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RE: Review of Limited Merits Review Regime – Response to Consultation Paper

Ausgrid welcomes the opportunity to provide comments in response to the COAG Energy Council ('Council') Consultation Paper on the review of Limited Merits Review (LMR) arrangements set out in the National Electricity Law (NEL) and National Gas Law (NGL).

We note that the Consultation Paper sets out a number of concerns regarding outcomes under existing LMR arrangements. However, the overarching concern seems to stem from the fact that a number of fundamental changes were introduced in 2013 to address perceived shortcomings with the LMR regime which Council is concerned may not be effective, given the recent appeals made by the NSW and ACT distributors.

To the extent that the Council has concerns about the performance of the LMR regime, any reforms should be proportional and targeted at addressing those concerns. Ausgrid strongly submits that removal of the LMR regime would be neither proportional nor targeted.

Our attached submission does not seek to provide detailed feedback to the comprehensive list of questions asked in the Consultation Paper. Rather, we considered that it would be more meaningful at this point in the review process to focus our comments around the following key themes:

- ***Benefits to the long-term interests of consumers provided by LMR*** - the LMR plays a crucial role in the overall regulatory framework governing electricity network providers by providing important checks and balances that enhance the accountability of the regulator and promotes transparent decision making and regulatory certainty. It is important to recognise that the abolishment of the LMR regime would also remove the rights of consumers to challenge the merits of future AER determinations as much as those of network service providers' (NSPs).
- ***The role LMR plays in promoting private sector investment*** - an effective and credible appeal process for revenue determinations is necessary to promote investor confidence in the industry, as it safeguards against regulatory error, reduces investor uncertainty, and delivers benefits to customers through lower financing costs and access to capital.
- ***Commentary on the Council's identified concerns with LMR*** – Ausgrid disagrees with some of the concerns identified in the Consultation Paper, particularly concerns regarding gaming

and cherry picking by NSPs, and seeks to provide further detail to refute the basis of those concerns.

- ***The underlying drivers that have contributed to reform outcomes*** - the underlying causes of many of the concerns expressed by the Council (i.e. the large number of applications for review since 2013 and delays in finalising the AER's 2015 determinations) are quite unrelated to the operation of the LMR arrangements per se and instead arise as a result of major amendments to the National Electricity Rules (NER) and National Gas Rules (NGR) in 2012.
- ***Judicial review is not an appropriate substitute for LMR*** – as it is not a suitable system of review for complex decisions made by an administrative decision-maker with specialist expertise. This is particularly important given the significant breadth of regulatory discretion the AER has under the NER, which is tied to impacts on property rights, and requirements to make continued ongoing investments to meet legally binding service obligations.
- ***Discussion on the reform options*** – our submission sets out our views as to why we consider options 1, 3 and 4 in the Consultation Paper should not be pursued, and that instead the Council should focus on further investigating option 2, as well as other options identified in our submission and by industry more broadly.
- ***Further options to improve the current LMR regime*** – Ausgrid considers that there are other options not raised in the Consultation Paper relating to the overall regulatory framework which could help to improve the current LMR regime, and represent a more proportionate and targeted response to the concerns raised in the Consultation Paper.

While we have provided our own comments in response to the Council's Consultation Paper, we fully support the analysis put forward by the Energy Networks Association (ENA). Industry participants have worked hard with the ENA within the short timeframe available to prepare analysis from highly respected experts to respond to the Consultation Paper.

The ENA's submission accurately reflects industry's concerns with respect to proposed options being considered by the Council to address perceived concerns with the operation of LMR. Importantly, the ENA's submission seeks to provide context on issues discussed in the Consultation Paper, as well as highlight considerations overlooked in the Consultation Paper that should be contemplated prior to deciding on any fundamental change to the existing LMR regime.

Ausgrid supports the detailed and persuasive evidence provided by the ENA to substantiate industry's key positions. In particular, this includes the evidence provided by the ENA supported by respected economic and legal experts demonstrating why options considered in the Consultation Paper should not be pursued and why alternative options put forward by the ENA should be further explored.

