Bargaining under Monopoly: Negotiated Settlement, Customer Bargaining and Australian Energy Networks

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Abstract

This paper examines whether negotiated settlement has a larger role to play in the economic regulation of Australian energy networks. The argument does not suggest that monopoly has disappeared, or that regulation can sensibly be wished away. The question is more modest, but more important: where the assets are sunk, the relationship is repeated and the regulator is necessarily imperfectly informed, is it always best for the regulator to determine every material term? Settlement is best understood as a form of regulatory contracting, not as deregulation. It is valuable only where the gains from revealing customer preferences, trading across interdependent issues, securing commitment and adapting over time exceed the costs of representation, negotiation, verification and public-interest approval. Experience at FERC, in Florida, in Canada, in Australian access regimes, in GB energy and in Scottish water suggests that settlement requires capable representation, a credible adjudicative fallback and a regulator willing to review packages rather than relitigate every component. Australia's Better Resets process has moved in a useful direction, but engagement is not the same as bargaining. The paper therefore proposes a cautious Australian pilot, beginning with agreed facts and partial settlements before any full revenue-package settlement is attempted.

Keywords

negotiated settlement; energy networks; regulatory contracting; monopoly regulation; consumer representation; Australia; incentive regulation; energy transition

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1. Introduction

The familiar picture of energy network regulation is one of expert adjudication. A network business submits a revenue proposal. The regulator examines forecasts, tests assumptions, consults interested parties, determines expenditure allowances and rates of return, and finally imposes a set of prices, revenues, service obligations and incentives for the next regulatory period. There is much to be said for this procedure. It is orderly, public and legally disciplined. It has also protected consumers against monopoly power in circumstances where exit is weak or unavailable.

But this familiar procedure is not the only possible form of consumer protection, nor is it always the best one. Modern network determinations involve sunk and lumpy investment, long asset lives, changing technologies, decarbonisation policies, reliability obligations, distributional concerns and quite different customer preferences. They require judgements about electric vehicles, distributed energy resources, demand response, resilience, emissions objectives and the timing of network augmentation. The regulator is asked to perform all these tasks in an adversarial setting, under information asymmetry, and within a timetable that encourages the parties to posture as well as to inform.

The standard reason for adjudication is that electricity and gas networks are not ordinary markets. A household or business cannot readily choose a rival distribution network. A generator or load customer may have few practical alternatives to a transmission service. The regulator must therefore stand between the network and its customers. That proposition is correct as far as it goes. But it does not follow that every term of the regulatory bargain must be selected directly by the regulator. A public backstop may be indispensable, while still leaving room for bargaining under that backstop.

In this paper, negotiated settlement means a voluntary agreement between a regulated network business and affected users or their representatives on some or all of the material terms of regulation, subject to regulatory approval and an adjudicative fallback. It is not deregulation. It is not a naïve belief that monopoly suppliers and diffuse consumers can sit around a table and somehow discover the public interest. It is bargaining in the shadow of regulation. The regulator sets the framework, ensures that the right parties can participate, tests information where necessary, adjudicates unresolved issues and rejects settlements that are exclusionary, coercive or inconsistent with statutory objectives.

The economic point is simple. Public utility regulation is a form of long-term contracting administered by the state. It seeks to protect consumers and investors where assets are sunk and where exit is limited (Biggar 2011; Biggar, Glachant and Soderberg 2018; Eskesen 2021). Once the problem is seen in that way, the relevant comparison is not between public regulation and private bargaining. It is between two ways of completing an incomplete regulatory contract: direct determination by the regulator, or structured bargaining by the affected parties, with the regulator as reviewer and backstop.

The Australian context makes this question particularly timely. The AER's Better Resets Handbook encourages network businesses to put consumer preferences at the centre of their proposals. The national energy objectives now require decision-makers to have regard to emissions reduction as well as price, quality, safety, reliability and security (Energy Ministers 2023; AER 2023; AER 2024). These developments are welcome. They also expose a gap. Consumers may be consulted, panels may challenge, and the AER may give weight to a well-supported proposal. But consumers do not thereby become bargaining counterparties with recognised authority to settle terms.

The argument is therefore conditional rather than evangelical. Negotiated settlement is not inherently superior to adjudication. In badly designed circumstances it may be worse. Its value depends on whether the gains from preference revelation, issue bundling, reduced regulatory error, reduced delay and commitment exceed the costs of representation, negotiation, verification and public-interest approval. That condition is more likely to hold where consumer or user representation is capable, the regulatory fallback is credible, the

regulator is prepared to review packages without reopening each term, and approval criteria protect non-participants and future consumers.

The rest of the paper proceeds as follows. Section 2 sets out the regulatory-contracting framework and the conditions under which settlement may improve on adjudication. Section 3 considers comparative evidence from FERC, Florida, Canada, Australian access regimes, GB energy regulation and Scottish water. Section 4 applies the argument to Australia and explains why Better Resets is a useful but incomplete precursor. Section 5 proposes a staged Australian model. Section 6 considers incentive regulation and the energy transition. Section 7 concludes.

