

28 September 2016

[www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)

Mr James Chisholm  
COAG Energy Council Secretariat  
GPO Box 9839  
Canberra ACT 2601

Contact Anna Brakey  
T (02) 9290 8438  
E [anna\\_brakey@ipart.nsw.gov.au](mailto:anna_brakey@ipart.nsw.gov.au)

Dear Mr Chisholm,

## REVIEW OF THE LIMITED MERITS REVIEW REGIME

We welcome the opportunity to provide comment to the COAG Energy Council Secretariat on its Consultation Paper for its Review of the Limited Merits Review (LMR) Regime.

The Independent Pricing and Regulatory Tribunal (IPART) is the economic regulator in NSW with nearly 25 years' experience in regulating across the water, energy and transport sectors, in addition to other functions. Our experience makes us well placed to comment on your paper.

In our view, a regime that places more emphasis on achieving well accepted and respected decisions in the first instance would add considerable value to the regulatory process. Changes to both the availability of review and the way the review process operates would facilitate this. We consider that merits review should only be available in limited circumstances and should be conducted by an expert body, as set out in this submission.

### *Availability of merits review*

Over the past decade the LMR regime has added considerable cost and uncertainty to energy network regulation in Australia. These costs are borne by energy consumers. Within an energy network price review process, the actions of both the regulated businesses and the regulator appear to be more focussed on the appeal process than the initial determination.

**We support retaining the requirement that a decision should only be replaced when it better serves the National Electricity Objective.** However, we note that, subject to being granted leave, the review process has to be completed in order for this decision to be made. This contributes to the significant time and resources required to conduct merits review, as

set out in the consultation paper. It has also failed to ensure that merits review is not routinely used.

We consider that changes should be made to the regime so that such appeals become the exception rather than the norm. **We recommend consideration be given to narrowing the set of criteria that must be satisfied by a business or third party seeking merits review to ensure that appeal occurs under only exceptional circumstances.**

#### *Review body*

We consider that the Australian Competition Tribunal should no longer be the appeal body. Instead we recommend that **the review body should be a purely administrative body that comprises experts in the industry and in economic regulation.** The review body should have flexibility in managing its processes and decision making, to ensure that it remains accessible and efficient.

Economic regulators typically have established processes to engage with stakeholders. Effective engagement includes several steps to allow stakeholders the greatest opportunity to understand and actively engage with the regulator on likely decisions. Thorough and transparent processes ensure that the regulator is in the best position to be able to balance the competing and often irreconcilable interests of (and between) stakeholders in a manner consistent with the relevant legislative provisions. The result of an effective public consultation process is that decisions are often well accepted and respected, even by stakeholders who are adversely affected by the outcome.

The review body should be required to undertake the same balancing process as the first instance regulator. The review process should not apply a court-like approach to hearing an appeal, and should allow the review body to 'stand in the shoes' of the first-instance regulator. In our view, a court-like body such as the Australian Competition Tribunal is not best placed to balance competing interests in exercising regulatory discretion.

If you have any questions, please contact Anna Brakey on 02 9290 8438.

Yours sincerely



Peter J. Boxall AO  
Chair