Given the short time frames that have been allowed for this review, rather than making fundamental changes to the LMR regime, the Council should, at its December meeting:

- i. accept that there is a case for reform of some aspects of the regulatory framework and LMR regime, and acknowledge that the extent and nature of that reform needs careful and detailed deliberation;
- ii. expand the scope of the review to include all credible options;

- iii. initiate a working group in collaboration with the AER, Energy Consumers Australia (ECA), the Australian Energy Market Commission (AEMC) and industry to review and test a range of options to change the current regulatory framework and LMR regime.

Adopting this approach would permit sufficient consultation and enable the judgement from the Federal Court on the AER's appeal of the Australian Competition Tribunal (ACT) rulings on the NSW and ACT electricity and gas distribution network revenue determinations to be taken into account.

If you have any queries or wish to discuss our submission in further detail please contact Jane Smith General Counsel, on (02) 9269 2023 or via email jane.smith@ausgrid.com.au.

Yours sincerely



TREVOR ARMSTRONG
Acting Chief Executive Officer

Review of the Limited Merits Review Regime – Response to COAG Energy Council Consultation Paper

October 2016



1. Introduction

Ausgrid considers that the ability to seek a review of the Australian Energy Regulator's (AER) revenue determinations is a crucial part of the regulatory framework, as it guarantees accountability, promotes transparency and quality in the decision making process. Importantly, it provides:

- appropriate checks and balances that safeguard against regulatory error and protect against regulatory capture;¹
- promotes consumer and investor confidence in the regulatory process; and
- helps clarify how complex regulatory rules, and economic and legal principles, should be interpreted and applied.

Ausgrid recognises that the COAG Energy Council ('Council') is concerned that the significant reforms to the Limited Merits Review (LMR) regime in 2013 ('2013 reforms') have not had their desired effect due to the number of appeals made by electricity network service providers (NSPs) and gas networks.

However, Ausgrid submits that there has not been sufficient time for those reforms to have their full effect and that the removal of the LMR regime at this point would be neither proportional nor targeted response to the Council's concerns. This is particularly so, given the underlying drivers that prompted the recent appeals by NSPs, and the pending judgement of the Federal Court on the AER's appeal of the Australian Competition Tribunal's (Tribunal) decision on the NSW and ACT distributors merit appeals of their regulatory determinations.

While we consider that it is too early to make fundamental changes to the LMR regime, a more proportionate and targeted response to Council's concerns would be to focus on exploring aspects of regulatory framework that could better support the operation of LMR.

Ausgrid has not attempted to provide detailed responses to the questions outlined in the Consultation Paper,² but has instead structured our feedback around the following key themes:

- **Providing important context on LMR regime** – this section is aimed at providing further discussion on the role that LMR provides and the context in which it operates within, as this context appears to be lacking in the Consultation Paper;
- **Why judicial review alone is considered insufficient** – this section sets out our views on why judicial review is considered insufficient to achieve the Council's objectives;
- **Understanding the causes of the outcomes under current LMR arrangements** – this section seeks to provide further analysis on concerns noted in the Consultation Paper and in particular, is aimed at refuting the concerns regarding NSP gaming and cherry picking;
- **Assessing the performance of the LMR** – this section sets out our views as to why it is premature to make fundamental changes to LMR at this point in time;
- **Discussion on reform options** – this section sets out our views on the different reform options considered in the paper as well as other credible options to improve the current operation of LMR.
- **Way forward** - sets out our recommendations regarding how Council should proceed given the constraints regarding the timeframe for conducting this review.

Ausgrid fully supports the Energy Network Association's (ENA) submission. We note that the views outlined in our submission are consistent with the ENA's and are intended to further build upon the comprehensive response put forward by the ENA.

¹ Regulatory capture refers to where the regulator favours the vested interests it regulates, or from a mistaken notion that it should act as a champion of consumers to the detriment of the legitimate commercial interests of the businesses it regulates.

² Ausgrid considers that the Consultation Paper lacked sufficient detail to appropriately respond to the questions. For example, the information provided in the Consultation Paper on Option 3 lacked sufficient detail for Ausgrid to provide a proper assessment of its capacity to meet the Council's stated policy objectives.