2. Regulation as incomplete long-term contracting

2.1 The regulated bargaining problem

In competitive markets, buyers and sellers normally settle terms by agreement. In most cases the negotiation is not elaborate because rival offers discipline both price and quality. If a seller asks too much or provides too little, customers can leave. That threat of exit does much of the work that regulation must otherwise attempt to do.

Monopoly networks are different. Exit is limited, the assets are sunk, the service is essential and the relationship is repeated. The conventional response is periodic adjudication. The regulator determines allowed revenue, expenditure allowances, service standards, incentive mechanisms, tariff constraints and sometimes specific investment allowances. This is a necessary response to monopoly power, but it is not a costless one.

Adjudication requires the regulator to infer efficient expenditure, forecast demand, decide a cost of capital, specify output incentives, balance price and service, and translate diffuse consumer preferences into formal determinations. Network businesses and consumer representatives then devote substantial resources to persuading the regulator. The process may discover useful information, but it may also encourage strategic presentation of evidence, fragmentation of issues and a tendency to treat each regulatory parameter as if it were independent of the others.

The relevant economic problem is therefore not bargaining versus monopoly. Monopoly remains and must be controlled. The problem is how to complete a long-term regulatory contract under uncertainty. One model asks the regulator to complete the contract by determining each term. Another asks the regulator to create a bargaining environment in which affected parties may agree some terms, while the regulator retains the power to reject the package or decide unresolved matters. The second model does not displace regulation. It changes the role of the regulator from sole architect to framework-setter, reviewer and backstop.

2.2 A simple welfare condition

The case for negotiated settlement can be stated as a simple comparative condition. Settlement should be preferred to direct adjudication where the expected gains from settlement exceed the additional costs and risks that settlement creates. In conceptual form:

$$Gs + \Delta E + \Delta T > Cs + Xs$$

Here Gs denotes the gains from settlement-specific mechanisms such as preference revelation, multi-issue trade and commitment. ΔE denotes any reduction in expected regulatory error relative to adjudication. ΔT denotes any reduction in delay, litigation and administrative cost. Cs denotes the cost of representation, negotiation, expert verification and regulatory approval. Xs denotes the expected cost of exclusion, capture, short-termism or prejudice to non-participants.

This is not offered as an equation to be estimated in this paper. Its purpose is more prosaic and more useful: to discipline the comparison. Settlement is not justified because agreement sounds attractive or because cooperation sounds nicer than litigation. It is justified only if the institutional mechanisms available through bargaining produce enough value to outweigh the institutional costs of making bargaining credible.

The condition implies several propositions. First, settlement is more promising when regulatory issues are interdependent. If the only matter in dispute is a single efficiently measured cost item, adjudication may be cheaper and clearer. If the parties must trade off expenditure, reliability, tariff structure, risk allocation, information disclosure and timing, then package bargaining may discover options that a line-by-line determination will miss.

Second, settlement is more promising when parties have relevant information not easily available to the regulator. Customers may be able to reveal the relative value they place on reliability, bill stability, innovation, tariff smoothing or faster connections. Network businesses may reveal cost and risk information more candidly when there is scope to trade rather than merely to defend a claim.

Third, settlement is more promising when the fallback is credible. Bargaining in the shadow of a weak or indulgent determination will not protect consumers. Bargaining in the shadow of arbitrary regulation will not command legitimacy. The fallback must discipline both sides. It must be strong enough to constrain monopoly power and predictable enough to define a sensible bargaining range.

Fourth, settlement is less attractive when representation is weak. Diffuse consumers cannot be assumed to bargain effectively merely because they are invited to a meeting. They need standing, continuity, expertise, funding and accountability. The absence of these features is not a small procedural defect. It goes to the heart of whether settlement can reveal preferences and discipline monopoly conduct.

Finally, settlement is not a substitute for statutory judgement. A regulator should not approve a bargain merely because some parties have signed it. The settlement must be tested against the public interest, including the interests of absent consumers and future consumers. The challenge is to apply that test to the package as a whole rather than to dismantle the package into independent parts and thereby destroy the bargain.

2.3 The mechanisms of settlement

Four mechanisms explain why settlement may add value. The first is information. Regulators cannot directly observe the many ways in which consumers value price, reliability, service quality, timing, resilience and innovation. Consultation elicits views, but it does not necessarily reveal how strongly those preferences are held or what trade-offs consumers would accept. Bargaining is potentially more informative because parties must choose among packages, not merely express preferences in isolation.

The second mechanism is multi-issue trade. Regulatory determinations often assess issues separately: operating expenditure, capital expenditure, tariffs, service standards, depreciation, incentives, connection policy and risk sharing. Yet these matters are economically interdependent. A network business may accept a lower revenue path if it receives a longer moratorium or a clearer reopener. Consumers may accept a targeted investment allowance if outputs, reporting and sharing arrangements are strengthened. A regulator can design such packages, but the parties may be better placed to discover which package is actually acceptable.

