National Electricity Law And National Gas Law Amendment Package: Creating a binding rate of return instrument

Response to COAG Energy Council Senior Committee of Officials

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Energy Networks Australia

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1 Executive summary

Key messages

- The current draft legislation would dramatically shift the rate of return framework from a balanced 'guided discretion' framework established in 2012 to a highly discretionary 'blank sheet' approach.
- This unexpected change is not consistent with any policy decisions to date and has not formed part of previous proposals to implement a binding guideline.
- A removal of critical rules-based guidance has potential to increase uncertainty, financing costs, and bill costs to consumers – with no offsetting benefit.
- Effective sole reliance on broader existing legislative guidance (such as the National Electricity and Gas Law objectives and Revenue and Pricing Principles) is not a substitute for principles-based guidance on what the regulator should be seeking to achieve and consider in setting a rate of return, and key established concepts within the existing rules.
- Clarity over the agreed policy intent and objectives of the proposed wide-ranging framework changes is an essential first step for a robust consultation process to assess and advance the reforms.
- A proposed removal of rule-making powers around the rate of return framework would be inconsistent with the separation of rule-making and economic regulation, COAG approved market governance arrangements, and has not been justified.
- The combined effect of the proposed changes would be to substantially lower regulatory accountability, with the substantial potential to harm to the long-term interests of consumers.

In March 2018 the COAG Energy Council Senior Committee of Officials (**SCO**) released the draft *Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Bill* 2018 (**the draft Bill**) for consultation. It also released proposed changes to the National Electricity Rules and National Gas Rules (**Rules**).

Energy Networks Australia welcomes the opportunity to provide perspectives to the Senior Committee of Officials (SCO) on the draft Bill and proposed Rule changes.

Importance of a balanced framework in supporting customer outcomes

Establishing a predictable, transparent and evidence-based rate of return guideline is critical for Australia's energy future because it allows for the efficient financing of long-lived infrastructure and other energy solutions in the long-term interests of consumers. A legislative framework for the making of a binding rate of return guideline that is balanced, certain, provides accountability and confidence in the regulatory process is crucial to achieving this outcome.

The return on capital building block is a critical component of electricity and gas regulatory decisions. It has the single largest impact on revenue and therefore prices

paid by consumers. The framework for making a binding rate of return guideline must provide certainty, stability and confidence that the resulting guideline will meet the overarching objective of contributing to the national electricity and gas objectives.

There is a balance to be struck between providing discretion and flexibility to the regulator in making a binding guideline and certainty and stability in the interests of all stakeholders, including consumers. In recognition of this, the current rate of return rules provide detailed guidance to the regulator on the setting of the rate of return, but still allow for the exercise of discretion in reaching its decisions.

Impact of proposed removal of substantial rules guidance

The draft Bill and amendments to the Rules propose, however, to remove the guidance in the current Rules (and effectively with it the many years of regulatory practice and precedent on rate of return matters) in favour of wide discretion in the regulator. No agreed policy rationale or supporting reasoning has been provided for this proposed change.

Removal of this guidance would not be mitigated by the existing requirement for a regulator to consider the relevant law objectives and revenue and pricing principles on rate of return issues. The guidance these provisions give is broad and potentially capable of supporting a wide range of significant departures from approaches applicable or contemplated under the existing rules guidance.

Energy Networks Australia considers that the proposed changes would introduce a level of discretion which is detrimental to regulatory certainty, stability, accountability and ultimately the long-term interests of consumers.

This is because the substantial levels of discretion provided are likely to result in substantial uncertainty on future potential regulatory approaches, increasing financing costs and impacting efficient network investment decisions.

Minimising avoidable regulatory uncertainty by a clear anchoring set of principles or rules guidance is critical given network assets are highly likely to be impacted by multiple guidelines or determinations due to their long-lived nature. As an example, a network asset with a life of 60-80 years would be influenced by the investment incentives of between 15-20 future guidelines, under the proposed regime.

