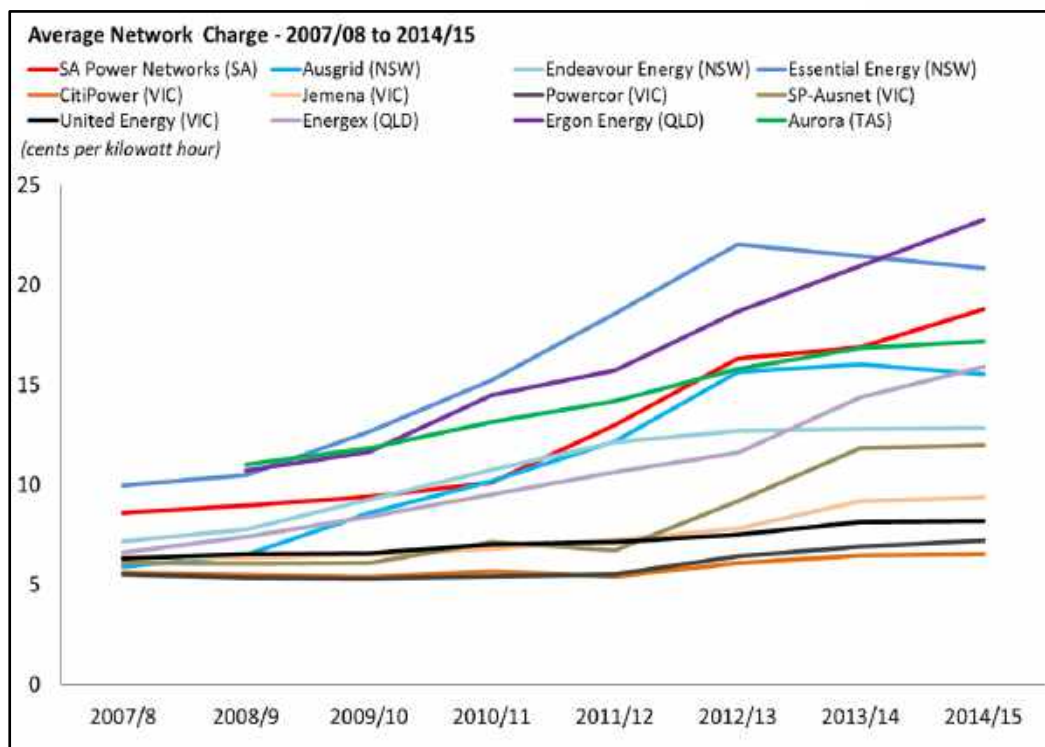


Figure 1 shows the network charge for an average consumption household for each distribution network in Australia over the last 7 years.

Figure 2 - International comparison

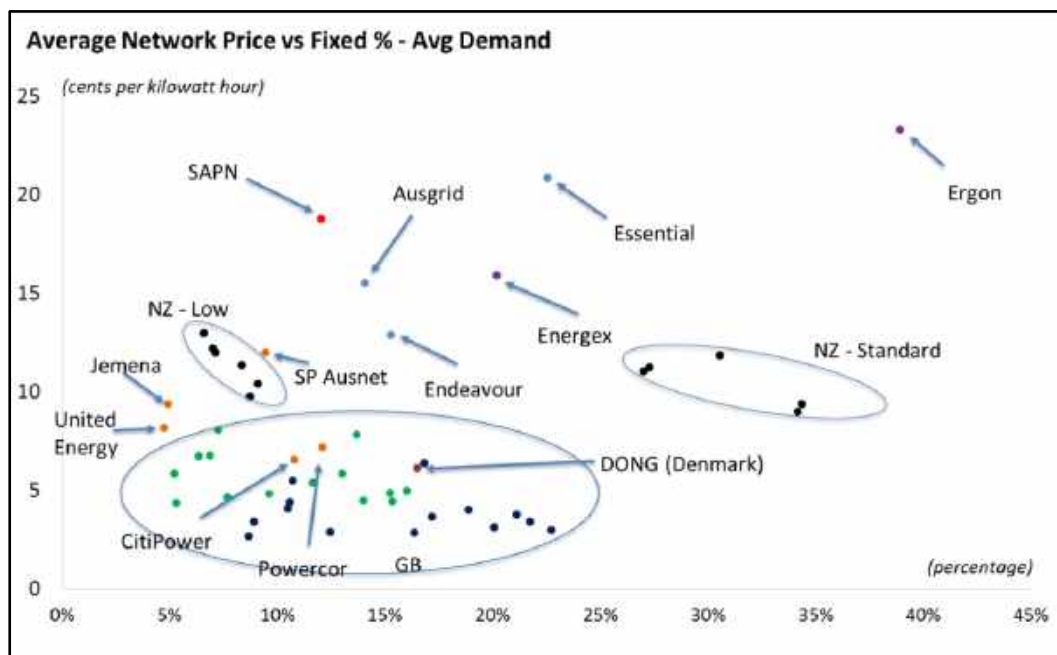


Figure 2 compares Australian distribution network businesses with network businesses from overseas locations that have electricity markets similar in structure to Australia's energy market.