The third mechanism is commitment. Periodic resets can create a repeated game of claims and counterclaims. Each side anticipates the next proceeding, guards information and seeks precedent. A settlement can include rate freezes, information obligations, performance targets, reopeners and dispute mechanisms that reduce the need to relitigate the same matters. This does not eliminate conflict, but it may make the conflict more productive.

The fourth mechanism is adaptation. The energy transition makes regulatory contracts more incomplete. Investment needs, technology costs, consumer behaviour and policy requirements will change during the regulatory period. A settlement may allow staged decisions, trigger mechanisms and agreed review points that respond more quickly than a static determination. This possibility is especially important where timing and option value matter.

Table 1. Settlement mechanisms and safeguards

Mechanism	Adjudication problem	Settlement contribution	Safeguard needed
Information	Regulator imperfectly observes consumer preferences and local trade-offs.	Representatives reveal choices across price, quality, risk and timing.	Funding, disclosure and representative standing.
Multi-issue trade	Issues are often assessed separately even when economically interdependent.	Parties can form package bargains across revenue, outputs, tariffs and risk.	Transparent main terms and public-interest approval.
Commitment	Repeated resets can encourage strategic positioning and relitigation.	Settlements can include moratoria, reopeners, performance targets and information duties.	Credible fallback and enforceable monitoring.
Adaptation	Transition investment creates uncertainty that may not be handled well by static determinations.	Parties can agree staged investment, trigger mechanisms and consumer protections.	Output commitments, prudence review and protection of future consumers.

2.4 Failure modes and design constraints

It would be a mistake to romanticise settlement. A bargain may be exclusionary. A network business may select convenient interlocutors and ignore more difficult consumer interests. Representatives may be underfunded, captured, or simply overwhelmed by the technical complexity of network regulation. Large users may obtain tariff concessions at the expense of households. Present consumers may agree lower current bills that leave future consumers with higher costs or poorer service. Regulators may approve settlements in order to reduce their workload rather than because the package is sound.

These risks are not incidental. They define the design problem. Settlement requires eligibility rules, information rights, participation funding, expert support, transparency, safeguards for dissenting or absent parties, and an approval test that asks whether the process was inclusive, informed and non-coercive. It also requires the regulator to retain a clear adjudicative fallback. Settlement without a fallback is merely monopoly bargaining. Settlement with a bad fallback is poor regulation by another name.

The approval test should be neither rubber-stamping nor full relitigation. If the regulator reopens every line item, parties will quite rationally decide that bargaining adds cost without adding effect. If the regulator approves any signed agreement, consumers and future users may be prejudiced. The necessary discipline lies between these extremes: review the process, test the information, consider dissent, assess whether the package lies within a reasonable range, and ask whether it is consistent with the statutory objectives.

2.5 Observable implications

The framework suggests several observable indicators of effective settlement. First, settlement should be more common where the parties are repeat players and where issues are interdependent. Secondly, settlements should contain package features rather than merely reproduce the regulator's likely answer. Thirdly, consumer or user representation should be not decorative but central. Fourthly, regulators should give procedural effect to settlements by narrowing the issues, shortening proceedings or approving packages without unnecessary duplication.

It also suggests several indicators of ineffective settlement. Negotiations will occur late in the process and merely add another procedural layer. Agreements will be confined to low-risk or symbolic matters. Consumer representatives will support packages without the capacity to explain why. Regulators will either dismantle the bargain or approve it without serious scrutiny. In either case, the promised benefits will not materialise.

These implications are useful for Australia because they prevent the discussion becoming a matter of slogans. A settlement regime should not be judged by whether people met more often or whether the tone of the proceeding improved. It should be judged by whether bargaining changed the feasible set of outcomes, reduced avoidable regulatory cost, improved the quality of commitments and protected consumers at least as well as adjudication.

2.6 Scope and limits of the evidence

The evidence on negotiated settlement is institutional rather than experimental. Identical regulatory problems are not randomly assigned to settlement and adjudication. The evidence instead concerns jurisdictions with different legal traditions, participants, backstops and regulatory cultures. That limits causal inference. But it does not make the evidence unhelpful. Institutional economics often proceeds by asking why arrangements persist, how incentives operate and what functions particular rules perform.

The comparative evidence is strongest where it identifies mechanisms. FERC shows the importance of a procedural backstop and an analytical baseline. Florida shows the importance of a capable consumer advocate. Canada shows the importance of treating settlements as packages. Australian access regimes show that negotiation with an arbitral backstop is not foreign to Australian infrastructure policy. GB energy and Scottish water show that common-law regulators can create structured space for customer engagement and bargaining while retaining statutory responsibility.