A re-balancing of the discretion provided to the regulator and appropriate anchoring guidance to be provided by the Rules and Law (as to both substance and process) is critical.

Alternative proposals to re-balance the proposed framework

Energy Networks Australia has developed potential amendments to the SCO released exposure legislation that seek to achieve a reasonable balance between discretion for the regulator and guidance and rate of return regime predictability for networks, investor and consumers (Attachment 1).

Network businesses have also provided detailed drafting suggestions on provisions of the draft legislation (Attachment 2).

Neither the illustrative alternative rate of return proposals made or the detailed suggested amendment are provided on the basis that their adoption would remove the risks to the long-term interests of consumers, regulatory accountability, predictability and the capacity to efficiently finance network investment over the medium term. Rather, they are provided as an initial illustrative indication of the types of changes the network sector considers are likely to be recognised as required under the recommended next steps below.

Recommended next steps

The SCO Bulletin notes that the draft Bill does not represent government policy and has not been endorsed by the Energy Council or any participating jurisdiction.

In light of this, Energy Networks Australia recommends that the following next steps should be taken:

1. **Provision of agreed policy intent and policy reasons for any framework changes beyond implementation of a binding guideline** - Having regard to submissions received on the draft Bill and proposed Rule amendments, the COAG Energy Council should publish a policy paper which identifies the policy reasons for the proposed changes and responds to the issues raised in submissions, including providing options for consultation and any proposed revised drafting to address identified issues.
2. **SCO Stakeholder Forum** - If a stakeholder forum is to be held, it should be held after the publication of the policy paper referred to above.
3. **Consultation on policy paper** - A further opportunity for submissions on the policy paper and any revised drafting should be allowed prior to finalisation of the proposed legislative reforms.

2 Background

Energy Networks Australia is the peak national body representing gas distribution and electricity transmission and distribution businesses throughout Australia. Twenty-five electricity and gas network companies are members of Energy Networks Australia, providing governments, policy-makers and the community with a single point of reference for major energy network issues in Australia.

With more than 13 million customer connections across the National Energy Market (NEM), Australia's energy networks provide the final step in the safe and reliable delivery of gas and electricity to households, businesses and industries.

The issues discussed in this submission have been the subject of consultative discussions between Energy Networks Australia and a range of critical stakeholder groups including customer and investor representative groups.

The remainder of this submission is structured as follows:

- Section 3 summarises the changes to the rate of return rules framework since inception.
- Section 4 addresses the proposed removal of the existing rate of return rules and provides, as an illustrative alternative, a shortened set of guidance rules that the AER must have regard to in making a binding rate of return guideline (see Attachment 1).
- Section 5 makes suggestions on the process for making the binding rate of return guideline.
- Section 6 addresses the re-opening of a binding guideline.
- Section 7 discusses the impact of the proposed legislative reforms on accountability of decision making.
- Section 8 deals with the proposal to remove the AEMC's rule making power in respect of rate of return rules.
- Section 9 makes some observations and comparisons with other regulatory regimes.
- Section 10 and Attachment 2 comment on and propose alternative drafting on specific sections of the draft Bill.

3 Impact of policy changes to the rate of return framework

Since the introduction of the national energy regime in 2005, the underlying policy and level of prescription and guidance on rate of return decisions has fluctuated considerably:

- In 2006, amendments to the *National Electricity Rules* introduced, for the first time, very prescriptive rate of return rules with the addition of the new chapter 6A and a form of binding instrument for electricity transmission;
- In 2008, similar rules were then introduced in chapter 6 dealing with electricity distribution;[1]
- The rules at that time adopted a "building block" revenue requirement prescribing specific methodologies for some parameters of the rate of return and left the regulator with limited or no discretion. The rules required the AER to conduct periodic reviews of the rate of return parameters, with the first review to be initiated in 2009;
- In 2012, following an extensive consultation and review process by the AEMC, amendments to the rate of return rules were made for electricity distribution, transmission and gas. The 2012 rule changes resulted in a consistent set of rules, process and guidance for the determination of the rate of return and a non-binding rate of return guideline. The 2012 amendments introduced the allowed rate of return objective as an overarching guiding objective (but subordinate to the achievement of the national electricity and gas objectives) and provided guidance, but less direct prescription to the regulator than the previous (electricity) rate of return rules.
- The *National Gas Rules* commenced with a comparatively lower level of prescription on rate of return compared to that contained in the *National Electricity Rules*. The Gas Rules were amended in 2012 to bring them in to line with electricity, leading to a greater level of prescription and guidance than had previously existed for gas networks.

