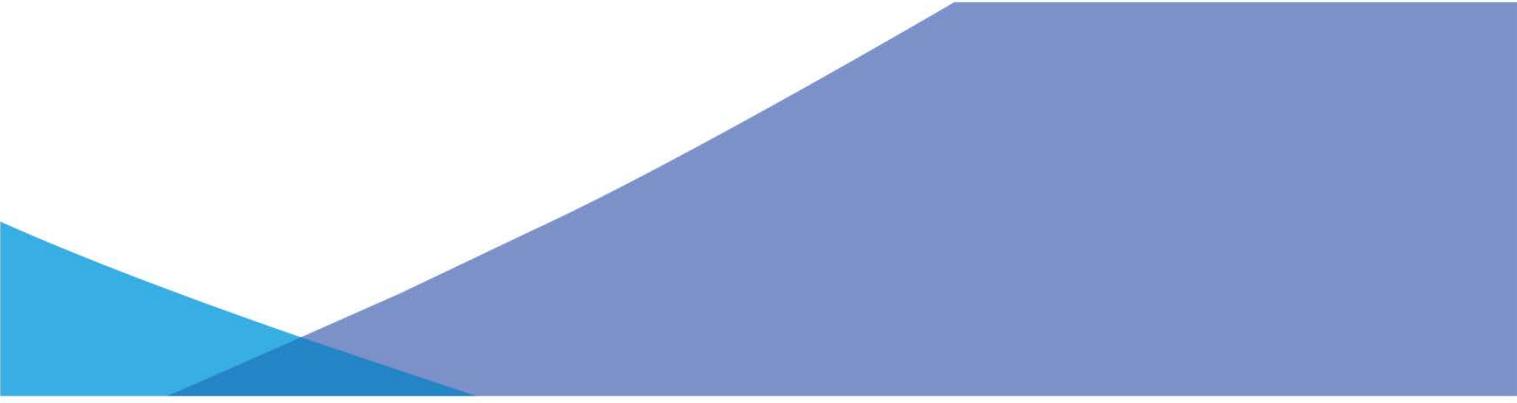


# Review of the Limited Merits Review Regime

## Consultation Paper

Limited Merits Review Project Team

6 September 2016



Submissions are invited on this consultation paper by close of business AEST 3 October 2016. Electronic submissions are preferred and can be sent to the COAG Energy Council Secretariat at [energycouncil@industry.gov.au](mailto:energycouncil@industry.gov.au).

Those who wish to provide hard copies by post may do so by addressing their submissions to:

COAG Energy Council Secretariat

GPO Box 9839

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All submissions will be published on the Council website ([www.coagenergycouncil.gov.au](http://www.coagenergycouncil.gov.au)) unless stakeholders have clearly indicated that a submission should remain confidential, either in whole or in part.

Please note that this paper does not provide legal advice about any of the laws discussed in it or on any other issue, and it should not be relied on for any purpose. It is intended as a consultation paper only. It does not reflect the final views of officials or Council policy.

The Limited Merits Review Project Team consists of officials from the State, Territory and Commonwealth agencies with responsibility for energy policy. It operates under the COAG Energy Council framework.

For further information about the Review, the project team or making a submission, please contact the Project Team Secretariat via email at [LMR@industry.gov.au](mailto:LMR@industry.gov.au).

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## Introduction

On 19 August 2016 the Council of Australian Governments Energy Council (the Energy Council) tasked its Senior Committee of Officials (SCO) with completing a review by December 2016 of the limited merits review (LMR) regime set out in the National Electricity Law (NEL) and National Gas Law (NGL). The Review will assess the effectiveness of the LMR regime, including the role of the Australian Competition Tribunal (the Tribunal), under the NEL and the NGL.

## The LMR regime

The LMR regime was amended in 2013<sup>1</sup> following a review by an independent expert panel in 2012<sup>2</sup>. These 2013 reforms were intended to ensure that regulatory decisions promote efficient investment, operation and use of energy infrastructure in ways that best serve the long-term interests of consumers. This included avoiding lengthy and excessively legalistic hearings that make it difficult for all stakeholders to participate.