The evidence is weakest where it is asked to show that settlement is always better. It does not and cannot show that. The proper conclusion is more limited: settlement may outperform adjudication where the institutional preconditions are present, and it may fail or add cost where they are absent. That is enough to justify a carefully designed Australian trial.

3. Comparative institutional evidence

Negotiated settlement is not a curiosity. It has been used in North American utility regulation for decades, and related arrangements have appeared in transport access, airports, water and energy network regulation. The experience is diverse, and it would be unwise to extract a single mechanical lesson. But several institutional lessons recur.

3.1 FERC: settlement under a strong procedural backstop

At FERC, settlement developed within a formal process that could otherwise involve hearings, evidence, cross-examination and decision. Settlement therefore occurs against a credible litigation baseline (Littlechild 2012; Wang 2004). The point is not that parties are sentimentally attracted to agreement. They settle because the alternative is costly, uncertain and sometimes slow, and because the process allows contested and uncontested issues to be separated.

The FERC experience also shows that settlement is not the absence of analysis. Staff, intervenors and affected parties must understand the evidence well enough to know the value of what is being traded. Bargaining does not remove the need for expertise. It relocates expertise into a process in which the parties can use it to form a package.

For Australia, the lesson is that settlement needs an analytical baseline. If the parties have no common understanding of demand forecasts, expenditure options, cost of capital issues or service outputs, they will not bargain intelligently. The regulator may need to help establish that baseline, at least in the early stages.

3.2 Florida: the institutional value of a consumer advocate

Florida electricity regulation offers a different lesson. Settlements there have included rate freezes, refunds, service commitments, accounting arrangements and incentive features (Littlechild 2009a; Littlechild 2009b; Chakravorty 2015). Their importance lies not only in reduced litigation but in the substance of the packages.

The Office of Public Counsel has been central. It gives diffuse consumers a bargaining presence with continuity, legal authority and technical capability. A utility may value certainty, reduced opposition, accounting flexibility or a lower probability of appeal. Consumers may value bill stability, refunds, service quality or clearer commitments. These trades require a party able to bargain for consumers and to explain the bargain afterwards.

For Australia, the lesson is blunt. Engagement is not enough. A consumer panel that can comment on a proposal is not the same as an institution that can negotiate across engineering, finance, tariff and legal issues. Settlement needs representation with authority and resources.

3.3 Canada: package review rather than duplicate adjudication

The Canadian pipeline experience is particularly important because it shows the role of regulatory attitude. Early settlements were not automatically treated as package bargains. If a regulator reopens each element of an agreement, the incentive to bargain is greatly reduced. The National Energy Board's gradual movement towards assessing whether the process was sound and the outcome broadly fair and reasonable was therefore decisive (Doucet and Littlechild 2009; Fellows 2011).

Canadian settlements developed into multi-year incentive arrangements covering tariffs, service terms, information requirements, risk sharing and performance improvements. These are precisely the kinds of multi-issue bargains that the theoretical framework predicts. The value lies in the interdependence of the terms. A regulator that cherry-picks the attractive elements and rejects the concessions that support them destroys the bargain.

For Australia, the lesson is that an approval test must be explicit. The AER would need to ask whether the process was inclusive, informed and non-coercive; whether the package is consistent with statutory objectives; and whether the outcome lies within a reasonable range. It should not ask whether it would independently have chosen every term.

3.4 Australian access regimes, GB energy and Scottish water

Australia's own access regimes are relevant even though they are not full negotiated-settlement regimes for electricity and gas revenue determinations. Airports, freight rail and other infrastructure frameworks have long encouraged negotiation with an ACCC, arbitral or access-dispute backstop (Productivity Commission 2011). The Hunter Valley rail access undertaking is a useful example of negotiated arrangements under regulatory oversight (Bordignon and Littlechild 2012). These examples do not prove that negotiated settlement should be transplanted into energy network resets. They do show that negotiation plus a public backstop is familiar in Australian infrastructure policy.

GB energy regulation and Scottish water provide a different comparison. Ofgem's RIIO framework has not adopted North American-style negotiated settlements, but it has moved towards stakeholder engagement, independent challenge and business plans that must explain how consumer views have been incorporated (Ofgem 2009; Ofgem 2020; Ofgem 2024; Ofgem 2025). Scottish water went further through the Customer

Forum, regulatory tramlines and agreement with Scottish Water on a price-control package (Customer Forum for Water in Scotland 2015; Littlechild 2014b; CCW 2024; Ofwat 2024; Scottish Water, Consumer Scotland and Water Industry Commission for Scotland 2024).

These arrangements are not identical. Some are closer to engagement, others to bargaining. But together they support a conditional proposition. Settlement may outperform adjudication when the gains from multi-issue trade exceed the costs of representation, verification and approval. Where representation is weak, the fallback unclear or the regulator unwilling to respect package agreements, settlement will not prosper. Where these conditions are present, it may reduce transaction costs, reveal preferences and expand the feasible set of regulatory bargains.

