

**Project Reference Code: ERC0207**

**Australian Energy Market Commission  
PO Box A2449  
Sydney South NSW 1235**

**10 September 2016**

**By e-mail**

**Consultation Paper:  
National Electricity Amendment (Rate of Return Guidelines Review) Rule  
2016  
National Gas Amendment (Rate of Return Guidelines Review) Rule 2016**

## **1 Introduction**

Thank you for the opportunity to comment on the proposed changes to the National Electricity Rules (NER) and the National Gas Rules (NGR) by the Australian Energy Regulator (AER).<sup>1</sup>

I am providing this submission in a private capacity. However, I have been closely involved in the development of the AER's various regulatory Guidelines following the reforms to the NER and NGR (the Rules) in 2012-13. This included representing the Public Interest Advocacy Centre (PIAC) during the development of the AER's Rate of Return Guideline (Guideline).

In addition, I was a member of the AER's Consumer Challenge Panel from 2013 to 2016. This provided an opportunity to closely observe the interpretation and application of the NER, NGR and the AER's Guideline during the recent round of electricity and gas revenue determinations.

I understand that the AER is seeking an amendment to the NER and the NGR to allow a postponement of the timing of the first review of the AER's Rate of Return Guideline (the Guideline) from December 2016 to December 2018.

This submission does not oppose the extension of the time period for the AER to review the current Rate of Return Guideline (the Guideline). It is appropriate that the AER conduct such a review after the Federal Court of Australia (FCA) rules on the AER's appeal regarding certain relevant decisions by the Australian Competition Tribunal (Tribunal).

---

<sup>1</sup> AER, *Request for changes to the National Electricity Rules and the National Gas Rules*, 7 June 2016. <http://www.aemc.gov.au/getattachment/58af76a1-95cc-41fa-8fcf-9732cc91dd6c/Rule-change-request.aspx>

However, the AER's intent in proposing this Rule change appears to be too narrow. The issues that have emerged over the last three years require a much broader perspective than simply a consideration of the Tribunal and FCA decisions under the current regulatory framework.

The extension of the time period for a review of the AER's Rate of Return Guideline will provide a 'window of opportunity' for a broader review that includes a review of the purpose of the AER's Guidelines and, more generally, the effectiveness of the NER and NGR (the Rules) and the National Electricity Law (NEL) and National Gas Law (NGL) (the Laws) by the AER, the Australian Energy Market Commission (AEMC), COAG Energy Council and other stakeholders.

This purpose of this submission is, therefore, to highlight the importance of using the extension of time to:

- Collect additional data, expert guidance, overseas experience etc., to assist the AER and relevant stakeholders in the 2018 review process as well as determinations under the current Guidelines in the interim period. This submission will provide some examples of this additional data; and
- Enable a critical examination of the operation of the Rules and Laws and the role of the Guidelines in the regulatory process with a focus on, but not limited to, the regulated rate of return.

Addressing the first matter above (the collection of additional relevant information) will also facilitate the critical examination of the operation of the current Rules and Laws and the role of the Guidelines in the regulatory process,

It is recognised that the COAG Energy Council has already initiated the review of the operation of the Limited Merits Review (LMR) process, leaving open the option to replace the Tribunal or remove access to the LMR process altogether. The COAG Energy Council intends to complete this review by December 2016.

This is a welcome development given the outcomes of the current round of decisions by the Tribunal and the uncertainty and expense this process has created for consumers and other non-network stakeholders.

An extension of the time for the AER's review of the Rate of Return Guideline means that the AER can take into account any changes to the regulatory framework arising from the LMR review and any relevant Rule changes determined by the AEMC.

## 2. Background

### 2.1 The AER's proposed Rule Change for Review of the Rate of Return Guideline

Under the NER and the NGR (the Rules), the AER is required to review its Rate of Return Guideline (Guideline) at "intervals not exceeding three years" with the first interval commencing from the date that the first Rate of Return Guideline was published under the Rules.<sup>2</sup>

The first Rate of Return Guideline was published in December 2013 and, therefore, under the Rules, the review of the Guideline must be completed by December 2016.