Under the LMR regime, parties, including network businesses and consumers affected by Australian Energy Regulator (AER) decisions that determine revenue or access arrangements for monopoly electricity and gas networks, can seek merits review by the Tribunal.<sup>3</sup> The grounds for review are that the determination involved an error of fact, an incorrect exercise of discretion or an unreasonable decision having regard to all the circumstances. Broadly speaking, the Tribunal can either reject the application, substitute the AER's primary decision with its own determination, or remit the decision back to the AER with instructions for reaching a new decision. For the purpose of hearing and determining proceedings, the Tribunal is constituted by a presidential member who must be a judge of the Federal Court of Australia and two non-presidential members to provide expert insight. The Tribunal has limited resources and its funding is managed by the Federal Court of Australia.

Since 2013, twelve of the AER's twenty decisions on electricity network revenue and gas access arrangements have been subject to applications by network businesses for review by the Tribunal. Taken together, these twelve network businesses asked the Tribunal to increase their revenue by around \$7 billion over a five year period. Legal challenges mean revenue determinations finalised by the AER more than 16 months ago (April 2015) will likely remain uncertain until at least early 2017.

The Terms of Reference (ToR) for the Review (Attachment A) outline the issues SCO will consider. In addition to considering the role of the Tribunal under the amended legislative regime, SCO will also explore all feasible options, including the removal of LMR, to achieve the objectives of administrative review generally and the energy sector specifically.

Key areas identified as requiring consideration through the Review include the apparent 'cherry picking' of issues for review by network businesses and the focus on correcting individual errors without sufficient consideration of whether a different decision would lead to a materially preferable decision that is in the long term interests of consumers. Other areas for consideration include that the LMR regime is not delivering timely and predictable revenue determinations and continues to present barriers to the participation of key stakeholders, such as consumer groups.

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<sup>1</sup> Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Bill 2013  
[http://www.austlii.edu.au/au/legis/sa/num\\_act/saeaglmra201379o2013770/](http://www.austlii.edu.au/au/legis/sa/num_act/saeaglmra201379o2013770/)

<sup>2</sup> 2012, Yarrow, Egan and Tamblyn, Review of the Limited Merits Review Regime  
<http://www.coagenergycouncil.gov.au/publications/review-limited-merits-review-regime-stage-two-report-september-2012>

<sup>3</sup> Certain other decisions of the Minister, National Competition Council and AER are also reviewable.

The reform options being considered by this Review are:

- retain the Tribunal as the review body without legislative amendment (status quo)
- retain the Tribunal as the review body with legislative amendments
- replace the role of the Tribunal with a new investigatory body
- remove access to LMR.

This public consultation will inform SCO's final advice to the Energy Council in December 2016.

## Scope of the Review

The 2013 reforms included a requirement under the NEL and NGL for the Energy Council to initiate a review of the Tribunal's role under the amended legislative regime by December 2016. This Review will assess the effectiveness of the LMR regime by assessing whether and to what extent the LMR regime has met policy expectations set out in the then Standing Council on Energy and Resources (SCER) Statement of Policy Intent *Review Framework for the Electricity and Gas Regulatory Decision-Making*<sup>4</sup> (December 2012) and Regulation Impact Statement Decision Paper *Limited Merits Review of Decision-Making in the Gas and Electricity Regulatory Frameworks*<sup>5</sup> (June 2013).

It is important to note that on 24 March 2016 the AER applied to the Federal Court for judicial review of the Tribunal's decisions to set aside the New South Wales (NSW) and Australian Capital Territory (ACT) electricity and gas distribution network revenue determinations, made under the amended LMR regime. The AER has asked the Federal Court to consider whether the grounds of review were properly established by the network businesses and whether these were correctly applied by the Tribunal. The proceedings will be heard by the Full Federal Court in October 2016. The outcome of this process will have implications for the approach adopted in future LMR matters before the Tribunal if some form of LMR is retained following this Review.

This consultation paper provides some specific issues, questions and options for reform to assist in the development of stakeholder submissions for the Review. However, these are not intended to be exhaustive and stakeholders should feel free to present submissions as they wish or raise other issues that are within the ToR. The scope of the Review gives stakeholders the opportunity to raise broader issues including linkages between administrative review and the economic regulatory framework in order to fully explore all factors contributing to achieving the policy intent of the 2013 reforms. Submissions should be informed by a strong evidence base. A complete list of questions is at Appendix I.

## Review process

The Energy Council has requested an expedited timeframe for the Review to increase policy and legislative certainty for the AER, regulated energy businesses and consumers.