Table 2. Comparative lessons for Australia

Case	Parties and representation	Backstop and approval test	Economic function and Australian lesson
FERC	Shippers, producers, marketers, distributors, large users, associations and public bodies.	Settlement receives procedural priority; contested issues may be severed; the Commission retains approval authority.	Delay reduction and innovation are credible because bargaining occurs against a litigation baseline.
Florida electricity	Office of Public Counsel, often joined by industrial users and other intervenors.	Public Service Commission reviews stipulations and may reject them; settlements operate within a strong formal process.	Diffuse consumers need a durable advocate with resources and authority, not only consultation.
Canada NEB/CER	Pipelines, shippers, producers and large users, with Board oversight.	Board moved from item-by-item reopening to process and public-interest review of packages.	Package bargains need regulatory restraint; cherry-picking destroys incentives to settle.
Australian access regimes	Facility owners and access seekers, usually commercially sophisticated users.	Negotiation occurs under ACCC, arbitral or access-dispute backstops.	Negotiation-plus-backstop is familiar in Australian infrastructure policy, but household representation is harder.
GB RIIO and Scottish water	Stakeholder groups, challenge groups and, in Scottish water, a dedicated Customer Forum.	Regulators set parameters and retain formal decision-making authority.	Structured customer bargaining can improve business plans, but engagement alone is not settlement.

4. Australia: from Better Resets to settlement

4.1 The present Australian position

Australia is better placed to consider negotiated settlement than it was a decade ago. Energy network regulation has moved towards stronger consumer engagement, and that movement has already been analysed in Australian discussions of consumer-centric regulation and negotiated settlements (Mountain 2013; Havyatt 2022). The AER's Better Resets Handbook seeks to encourage networks to engage earlier and more substantively, and to have consumer preferences shape regulatory proposals (AER 2024). The National Electricity Rules continue to organise network regulation through Chapters 6 and 6A, for distribution and transmission respectively (AEMC 2026a). The national energy objectives are framed around the long-term interests of consumers and now include an emissions-reduction component (Energy Ministers 2023; AER 2023; AEMC 2024; AEMC 2026b).

These developments matter because they push the regulatory environment towards explicit trade-offs. A proposal that reflects consumer views should, other things equal, be better than one that treats customers as

an audience for a finished plan. An emissions objective also makes it harder to pretend that network regulation is merely a mechanical cost assessment. The regulator must now consider intertemporal and policy-related trade-offs that consumers may value differently.

But these developments do not create a settlement regime. The AER still makes the determination. Network businesses prepare proposals. Consumers and stakeholders influence, challenge and support those proposals. The regulator then decides. That structure may improve proposals and reduce dispute, but it does not materially alter the allocation of decision rights. Consumers remain consultees and submitters rather than recognised counterparties to a regulatory bargain.

4.2 Why engagement is not settlement

The Better Resets process should be understood as a useful precursor, not as a substitute. It encourages network businesses to engage with consumers and to develop proposals capable of acceptance. It does not give consumers bargaining status, create a settlement participation fund, specify who may enter agreements, or establish an approval test for package bargains. Engagement remains an input into AER adjudication.

Settlement would require a further institutional step. Recognised parties would need to be able to agree full or partial regulatory terms. The AER would need to approve those terms where the process and outcome satisfy a public-interest test. The difference is summarised in Table 3.

Table 3. From engagement to settlement in Australian energy network regulation

Dimension	Consumer engagement	Negotiated settlement
Status of consumers	Consumers influence proposals and submissions.	Recognised representatives bargain over specified terms.
Role of the regulator	The AER remains the direct decision-maker on all material terms.	The AER sets the framework, provides or tests information, approves qualifying settlements and decides unresolved issues.
Treatment of issues	Issues are generally assessed through the proposal, draft decision and final decision.	Issues may be bundled into full or partial agreements, with unresolved issues severed.
Procedural consequence	Good engagement may support early acceptance or targeted assessment.	A qualifying settlement has procedural status and may narrow, pause or reshape adjudication.
Institutional needs	Consultation capability, challenge panels and stakeholder submissions.	Standing, funding, information rights, approval criteria and review rules.

4.3 The Australian institutional gaps

A genuine Australian settlement model would have to close at least five gaps. The first is procedural. The National Electricity Rules and National Gas Rules are built around proposals, draft decisions, final decisions and review mechanisms. They encourage engagement but do not give settlement procedural primacy. If settlement is simply added to the existing timetable, it will duplicate cost. Parties will prepare for full adjudication while also negotiating.

The second gap is funding. Australian consumer advocacy has improved, but it remains fragmented and episodic relative to network business capability. Network determinations involve engineering forecasts, asset management, finance, demand modelling, incentive design, tariff structures and legal process. A consumer representative without durable technical capacity cannot credibly bargain across those matters.

The third gap is standing. Many stakeholders are consultees rather than counterparties. They can submit, criticise and advise, but they do not necessarily have authority to make or defend a bargain. Settlement requires clearer status for eligible participants, including the network business, retailers where relevant, large

users, small-business and residential consumer representatives, jurisdictional bodies and potential representatives of future consumers.