This comparison provides a very useful check of costs charged to Australian consumers by our network businesses, noting that electricity network businesses all borrow on international capital markets, and so have comparable costs in capital raising, which is one of their major costs. Australian businesses are highly variable, but tend to cost more than comparison businesses.

The consumer response to this issue, and the circumstances in which many find themselves as a result of it, are of concern. UnitingCare is seeing, for instance, that:

- More people are being disconnected from supply.
- There are growing numbers of consumers installing solar photovoltaic (PV) panels to avoid network costs.
- Energy stress is increasing, both with more people affected by rising prices, couple with a 'deepening' of energy stress for some groups of consumers.
- Growing numbers of customers are being placed in hardship programs.
- More complaints from energy consumers are being received.
- People are using less energy.

The nature of energy supply and use is changing

A paper on *Rooftop solar PV and network tariffs*³ released by UnitingCare considers the impact of rooftop solar PV panels, which has galvanised debate over recent years.

³ See UnitingCare Australia's *Rooftop Solar PV and Network Tariffs* paper. Available at: http://www.unitingcare.org.au/images/stories/publications/2015/150522_pub_Rooftop_PV_tariffs_and_economic_theory.pdf

Figure 3 - Reduction in network payments in 2013 attributable to households with rooftop PV



Figure 3 expresses revenue reductions as a percentage of the allowed distribution network services business revenues in 2013.

These amounts are significant and particularly in the case of South Australia. As the data below in Figure 4 further indicates, as at the end of 2013, regulated network service provider charges would have to be six per cent higher if the revenue that has been lost to households that have installed rooftop PV is to be recovered.

Figure 4 - Reduction in network payments in 2013 attributable to households with rooftop PV as a percentage of regulated distribution network services revenues



Rooftop PV has grown very quickly in Australia. Mountain and Szuster⁴ quantify the impact of capital and production subsidies, the role of avoided energy purchases and retailer feed-in payments in supporting this very rapid growth. The installation of rooftop PV continues to be very attractive to households. For example, based on an actual quote obtained by the authors at the time of writing⁵ households that install rooftop PV are able to produce their own electricity for around six cents per kWh.⁶ This is less than one-fifth of the typical average price for electricity supplied from the grid, and one quarter of the variable price.

Solar PV is both a crucial issue for future network regulatory determinations and is an example of the rapid change that is now a part of energy markets. Another example is the emergence of new distributed storage technologies, such as the Powerwall⁷ and other high performance batteries. This kind of technology has the potential to change the number of households connecting to the grid, and by implication, the number of market participants among whom network costs will need to be shared.

As well as changes with PV demand and the emerging reality of battery storage, a number of other significant changes are also underway including advanced metering that provides much greater capacity for real time feedback to customers, network efficiencies through 'smart grids' and greater opportunities for home energy management systems. Metering rules are about to change with each customer having a 'metering coordinator'⁸ (as determined through and AEMC rule change that is near to implementation), with expected efficiencies to benefit customers.

3.2 Regulatory decisions are difficult for consumers to understand

Regulatory decisions are complex and present a significant challenge for the regulators themselves. Network businesses may spend hundreds of thousands of dollars, and thousands of staff hours, to prepare proposals for the regulator's consideration. When the three NSW network businesses lodged documentation as part of their latest regulatory

⁴ Mountain, B and P Szuster. 2014. *Chapter 4 - Australia's Million Solar Roofs: Disruption on the Fringes or the Beginning of a New Order?* In Sioshansi, F. (ed.) *Distributed Generation and its Implications for the Utility Industry*. Boston: Academic Press.

⁵ For installation of a 5 kW PV system in Melbourne (\$4,990 inclusive of GST after SRECs).

⁶ This assumes a 20 year life, 5% real cost of capital and \$50 per year annual maintenance.