As a result of the 2012 amendments, the national regime has provided greater transparency in the AER's process of setting the rate of return. Since their introduction there have been approximately 40 gas and electricity determinations by the AER and ERA giving detailed consideration to the rate of return rules and the estimation of the rate of return and gamma. There has also been eight Competition Tribunal and three Full Court decisions[2] scrutinising those decisions and interpreting the current version of the rate of return and gamma rules. This has provided

[1] The rules required the AER to publish a Statement of regulatory intent on the revised WACC parameters, which would apply unless persuasive evidence was provided in individual distribution proposals to justify a departure.
[2] Noting that in some cases the same Tribunal/Court reasons have been applied to numerous proceedings with common issues.

significant clarity and precedential evidence on the meaning and application of core concepts in the current provisions.

The draft Bill and proposed changes to the Rules reflect a further significant change in policy, removing the guidance currently contained in the Rules (including the allowed rate of return objective), and instead providing the regulator with almost complete discretion in making a binding rate of return guideline.

A change in the policy position to provide significantly more discretion to the regulator without the guidance currently found in the Rules would compound the already heightened concerns of risk held by investors in networks as a result of the unilateral Commonwealth legislative action to remove of the jurisdiction of the Competition Tribunal to assess merits review applications.

With heightened perceptions of regulatory risk on the rate of return – that is the single most influential factor investors are likely to consider - comes a potentially degraded ability of networks to access efficient debt and equity funding. Put simply, the higher the perceived risk, the higher the return capital providers will demand and the smaller the pool of willing capital providers to regulated network assets. In turn this could impact the ability of networks to efficiently invest required capital in the networks in a manner that promotes the long-term interests of consumers.

This is because final energy bills have the potential to be critically impacted by even small changes in financing costs associated with credit rating actions or capital market responses to adverse changes to the regulatory regime. As an example, a mere 5 basis point (or 0.05%) addition to the existing weighted average cost of capital would lead to an increase in financing costs of approximately $250 million over a five-year regulatory period. A more substantial capital market response, for example flowing from a 'one-notch' downgrade in credit metrics of around 20 basis points (or 0.20%), would equate to a potential increase in financing costs borne by consumers of approximately $1 billion over five years.

It is a feature of regulatory risk created by a lack of regime predictability, or the potential for substantial adverse change, that no party benefits. Unnecessary regulatory risk represents a net loss to both consumers and investors, and distorts investment decisions across and beyond the energy infrastructure sector.

4 Role of the rate of return rules

The proposal to remove the rate of return rules introduced less than six years ago (one regulatory cycle for most networks) is said in the Energy Council Bulletin to result from the movement of the rate of return framework from the Rules, to now reside in the Law.[3]

[3] SCO Bulletin, page 3.

Critically, however, the framework proposed to be included in the National Electricity and National Gas Laws (the Law) does not include any of the guidance provided by the existing rules.

That is, guidance has not been relocated from the Rules to the Law, which would be one feasible option to provide enhanced predictability and certainty. It has been omitted.