The fourth gap is information. Settlement requires timely access to the evidence on which bargaining depends. That includes expenditure drivers, asset condition, demand forecasts, connection performance, tariff impacts, reliability outcomes, risk allocation and the assumptions behind transition-related investment. Confidentiality can be managed, but it cannot be used to make bargaining one-sided.

The fifth gap is approval. Australia would need an explicit settlement approval test. Without it, the AER will either relitigate every term or approve agreements without sufficient discipline. Neither course would be satisfactory. The approval test should ask whether the process was adequate and whether the package is consistent with the national energy objectives, including the long-term interests of consumers and emissions-related objectives.

4.4 Existing institutions and the representation problem

Australia need not start from nothing. Energy Consumers Australia, jurisdictional advocates, consumer challenge panels, large-user associations and specialist advisers already contribute to network regulation. The question is not whether these bodies are useful. Plainly they are. The question is whether they are presently configured to bargain.

Settlement requires more than submitting on a draft decision. It requires the ability to identify trade-offs, obtain expert advice, understand the financial and engineering consequences of a proposal, consult constituencies, accept or reject concessions, and explain the bargain publicly. It also requires continuity. A one-off consumer challenge arrangement may be valuable for engagement but may not provide the institutional memory needed to negotiate repeated settlements over successive resets.

The representation problem is particularly acute for residential and small-business consumers. Large users often have resources and direct incentives to participate. Retailers may have information about customer preferences, although their incentives will not always align with final consumers. Diffuse consumers need an advocate that can stand in the bargaining room with legitimacy and competence. Without that, settlement risks becoming an agreement among sophisticated parties over costs that others must bear.

There is also a future-consumer problem. Energy networks are long-lived. Present consumers may prefer lower current bills even if that postpones efficient investment or creates later cost shocks. Conversely, network businesses may invoke future needs to justify current expenditure that is not yet prudent. A settlement regime should require explicit consideration of intergenerational effects, particularly where investment is justified by decarbonisation, resilience or electrification.

In short, Australia has engagement institutions. It does not yet have a settlement architecture. The missing elements are not ornamental; they determine whether settlement would protect consumers or merely change the forum in which monopoly claims are advanced.

5. Designing a staged Australian settlement model

5.1 Rule changes and procedural sequencing

The first requirement is legal and procedural. A settlement regime would require rules that recognise both full and partial settlements. The rules should specify when a settlement window may be initiated, which issues can be included, how confidential information is handled, how unresolved issues are severed and how the ordinary AER timetable is paused, narrowed or sequenced while negotiations proceed.

Timing matters. Early settlement may shape the regulatory proposal and reduce later dispute, but it requires stronger information disclosure before parties can bargain intelligently. Later settlement may be better

informed because the AER has identified contested issues in a draft decision, but it may save less cost. A sensible Australian model could therefore allow settlement at three points: before the proposal, after the proposal but before the draft decision, and after the draft decision for unresolved issues.

The rules should not require unanimity among all possible stakeholders. Unanimity would create holdout incentives. But nor should a settlement between a network business and a narrow group bind all consumers without safeguards. The model should permit all-party settlements, broad settlements and partial settlements, with the AER required to assess participation, dissent and the treatment of absent interests.

5.2 Representation and participation funding

The most important reform would be durable participation funding. Settlement cannot sensibly proceed on the assumption that diffuse consumers will match network businesses through goodwill or voluntary effort. Funding should be independent of individual network businesses, stable across regulatory periods and available for expert advice, modelling, legal support, engineering review and negotiation.

Funding should carry obligations. Representatives receiving support should disclose conflicts, explain the consumer interests they represent, consult affected groups and publish reasons for supporting or opposing settlement. This will not create perfect equality of arms. Nor will it eliminate disagreement among consumers. It would, however, improve the quality of revealed preferences and make consumer commitments more credible.

Australia need not copy the Florida Office of Public Counsel exactly. Plural representation may be valuable because consumer interests differ. Large industrial users, retailers, small businesses, vulnerable households, distributed energy resource owners and future consumers may value different things. But at least one standing diffuse-consumer representative is needed: an institution with continuity, legal standing, technical competence and independence from the regulated business.

5.3 The AER's role and the settlement fallback

Settlement depends on the quality of the fallback. If the expected adjudicated outcome is indulgent to the network business, the business has little reason to compromise. If the expected adjudicated outcome is arbitrary or hostile, the business may settle merely to avoid risk, and the settlement may lack legitimacy. The fallback must be credible in both directions: strong enough to discipline monopoly power and predictable enough to define a bargaining range.

Two broad models are available. A FERC-style model would involve active AER staff analysis, with appropriate internal separation between staff assisting settlement and decision-makers responsible for approval. This model may be useful while consumer capability is developing because it supplies a common analytical baseline. A Florida-style model would rely more heavily on an independent consumer advocate, with the AER remaining more clearly neutral until approval. Australia may need a hybrid at first: AER-convened issue identification and information testing, combined with independent consumer representation.