⁷ Powerwall is a home battery that charges using electricity generated from solar panels, or when utility rates are low, and powers your home in the evening. More information available at: http://www.teslamotors.com/en_AU/powerwall

⁸ See DRAFT RULE DETERMINATION National Electricity Amendment (Expanding competition in metering and related services) Rule 2015 <http://www.aemc.gov.au/Rule-Changes/Expanding-competition-in-metering-and-related-serv/Draft/AEMC-Documents/Draft-determination.aspx>

proposals, it ran to over 44,000 pages. This volume of documentation and consultant reports means that active engagement with the regulatory process for consumer groups, even those that receive funding, is essentially impossible.

Regulatory decision-making quickly becomes a dance between two giants – the public sector overseer and the utility being overseen – and there is little room for the consumer in this process. There is little realistic prospect of any consumer, or even consumer representative organisation, digesting the thousands of pages of material that a utility can prepare and present. There is even less chance that a consumer organisation will have expertise to match that at the disposal of the business.

The effects of this complexity are obvious in the official public engagement phase of decision-making. The numbers of public submissions received by the Australian Energy Regulator is very small when compared with the number of customers affected by the regulatory decision. UnitingCare representatives have attended public forums organised by the regulator at which almost no members of the public, including community organisations, were actually present.

3.3 Engagement is challenging

Incentives for consumer to engage are limited and both regulators and energy businesses can find consumer engagement challenging. This is partly for the reason previously discussed: the decisions that regulators are making are very complex. But there are two other reasons.

The first is that, for many consumers, energy bills, while significant, are a purchase that is modest in comparison to their household budget, are an unavoidable cost (they cannot realistically choose whether or not to buy energy in the way they might choose whether or not to purchase a piece of furniture, or a holiday), and there may be limited, or no, choices of product available to them. All of these features – limited importance, lack of discretion, and lack of choice – will all reduce the incentive a consumer faces to get more involved in the transaction. This is not a phenomenon confined to the regulatory environment. Energy utilities seeking to engage directly with their customer base may experience the same problem. Of course, some consumers – such as those with unusually high energy costs, or with a lot of spare time – may still decide to engage. But they will not be the typical customer, meaning the information gained from them may not help the regulator or the energy businesses.

The second reason for limited consumer engagement is that it is far from clear how engaging will make a difference. Why should consumers get involved in regulatory decisions when they can't see how their views can affect the outcome?

4 What our tariff project has shown

4.1 The role of consumer engagement

The importance of increasing consumer engagement in energy network regulatory process has been recognised in recent years. It is significant to achieving better outcomes for consumers, and to provide signals from consumers to businesses.

In 2013, the Productivity Commission Report on Electricity Network regulation⁹ stated:

“The overarching objective of the regulatory regime is the long term interests of customers. This objective has lost its primacy as the main consideration for regulatory and policy decisions. Its pre-eminence should be restored by giving consumers much more power in the regulatory process.”

In December 2013, the Standing Council on Energy Resources’ report to the Council of Australian Governments (COAG) called for the *“strengthening of consumer input into network pricing decisions”*. This was an approach endorsed by COAG.

The term ‘consumer engagement’ is widely used but we suggest has many interpretations.

The Canadian Tamarack Centre for Community Engagement¹⁰ is recognised as a leader in developing and documenting community engagement practice. They define community engagement as:

“people working collaboratively, through inspired action and learning, to create and realize bold visions for their common future.”

What is perhaps less considered is that consumers are heterogeneous – different people have different views to each other and different preferences, so there will never be one single ‘correct’ answer to the question of what consumers want. In developing processes to more actively engage consumers, the plurality of consumer perspective will need to be recognised. This said, our experience is that what is best for one consumer in energy markets, is often what is best for most. So there is little point in overplaying the differences between consumer interests, though engagement processes need to be cognisant of potential differences. Perhaps these differences are more likely in tariff setting than other

⁹ Electricity Network Regulatory Framework <http://www.pc.gov.au/inquiries/completed/electricity/report>

¹⁰ See Tamarack Centre for Community Engagement at <http://tamarackcommunity.ca/>

aspects of energy network regulation, because of the potential for trade-offs between customer classes in tariff setting.

Our proposed approach provides a greater range of opportunities for consumer engagement as well as giving greater opportunity for it to occur at a deeper level of consumer engagement.

