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

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This paper asks whether negotiated settlements could play a larger role in regulating Australia's energy networks. It does not argue that monopoly has disappeared, that regulation is unnecessary, or that network businesses and consumers can simply be left to reach private agreements. Energy networks remain essential monopolies, and regulators must protect consumers and the wider public interest. The narrower question is whether the regulator must decide every important term of a network determination, or whether some matters could be agreed between the network business and properly represented customers, subject to regulatory oversight and a credible fallback decision.

The present Australian model is largely based on expert adjudication. A network business submits a proposal covering expenditure, revenue, service standards, tariffs and incentives. The Australian Energy Regulator tests the evidence, consults stakeholders and makes a determination. This process is orderly but demanding. The regulator must forecast uncertain investment needs, judge expenditure, weigh service quality against prices, and anticipate changes in technology, demand and policy. These tasks have become harder as networks respond to electrification, rooftop solar, batteries, electric vehicles, resilience concerns and emissions-reduction objectives. The network knows more about its assets and costs, while customers know more about the services and trade-offs they value.

The paper treats network regulation as long-term contracting. Network assets are sunk, relationships continue for decades, and no regulatory decision can anticipate every future circumstance. Conventional regulation deals with this incomplete contract by asking the regulator to fill in the missing terms. Negotiated settlement offers another possibility. The regulator establishes the rules, ensures access to information, recognises eligible representatives, and retains the power to reject an agreement or determine unresolved issues. The parties then negotiate some or all of the regulatory package. Settlement is therefore not deregulation. It is bargaining in the shadow of regulation.

Settlement may add value in four main ways. First, it can reveal customer preferences more effectively than consultation alone. People may want lower bills, greater reliability, faster connections and more resilience, but those wishes often conflict. Negotiation forces

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representatives to consider actual packages and decide what they are prepared to trade. Second, settlement allows linked issues to be considered together. A network might accept a lower revenue path in return for greater certainty, while consumers might support an investment if it is tied to measurable outputs, stronger reporting and sharing of savings. Third, settlements can create commitment through multi-year arrangements, performance obligations, review points and dispute procedures. Fourth, they can provide a more adaptable response to uncertain transition-related investment than a fixed determination made periodically.

These benefits are not automatic. Negotiation can fail if customer representatives lack resources, authority or technical expertise. Large industrial users may secure advantages paid for by households. Present customers may favour lower bills while shifting costs to future consumers. A regulator may approve an agreement simply to reduce its workload, or reopen every term and destroy the value of the bargain. Settlement is worthwhile only when the gains from better information, package trading, commitment, adaptation and reduced dispute exceed the costs of negotiation, expert support, verification and public-interest review.

Experience elsewhere shows most clearly the conditions that matter. At the United States Federal Energy Regulatory Commission, parties negotiate against the background of a formal hearing process. This credible fallback encourages compromise and allows agreed and disputed issues to be separated. Florida's electricity settlements show the importance of a strong consumer advocate with legal standing, continuity and expert capability. Canadian pipeline regulation demonstrates that regulators must assess settlements as packages rather than selecting favourable elements and rejecting the concessions that support them. Australian infrastructure access regimes show that negotiation backed by arbitration or regulatory intervention is not foreign to Australian policy. Great Britain's energy regulation and Scottish water regulation also show how structured customer involvement can influence business plans and regulatory packages, although engagement does not always amount to bargaining.

Australia's Better Resets process is an important step in this direction. It encourages network businesses to engage customers earlier and develop proposals reflecting consumer preferences. However, engagement and settlement are different. Under engagement, consumers comment, challenge and advise, but the regulator still determines every material term. Under settlement, recognised customer representatives would have authority to negotiate specified terms, and an accepted agreement would have procedural consequences: it might narrow the issues, shorten the determination or remove agreed matters from further adjudication.

Several institutional gaps must be closed. Consumer participation funding would need to be durable, independent and sufficient to support legal, engineering, financial and economic advice. Eligible representatives would need clear standing and accountability to the consumers they claim to represent. Parties would need timely access to information on asset condition, forecasts, expenditure drivers, reliability, connections, tariffs and transition-related assumptions. The rules would need to specify when settlement could occur, how confidential information would be handled, how dissenting and absent interests would be protected, and how regulatory timetables would be adjusted.

The Australian Energy Regulator remains central. It should neither act as a passive notary nor dominate negotiations so completely that parties merely try to guess its preferred answer. Its role would be to establish the settlement window, test information, ensure fair participation, record unresolved issues and apply a clear approval test. That test should consider whether the parties were representative, had adequate information, followed a fair and non-coercive process, produced a package consistent with the national energy objectives, stayed within a reasonable range, and protected absent and future consumers. The regulator should publish reasons for approval or rejection, but assess the bargain as a whole rather than reconstructing a full determination line by line.

The paper recommends a cautious, staged pilot rather than an immediate move to complete revenue settlements. The first stage would focus on agreed facts, common information and narrowing the issues genuinely in dispute. The second would allow partial settlements on matters such as service standards, tariff transitions, reporting obligations, customer service, connection processes, innovation allowances and clearly defined projects. Only after evaluating these stages should Australia consider broader packages covering revenue paths, expenditure allowances, outputs, risk sharing and review mechanisms. The rate of return, opening asset-base valuation and broad transition investment allowances should initially remain outside the process because they are especially complex or difficult to verify.

Success should be measured by outcomes, not by the number of meetings or the tone of consultation. A pilot should be judged on whether it reduces duplication, improves information, narrows disputes, produces clearer commitments, lowers the risk of appeals, and achieves better trade-offs between bills and services while protecting consumers who were not directly represented. The relevant comparison is not with an imaginary regulator possessing perfect information, but with the real costs, delays and limitations of existing adversarial determinations.

The central conclusion is conditional but positive. Negotiated settlement will not suit every issue or every network. Poorly designed settlement could weaken consumer protection. Yet where representation is capable, information is shared, the regulatory fallback is credible and the regulator respects coherent package agreements, settlement may improve on adjudication. Australia already has stronger consumer engagement and relevant experience in other infrastructure sectors. A pilot would test whether bargaining under regulatory supervision can produce more informed, flexible and durable outcomes for energy networks during a period of rapid change.

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