In addition to providing a written submission, stakeholders will have an opportunity to present their views at consultation sessions in September 2016.

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<sup>4</sup>SCER, 2012, Statement of Policy Intent, <http://www.coagenergycouncil.gov.au/publications/statement-policy-intent-review-framework-electricity-and-gas-regulatory-decision-making>

<sup>5</sup> SCER, Regulation impact statement, Limited merits review of decision making in the electricity and gas regulatory frameworks decision paper, 6 June 2013, <http://www.coagenergycouncil.gov.au/publications/limited-merits-review-regulation-impact-statement-decision-paper-june-2013>

## Timeline

Date	Process
6 September 2016	Release of consultation paper
September 2016	Face-to-face consultation forum with stakeholder (date to be advised)
3 October 2016	Stakeholder submissions due <sup>6</sup>
December 2016	Advice provided to Energy Council Ministers

## Context for the Review

### Administrative review

In general, government decision makers exercising administrative functions and powers that affect the rights and interests of individuals and organisations must be accountable for the way they exercise those powers. There is a significant array of accountability mechanisms provided for through existing parliamentary and executive oversight. Merits review was introduced in the Australian legal system in 1977.

Mechanisms are designed to provide external scrutiny and review by:

- enabling errors to be corrected
- improving the way decisions are made
- ensuring transparency
- engendering public confidence in the integrity of government administration.

But where such review processes are ineffective, they can operate to delay or derail efficient decisions, impose unnecessary costs and/or prolong regulatory uncertainty.

Generally speaking, *merits review* is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the 'correct' or 'preferable' decision. This is different to *judicial review*, which only allows for a review of the legality of earlier decision making processes. Judicial review usually consists of a review of the procedures followed in making the decision. It may follow or be undertaken independently to merits review.

The objective of merits review is to ensure administrative decisions are 'correct' or 'preferable' – that is, they are made according to law or, if there is a range of possible decisions that are 'correct' in law, the best on the relevant facts. The distinction between 'correct' or 'preferable' in relation to a decision is important. The 'correct' decision is made in a non-discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of a discretion or a selection between possible outcomes, judgment is required to assess which decision is 'preferable'.

There are two types of decisions that are widely accepted as being unsuitable for merits review:

- legislation-like decisions of broad application (which are subject to the accountability safeguards that apply to legislative decisions)
- decisions that automatically follow from the happening of a set of circumstances (which leaves no room for merits review to operate).

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<sup>6</sup> See page 2 of this consultation paper for details on how to make a submission and where questions can be directed to.

There are additional circumstances where removing access to merits review might be appropriate. Relevant factors to consider include the nature of the administrative decision, the effect of the decision, the costs of review of the decision and whether there has been an extensive inquiry process informing the decision<sup>7</sup>. Merits review might also be inappropriate if the regulator is making a determination on which various experts could validly differ in conclusions, leading to appeals.

Access to merits review was recently removed in the telecommunications sector, for example. In this case, the regime was considered to be inappropriate for regulatory determinations on certain access arrangements by the Australian Competition and Consumer Commission (ACCC).<sup>8</sup> This Review will explore, among other issues, whether a similar set of circumstances and challenges apply to revenue and access decisions in the energy sector.

### Introduction of the LMR regime to the energy sector

Primary decision makers in the energy sector include the Australian Energy Market Commission (AEMC), the Australian Energy Market Operator (AEMO), the AER, the Western Australian Economic Regulation Authority (ERA), the National Competition Council (NCC), the Energy Council and jurisdictional energy ministers (where prescribed by legislation). Administrative decisions made under legislation by these bodies are subject to judicial review.

There are a small number of decisions that are also subject to merits review<sup>9</sup>. The most significant of these are the AER's periodic setting of revenues that the monopoly network businesses are able to recover from consumers<sup>10</sup>. Ministers agreed to introduce LMR in the energy sector in 2006 and the LMR regime formally commenced in 2008 following amendments to both the NEL on 1 January 2008 and the NGL on 1 July 2008. Prior to this there were various review arrangements across the jurisdictions in the energy sector.

In agreeing to introduce LMR, the then Ministerial Council on Energy (MCE) was attempting to balance outcomes between competing interests and protecting the property rights of all stakeholders. Part of this balancing was to allow parties affected by decisions with appropriate recourse to have decisions reviewed. The MCE considered at the time that there was a need to develop a more consistent and effective framework across jurisdictions to support efficient investment in and use of energy infrastructure.