4.2 The role of tariff theory

As part of this project, we also considered how tariff theory can assist in the making of tariff design choices, and is published as an appendix to the paper titled, *Rooftop solar PV and network tariffs*. This paper considered, in particular, the role of marginal costs over the long run in influencing tariff design. The paper reached three main conclusions:

- Using the idea of long run marginal costs as the guiding focus for tariff design is at best a philosophy or broadly defined principle. It can be applied in many ways. The theoretical discussion associated with our paper on rooftop PV showed that very different tariff structures and levels can be claimed to be consistent with long run marginal cost. It is neither an objective, verifiable nor precise standard.
- We do believe that a good case exists in the theory of marginal costs (whether short run or long run) for some form of time differentiation in tariff charges for residential and other energy users. The theory does not however provide clear guidance on relative price levels (how much higher peak prices should be than off-peak) or the number of different time bands.
- The theories of electricity pricing provide no substance to the idea that shortfalls between marginal costs and total costs are efficiently recovered through fixed charges. In fact, to the contrary, the use of fixed charges to recover sunk costs is anathema to the theory of marginal costs, whether long run or short run.

4.3 Steps for change

The research, discussion and experience distilled during this project leads us to propose a range of steps that consumers, regulators and businesses can pursue.

- Regulators such as the Australian Energy Regulator (AER) can change the way they operate to bring consumers into decision-making more effectively, but the barriers we have identified earlier will make this difficult unless the regulatory approach itself is reformed.
- Mechanisms need to be adopted that will broaden the consumer voice, and make its messages more reliable and robust. Central to this will be a strong and independent Energy Consumers Australia.

- Utilities can engage more with consumers, particularly since many decisions they make are not necessarily regulated. Utilities can build trust through high quality consumer engagement, or they can erode that trust by doing it badly. The opportunity is there for more intensive engagement, both within and outside the context of regulated decisions/determinations.
- The regulator should do more benchmarking on prices and performance. Comparison between businesses is absolutely essential where the individual businesses are monopolies. It is a pivotal opportunity to identify possibilities for innovation and to place downward pressure on prices (which is one of the fundamental purposes of competition, that regulation is designed to emulate). Comparison of performance was important to UnitingCare's commissioned analysis of networks, and it should be just as important for regulators and consumers.
- Hardship programs are one piece of the puzzle, but even for low income consumers they should never be the main piece. Tariffs, prices, and the hardship programs themselves need to be designed to ensure that people with limited means have a sustainable connection to essential services. One-off forgiveness of debt is not always a viable solution.

When UnitingCare Australia commenced this project, we intended to describe preferred tariff structures that would meet equity and efficiency objectives. What became clear, however, is that it is the structure of energy markets, the performance of individual businesses, the preferences of consumers, and the circumstances of disadvantaged customers in each market that should determine these tariff structures. These circumstances can vary from market to market, and over time.

What is needed is a more robust process of consumer engagement that gives consumers more power in their relationship with the network businesses.

5 Proposal for deliberative and negotiated processes

Existing processes have not always delivered the best outcomes for consumers, notwithstanding considerable improvements. We propose a significant cultural shift from current arrangements for regulatory determination. Under the current model, networks put a price and revenue proposal to the regulator, and then defend that proposal during the Australian Energy Regulator's deliberations. This 'propose and defend' approach entrenches the network's position from the start, and automatically relegates consumers to a reactive and usually marginal role. Instead we propose an approach that changes it to one of deliberation, negotiation, and agreement (DNA). This proposal places two innovations at the centre of network regulated decision-making:

1. The use of deliberative democratic techniques¹¹ to develop fundamental understandings of community views and preferences; and
2. The use of negotiation between networks and consumers as an alternative vehicle for debate and compromise to the current system, by which the regulator has to make a judgement about all network proposals.

Incorporating direct and ongoing consumer focussed engagement in network regulatory processes is the priority for lasting reform, changing the make-up of regulatory processes.

This proposal is put forward for discussion with regulators and consumer organisations, and we welcome suggestions on its further development, refinement, piloting (where appropriate), and implementation.

In this section we consider a number of topics of relevance to how this DNA process could function, in the Australian regulatory context, at this point in time (April 2015) in the evolution of energy markets. This section considers:

- Outline of the DNA process
- Possible institutional arrangements
- Ratification of agreements and resolution of disagreement

Definition of the terms ‘deliberation’, ‘negotiation’ and ‘agreement’ is critical in describing each of these processes and their implementation. The three key terms are summarised below, with further discussion provided at [Appendix A](#).

5.1 Key terms

Deliberation

- Deliberation is any process of public engagement and participation in decision making that focuses on gathering representative views from the community and encouraging their reflection and debate, leading to recommendations for action. The central participants are not organised interests, but people from the community affected by the decision under consideration.