2. Important context for reviewing LMR

Ausgrid is concerned that the Consultation Paper appears to understate the substantial benefits that are provided from having a LMR regime³ and appears to overlook the broader regulatory framework in which LMR operates within. In this section, we seek to highlight the:

- benefits which are provided from having LMR in place;
- the role that LMR plays in promoting private sector investment;
- LMR in the wider context of regulatory framework; and
- relationship between judicial and LMR.

2.1 Benefits to consumers from merits review

As set out in the Council's 2012 Statement of Policy Intent, the presence of merits based review mechanisms provides a range of key benefits to the regulatory framework, including:

- providing checks and balances, which can enhance the accountability of the regulator and improve the quality of the regulator's decision making;
- safeguards against regulatory error and regulatory capture, thereby promoting confidence (amongst consumers and investors) in the regulatory process;
- facilitating efficient low cost financing of existing and ongoing private sector investment in long-lived energy network infrastructure by promoting investor confidence through greater regulatory certainty and accountability of regulatory decisions; and
- assists in clarifying how complex regulatory rules, and economic and legal principles, should be interpreted and applied. The regulator can use interpretive precedents to refine and improve its future decisions.

2.2 Merits review and private sector investment

Ausgrid is concerned that the Council may not have had appropriate regard to the significant role LMR plays in promoting investor confidence. This is particularly important when viewed in light of the fact that Australia's energy network sector features significant existing and ongoing private sector investment, which is heavily reliant upon efficient and ready access to debt and equity capital.

Private sector capital in Australian energy networks totals around \$44 billion, and approximately \$7 billion of debt financing and refinancing is required each year. Using data and benchmark assumptions by the AER, privately-owned networks are likely to face a total debt financing task of approximately \$4.4 billion per annum to underpin efficient financing of existing assets, and financing new capital investment approved by the AER.

Globally, investors in network services and long-lived infrastructure make capital allocation decisions based on confidence in the transparency and stability of the relevant regulatory regimes.

Ausgrid refers the Council to the extensive evidence provided in the ENA's submission that highlights the reliance investors place on LMR, and the likely impact on the cost of capital that would likely arise should the LMR regime be removed. We consider that the resulting increase in cost of capital that would arise from the removal of LMR would likely result in significant increases in the cost of providing electricity services, and therefore would be inconsistent with promoting the long term interests of customers as expressed by the National Electricity Objective (NEO).

³ Note that the term "LMR", "LMR regime" and "merits review" are used interchangeably throughout our submission to when referring to the Limited Merits Review arrangements contained in the National Electricity Law (NEL).

2.3 Limited merits review and the wider regulatory framework

It is critical that as part of the Council's review of LMR that it is recognised that the regime applies in the context of a regulatory framework which features, significant regulatory discretion. Where regulatory decision-making does involve relatively wide regulatory discretion in the application or law or statutory rules, and particularly where the application of this impacts substantially on private property rights, access to merits review is appropriate and important to the overarching operation of the framework. This point was specifically noted by expert panel as part of its review of the regime in 2012, where it was noted that:⁴

"We are convinced of the contribution that merits review can make to better regulatory decision making, and, more specifically, we consider it to be an important component of a system of checks and balances that supports the independence of delegated regulation...It is because the Australian Energy Regulator (AER) can exercise significant discretionary powers that merits review has such an important potential role to play."

Both the most recent amendments to manner in which the AER makes its regulatory determinations under the National Energy Laws, current appeal settings, and the Australian Energy Market Commission's (AEMC) 2012 rule on the *Economic Regulation of Network Service Providers* explicitly increased the scope of regulatory discretion.⁵ However, in making the making the 2012 *Economic Regulation of Network Service Providers* rule it was the explicitly noted by the AEMC the need for accountability of the regulator through some form of merits review to balance the increased scope of discretion that the amendments provided.⁶

2.4 Relationship between judicial review and LMR

Ausgrid notes that the Consultation Paper discusses an option for the removal of limited merits review in its entirety (Option 4), and seeks to suggest that access to judicial review alone may be a sufficient substitute or 'check' on reasonable decision-making under a regulatory regime featuring significant regulatory discretion.