At the time the NER and NGR was amended to include a requirement to review the initial Rate of Return Guideline by December 2016, it is possible that the AEMC did not anticipate the extent to which the AER's rate of return decisions would be contested by the NSPs, even when these decisions were based on the AER's Rate of Return Guideline.

In practice, the NSPs have made multiple appeals to the Tribunal regarding (inter alia) significant elements of the AER's rate of return decisions and the Tribunal has made a number of decisions in favour of the NSPs' contentions.

The AER has responded by appealing elements of the Tribunal's decision in the Federal Court of Australia (FCA). A final decision on the AER's appeal is unlikely before November 2016.<sup>3</sup>

The AER therefore proposes to amend the NER and the NGR (the Rules). The AER states that:<sup>4</sup>

*It would not be prudent to conduct a Guideline review by December 2016, when fundamental issues about the appropriate application of the legislative framework are likely to be unresolved by that time and if [therefore] an amended Guideline would be superseded shortly after.*

The AER also claims that important stakeholders would be 'preoccupied' with the Tribunal and FCA processes, compromising the consultation component of any review of the Guideline.

In conjunction with the Rule change proposals, the AER has sought that the matter be treated in accordance with the 'non-controversial' provisions of the National

---

<sup>2</sup> NER, cl. 6.5.2(p)(1) and 6A.6.2(p)(1) and the NGR, r. 87(16)(a).

<sup>3</sup> It is understood hearings before the FCA are due in October 2016.

<sup>4</sup> AER, *Request for changes to the National Electricity Rules and the National Gas Rules*, 7 June 2016, p. 2.

Electricity Law (NEL) and the National Gas Law (NGL) (the Laws).<sup>5</sup> The AER states that proposed rule changes is “unlikely to have a significant effect on the energy market”<sup>6</sup> as the current Guideline will remain in force during the extension period.

The AER is now proposing to amend the Rules to allow a two-year extension to the requirement that a review of the Rate of Return Guideline be completed by December 2016.

If the AEMC approves the AER’s proposed amendment to the Rules, the review of the Guideline will be completed by December 2018.

What is not stated in the AER’s proposal however, but is a critical issue for the AER and consumers, is the extent to which the release of a revised Guideline would address a more underlying issue.

In this submission, it is argued that both the NSPs and the Tribunal are effectively ignoring the Guideline and the consultation processes behind the development of the Guideline and thereby undermining its value as a mechanism to provide confidence and certainty to all stakeholders.

Because of this outcome, the AER’s proposed changes to the Rules should also be considered in the broader context of the operation of the current Rules and Laws and the effectiveness of the Guidelines (including the Rate of Return Guideline) in providing clarity and certainty for all stakeholders in the regulatory decision making process.

The following sections of this submission provide a brief outline of the 2012-13 changes to the Rules and Laws that were intended to address the issues identified with the initial national Rules and Laws.

It is clear that the changes to the Rules and Laws have not delivered the expected improvements to the regulatory processes and outcomes. Nor has the Guideline process provided the expected certainty for stakeholders.

Rather, as discussed below, the regulatory process has become even more arcane and protracted, effectively sidelining consumers and undermining the value of the Guidelines. Unless these broader issues are addressed in the interim, merely extending the time period for review of the Guideline will not sufficiently improve the regulatory outcomes.

---

<sup>5</sup> See NEL, s. 96 and NGL, s. 304.

<sup>6</sup> AER, *Request for changes to the National Electricity Rules and the National Gas Rules*, 7 June 2016, p. 1.

## 2.2 The 2012-13 amendments to the Rules and Laws and the Regulatory Guidelines

In making the 2012 amendments to the NER and NGR, the AEMC was responding to the widespread concerns by policy makers, the AER and consumers with the initial national electricity and gas rules established in 2006-2007.

That is, the pre 2012 Rules were, in effect, enabling significant increases in the revenue allowances for electricity and gas network service providers (NSPs) above 'efficient' levels and were undermining the incentive characteristics of the regulatory regime. The result was a rapid escalation in network prices that went beyond providing for the forecast demand growth and with a considerable impact on consumers.