In particular, in 2006 policymakers intended that introducing LMR in the energy sector would enable correction of a greater range of regulatory errors and improve accountability in regulatory decision making. The reforms also introduced consistency, for the first time, between merits based appeals for electricity revenue determinations and gas access arrangements.

Policymakers in 2006 expected that introducing LMR would reduce the risk to both businesses and the community of regulatory error and failure. Further, policymakers expected that merits review

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<sup>7</sup> Administrative Review Council, What decisions should be subject to merit review?, website, <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>

<sup>8</sup> Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 <https://www.legislation.gov.au/Details/C2010B00242/Explanatory%20Memorandum/Text>

<sup>9</sup> These decisions include: in relation to gas – Ministerial decisions relating to the coverage of gas pipelines, decisions by the NCC in relation to the application of light regulation to gas pipelines, certain AER decisions relating to the making of a gas access arrangement, AER ring fencing determinations, AER decision to give an exemption from minimum ring fencing requirements, certain decisions of the AER under the Rules to approve or not approve an associate contract; in relation to electricity – AER revenue and pricing determinations for transmission and distribution that sets a regulatory period, and other AER determinations or decisions under the Rules prescribed by the Regulations to be a reviewable regulatory decision including certain cost pass through determinations; in relation to electricity and gas – certain information disclosure decisions made by the AER.

<sup>10</sup> Decisions made by the ERA on regulated gas transmission pipelines and distribution systems in Western Australia are also reviewable by the Tribunal.

would clarify and inform the operation of legal frameworks through the development of precedents which would provide greater predictability in future decision making and underpin private sector decisions to invest in new and long-lived capital assets.

#### Limited merits review of energy decisions

For energy, in addition to the basic objectives of administrative review, the purpose of regulation and LMR alike, is to deliver the long term interests of consumers (with respect to price, quality, safety, reliability and security of supply), through<sup>11</sup>:

- providing a balanced outcome between competing interests and protecting the property rights of all stakeholders by:
  - ensuring that all stakeholders' interests are taken into account, including those of network service providers and consumers
  - recognising efforts of stakeholders to manage competing expectations through early and continued consultation during the decision making process
- maximising accountability by:
  - allowing parties affected by decisions appropriate recourse to have decisions reviewed
- maximising regulatory certainty by:
  - providing due process to network service providers, consumers and other stakeholders
  - providing a robust review mechanism that encourages increased stakeholder confidence in the regulatory framework
- maximising the conditions for the decision maker to make a correct initial decision by:
  - providing an accountability framework that drives continual improvement in initial decision making
- achieving the best decisions possible by:
  - ensuring that the review process reaches justifiable overall decisions against the energy objectives
- minimising the risk of "gaming" through:
  - balancing the incentives to initiate reviews with the objective of ensuring regulatory decisions are in the long term interests of consumers
- minimising time delays and cost by:
  - placing limitations on the review process that avoid or reduce unwarranted costs and minimise the risk of time delays for reaching the final review decision.

Any options for reforming the administrative reviews available in the energy sector will need to have regard to both the objectives of administrative review generally, the objectives of merits review specifically and the policy case around whether or not to legislate for merits review.

#### 2013 reforms to the LMR regime

In light of the significantly higher retail electricity prices resulting from Tribunal decisions between 2009 and 2011, in 2012 the Energy Council established an independent expert panel to undertake a

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<sup>11</sup> SCER, 2012, Statement of Policy Intent, <http://www.coagenergycouncil.gov.au/publications/statement-policy-intent-review-framework-electricity-and-gas-regulatory-decision-making>

review of the performance of the LMR regime since its introduction in 2008. This Review found a number of shortcomings in the regime.<sup>12</sup>

Specifically, the 2012 Review found that the original policy intention for introducing a LMR regime remained sound and relevant, but that, in its operation, the LMR regime had not delivered on the National Electricity Objective (NEO), the National Gas Objective (NGO) or the original policy intentions. In particular the Review found that not all stakeholders' interests (especially consumers) were being adequately addressed, the Tribunal did not pay due consideration to the NEO and NGO in making its rulings, and the regime was costlier to operate and cases took longer than anticipated at the outset.