Negotiation

¹¹ See the UnitingCare discussion paper on deliberative democracy for a full explanation of deliberative democracy and deliberative engagement.
http://www.unitingcare.org.au/images/stories/publications/2014/140912_pub_dis_deliberative_democracy_discussion_paper.pdf

- Negotiation is engagement by two or more of the most affected stakeholders with each other in a process focussed on seeking agreement. Negotiation will be directly informed by, and occur within the context set by, deliberation processes.

Agreement

- Agreement records the outcomes of negotiation, to the satisfaction of the negotiating parties, on behalf of all key stakeholders.

5.2 Outline of the DNA process

We commence by proposing a general approach, based on the current regulatory process in Australia. The proposal represents a shift from current arrangements where networks “propose and defend” to approaches of “deliberate, negotiate and agree”. Under this generic model for future network regulation, the process would have six stages:

- i. Initiation*
- ii. Deliberation*
- iii. Negotiation*
- iv. Progress Agreement/Draft Determination*
- v. Final Agreement*
- vi. Final Determination*

i Initiation

At present, regulatory determinations begin with a proposal originating with the network service provider. However, this places other parties, including the regulator, in a reactive position from the beginning.

An alternative approach is for the regulator to start the process. We suggest that the regulator should call on interested stakeholders, in particular consumer representative groups and network businesses, to identify what they regard as the main questions that will require decisions. This would, in turn, assist in determining what revenues, tariffs, and network activities will entail for the next period.

Examples of issues that might be identified could include:

- what trade-offs consumers want between reliability and price
- what major capital works could be considered and why they are needed
- levels of support for grid connection to remote sites
- what level of support there should be for demand side management
- introduction of smart meters and/or time-of-use pricing
- costs and benefits of remote-control of appliances to manage peak demand

- proposals for undergrounding.

The issues might vary considerably between networks, geographic locations and over time.

The regulator could bring together stakeholders and seek consensus on the list of issues that all parties believe to be important in the decision-making process. The purpose is to prioritise issues which would be the focus of deliberative processes and, if necessary, seek expert input, such as through consultants.

The AER would oversee the implementation of deliberative processes.

ii Deliberation

At the heart of this proposal is the use of deliberative democratic techniques to assist citizens to make choices and decisions around network service provision. Deliberative processes have been described in the UnitingCare Australia discussion paper, *A deliberative approach to consumer engagement in the energy sector*¹², and are recapped here.

Deliberative democracy provides an opportunity to ensure appropriate representation of those disengaged voices in energy policy and regulation issues. Deliberative processes can provide forums that allow for balanced information sharing, within a framework that enables the outcomes to be utilised in decision-making.

One of the key arguments for using deliberative engagement processes is that they bring together different perspectives and viewpoints and ensure all are considered. Within electricity markets, consumers are poorly organised and not well represented in traditional advocacy approaches or conventional stakeholder consultation processes. Deliberative engagement processes, in contrast, are aimed at including everyday citizens as opposed to 'stakeholders' (who are typically well organised advocacy groups). Deliberative processes are therefore particularly well suited to 'hard to reach' groups.

Deliberative democracy focuses on gathering representative views from the community and encouraging reflection and debate, leading to recommendations for action. Through more robust representation of public preferences it aims to encourage greater public confidence in decision making, by gathering more representative views on important issues.

Essential elements in the design of a deliberative process include the need for it to ensure:

¹² See Discussion Paper, *A deliberative approach to consumer engagement in the energy sector* at http://www.unitingcare.org.au/images/stories/publications/2014/140912_pub_dis_deliberative_democracy_discussion_paper.pdf

1. Influence: The process should have the ability to influence policy and decision making.
2. Inclusion: The process should be representative of the population and inclusive of diverse viewpoints and values, providing equal opportunity for all to participate.
3. Deliberation: The process should provide open dialogue, access to information, respect, space to understand and reframe issues, and movement towards consensus.¹³

Other typical features of a deliberative process include that there are:

- Facilitators – who are not experts and are impartial to assist with and facilitate discussion
- Participants – who are not experts and may have previously been disengaged
- Information – provision of balanced and impartial information to participants.

To ensure that deliberations are utilised in decision making, the process and outcomes will ideally be endorsed or supported by elected officials – in this case, it would require formal recognition by the regulator and the rules it is implementing.

Deliberative forums that utilise random selection of participants ensure that they are not self-selected or stakeholder determined. Random selection may utilise stratified random sampling, particularly for smaller groups, to ensure that the sample is representative of the demographics of the larger population (in terms of socio-demographic relevance—for example, sex, age, income bracket, geography, education).

