

30 September 2016

COAG Energy Council Secretariat  
GPO Box 9839  
Canberra ACT 2601

via email: [energycouncil@environment.gov.au](mailto:energycouncil@environment.gov.au)

Dear COAG Limit Merits Review Project Team

**RE: COAG ENERGY COUNCIL LIMITED MERITS REVIEW PROJECT TEAM – REVIEW OF THE LIMITED MERITS REVIEW REGIME CONSULTATION PAPER**

Endeavour Energy welcomes the opportunity to provide feedback on the Limited Merits Review Project Team's (LMRPT) review of the Limited Merits Review (LMR) regime consultation paper. Broadly, the consultation paper provides an outline of the roles and objectives of both the administrative and merits review in relation to economic regulation in the energy sector. The LMRPT seeks stakeholder views on the effectiveness and efficiency of merits review in achieving the National Electricity Objective (NEO) and National Gas Objective (NGO).

Endeavour Energy is concerned that the short LMR review timeframe may lead to suboptimal policy outcomes. As such, we encourage that the LMRPT recommend to COAG that they consider holistically the various options being presented through this consultation and test them for their relative merits and limitations, ideally with the opportunity for expert advice from the cross section of stakeholders. Such an investigative process would enhance the transparency and engagement on a policy topic that has significant stakeholder and customer implications.

It is noted that the current review was scheduled following a suite of reforms to LMR in 2013 after a COAG review (2013 LMR reform) and substantial changes to the National Electricity Rules (NER) and National Gas Rules (NGR) in 2012. Consideration of the performance of the LMR reforms cannot reasonably be assessed in isolation from the NER reform packages.

There is evidence that LMR has delivered or substantially delivered on several policy objectives, including:

- Customer's long term interests were centrally placed in the considerations of the Australian Competition Tribunal (the Tribunal).
- Customer consultation forums and customer advocate participation in the LMR process provided the Tribunal with clarity of customer issues and concerns as can be observed in the Tribunal's recent decision for the NSW Distribution Network Service Providers (DNSPs).

- The Tribunal applied a higher threshold for matters to be reviewed and sought advice from the AER regarding related decisions with the purpose of identifying and rejecting selective arguments or issues with offsetting adjustments that would result in an immaterial change to the overall decision.
- Increasing use of remittal to allow the AER to consider the Tribunal findings in the context of the AER decision as a whole and not in isolation.
- Precedents set by the Tribunal's thorough and transparent examination of the issues have resulted in reduced appeals being sought in subsequent review processes, the clearest example being the retraction of return on equity appeals following the Tribunal's decision in relation to the NSW and ACT networks.

Notwithstanding these positive developments, there remain opportunities to address outstanding areas of concern raised by the LMRPT and stakeholders. Broadly the concerns can be summarised as follows:

- **Materially preferable:** it is not clear whether the Tribunal has addressed this test in the manner or detail anticipated. It appears that reviews continue to focus on individual decisions rather than genuine matters of substance.
- **Legal nature:** the length and amount of submissions suggest the process continues to be legalistic which creates a regulatory impost.
- **Cost:** due to the above the process remains an expensive exercise that only networks may be incentivised to invest in.
- **Consumer representation:** the legalistic nature and costs of LMR may inhibit consumer participation. It is also unclear to what extent consumer views were relied upon in recent Tribunal decisions.
- **Uncertainty:** the length of the process continues to create uncertainty in outcomes.

The LMRPT identify four broad options to moving forward given these concerns, within the context of the objectives of LMR outlined in the 2013 LMR reform. These options and our views are outlined below:

1. **Retain the Tribunal as a review body without legislative amendment:** While we support the continued use of the Tribunal as the appropriate appeals body, we acknowledge the issues and concerns raised by stakeholders and the opportunity for further reform that could reduce the cost and time impost of LMR process and promote greater certainty.
2. **Retain the Tribunal as the review body with legislative amendments:** Consistent with the Energy Networks Association (ENA) submission we consider this is the most preferable solution with targeted options that better address the specific concerns raised by stakeholders which should be examined further by LMRPT in detail into 2017.
3. **Replace the role of the Tribunal with a new investigatory body:** We consider this option is less likely to achieve the targeted outcomes desired by stakeholders due to the broad spectrum of possibilities; however we would welcome any clarity or detailed specification from the LMRPT on this issue to crystallise the limitations and opportunities of this option.

4. Remove access to LMR: We consider the removal of LMR is inherently inconsistent with the long terms interests of consumers and will increase costs to consumers as discussed below. Further, it would weaken accountability and regulatory certainty that would not support the NEO and NGO or the LMR objectives outlined in the 2013 LMR reform. We do not consider judicial review is an appropriate substitute as experiences shared at the LMR forum on 22 September 2016 highlighted that it is a more expensive, legalistic and time consuming process that does not have a similar scope and would exclude customer participation.

Overall we consider a workable model of merits review best promotes the NEO and NGO. It is a crucial component of the regulatory framework that supports investor confidence, consumer outcomes and regulatory accountability. Judicial review alone, which addresses errors of law rather than fact or the correct weighing of evidence, is not adequate in providing a stable, effective regime that promotes strong and high quality regulatory decision-making.

Furthermore, there have not been a sufficient number of completed merits review proceedings following the 2013 LMR reforms to robustly and confidently identify any serious or fundamental issues with LMR itself. However, there may be more direct and effective changes to the upstream elements of the regulatory framework that would more effectively address the concerns and experiences of stakeholders.

It is for these reasons that we support option two which maintains LMR with targeted amendments to improve its performance and address specific issues. We suggest the following amendments be considered and developed for consultation by the LMRWG into 2017:

- Allow for merits review of the Rate of Return guideline to avoid the overlapping sequence of individual network reviews on common issues.
- Consider closer alignment of regulatory review cycles for like networks.
- Greater regulatory focus on incorporating feedback from LMR decisions to avoid repeated reviews of an individual issue.
- Provide for more inquisitorial based review processes such as expert roundtables and agreed statements of facts to reduce the legalistic nature of LMR.
- Simplify and raise the review threshold using a monetary minimum (or percentage of annual revenue) to better clarify the materially preferable test.

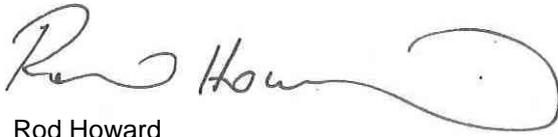
We endorse the ENA submission on this matter and refer the LMRPT to it for further details on the above (and other) suggested improvements in giving effect to option two.

For completeness, Endeavour Energy does not believe that option one or option four will provide the necessary customer or investor confidence in the overall regulatory regime outcomes to support the long term interests of consumers. As participants heard at the LMR stakeholder forum on 22 September, the removal of LMR could:

- Remove access to lower cost sources of debt that is required to fund network investment, particularly from foreign financial institutions.
- Negatively impact the credit ratings for all network businesses due to a downgrade of the regulatory regime and thereby potentially raising the benchmark cost of capital; and
- Ultimately increase consumer prices.

If you have any queries or wish to discuss this matter further please contact Jon Hocking, Manager of Network Regulation at Endeavour Energy on (02) 9583 4386 or via email at [jon.hocking@endeavourenergy.com.au](mailto:jon.hocking@endeavourenergy.com.au).

Yours sincerely

A handwritten signature in black ink, appearing to read "Rod Howard". The signature is fluid and cursive, with a large, rounded flourish at the end.

Rod Howard

**Acting Chief Executive Officer**