Ausgrid disagrees with the view that judicial review provides a credible alternative to LMR. These regimes are separate and distinct to one another. Importantly, judicial review serves a different purpose than LMR, and cannot address the risk of regulatory error, nor deliver the accountability and transparency benefits of LMR as it is:

- limited in its scope to address some types of critical flaws in decisions;
- less accessible to consumer and other stakeholders who are unable or unlikely to engage legal counsel;
- more formal, with no opportunities for consultation or engagement with affected stakeholders;
- limited in its ability to provide feedback on decision-making to support ongoing improvements to applying regulation;
- not bound by any restrictions on delays and costs;
- generally limited to setting aside or remitting (no ability to correct simple errors), guaranteeing remittal or entire re-making of decision; and
- subject to the risk of correct and preferable (i.e. soundly evidenced) regulatory decisions being set aside on technical legal error grounds.

⁴ Review of the Limited Merits Review Regime: Interim Stage Two Report, 31 August 2012, p 3.

⁵ AEMC 2012, *Economic Regulation of Network Service Providers, and Price and Revenue Regulation of Gas Services*, Final Position Paper, 29 November 2012, Sydney. For example refer to page 36 where it is noted that "in general the final rules give the regulator greater discretion than it has currently. The objectives and factors show the regulator what it must bear in mind when it exercises that discretion."

⁶ Ibid, p.xi.

Judicial review and LMR should be viewed as complementary rather than substitutes. Together these review types promote well-founded, high quality decisions, which are legally permissible and made according to due process.

For these reasons Ausgrid considers that judicial review alone is not capable of delivering on the Council's policy objectives for reviews of energy decisions. In the event that LMR was removed, the only way we consider that judicial review could achieve the Council's policy objectives with respect to energy decisions would be for corresponding amendments to be made to the National Electricity Rules (NER) and National Gas Rules (NGR) to tighten the discretion provided to the AER under these regulatory frameworks.

3. Analysis of concerns

This section seeks to provide further analysis on the underlying cause of the Council's concern with the operation of the LMR regime since the 2013 reforms. Ausgrid is concerned that the Council appears to have formed some of its preliminary views on the performance of LMR based on issues that unrelated to LMR arrangements. This section seeks to illuminate these issues and also seeks to provide evidence which refutes claims in the Consultation Paper on network service provider gaming and cherry picking.

3.1 Underlying causes of LMR outcomes

It is our observation that the underlying cause of many of the concerns expressed by the Council (i.e. the large number of applications for review since 2013, delays in finalising the AER's 2015 determinations) are quite unrelated the operation of the LMR arrangements per se. For instance:

- Several of the applications for review since 2013 were made because parties, reasonably, sought to preserve their legal positions pending the outcome of an ongoing LMR process, or because of uncertainty created by the AER's decision to seek judicial review of the Tribunal's decision in respect of the NSW and ACT applications.
- Major amendments to the NER and NGR in 2012 also meant fundamental changes to the way in which decisions were made by the AER in 2015 and 2016. There was genuine uncertainty over whether the AER had applied the new rules correctly. The recent LMR applications represent parties' attempts to test and clarify the AER's implementation of the new rules.
- The delays in finalising the AER's 2015 decisions for NSW and ACT NSPs has been due largely to the AER's decision to prolong the review process by seeking a judicial review of the Tribunal's decision on those matters.

While Ausgrid does not agree with Council's assessment of the LMR regime's performance since the 2013 reforms, we consider that they are opportunities for the regime to be improved by undertaking careful assessment of underlying causes, and developing targeted and proportionate remedies.

Ausgrid refers the Council to Attached C of ENA's submission which sets out detailed analysis on the performance of the LMR regime since the 2013 reforms, and suggests a number of options for improving LMR which are targeted at addressing the underlying causes for the regime's recent performance.⁷

3.2 Response to concerns on gaming and cherry picking

Ausgrid is concerned that in making some of its observations on perceived problems with the LMR regime that the Council appears to have overlooked the link between rule and legislative changes and 'testing' of AER determinations.

⁷ Frontier Economics and HerbertSmithFreehills, *Options for enhancing the Australian Limited Merits Review regime*, September 2016, (**Attachment C**) to ENA submission.