The existing rules resulted from a detailed assessment of the framework by the AEMC, including, as its guiding principle (and test for making the change to the Rules), contribution to the achievement of the national electricity and gas objectives. In developing the 2012 amendments the AEMC gave careful consideration to the appropriate balance between flexibility and discretion in the decision-making process and certainty provided by the rules stating:

> *The Commission has taken the view that guidance in the NER and the NGR is beneficial unless it limits the flexibility of the regulator to make decisions more likely to achieve the NEO, the NGO and the RPP.* ***The Commission disagrees with suggestions that the level of guidance included in the draft rule makes the AER less likely to be able to achieve these objectives than were there less prescription. Equally, the Commission disagrees that more prescription is needed than that provided by the draft rule. Rather, the Commission is of the view that the right level of balance has been struck by providing a framework for how the regulator should perform its duties, while at no stage undermining the primacy of the overall allowed rate of return objective.***[4] (emphasis added)

The AEMC formed the view that the final rule struck an appropriate balance between flexibility and certainty for all stakeholders.[5]

While the current Rules provide a set of guiding principles and a level of certainty of approach, the regulator's discretion is maintained with primacy given to achieving the allowed rate of return objective and the national electricity and gas objectives. No reason has been given as to why this balance between discretion and guidance is no longer appropriate, and Energy Networks Australia seeks an open exploration of this issue this as part of its suggested way forward through development of a SCO policy paper.

The proposed deletion of the rate of return rules takes with it detailed precedent, certainty and the resolution of many contentious issues, in favour of discretion in the regulator. Most notably, fundamental elements of the rate of return rules are proposed to be removed. A summary of these fundamental elements and a description of the benefits of the provisions are set out in Table 1 below.

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[4] AEMC Rule Determination, 29 November 2012, page 56.
[5] AEMC Rule Determination, 29 November 2012, page 38.

Table 1 – Rationale for existing key rate of return rule elements

Element of existing rules	Purpose and benefits of provision
The allowed rate of return objective (ARORO) that the allowed rate of return is to be commensurate with efficient financing costs of the benchmark efficient entity facing similar risks to the service provider	Provides an explicit goal for the process. Ensures consumers only pay efficient financing costs. Recognition of the risk adjusted nature of rate of return, anchoring decisions on risk.
The requirement to use a weighted average cost of capital approach.	Provides clarity that the regulator will derive an overall rate of return by a weighted average cost of debt and equity, as is standard regulatory practice, enhancing predictability.
The requirement to have regard to all relevant methods, models, evidence and data.	Requires the regulator to not narrowly consider only a single financial model to determine a rate of return, but to consider all relevant models and other evidence to support a higher quality decision.
The requirement to have regard to prevailing conditions in equity markets.	Ensures that the rate of return reflects changing conditions, lowering overall financing costs.
The guidance on the range of return on debt methodologies that may be used (an on the day approach, a trailing average approach or some combination of the two).	Provides guidance on key principles in applying two alternative cost of debt approaches, whilst leaving discretion for the regulator to select between alternatives or adopt a hybrid approach.
The requirement to consider impacts of a change in debt methodology.	Lowers financing costs by directing the regulator to consider incremental costs of changes in approach. Promotes stability of approach.

Energy Networks Australia is unaware of any policy rationale supporting the above requirements being removed as formal guidance to the AER, or any party contending that these basic requirements have formed a material obstacle to the AER making rate of return decisions that promote the NEO and NGO. If this is claimed to be the case, such evidence needs to be provided to enable stakeholder engagement with and testing of this view through a public consultation process.

Energy Networks Australia recognises and supports the AER's incremental approach in the current review of the rate of return guideline and the continued relevance of the

current Rules in that process. However, even if the elements of the current Rules are captured in the first binding guideline currently under consideration by the AER, there is no certainty that will continue.

The proposed rate of return framework to be included in the Law narrows down to one central test for the regulator to meet - that the rate of return guideline will or is likely to contribute to the national electricity or national gas objective. Other than in a high level way, that test does not provide any ongoing certainty that the guidance contained in the current rules will continue to be taken into account in future decisions.

The discretion reflected in the draft Bill is so broad that the regulator would theoretically no longer even need to apply the well-recognised weighted average cost of capital approach.