An important component of these poor regulatory outcomes between 2008 and 2012 was the determination of the efficient rate of return, particularly following the decisions of the Tribunal. That is, many of the Tribunal's decisions related to various aspects of the rate of return calculation (including gamma) and the Tribunal's decisions on components of the rate of return added billions of dollars to the network revenues, thus accelerating the disastrous increase in electricity and gas network prices.

Following Rule change applications by the AER and by consumer representative groups, the AEMC made significant amendments to the NER and NGR.

These amendments gave greater focus to setting high-level regulatory objectives and principles in preference to the AEMC setting more prescriptive requirements in the Rules. In making these changes, the AEMC provided greater scope for the AER to exercise its regulatory discretion in determining the best approach to assessing the rate of return and other expenditures.

The AEMC's amendments also required the AER to develop and publish a series of Guidelines (including a Rate of Return Guideline) that would set out how the AER proposed to apply the objectives and principles in the Rules. The purpose of the Guidelines was to provide some regulatory certainty to the networks, their bankers and other stakeholders in how the AER would exercise its discretion.

However, the AEMC specified that the Guidelines were not mandatory (with the exception of the Confidentiality Guideline) and the networks could propose alternative approaches, subject to them setting out the reasons for this variation. Similarly, the AER could adopt an alternative approach to that set out in the Guideline.

However, there was no obligation on the NSPs to conduct the extensive stakeholder consultation process that was required of the AER in developing the Guidelines. Thus, there was an asymmetric requirement for consumer engagement, particularly

with respect to the Rate of Return Guideline and the NSPs' alternative approaches to the rate of return assessment.

In parallel to the AEMC's amendments to the Rules, the COAG Energy Council<sup>7</sup> amended the NEL and the NGL in relation to the operation of the Limited Merits Review (LMR) process and the decisions made by the Tribunal in response to a LMR appeal by the NSPs.

This change to the Laws followed a highly critical assessment by an independent expert panel of the Tribunal's operation and decisions in the 2009-2012 period.<sup>8</sup>

### 2.3 The failure of the present Rules and Laws

Unfortunately, the AEMC's amendments to the Rules have not produced the intended outcomes or resulted in the regulatory certainty sought by all parties.

In particular, the majority of NSPs have chosen to ignore the AER's Guidelines, particularly the Rate of Return Guideline, and have subsequently chosen to appeal the AER's decisions even when the AER's decisions were made in accordance with the AER's published Guidelines.

The amendments to the NEL and NGL have also failed to adequately reform the LMR process. For instance, it appears that in making its recent decisions, the Tribunal has effectively ignored the AER's Rate of Return Guideline including the extensive consultation process undertaken by the AER in developing the Guideline and the contribution of consumers and other stakeholders to the Guideline.

To conclude, much time and money was devoted to the preparation of all the Guidelines, particularly the Rate of Return Guideline, yet effectively much of this has been lost as the NSPs and the Tribunal have generally ignored the Guideline.

The high-level Rules, designed by the AEMC to provide scope for the AER to exercise its discretion, have instead provided a vehicle for NSPs to propose alternative approaches that deviated from the AER's Guideline and have not been subject to the extensive consultation processes that underpinned the AER's Guideline.

As a result, even more time and money has been spent on the minutiae of the rate of return proposals by the networks, the AER's determinations and the legal appeal processes, little of which is in the long-term interests of consumers.

Consumers are now in the invidious position that four years after the changes to the Rules and the Laws, and the development of the regulatory Guidelines, there is no

---

<sup>7</sup> Previously, the Standing Council of Energy & Resources (SCER) and the Ministerial Council of Energy (MCE).

<sup>8</sup> Yarrow, Egan and Tamblyn, Review of the Limited Merits Review Regime, 2012.

clarity or certainty in the outcomes and a good deal of dissolution about the regulatory processes and the relevance of consumers' views in this process.

The following section 3 will provide a high-level response to the AER's proposed Rule changes for the review of the Rate of Return Guideline while also emphasising the need for a broader consideration of the Guideline in the context of the failures of the Rules and Laws described above.