For example in the Consultation Paper the Council makes note that more than half of the determinations made by the AER since 2013 have been subject to applications for review, and is therefore evidence of the regime is not operating effectively. However, it is important that this fact is viewed in proper context of:

- major changes to the NER and NGR in 2012; and
- major changes to the NEL and NGL in 2013,

which significantly altered the way in which the AER must make its revenue determinations for NSPs.

Rather than viewing the applications for merits review since 2013 as failings of the regime that should be viewed in their proper context which is NSPs and consumers seeking to test and resolve uncertainty surrounding the new rules and legislation.⁸

While there have been 18 applications for review relating to AER and ERA decisions made to the Tribunal since 2015, it is important that this number is considered in the following context:

- four of those applications for review were made by consumer groups;
- the grounds for review relied upon by the applicants relate to the proper interpretation of provisions in the NER and NGR which had been amended in 2012;
- the considerable commonality of grounds relied upon by the NSPs (particularly in relation to the cost of capital, estimated cost of corporate income tax and use of benchmarking), which reflected both the significant industry-wide implications of the AER's interpretation of the NER and NGR;
- that NSPs whose AER determinations were made after the NSW and ACT proceedings were heard, but before they were determined by the Tribunal, made applications for review on largely similar grounds and abandoned the grounds relating to the cost of equity once the Tribunal upheld the AER's approach in the NSW and ACT proceedings; and
- the NSPs whose AER determinations were made after the Tribunal published its decisions in the NSW and ACT proceedings made applications to the Tribunal for review of the AER's decisions because the AER had failed to apply the reasoning of the Tribunal in the NSW and ACT determinations.

Consequently, when viewed in light of this and the evidence provided in section 4, we consider it to be incorrect for the Council to claim that LMR regime gives rise to cherry picking and gaming by NSPs.

4. Assessing the performance of the LMR regime

A significant issue facing the review of the limited merits review regime is the upcoming judicial review on critical aspects of the Tribunal's ruling on the NSW and ACT distributors' merits review of their revenue determination.

Under the current review timelines, the Council are not in a position to determinatively assess the performance of its previous reforms to limited merits review. This is because the final outcomes for consumers of the AER's application for judicial review of the Tribunal's February 2016 decision are not likely to be known until at least February or March 2017. Consequently, the interpretation of key elements of the 2013 reforms such as the interpretation of concepts of a 'materially preferable' decision will not be known.

These circumstances make determining a clear view on the overall performance of the regime by December impossible, as any such assessment could not take into account practical evidence of the final impact of the review arrangements on the long term interests of consumers under the NEO/NGO.

While we note that the Council is concerned that the 2013 reforms to LMR have not been effective in achieving its policy objectives, it is important that the reforms are viewed in context of the significant

⁸ Similarly, the significant revenue reductions, exclusive reliance on benchmarking to establish efficient expenditure levels, and judicial review by the AER may be characterized, in some senses, as a 'testing' of its new powers.

amendments that were made to the economic regulation of NSPs as part of the AEMC 2012 rule change. Ausgrid is concerned that the Council appears to have overlooked this and has further not had regard to the following evidence that demonstrates that the 2013 reforms have been delivering the Council's intended policy objectives.

Outlined below are a few key examples of how the LMR regime has been performing effectively and note that more detailed evidence on this issue has been provided by the ENA.

Evidence to suggest that reforms are acting as intended

- In relation to the NSW and ACT applications, the Tribunal upheld the AER's decisions on return on equity allowances. The alleged errors in respect of these allowances amounted to over \$2.4 billion in regulated revenues. The Tribunal's decision to uphold the AER's original determinations is largely due to the introduction in 2013 of the 'materially preferable NEO decision' test.
- The Tribunal's decision has helped clarify for NSPs, consumers and other parties affected by the AER's decisions how the new rules should be interpreted in respect of return on equity determinations. In light of the Tribunal's decision, SA Power Networks withdrew its application to the Tribunal in respect of return on equity matters and Victorian NSPs chose not to seek review on return on equity matters, notwithstanding that they had expressed very similar concerns to the NSW and ACT NSPs that sought review on those grounds. This demonstrates that the LMR regime can and does provide a means of clarifying how the NER and NGR should be interpreted.
- PIAC was both an applicant and intervener in the NSW and ACT review process, and made its case to the Tribunal competently. PIAC's involvement provided a clear contraposition to that of the NSPs' on a number of matters and demonstrates that consumer involvement in the LMR process has improved since 2013.
- In LMRs since 2013, the Tribunal has consulted directly with consumers without legal representation, using informal processes free of 'legalism'. This is a clear outcome of the 2013 legislative changes that now require the Tribunal to consult with consumers when making its decisions.
- In all instances since 2013 in which the Tribunal has not upheld the AER's original decisions, those decisions have been remitted back to the AER to remake (rather than being varied by the Tribunal). This was an intention of the 2013 reforms.