The draft Bill provides for the binding guideline to state a single rate of return or value for imputation credits, or a way (methodology) to calculate the rate of return or value for imputation credits which applies automatically without the exercise of any discretion by the regulator.[6]

The discretion to specify a single value for the rate of return and lack of Rule guidance opens up the possibility that in the future the regulator could approach the setting of a rate of return in an entirely different way to the past decade of regulatory practice and precedent on rate of return decisions. There are many and varied ways in which the regulator could determine a rate of return and seek to reason it as contributing to the achievement of these overarching objectives.

Billions of private and public sector capital have been invested in gas and electricity networks on the basis of the rate of return approaches developed over the past 10 years. The effect of the proposed deletion of the substantive rate of return rules combined with the broad discretion proposed to be provided in the draft Bill is to significantly compromise certainty and stability in the regulatory process in respect of the single largest building block decision made by the regulator. Uncertainty and regulatory risk that significantly different approaches to the rate of return could be taken in the future could result in further price volatility and uncertainty for consumers and hamper efficient investment in networks. This is not in the long-term interests of consumers.

Subject to the conclusions of the further policy steps suggested in Section 1, Energy Networks Australia considers it would be feasible to consider alternative options to reduce the absolute level of prescription in the current rules. This could potentially occur as part of lifting such guidance into the Law if this was an agreed COAG Energy Council policy objective, recognising that this is not network businesses' preferred outcome.

Energy Networks Australia has developed for SCO consideration an illustrative 'straw man' example of an alternative that would offer a much more balanced approach than

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[6] Section 18J of the draft Bill.

the current proposed deletion of all rules based guidance, but which would nonetheless reduce the overall level of prescription from the existing rule provisions.

Attachment 1 to this submission is an example of a revised version of the current rate of return rules.

Energy Networks Australia proposes that these key elements of the existing rules could be maintained as matters that the regulator must take into account in making the binding rate of return guidelines. This could ensure that the current precedent and guidance provided by those rules will continue to be relevant, providing greater certainty and confidence in the decision making process in the interests of all stakeholders.

As above, it is noted that an alternative - though in Energy Networks Australia's view less preferable option - open to SCO if it strongly considers that rate of return guidance should be exclusively contained in the legislation, is to include this same short principles-level guidance directly in the law.

5 Process for making the binding rate of return guideline

Subdivision 3 of the draft Bill sets out the process for the making of the binding guideline. While that Subdivision provides some guidance as to the steps that must be taken and matters that the regulator must have regard to, Energy Networks Australia considers that there should be more explicit minimum protections around the process to ensure it is fair and transparent.

Energy Networks Australia supports the approach being taken by the AER in the current review of the rate of return guideline, for example in relation to the concurrent expert evidence sessions and the appointment of the independent panel. To date these processes have been very positive and enabled a wide range of stakeholder and expert views to be presented and considered by the AER, consistent with the formulation of a transparent and evidence based guideline.

It is appropriate that the framework for the making of the binding guideline captures similar process steps to provide confidence and certainty for all stakeholders that the these steps will continue in future guideline reviews. A lack of minimum protections around process increases the risk that arises from the very broad discretion proposed to be given to the regulator by the draft Bill.

Energy Networks Australia submits that minimum requirements, similar to the processes being undertaken in the current guideline review, should be added to Subdivision 3 of the draft Bill:

1. **Relevant expertise requirements -** The experts appointed to give concurrent evidence or sit on the independent panel should be required to have relevant finance, economic, regulatory, consumer perspectives or institutional investment expertise relevant to the making of the binding guideline.

2. **Call for nominations -** In respect of the concurrent expert process, provision should be made for the AER to call for nominations of an expert..
3. **Task and eligibility of independent panel -** In respect of the independent panel process:
   - To ensure the members of the panel are truly independent, the panel members should not have been engaged by the AER or networks on rate of return matters for a stated preceding period of time.
   - The Law should provide further guidance on what the independent panel is to assess in preparing its report. Section 18P(4)(a) of the draft Bill provides that the report is to include the panel's assessment of the evidence and reasons supporting the draft guideline. This task guidance is incomplete. The panel should be asked to consider whether the regulator's draft guideline meets the requirements of the framework, i.e. - whether the rate of return contributes to the achievement of the national electricity and gas objectives and if not, what changes the panel would recommend.