The 2012 Review also found that the Tribunal was adopting an excessively legalistic approach, meaning the scope of reviews of regulatory decisions were unduly narrow and not consistent with the original policy intent—reviews were only intended to be used rarely and only to address issues with a material consequence on the operation of the network business. This led to consumer and user groups being disengaged from participating in the review process due to the high risks and costs, as well as the overly legalistic environment.

In light of these findings, in June 2013, the Energy Council agreed to reform the LMR arrangements, with the details of the policy set out in a decision Regulation Impact Statement<sup>13</sup> and Statement of Policy Intent<sup>14</sup>. The Council agreed to retain the Tribunal as the review body and maintain the limited nature of merits review. However, it was decided to introduce much clearer linkages to the long term interests of consumers through a series of changes to the national energy laws to modify the test for initiation, processes, and roles of participants in a review process—changing the goal of LMR for energy decisions to result in 'materially preferable NEO/ NGO decisions'. That is, the original decisions were intended to stand unless there was a materially better decision in terms of achieving the NEO/ NGO). Changes included:

- raising the threshold for seeking merits review before the Tribunal
- ensuring determinations were in the long term interests of consumers
- increasing the participation of consumers.

The 2013 reforms were timed to coincide with the end of the 'first cycle' of regulatory determinations. The timing for the legislative reform process recognised the importance of revenue certainty for all stakeholders, including network businesses and consumers.

#### Australian Competition Tribunal decisions under the revised LMR regime

Since the 2013 reforms, the Tribunal has published decisions on its reviews of the AER's primary revenue determinations for the NSW electricity distribution networks and gas distribution pipeline and the ACT electricity distribution network. The Tribunal has also delivered its decision on the application by a Western Australian gas distribution network provider for review of its access arrangement made by the ERA. Further, the South Australian electricity distribution network has sought review of its electricity distribution determination (a decision is pending) and five Victorian electricity distribution network providers and an ACT gas distribution network provider have also

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<sup>12</sup> 2012, Yarrow, Egan and Tamblin, Review of the Limited Merits Review Regime, <http://www.coenergyCouncil.gov.au/publications/review-limited-merits-review-regime-stage-two-report-september-2012>

<sup>13</sup> 2013, SCER, Regulation impact statement, Limited merits review of decision making in the electricity and gas regulatory frameworks decision paper, 6 June 2013, <http://www.coenergyCouncil.gov.au/publications/limited-merits-review-regulation-impact-statement-decision-paper-june-2013>

<sup>14</sup> SCER, 2012, Statement of Policy Intent, <http://www.coenergyCouncil.gov.au/publications/statement-policy-intent-review-framework-electricity-and-gas-regulatory-decision-making>

sought review of their respective distribution determinations, in proceedings which will be heard together in November. Stakeholders are encouraged to refer to these and other applications in their submission to the Review.

## Assessing the performance of the LMR Regime

The overarching objective of the 2013 reforms was to clearly prioritise the long term interests of consumers through a series of changes to the NEL and NGL which modify the test for initiation, processes, and roles of participants in a review process.

While a full cycle of post-reform electricity network revenue decisions and gas access arrangement decisions and associated reviews are yet to be completed, a number of concerns have been raised by stakeholders in relation to the performance of the revised LMR framework. This feedback has led the Energy Council to be concerned that the 2013 reforms have failed to deliver their policy intent.

### Threshold for review

When ministers first agreed to introduce LMR, they considered limitations on what could be reviewed recognising the costs and delays involved in merits review, and the fact that the relevant regulatory decisions have usually been reached after extensive public and consultative processes. The 2013 reforms were intended by policymakers to prevent reviews being sought as a routine part of the regulatory process and, instead, only occur in limited situations where the original decision would, or would be likely to, materially compromise the services being provided to consumers over the long term, with regards to cost, reliability, quality, safety and security of supply.

The 2013 legislative reforms did not amend the grounds for review, but did introduce a requirement on applicants seeking leave to apply for review of a decision, and on the Tribunal in granting leave, to justify the application on the basis that correcting the relevant error of fact or discretion would, *prima facie*, be likely to lead to a materially better outcome for consumers (as expressed in the NEO and NGO). The intention of this requirement was to ensure that leave to review would only be granted on matters of substance and that those matters of substance were to be determined by reference to the statutory objectives of the national energy laws.