The above evidence indicates that it is too early to assess the full impact of the 2013 legislative amendments, as it will take time for major reforms to settle and for the Tribunal to gain experience in applying the legislative changes since 2013.

5. Discussion on reform options

This section of our submission provides feedback in response to the reform options listed in the Consultation Paper, and also sets out further options that could provide a more targeted and proportionate response to the Council's concerns with the effectiveness of LMR.

5.1 Analysis of reform options discussed in the Consultation Paper

Option 1 – Retain the Tribunal as the review body with no legislative amendments

Ausgrid agrees with the ENA's position that a 'no change' option is unlikely to promote the NEO or National Gas Objective (NGO).

Rather, it is critical that the Council undertake a robust evidence-based assessment of the current regime, including a full identification of the underlying drivers of the outcomes under the current regime, and its full impact on consumers' long-term interests.

Option 2 – Retain the Tribunal with legislative amendments

Ausgrid supports Option 2 and considers that the potential reforms outlined in the ENA's submission and further options discussed in section 5.2 if our submission provides a strong basis for adjustments to address concerns with the current operation of LMR in a more targeted and proportionate manner.

Importantly, we consider that incremental rather than fundamental changes be made to the LMR regime. This is because it is too early to assess the full impact of the 2013 reforms, as it takes time for major new reforms to settle down and for the Tribunal to gain experience applying the legislative changes made in 2013.

Option 3 – Replace the Tribunal with a new investigatory body

The adoption of Option 3 may have the potential to satisfy some elements of the Council's objectives however, Ausgrid finds it difficult to provide further comments on the feasibility of this option due to the lack of detailed provided in the Consultation Paper.

Option 4 – Removal of access to LMR

As noted in section 2.4 of our submission and the comprehensive evidence provided by the ENA, removal of access to merits-based review would not be consistent with critical requirements for a stable, predictable regulatory regime - which underpins least cost financing and refinancing of significant ongoing private sector network investments. We consider that this option would result in outcomes inconsistent with the NEO such as it:

- reduces the overall accountability of regulator;
- creates lower incentives for high-quality primary regulatory decisions;
- creates a higher risk of significant regulatory errors;
- promotes a higher cost Court-focused reviews; and
- potentially lock consumer groups out of meaningful involvement in future appeal proceedings.

If the Council proceeds with this option, it will also need to revisit the determination framework set out in the NER and NGR.

5.2 Further options to improve the current LMR regime

Ausgrid supports the alternative options put forward by the ENA. In particular, we strongly support the establishment of a binding and reviewable rate of return determination. We consider that adopting this approach will significantly reduce the number of appeals made by NSPs, and would likely give rise to the following benefits:

- **Efficiency and reduced duplication of process** – this approach would ensure a single, efficient review process for a determination with network sector wide implications, rather than the decision needing to be tested in a later network determination process. This would also address the issue of networks needing to apply for duplicative, cascading sequential reviews on similar issues to ensure flaws in the original AER determination are remedied.
- **Reducing resource costs and delay** – this approach is likely to lower the total resource cost of review (by movement from a three-year cycle to a five-year cycle) and permitting any review applications to occur in a timely manner.
- **Consumer-centred processes** – this approach is more aligned towards giving effect to the original policy intent of the AEMC's 2012 amendments, by providing a single central focal point for consumer involvement in cost of capital issues, rather than splitting these resources between individual network determinations and the existing non-binding guideline. This would also allow for customer and stakeholder groups to focus their review of individual network determinations on specific network regulatory proposals such as the impact of investment and efficient service delivery plans on local customers.