Section 4 sets out some specific recommendations for consideration by the AER, the AEMC and other policy and law makers such as the COAG Energy Council.

### **3 Response to the AER's proposed rule changes**

#### **3.1 Overview**

The AER's proposed extension of time for the review of the Rate of Return Guideline provides many practical benefits and this submission supports the AER's proposal.

In particular, as noted by the AER, the outcomes of the NSPs' appeals on a number of rate of return components to the Tribunal, and the AER's subsequent appeal to the FCA, will not be finalised in time to be incorporated into the AER's Guideline review if this review was required by December 2016. Issues with the rate of return approach that might be subsequently 'settled' in the Courts will be excluded from the review.

In these unique circumstances, it seems reasonable to allow this legal process to run its course before undertaking a mandated review of the Rate of Return Guideline.

In principle, therefore, this submission supports the AER's proposal to amend the Rules with respect to the timing of the first review of the AER's Rate of Return Guideline (Guideline).

It is also reasonable for the AEMC to propose to treat this rule change as "non-controversial" as proposed by the AER in accordance with s. 96 of the National Electricity Law (NEL) and s. 304 of the National Gas Law (NGL).

The AER states that it has consulted with key stakeholders about the changes and the support of the Energy Networks Association, the Australian Pipeline and Gas Association and the Public Interest Advocacy Centre is relevant to the AEMC's decision.

However, although the AER regards the rule changes as "unlikely to have a significant impact on the national energy market", this should not be taken as meaning that the AER's Rule change proposal should be granted without some qualification.

While the mechanism is not necessarily clear, the principle that the additional time is used to collect data and undertake necessary reforms should be established by the AEMC as part of its assessment of the AER's Rule change proposals.

These reforms include the clarification of the future role of the Rate of Return Guideline given the actions by the NSPs and the decisions by the Tribunal to effectively ignore the content of the Guideline and the consultation processes undertaken in the development of the Guideline.

### **3.2 The additional time should be used to collect data and to undertake a broader assessment of the Rules, Laws and Guidelines**

As noted above, a delay in reviewing the current Rate of Return Guidelines provides a unique 'window of opportunity' for the AER to undertake further research and for the AEMC and COAG Energy Council to review the effectiveness of the current Rules and Laws.

In the first instance, if the review of the Rate of Return Guideline is postponed, then the AER will be making important regulatory revenue decisions under the existing Rate of Return Guideline and the current Rules and Laws.

However, even in these circumstances, it is valuable for the AER to continue to collect data, undertake expert analysis and research and to continuously develop its own capabilities in analysing the components of the Rate of Return. The current Rules and Guideline provides flexibility for the AER to continue this work taking into account the decisions of the Tribunal and the FCA.

Such actions will inform both the AER's decisions under the current framework and the future review of the Rate of Return Guideline.

In addition to these more immediate benefits, however, the outcomes of the NSPs' appeals to the Tribunal and the AER's appeal to the FCA are likely to highlight a need for broader reforms including further amendments to the Rules and the Laws. The AER will be in a better position to take such amendments to the Rules and the Laws into account in the Guideline review process given a postponement of its own review of the Rate of Return Guideline.

The additional time period will also provide an opportunity to reconsider the role of the Guidelines given the approaches of the NSPs and of the Tribunal to the Guideline as outlined above.

For example, a 2-year delay in the Guideline review provides an opportunity for the AEMC to consider whether its changes to the Rules in 2012 have achieved the intended outcomes, noting that the AEMC made what it considered a 'more preferable' Rule change to the more prescriptive changes initially proposed by the AER and (separately) by consumer organisations in 2011.

It is also recognised that the decision by the AEMC to require the AER to publish a Rate of Return Guideline was to provide:<sup>9</sup>

*... for investor, service provider and consumer confidence in the framework that the regulator is transparent about its approach, and consults extensively, when determining the allowed rate of return.*

However, as highlighted above, what has eventuated are decisions by the NSPs to effectively ignore the AER's Guideline in search of higher allowances for the rate of return. This has effectively destroyed the AEMC's concept that its Rule changes would lead to greater certainty for all stakeholders.