Attachment 2 sets out Energy Networks Australia's proposed amendments to the draft Bill to include such enhanced minimum process requirements.

6 Re-opening of the guideline

The draft Bill provides for the guideline to be binding on the AER and each network for a four year period.[7] The regulator may replace the binding guideline before the end of the four year period if it is satisfied it should be replaced earlier to ensure that it will, or is likely to, contribute to the achievement of the national electricity and national gas objectives (NEO/NGO).

The broad nature of the concepts contained within the NEO and NGO means it is very difficult to predict when this threshold would be crossed. The broad discretion proposed to be given to the regulator in making the guideline may potentially mean that even very material changes in market conditions, up or down, such as occurred after the Global Financial Crisis, may not trigger a revisiting of the guideline.

There is insufficient certainty for stakeholders as to the circumstances that would give to a re-opening of a binding guideline.

Greater certainty about those circumstances will provide confidence and stability in the regulatory process in the interests of all stakeholders, including consumers who will benefit from knowing when a binding guideline might be revisited in order to reduce a rate of return.

Attachment 2 sets out Energy Networks Australia's proposed amendments to the relevant provisions of the draft Bill which seek to identify with more clarity circumstances which may give rise to a re-opening of a binding guideline, including:

[7] Proposed new section 18U of the NEL/30P of the NGL.

- A material change in market conditions.
- A material change in underlying assumptions on which the rate of return or value of imputation credits was based.
- A change in availability or appropriateness of data used to calculate a rate of return or value of imputation credits.

Energy Networks Australia's proposed changes retain as the overarching consideration whether a re-opening of a binding guideline is necessary to ensure it will or is likely to contribute to the relevant national energy law objectives.

7 Accountability of regulatory decisions

Having independent oversight of the very significant regulatory decisions made in respect of electricity and gas networks is a key concern for investors in those networks.[8] Review processes provide a check and balance in the framework and ensure that there is accountability of decision making and confidence in the regulatory process.

The removal of merits review rights in 2017 has left judicial review as the only check and balance on these important decisions. Judicial review by its nature, however, does not give rise to the same level of accountability of decision-making as existed under merits review. This is because judicial review is more focused on the process by which the decision is made and whether it is made within power, rather than the underlying merits of a decision. Judicial review may provide an appropriate check and balance in circumstances where a reasonable amount of prescription and guidance is provided by the decision making process. The AER noted in the 2016 COAG review of limited merits review:

> *In our view, judicial review provides an appropriate accountability mechanism in light of the primary decision making process. As noted in section 1.3, the level of prescription in relation to performing our economic regulatory functions is unique compared to other independent decision makers in Australia and internationally. This prescription means that regulatory determinations are likely more amenable to judicial review than to limited merits review.*[9]

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[8] See for example the October 2016 submissions of Spark Infrastructure, Hastings Fund Management Limited and Infrastructure Partnerships Australia in the COAG Energy Council's review of the limited merits review regime; http://www.coagenergycouncil.gov.au/publications/review-limited-merits-review-regime-consultation-paper

[9] AER Submission on the Review of the limited merits review framework, October 2016 at page 21.

Energy Networks Australia is concerned that the draft Bill will reduce the potential remaining accountability provided by judicial review for the following reasons:

- The proposed removal of the rate of return rules and discretion proposed to be provided to the regulator means that judicial review will provide only a very limited check and balance.
- The proposed sections 18R and 30M of the draft Bill provide that failure to comply with the process provisions in Subdivision 3 does not invalidate or otherwise affect the binding guideline.