- **Improving certainty** – this approach is better targeted at achieving the AER’s preference for no party to depart from the outcomes of a rate of return review process.

In addition to the alternative options outlined by the ENA, Ausgrid considers there is merit in considering the following options:

1. **Utilise the period better between draft and final determination to increased engagement and resolve issues** - a lack of transparency in decision making and engagement with consumers during the final determination stage can result in networks having to access the appeal process under LMR. Ausgrid considers that this could be avoided if the period between Draft and Final is used more constructively on trying to resolve any outstanding issues. This would involve greater engagement with the AER, customer groups and the businesses, and would act as a form of informal arbitration. We believe that this will result in a more robust final determination and a greater appreciation on all sides of the AER’s consideration of issues, so that there are no surprises when the final is determination is published.
2. **Establish a simple process to resolve errors.** The current arrangements are inadequate to resolve issues of simple transcription or mathematical error in final determinations, which can be material in their impact on revenue allowances. While the NER includes a limited ability for AER to rectify such errors,⁹ this provision has not exercise consistently. Further, there is no ability for NSPs to trigger this consideration, nor is the assessment independent. To address this, Ausgrid considers that appropriate amendments should be made to the NER to provide NSPs with the ability to raise material errors (i.e. calculations) within a fixed time after the final determination, and require the AER to appoint a panel of experts to rule on the error.
3. **Establishment of an independent expert panel on Weighted Average Cost of Capital (WACC)** – the establishment of a WACC Expert Panel would provide more certainty on WACC assessments and would assist in making the determination process more deterministic. We consider that this option complements the ENA’s option of making the rate of return guideline binding.
4. **Provide further guidance in the NER on benchmarking** – by establishing criteria in the NER on how benchmarking should be used and conducted by the AER.

Ausgrid notes that the consultation paper does not provide any details on how the Council intends on assessing the various options outlined in the Consultation Paper or alternative options put forward by stakeholders.

We consider it important that any option considered by the Council to address perceived shortcomings with the operation of the existing LMR regime needs to subject to a proper cost benefit analysis and assessed against criteria which is consistent with the promotion of the National Electricity Objective (NEO) or National Gas Objective (NGO). We recommend that the following criteria provided by the Council to the 2012 Expert Panel in its review of LMR remains appropriate and should be used in this review:

1. Maximising accountability;
2. Maximising regulatory certainty;
3. Maximising the conditions for the decision-maker to make a correct initial decision;
4. Achieving the best decisions possible;
5. Ensuring that all stakeholders’ interests are taken into account, including those of service and network providers, and consumers;
6. Minimising the risk of “gaming”; and
7. Minimising time delays and cost.

⁹ Refer to rule 6.13 of the National Electricity Rules (NER).

6. Way forward

Ausgrid is concerned that the Council has not allowed for sufficient time to conduct a proper review of the evidence and options provided as feedback to the Consultation Paper.

Given the short time frames that have been allowed for this review, rather than making fundamental changes to the LMR regime, the Council in its December meeting should:

- i. accept that there is a case for reform of some aspects of the regulatory framework and LMR regime, but the extent and nature of that reform needs careful and detailed deliberation;
- ii. expand the scope of the review to include all credible options;
- iii. initiate a working group in collaboration with the AER, Energy Consumers Australia (ECA), the AEMC and industry to review and test a range of options to change the current regulatory framework and LMR regime.

Adopting this approach would permit sufficient consultation and enable the judgement from the Federal Court on the AER's appeal of the Tribunal's rulings on the NSW and ACT electricity and gas distribution network revenue determinations to be taken into account.

Further, we note that adopting this approach is consistent with section 71Z of the National Electricity Law (NEL) which provides that the Council must *initiate* a review of the Tribunal's role under Division 3A of the NEL by 1 December 2016.

Ausgrid notes that there is nothing in the current drafting of the legislation that compels the Council to conclude its review by 1 December 2016, and is concerned that making fundamental changes to the regime without careful consideration will have a number of intended consequences and will give rise to outcomes that are contrary to the long term interests of consumers.