In spite of these policy objectives, over 50 per cent of regulatory decisions on electricity network revenue and gas access arrangements since the 2013 reforms were implemented have been subject to applications for review. While the long term interests of consumers have clearly been considered in these processes, there remains an open policy question as to whether this is being achieved.

### Questions:

1. *Are there any specific factors which prevent issues being resolved through the determination process?*
2. *Are reviews generally considered a routine part of the determination process?*
3. *Does the framework enable reviews to focus primarily on the long term interests of consumers?*

### Basis of the Tribunal's decisions

An objective of the 2013 legislative changes was to make it evident that the purpose of decision making, whether by the Regulator or the Tribunal, was to meet the long term interests of consumers. In addition, the changes were intended to improve transparency and accessibility of decision making for consumers by having the Regulator or the Tribunal clearly express why decisions are in the long term interests of consumers.

In recent decisions, while consideration was given to the Tribunal being satisfied there was a materially preferable NEO/ NGO decision, few details were provided on how it considered the particular arguments put forward by the applicants. Stakeholders have expressed concerns that some of these arguments (for example, assertions that correcting minor errors, including transcription errors, would lead to a materially preferable NEO/NGO decision) lacked rigour, focusing on the correctness of individual decisions rather than establishing a case that overturning them would result in a materially preferable outcome.

This raises a policy question about the effectiveness of the current framework in delivering materially preferable decisions in the long term interests of consumers.

#### *Questions:*

4. *To what extent does the current LMR process support materially preferable decisions being made for the long term interests of consumers?*
5. *Are there any other issues which impact on the delivery of regulatory decisions that serve the long term interests of consumers?*
6. *Are the current grounds for review sufficiently robust to avoid undue weight being placed on minor matters in merits reviews?*

#### Material considered by the Tribunal

The material which comprised the 'review-related material' for the purposes of hearing the recent NSW/ACT applications was said to extend to more than one million pages. This included extensive expert reports, which were considered would provide value to the Tribunal by enabling it to access advice from competing experts as a means of understanding the contentions of the various parties. This raises a policy question about the regulatory impost on the Tribunal with limited resources in reviewing such extensive material and for the AER in maintaining a record of its decisions.

#### *Questions:*

7. *Are there any issues with the scale and scope of material that can be brought forward in relation to reviews?*
8. *Is there a way to minimise the regulatory impost of maintaining a record of decision making as part of any future reforms?*
9. *Are there any barriers to the Tribunal seeking additional expert advice? If so, how could these barriers be addressed?*

#### Approach adopted in reviews and consumer consultation

There is a policy intent for the review process to be as informal as practical in order to make it more accessible for stakeholders without legal representation. This was intended to allow a more interactive process and to move away from the overly legalistic approach to the way that the proceedings were run. Feedback from stakeholders has been that the Tribunal hearings continue to be highly formalised and very legalistic and that participation without legal representation appears impossible.

It was intended as part of the 2013 reforms that energy consumers are consulted routinely in reviews. Recognising the range of difficulties in participating formally in reviews and the value of consumer perspectives, special provision was made for the Tribunal to consult with consumers as part of the review process. Consumer and user views have now been sought in all relevant reviews. However, stakeholders have suggested that while there is now greater consumer involvement in the review process it is unclear how consumer views are being taken into account in review decisions.

#### Questions:

10. *Is participation without legal representation possible? Are there barriers hindering full consumer participation in the review process?*
11. *How costly has your participation in the appeal process been and what are the implications of this participation for you?*
12. *What are/were your expectations of how the Tribunal would consider the input from consumers?*
13. *How can parties provide the Tribunal with sufficient evidence to inform its decision making, while still supporting the Tribunal in its aim to conclude decisions within three months?*

#### Delivery of regulatory certainty

The 2013 reforms were intended to deliver improved regulatory certainty by enhancing the rigour and transparency of the process and maintaining a legislated timeframe for completing reviews.

The extended timeframes of reviews of the AER's determinations and Tribunal decisions have created significant uncertainty for consumers, the AER and network businesses, where resulting price setting arrangements are complex and lack transparency. Further, the final decisions potentially could have wider ramifications for future energy market regulation.