The AER should not be a passive notary. Nor should it dominate the negotiation so thoroughly that the parties merely bargain over what they think the regulator wants. Its function should be to define the settlement window, ensure relevant information is available, identify issues that may be suitable for settlement, protect confidentiality where justified, record unresolved matters and apply the approval test.

5.4 Approval criteria

A settlement-specific approval test should include six elements. First, standing: were the parties eligible and sufficiently representative of the affected interests? Secondly, information: did the parties have timely access to the evidence needed to bargain? Thirdly, process: was the negotiation open to relevant parties, non-

coercive and procedurally fair? Fourthly, statutory consistency: is the package consistent with the national energy objectives, including the long-term interests of consumers and emissions-related objectives? Fifthly, package reasonableness: does the outcome lie within a reasonable range, taking account of trade-offs across issues? Sixthly, protection of absent and future consumers: does the package avoid material prejudice to those who could not effectively participate?

The AER should publish reasons for approving, modifying or rejecting a settlement. The reasons should explain the package rather than reconstruct every line item as if no bargain had been struck. The regulator should be able to reject a settlement, or approve a partial settlement and adjudicate the rest. But it should not casually unpick the concessions that make the agreement possible.

The approval criteria should also address dissent. Dissent does not necessarily defeat a settlement. It may reveal a distributional issue, a holdout strategy or a genuine defect. The AER should identify who dissents, why they dissent, what interest they represent and whether the settlement adequately protects that interest.

5.5 Transparency, confidentiality and review

Transparency is important, but complete disclosure may sometimes reduce the scope for bargaining. Commercially sensitive information, security-related material and some negotiating positions may require confidentiality. The answer is not to choose between secrecy and publicity. It is to distinguish among information used to support the settlement, the terms of the settlement, the regulator’s reasons and the negotiating material that need not be disclosed.

The main terms, consumer impacts, output commitments, risk-sharing arrangements and reasons for approval should be public. Confidential supporting material can be made available under protective arrangements to funded representatives and experts. The AER should retain powers to require disclosure where confidentiality claims would prevent meaningful scrutiny.

Review rights should be calibrated. If every settlement can be reopened through ordinary merits review by a dissatisfied party, the incentive to settle is weakened. If no review is possible, legitimacy suffers. A sensible approach would allow review of jurisdictional error, procedural fairness and failure to apply the settlement approval criteria, while limiting attempts to relitigate the package on the merits.

5.6 A staged pilot pathway

A staged pilot is preferable to an immediate attempt at full revenue settlements. Stage 1 should focus on agreed facts and issue narrowing. Parties could agree demand baselines, uncontested expenditure items, service performance history, definitions, information disclosure and the list of genuinely disputed issues. This stage would reduce duplication without binding consumers to a revenue outcome.

Stage 2 should allow partial settlements. Suitable issues might include service standards, tariff transition paths, innovation allowances, information reporting, customer-service commitments, connection processes and defined capex projects where outputs are clear. The AER would approve qualifying settlements and adjudicate severed issues.

Stage 3, attempted only after evaluation, could permit package settlements covering revenue paths, expenditure allowances, outputs, risk sharing and review mechanisms. At this point consumer representation and approval criteria would need to be well established. Table 4 sets out the staged pathway.

Table 4. A staged Australian settlement pilot

Stage	Eligible issues	AER role	Evaluation criteria
1. Agreed facts and issue narrowing	Information baselines, uncontested issues, disputed forecasts and agreed expert material.	Convene, test evidence and record agreements without binding revenue outcomes.	Fewer contested issues; reduced duplication; clearer information gaps.
2. Partial settlements	Service standards, tariff transitions, information disclosure, innovation allowances and defined projects.	Approve qualifying settlements and adjudicate severed issues.	Lower transaction costs; clearer commitments; consumer representatives report adequate support.
3. Package settlements	Revenue paths, expenditure allowances, output commitments, risk sharing and review mechanisms.	Apply settlement approval test and retain full adjudication fallback.	Implementation performance; fewer appeals; better bill-service trade-offs; protection of absent and future consumers.

5.7 What should not be settled initially

Some issues should not be included in the first Australian settlements. The rate of return is one candidate for exclusion at the pilot stage. It is technically complex, highly distributive and already subject to a separate AER instrument. Including it too early could make the pilot a proxy battle over financeability and investor returns.

Opening asset-base valuation would also be unwise. It raises difficult questions of sunk costs, legitimacy, investor expectations and intergenerational allocation. A settlement regime should first demonstrate value on issues where trade-offs are more observable and outputs more readily specified.

Finally, broad decarbonisation investment allowances should not be settled without strong output definitions. The energy transition cannot be treated as a blank cheque. Where investment is justified by emissions, resilience or electrification, the settlement should specify the need, options considered, timing, consumer protections, sharing arrangements and the consequences of non-delivery.