**It is essential, therefore, that the extension of time is used by all parties, the AER, the AEMC, the COAG Energy Council, consumer representatives and industry as an opportunity to improve the regulatory determination processes and outcomes.**

### 3.3 The need for reform of the Rules and Laws

As noted above, the AEMC had every reason to expect that a review of the Rate of Return Guideline could be conducted by the AER by December 2016.

When implementing the changes to the Rules in 2012, the AEMC was also attempting to address the widespread concerns with (inter alia) the rate of return decisions by the AER under the initial Rules.

The AEMC's 2012 Rule changes had a particular focus on establishing higher-level principles in the Rules, leaving the detailed decisions on implementation of these principles to the discretion of the AER.

To provide some certainty to the network investors and consumers, however, the AEMC required the AER to develop a number of guidelines including the Rate of Return Guideline that set out how the AER proposed to implement the Laws and the Rules in its determinations. The AER finalised the Rate or Return Guideline in December 2013 after an extensive 12-month consultation period.

The AER's subsequent decisions on the regulated rate of return were very largely consistent with the AER's Rate of Return Guideline.<sup>10</sup> However, the actions of the NSPs in proposing significant variations from the Guideline and in appealing the AER's decision based on the Guideline have complicated and delayed the determination process to the detriment of all other stakeholders.

---

<sup>9</sup> AEMC **RULE DETERMINATION** National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012 National Gas Amendment (Price and Revenue Regulation of Gas Services) Rule 2012, 29 November 2012 pages iii and iv

<sup>10</sup> The AER did modify the value of gamma from 0.5 to 0.4 based on additional information and advice it received after completion of the Rate of Return Guideline.

The Tribunal's decision to support a number of the major elements of the NSPs' rate of return proposals that were contrary to the Guideline further undermined the effectiveness of the Guideline process to provide clarity and certainty.

It is therefore important that in approving an extension to the Guideline review, all parties acknowledge that the AER's request arises in large part because the current regulatory framework of Rules and Laws:

- failed to provide effective authority to the independent regulator to make its rate of return determination in the long term interests of consumers, based on a Guideline that was developed after significant consultation with all stakeholders;
- created an environment that ultimately disempowered consumers by virtue of the time and resources required to participate meaningfully through the proposal, determination and appeal processes;
- undermined and devalued the process of developing the Guideline given that the NSPs saw no difficulty in overriding (even ignoring) the Guideline and the Tribunal made its decision without even reference to the Guideline or the consultation processes that underpinned the Guideline;
- failed to provide the required certainty for customers and investors who might reasonably have expected that the Guideline would have some standing.

Thus, we are in the rather absurd position that the Tribunal can, for instance, overturn the AER's decisions based on the AER's Guideline and the Tribunal can do so without any acknowledgement of the considerable consultation processes that underpinned the Guideline's development.

*To be clear on this point.* Under the current arrangements, the networks can propose alternative approaches to the approach set out in the Rate of Return Guideline and do so as if the AER's extensive consultation process had not occurred – and without commensurate level of stakeholder consultation on their rate of return proposals.

The Tribunal can also subsequently decide that the Rate of Return Guideline (or one or more components in the Guideline) has no standing and is effectively null from a judicial perspective, along with all the contributions of non-network stakeholders to that process over a 12-month period.<sup>11</sup>

Thus, the Tribunal implicitly, if not explicitly, overrules the COAG policy intent and the AEMC's stated aim in the 2012 amendments to the Rules of promoting greater regulatory discretion while ensuring some predictability in the AER's decision making through the AER's development and implementation of the Guidelines.

Significantly, the Tribunal's decisions also effectively overwrite the consumer consultation processes that were key inputs into the development of the Guideline

---

<sup>11</sup> That is, the non-network stakeholder inputs into the development of the Guideline had no standing with the Tribunal.

and subsequent regulatory decisions by the AER. It is estimated that, some \$7 billion of additional costs to consumers is at risk as a result of the networks' appeals to the Tribunal.