Deliberative processes can be adapted and combined to create a unique process specific to a particular issue, project or stakeholder groups. Maintaining the essential elements of an effective deliberative process is important to ensure that the need for influence, inclusion and deliberation is still satisfied.

What is the subject of deliberation?

Deliberative processes would be initiated, funded and overseen by the regulator. Deliberation would focus on the significant choices to be made in which consumers would want a say – issues such as those listed above. Not all issues would necessarily be suited to deliberation. However, deliberation is the main vehicle for consumers to reflect on complex information and potentially conflicting values and trade-offs, in order to make choices that affect them.

¹³ L. Carson & J. Hartz-Karp, 'Adapting and combining deliberative designs', *The Deliberative Democracy Handbook*, Jossey-Bass, San Francisco, 2005, p.122.

Most choices on which citizens deliberate will require information. Sometimes that information can be quite technical, as is likely in energy network regulatory decisions. Deliberative processes are readily designed to seek out and reflect upon information. There are two broad approaches that can be taken: either, for existing stakeholder organisations to identify what they consider important information to present to the deliberative forum; or for the forum to be given more autonomy, in which case it decides for itself what information it wants and the regulator sources the information and supplies it as requested. Either approach might be suitable to energy network decision making, depending on circumstances.

The deliberative forum would supply outcomes to the regulator, who could then publish them, so the whole community would see the outcomes, as well as supplying them to the negotiation group.

iii Negotiation

While deliberative processes are being undertaken, the regulator would constitute a Negotiating Group. Business and consumer interests would each agree to membership of this group. Where the interests themselves could not agree on negotiators for their interest, the regulator could make that choice, but the emphasis would be on interests taking responsibility for their own negotiators and taking ownership of the process.

The Negotiating Group would seek to debate, bargain and compromise within the broad parameters of consumer preferences that have been identified through deliberative processes. It would also seek evidence and negotiate on matters not considered by deliberative mechanisms.

Any rejection or adjustment by the Negotiating Group of deliberative advice would need to be accompanied by a documented and quantifiably better alternative that is demonstrably a better outcome for end consumers.

The Negotiating Group would also serve to ensure that large energy consumers, who might be under-represented in deliberative processes, would have access to the process. It is important that consumers of large amounts of electricity, such as heavy industries, rail networks and retail chains, are engaged in the process, as significant stakeholders in the outcome.

Terms of reference for the Negotiating Group would include:

- Identifying issues that should be subject to negotiation.
- Commissioning research and advice to assist with decision making, having negotiated resourcing.

- Negotiating in good faith to seek agreement in the best interests of consumers as per the National Energy Objective
- Present Progress Agreement and Final Agreement statements to the AER on all matters agreed. This would involve:
 - Documenting areas of agreement with relevant detail to be presented to the AER; and
 - Documenting areas of disagreement for separate decision by the AER.

iv Progress Agreement/Draft Determination

Negotiations would occur under the oversight of the regulator, with the objective of reaching further agreement. Where the parties reached agreement, the regulator would be responsible for checking that agreements met a reasonableness test and consistent with legal requirements. This process would occur at a similar point of time to the current draft determination process.

The Negotiation Group would present a progress agreement, including identification of any unresolved matters, to the regulator, who would use the material to produce a Draft Determination.

It is anticipated that the regulator would accept agreements made by the Negotiating Group that would be also consistent with the outcomes of the deliberative processes, and would make draft determinations with regard to unresolved matters and provide indicative directions for further negotiations.

Release of the Draft Determination would include a call for comment by interested parties and most likely include public forums and potentially, further deliberative forums. Input through submissions, any deliberative forums and any other process would be made available to both the AER and Negotiating Group.

v Final Agreement

The Draft Determination and input received through the call for comment would form the foundation for a final round of negotiation by the Negotiating Group. The Group's final agreement would be presented to the AER, by the Negotiating Group in four parts:

- Aspects of the determination that were negotiated and agreed between consumer and industry interests.
- Evidence considered, including outcome of deliberative processes and other advice received, including from consultants and submissions.
- A statement showing how deliberative process recommendations have been incorporated into the final agreement.

- Matters that were not agreed between consumer and industry interests in the negotiation process and any comments about the extent of disagreement with key arguments on the various sides of the disagreement.

vi Final Determination

The final decision would be presented by the AER in three parts:

1. Aspects of the determination that were negotiated and agreed between consumer and industry interests through the Negotiating Group and that satisfied the AER as reasonable.
2. Matters that were not agreed between consumer and industry interests, resulting in the AER making a determination.
3. Evidence from all sources in support of the determination.