  Such a provision appears beyond the power of the legislature to include because judicial review rights in respect of certain errors (jurisdictional errors) cannot be excluded.[10] This proposed exclusion also appears inconsistent with any policy objective of enhanced process steps giving rise to greater stakeholder confidence in the outcomes of a guideline review process.

These concerns lend further support for the need to provide greater guidance to the regulator both in the content of the binding guideline and the process for making it, as Energy Networks Australia have suggested in the preceding sections of this submission and in Attachment 2.

8 Removal of rule-making power

The draft Bill proposes to elevate all rules relevant to the determination of the rate of return and the making of the binding guideline to the Law and remove the AEMC's existing rule making power in respect of rate of return matters.

The practical effect is that the separation of roles of policy-maker, rule-maker and decision maker is compromised and future changes to the rate of return framework could be made without the rigour provided by the current rule change process.

The current rule change process enables any of the AER, consumer and user groups, networks or anyone else to propose a rule change. This has been a very effective regime to date. In fact the 2012 amendments to the rate of return rules were the result of rule change proposals made by energy user representatives and the AER, which led to a very detailed analysis and the current version of the rate of return rules applicable today.

The 2003 Ministerial Council on Energy Report foreshadowed the need for more active participation of energy users and suppliers in the development of energy markets. The rule change process enabling any person to initiate a rule change was

[10] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 [76], [104], *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at [100].

introduced to facilitate this.[11] The rule change regime was designed to be transparent and provide the opportunity for significant input by stakeholders.[12]

The current rule change process is well-designed and an effective rule change process. The ability to propose a rule change adds to the flexibility of the regulatory process and confidence that stakeholders can have meaningful input into the rules governing significant issues such as rate of return. The rule change provisions should be maintained.

9 Other jurisdictions and the regime as a whole

In many other jurisdictions regulators are given relatively broad discretion in deciding matters such as the rate of return. However, it is often the case these same regimes retain some form of merits review rights to provide the check and balance which has now been removed from the Law in Australia.[13]

It is critically important in developing the policy and drafting for the binding rate of return guideline that the Australian energy regime as a whole is considered, including the absence of any merits review rights and the limited nature of judicial review as a check and balance. As set out in comments above, in the context of an absence of merits review, Energy Networks Australia's concern is that the draft Bill and proposed removal of the rate of return rules does not provide sufficient certainty, accountability, or regulatory stability.

A relevant matter for further empirical policy consideration by SCO and stakeholders is whether the combined impact of abolition of limited merits review rights, a removal of rules-based guidance on the specific objectives and principles for a regulator to consider in reaching a rate of return estimate, and the effective narrowing of remaining judicial review avenues would lead to an overall framework that sits outside of the mainstream of comparable regulatory jurisdictions.

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[11] *National Electricity (South Australia) (New National Electricity Law) Amendment Bill* 2005, Second Reading Speech, The Hon J.D Hill

[12] ibid

[13] For example, in New Zealand rate of return is subject to an input methodology process. The NZCC has broad discretion to vary an input methodology provided it complies with the input methodology process. Any person who gave views on the input methodology and has a significant interest may appeal to the High Court against the determination. Further appeal rights also exist.
Another example is in relation to ESCOSA water regulation. ESCOSA has a broad discretion to regulate prices in any manner it considers appropriate and is required to follow certain procedures. ESCOSA also has a broad discretion to vary or revoke a determination. A pricing order may prescribe the manner in which ESCOSA is to make a price determination including the matters that it must have regard to and parameters, principles or facts that it must adopt or apply in making a determination. A pricing order is a binding instrument which cannot be varied. Price determinations are subject to internal review and further merits review to the District Court.

10 Specific drafting amendments and comments

In addition to the points made above, Energy Networks Australia has comments on the specific drafting proposed in the draft Bill.

Attachment 2 sets out our comments on specific provisions in the draft Bill, together with proposed drafting changes.

As noted above, Attachment 1 sets out a potential revised version of the rate of return rules and should be read with Attachment 2.