Moreover, the various appeals have created considerable uncertainty and delays in finalising network revenue allowances, an outcome that is again inconsistent with the policy reform objectives.<sup>12</sup>

Not only are the immediate regulatory outcomes unsatisfactory (as highlighted above), the flow on effects to consumers in terms of its impact on stable and efficient network prices is also unacceptable. Longer term, it promotes the continued legalistic and adversarial approach to regulatory decisions by many of the networks and the alienation of consumers in the process.

It is reasonable therefore for consumers to question to the relevance of the Guideline and all the associated consultation processes that the AER undertook as part of the development of the Guideline, if the Guideline can be so readily ignored by the networks and 'overturned' by third parties such as the Tribunal.

In saying this, it is recognised that the FCA is still to make its judgment on the merits of the Tribunal's decisions. Consumers have generally supported the AER's subsequent application to the Federal Court for review of the Tribunal's decisions given the outcomes undermine the Guideline process and cast doubt on the effectiveness of the 2012-13 reforms to the NER and NGR and the NEL and NGL.<sup>13</sup>

The more specific recommendations set out in Section 4 below should therefore be considered within the context of the need for a much broader consideration of the purpose of the AER's Guideline, the associated Rules and Laws and the role of the Tribunal.

## 4. Recommendations

### 4.1 Using the additional time to improve regulatory decisions

The additional time should be used by the AER to collect additional information and conduct further research that will, inter alia, achieve the following outcomes:

---

<sup>12</sup> See for instance, COAG Energy Council, *Review of the Limited Merits Review Regime, Consultation Paper*, 6 September, 2016, p. 4.

<sup>13</sup> See for instance the media release by the Energy Consumers Australia, "AER appeal good for NSW energy consumers", 29 March 2016. The ECA was also critical of the operation of the Limited Merits Review process as set out in the National Electricity Law and the National Gas Law.

<http://www.energyconsumersaustralia.com.au/news/aer-appeal-good-for-nsw-energy-consumers>

- enhance the rate of return decisions that the AER will make over the next few years under the current Guideline;
- provide information that can inform the Tribunal, Courts and consumer representatives in any further appeals under the current Guideline;
- provide 'feedback' to the AER on the quality of their current decisions, for instance by comparing actual outcomes with expected outcomes;
- provide information to the AER, the AEMC, policy makers and consumers which may indicate the need for further changes to the Rules and the Laws in order to achieve the outcomes set out in the National Electricity Objective (NEO) and National Gas Objective (NGO); and
- lay the 'ground work' for the formal process of reviewing the Rate of Return Guideline, including consideration of the future standing of the Guideline.

The importance of using this 'extended' period to examine the outcomes under the current energy Rules and Laws are highlighted above. In particular, this submission has emphasised the widespread dissatisfaction with the length and adversarial nature of the current process and the very considerable costs in money and time invested by all stakeholders.

The actual process became the antitheses of a process that sought to engage consumers despite the efforts of the AER to do so.

This outcome was, in turn, a result of the:

- the 2012 changes to the NER and NGR that sought to increase the scope for the AER to exercise its discretion taking into account the circumstances of the time and the NEO and NGO; and
- the apparent ineffectiveness of the 2013 changes to the NEL and NGL to ensure that the Tribunal made its decisions taking into account the overall outcomes of its decisions and whether these represented preferable outcomes for consumers compared to the AER's decisions.<sup>14</sup>

#### 4.2 Specific recommendations for additional actions by the AER, AEMC and COAG Energy Council

The recommendations below relate to actions that include but also go beyond the AER's Rate of Return Guideline review process.

With respect to the recommendations on the broader issues with the Rules and Laws, this submission suggests that the AEMC consider ways that these broader actions might be formalised in its review of the AER's current proposal for changes to the NER and NGR.