5.3 Possible institutional arrangements

Constituting consumer Negotiating Group

The AER will be responsible for formally endorsing a Negotiating Group. We would expect that the relevant network would identify negotiators from the network side, and that Energy Consumers Australia (ECA) would conduct a process to identify an equal number of consumer negotiators.

ECA would call for expressions of interest from amongst consumer organisations for individuals to form the Negotiating Group, with representatives to be identified that would represent the interests of household consumers, low and modest income consumers, and small and large business consumers. Consumer representatives from other interest groups could be taken into account depending on the circumstances. These could include, for example, consumers from regional and remote communities and people from non-English speaking background communities. We propose that ECA would appoint a Negotiating Group through whatever process they deem appropriate, and that the Negotiating Group would then be accountable to a broader consumer base and would negotiate in good faith with the network representatives for the Negotiating Group. Consumer representatives would be reimbursed for their time and travel expenses.

We propose that the AER appoint a chair of the Negotiating Group who would be a participating, but non-voting, chair.

Accountability to consumers

We recognise the importance of the consumer negotiators being accountable to both their organisational or community bases, as well as to consumers in general. We have assumed

that negotiators would largely come from existing consumer, community and advocacy organisations, and that the consumer negotiators would also need to be accountable more broadly to consumers. This could be achieved through:

- provision of regular updates to be published through ECA or the AER
- presentations at formal bi-lateral processes or other forums such as local community meetings
- formal reports back to ECA from the Negotiating Group at each phase of the process.

6 Barriers to implementation

In considering the implementation of the proposed DNA approach, there are two main barriers:

- the existing rules
- resistance to change.

Both of these issues are addressed in turn below.

6.1 Existing rules

The existing rules may be a barrier to application of the DNA approach. For example, rule 6.10.1 on *Making of draft distribution determination* states:

“(a) The AER must make a draft distribution determination in relation to the Distribution Network Service Provider.

(b) In making a draft distribution determination in relation to the Distribution Network Service Provider, and subject to clause 6.14, the AER must have regard to each of the following:

(1) the information included in or accompanying the regulatory proposal and the proposed tariff structure statement;

(2) written submissions on the issues paper received under clause 6.9.3 and on the documents and information referred to in sub-paragraphs 6.9.3(a)(1) to 6.9.3(a)(4); and

(3) any analysis undertaken by or for the AER that is published prior to the making of the draft distribution determination or as part of the draft distribution determination.”

Some network businesses have the opinion that this rule requires the AER to make decisions, on their own, and can only do so on the basis of the written documentation specified in 6.10.1 (b), i.e. precluding any outcomes of deliberative or negotiation processes. Other views suggest that while the AER is the decision maker, they can take into account any relevant material and can decide to give preference to findings from deliberative processes and agreements reached between network and consumer stakeholders.

Flowing from this question of understanding of the role of the AER in network determinations and capacity to utilise deliberative and negotiated decisions, there are a number of other clauses from Chapter 6 of the National Electricity Rules that may also need adjustment to enable the DNA approach to be applied. These include, but are not limited to:

6.2.4 “Duty of AER to make distribution determinations”

6.8.2 “Submission of regulatory proposal and tariff structure statement”

6.9.3 “Consultation”

6.12.1 “Constituent decisions”

6.12.3 “Extent of AER’s discretion on making distribution determinations”

6.16 “Distribution consultation procedures”

It is not the purpose of this paper to provide opinions on interpretation of the rules, nor to consider all aspects of the rules that may need adjustment to facilitate the transition to application of the proposed DNA process. The rules are, however, critical to application of a different approach to distribution regulation and must be considered as a part of next steps.

Clarification is needed on how the AER would regard an agreement as described, being presented as part of a regulatory process. Alternatively, a rule change may be needed.

6.2 Resistance to change

To move to the DNA approach in practice, all stakeholders will need to become confident in working with the approaches involved. This will entail trialling the approaches and developing confidence in them, and will need to occur over time. A reasonable degree of goodwill is needed by network businesses and consumer interests, but our opinion is that even at the height of the current round of network regulation, levels of goodwill are robust.

We are aware that network businesses are now required to lodge a Tariff Structures Statement (TSS) as part of their regulatory proposals and that the development and application of the inaugural TSS’ will occur over the next 18 months or so, including process

development by the AER during much of the 2016 calendar year. We propose that the TSS would be an excellent process to being with, in applying the DNA approach.