These exclusions need not be permanent. They are prudential. A settlement regime should earn the right to handle more difficult issues by first performing well on narrower ones.

5.8 Measuring success

A pilot should be evaluated against outcomes, not atmospherics. The fact that parties talked more often is not success. Nor is a reduction in the number of submissions necessarily success. The relevant questions are whether settlement narrowed the issues, reduced duplication, improved information, produced more coherent packages, generated commitments that consumers valued, reduced appeals or implementation disputes, and protected absent and future consumers.

Evaluation should include both process and performance measures. Process measures might include the number of issues settled, the extent of participation, the adequacy of information disclosure, the cost of expert support, the treatment of dissent and the time saved in adjudication. Performance measures might include delivery of outputs, bill impacts relative to expectations, service outcomes, the use of reopeners, dispute frequency and consumer representative assessments.

The benchmark should be the real adjudicative process, not an idealised regulator with perfect information and no administrative cost. The question is not whether settlement can achieve perfection. It is whether, under Australian conditions, it can improve on the existing combination of adversarial proposals, draft decisions, submissions, final decisions and possible review.

6. Settlement, incentive regulation and the energy transition

Negotiated settlement should be seen as a complement to incentive regulation, not a repudiation of it. RPI-X and its descendants sought to move regulation away from detailed cost reimbursement and towards stronger incentives for efficiency, competition as a discovery process and customer engagement (Littlechild 2008; Littlechild 2014a). That objective remains sound. But experience with periodic resets shows that incentive regulation is itself a contracting problem. How long should incentives last? How should efficiency gains be shared? When should unexpected investment needs trigger reopeners? How should performance be measured where consumers value reliability, resilience, decarbonisation and affordability at the same time?

Littlechild's retrospective on resetting the electricity distribution price caps in Britain is relevant. The lesson was not that incentive regulation failed. It was that the reset process could usefully incorporate more negotiation with interested parties to secure initial agreement, together with ongoing appraisal and quicker adjustment to changing conditions (Littlechild 2024). That observation matters now. Energy networks face electrification, distributed energy resources, demand response, storage, electric vehicles, resilience investment and emissions-related targets. The future is not simply a larger version of the past.

Adjudication can address these issues, but it may do so in a fragmented way. Settlement can allow parties to bargain over adaptive packages: a higher allowance for a particular programme in return for defined outputs, sharing of underspend or overspend, enhanced information, trigger mechanisms, customer protections or staged review. It can also make explicit the trade-off between present bills and future network readiness.

The risk is equally clear. Settlement could become a vehicle for under-scrutinised investment justified by energy-transition rhetoric. That risk reinforces rather than weakens the case for approval criteria, independent expertise and transparency. A settlement model should not weaken prudence review. It should redirect prudence review towards the package, the process and the consumer protections attached to the investment.

The energy transition therefore strengthens the case for exploring settlement. The more uncertain, multi-dimensional and path-dependent regulation becomes, the less plausible it is that a regulator can efficiently specify every term by adjudication alone. The question is not whether regulators should remain responsible for the public interest. They should. The question is whether the public interest is always best served by keeping the parties at arm's length from the operative bargain.

7. Conclusion

The case for negotiated settlement in energy network regulation is not that monopoly has disappeared or that regulators should retreat. It is that conventional adjudication is not the only way to protect consumers where monopoly remains. Network regulation is a repeated incomplete-contracting problem. Affected parties may sometimes be better placed than the regulator to identify mutually valuable trades across price, service quality, investment timing, risk allocation and information obligations. The regulator's task is then to design and police the conditions under which such trades may be made.

The argument is conditional. Settlement should be preferred only where the gains from information, multi-issue trade, commitment and adaptation exceed the costs and risks of representation, negotiation, verification and approval. Comparative experience suggests that this condition is more likely to be satisfied where consumer or user representation is capable, the fallback is credible, the regulator is willing to respect package bargains, and approval criteria protect non-participants and the public interest.

Australia is now better placed to test this proposition than it was a decade ago. Better Resets has moved energy network regulation towards consumer-centric proposals. But engagement remains short of settlement. The next step would require rule changes, durable participation funding, legal standing for representative parties, a settlement-specific approval test and calibrated transparency and review rights.

Such reforms should not be introduced wholesale. A limited pilot using agreed facts and partial settlements would be more prudent. But the principle should be clear. Negotiated settlement should be judged not by comparison with an ideal regulator, but by comparison with the real costs, delays and limitations of adversarial adjudication. On that comparison, settlement remains a credible and underused mechanism for Australian energy network regulation.

Declaration of generative AI and AI-assisted technologies

During preparation of this paper SCL (the retrieval-augmented AI Agent built on ChatGPT) was used to assist with editing, restructuring and style adaptation. The author remains responsible for the content, argument, citations and conclusions.

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