---

<sup>14</sup> Noting that this claim will be further tested in the FCA

### Recommendations for the AER:

- The AER should continue to gather evidence directly from the market and from economic/financing experts regarding the value of parameters such as gamma, beta, and market risk premiums;
- The AER work with both the RBA and Bloomberg to further expand the AER's understanding of the reported yields for different bond terms and credit categories;
- The AER should establish/extend a data base that collects financial information on each of the NSPs, including (but not only):
  - the ownership and corporate structures of the businesses,
  - actual rate of return on equity over time,
  - actual cost of debt and equity by year,
  - borrowing and equity raising activity and costs,
  - actual taxation paid to the Commonwealth of Australia,
  - credit ratings of the companies and how these have changed over time, including whether these changes reflect individual business events or trends in the industry over time;
- The AER commence the process of developing international benchmarks, including (but not only) a comprehensive analysis of the rate of return decisions by other regulators in Australia and in comparable countries and in the context of comparable regulatory and financing risks.

These recommendations are made in order to ensure that the next Rate of Return Guideline will reflect the appropriate returns on equity and debt for a regulated network firm in Australia.

To the extent that the current Rate of Return Guideline will apply to the AER's decisions over next few years, the progressive collection of 'real world' data and expert advice will also assist the AER in applying its discretion within this current Guideline.

### Recommendations for the AEMC & COAG Energy Council

The additional time before the review of the Rate of Return Guideline commences also provides the AEMC with the opportunity to conduct an open and transparent assessment of whether the 2012 changes to the NER and NGR achieved the intended purpose of delivering a regulated rate of return that better meets the NEO and NGO.

This assessment should include (but not limited to):

- an assessment of the process including the appeal process;
- an assessment of the effectiveness of the NER and NGR as amended in 2012; and
- the interpretation of the NEL and NGL and the NER and NGR by the Tribunal and the Federal Court.

The outcomes of such an assessment should also provide valuable information to the COAG Energy Council. For example, the CEO of the Energy Consumers Australia (ECA), Ms Sinclair, stated in a March 2016 media release by the ECA:<sup>15</sup>

*The COAG Energy Council and its regulators have made clear the intention of the changes made in 2012 and the Tribunal's decision is, without doubt, inconsistent with the new rules.*

*The review by the Federal Court will determine whether the Limited Merits Review can operate as the COAG Energy Council expects...*

It is also noted that after the August 2016 CoAG Energy Council meeting, the Chair (Minister J Frydenberg) and other state ministers for energy have issued press releases questioning the efficacy of the limited merits review process.

The COAG Energy Council released the Terms of Reference for the Limited Merits Review (LMR Review) on 19 August 2016.<sup>16</sup> The Review is to: "assess the effectiveness of the merits review regime under the NEL and the NGL since the 2013 were implemented".<sup>17</sup>

The COAG Energy Council also released a Consultation Paper in September 2016 as the first step in the LMR Review.<sup>18</sup>

The Consultation Paper notes the continued "cherry picking" of issues for review and the lack of consideration of whether the decision represented a "materially preferable decision" in the long term interests of customers.

The Consultation Paper also states that: "the limited merits review is not delivering timely and predictable revenue determinations and continues to present barriers to the participation of key stakeholders, such as consumer groups".<sup>19</sup>

This submission supports the concerns expressed in the Consultation Paper. The postponement of the review of the Rate of Return Guideline provides an opportunity for the outcome of the LMR review to be incorporated into the regulatory framework of which the Guideline is a key component.

Specifically, it is important that the issue of the standing of the Rate of Return Guideline in any subsequent appeal process is resolved. It is unreasonable to expect consumers and other stakeholders to engage fully in the review of the Rate of Return

---

<sup>15</sup> Ibid.

<sup>16</sup>

<http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Limited%20Merits%20Review%20Terms%20of%20Reference%20-%20August%202016.pdf>

<sup>17</sup> Ibid, p 1.

<sup>18</sup> COAG Energy Council, *Review of the Limited Merits Review Regime, Consultation Paper*, 6 September, 2016.

<sup>19</sup> Ibid, p. 4.

Guideline if any appeal body can subsequently ignore the AER's Guideline consultation process and the stakeholders' contributions to this process.

Thank you for your consideration of these important issues.

Signed

A handwritten signature in black ink, appearing to read "Bev Hughson". The signature is written in a cursive style with a large, stylized initial "B".

Bev Hughson  
Principal, Darach Energy Consulting Services  
[Bev.hughson@gmail.com](mailto:Bev.hughson@gmail.com)