The DNA process has advantages for consumers, network businesses and regulators. For consumers, they will have greater say in choices that affect them, and all types of consumers will have a voice in the process. For network businesses, there will be fewer challenges to the legitimacy of regulatory decisions, and as a result, less reputational risk. Network businesses and consumers will both benefit from being able to communicate directly with each other, and negotiate where there are opportunities for mutual interest to be advanced. The regulator stands to benefit from having to carry less responsibility for discerning consumer preferences. We believe the opportunities for greater transparency and decisions that more closely align with what consumers want will help overcome any resistance to change.

7 Next steps

We propose the following initial steps towards implementing this Roadmap as per the DNA process.

1. Continued debate is needed about the merits, challenges and opportunities that would come with implementing the process. Refinements will be needed to the concepts given or implied in this paper. Some of this process will need to be formal, at workshops, conference sessions and forums, however, more organic consideration is essential as well, so that the DNA process can evolve.
2. The relationship between the rules and the DNA process will also need to be scrutinised, with the AER determining the extent to which they can include the DNA process in their regulatory roles, or whether rule changes are needed. We have indicated some initial points where we think rule reform might be considered.
3. The capacity for consumer groups to effectively engage in negotiation and agreement is of paramount importance. Consumer groups will need to decide the extent of their interest in the approach. Energy Consumers Australia will also need to have a significant role in building consumer focussed capacity.
4. Trials will be crucial to develop understandings and experience of deliberative processes. Deliberative processes can be applied by the AER or utilities. No major rule changes are required to achieve this, and processes can be trialled for a range of issues that are not directly related to revenue resets.
5. Negotiations with written agreements can also be undertaken to develop understandings and experience of these processes, starting with non-controversial topics, to develop trust and process experience.

8 Conclusion

UnitingCare Australia has reviewed key features of energy tariffs, markets and regulation because we believe there is scope to ensure better engagement of consumers, particularly those who are vulnerable or marginalised. We hope to continue to engage with other consumer organisations, network businesses and regulators in coming months, working together to ensure that consumer preferences are recognised and reflected in the way electricity tariffs are decided and structured.

Feedback on this paper is eagerly sought by UnitingCare Australia.

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Appendix A

Definition of Deliberation

Deliberation is any process of public engagement and participation in decision making that focuses on gathering representative views from the community and encouraging their reflection and debate, leading to recommendations for action. Examples of deliberative processes¹⁴ include Citizen Juries, Community Budgeting and deliberative forums. Through more robust representation of public preferences deliberative processes encourage greater public confidence in decision making, by gathering more representative views on important and often complex issues.

Stakeholders present to the people involved in a deliberative process, but are not a part of the actual deliberation, just as a jury in a trial hears all the evidence presented, but deliberates and decides on its own.

Definition of Negotiation

Negotiation is a direct process involving representatives of the most affected stakeholders, in this instance customers and network businesses – the end buyers and the sellers. Negotiation is a process that occurs over a period of time and is focussed on seeking agreement.

We expect negotiation to be informed by deliberation, where this has occurred separately from a clearly understood negotiation process.

Definition of Agreement

In this instance, we define an Agreement as a formal document that faithfully records the outcomes of negotiation, to the satisfaction of the negotiating parties.¹⁵

We note that in some overseas jurisdictions the term ‘Negotiated Settlements’ is used to summarise a process that involves negotiation and agreement with consumer interests, we provide some comments about this below.

¹⁴ Sometimes called ‘deliberative democracy’.

¹⁵ Our definition of ‘Agreement’ correlates closely with the notion of ‘Settlement’ used in Negotiated Settlements.

Negotiated Settlements

There are aspects of the proposed negotiation and agreement aspects that are similar to the Negotiated Settlements processes used in North America. It is therefore instructive to describe this process, within the statement of definitions. Bruce Mountain said the following about negotiated settlements in 2013¹⁶:

“Negotiated settlements have been used to determine prices, incentives, expenditures and so on for services provided by electricity and gas monopolies in the United States of America and Canada for many decades. In the United States it is common for the parties to enter into settlement negotiations, with the goal of presenting an agreed position on all issues (or a partial settlement on some issues) to regulatory commissions. This has been documented in detail in the federal regulation of interstate gas pipelines and electricity transmission in the United States, in the regulation of major oil and gas pipelines in Canada, and in the regulation of electricity utilities in Florida.

The arguments in favour of negotiated settlements are that they are quicker, less expensive, and more innovative than traditional regulation. It is also argued that it leads to a better understanding and less adversity between users and service providers; and that it delivers mutually beneficial gains because users can better determine the trade-offs that are important to them, than can regulators”.

¹⁶ Mountain, B. April, 2013. A summary of evidence and thinking on negotiated settlements in the regulation of energy network service Providers.