#### Questions:

14. *What has been the impact of the extended timeframe of review processes? How could these impacts be addressed?*

## Potential options

The following four options for administrative reviews of energy decisions are described at a relatively high level with some initial consideration of the strengths and weaknesses of each intended to provide assistance to stakeholders in providing feedback.

These options are:

- Option 1: Retain the Tribunal as the review body without legislative amendment (status quo)
- Option 2: Retain the Tribunal as the review body with legislative amendments
- Option 3: Replace the role of the Tribunal with a new investigatory body
- Option 4: Remove access to LMR

#### Option 1: Retain the Tribunal as the review body without legislative amendments (status quo)

This option would maintain the status quo and allow an extended period of time to judge the effectiveness of changes made through the 2013 reforms.

#### Limitations

- Any regulatory failures in the existing regime cannot be addressed if the relevant legislative arrangements are retained in their current form.

#### Benefits

- Retaining the existing LMR regime would provide more time to assess the effectiveness of the 2013 reforms.

## Questions

### 15. What would be the impact of maintaining the current regime?

#### Option 2: Retain the Tribunal as the review body with legislative amendments

This option involves retaining the Tribunal as the review body and the right of regulated entities and consumers to seek merits review, but to undertake legislative changes as necessary to better achieve the policy intent of the 2006 and 2013 policy reforms. Appendix II lists some of the key areas within the national laws that may require further consideration. These include information to be retained through the regulatory process, grounds for review and matters the Tribunal may consider in making a determination.

CHARACTERISTIC	DESCRIPTION
Review body	Australian Competition Tribunal
Institutional character	Administrative review tribunals are concerned with reconsidering the decision under review on its merits and determining whether it is the correct or preferable decision. In addition, for energy, the Tribunal is required to determine whether varying or remitting the decision would result in a materially preferable NEO/ NGO decision.
Legislative basis	The Tribunal is established under Commonwealth law and performs reviews in accordance with requirements set out in the national energy laws.
Review type	Limited merits review
Grounds for review	The decision maker has: <ul style="list-style-type: none"><li>• made an error of fact or more than one error of fact</li><li>• exercised discretion incorrectly</li><li>• made an unreasonable decision.</li></ul> The applicant has specified how varying the decision would, or would be likely to, result in a materially preferable NEO/ NGO decision.
Decisions available	Affirm, set aside and vary, or set aside and remit the decision back to the original decision maker to make again
Basis for decision	There is a materially preferable NEO/ NGO decision

While some of the limitations around the operation of the LMR arrangements for energy explored above could, in theory, be addressed legislatively, there are a number of characteristics that are inherent to the Tribunal or the types of decisions being reviewed that could restrict the policy objectives being achieved in full.

## Limitations

### *Tribunal's ability to investigate complex matters*

- The 2013 reforms do not appear to have made LMR more investigatory and less judicial in nature. It is not clear whether further legislative reforms would be able to achieve this.
- Regulatory determinations and access arrangements for monopoly businesses in the energy sector may be too complex, technical and subjective for LMR.
- The Tribunal may not have the necessary subject matter expertise due to:
  - The tight timeframes required for reviews of energy decisions restricting access to the expertise needed to consider complex and contentious matters
  - The limited number of experts available without conflicts of interest.

### *Inherently legalistic process of Tribunal*

- Formality is often inbuilt where the circumstances require a tribunal to require facts to be established in ways closer to the methods required by the rules of evidence. Further legislative changes may not be able to resolve this.
- The characteristics of energy decisions being highly complex and contentious drive an adversarial approach which in turn leads to decisions that tend to be binary in nature.
- A highly formalised and legalistic process is a barrier to consumer participation without legal representation.
- Equity concerns potentially arise if consumer participation in Tribunal determinations is restricted by high legal costs but where network businesses have greater legal resources.
- If it is more likely that network businesses would gain greater financial benefits from a successful Tribunal determination than consumers, network businesses have a greater incentive to meet the high legal costs of participating in the LMR regime.
- Resources spent representing consumers in the review processes might have more value in other parts of the determination process.

### Benefits

- Under the existing LMR regime there are restrictions on delays and costs.
- The President of the Tribunal is a Federal Court judge, which provides judicial independence and helps to ensure decisions are correct in law.
- The Tribunal's other members provide expert insight, which leads to a more robust decision making process than would occur if made by judicial officers alone.

### Questions

16. *What amendments, if any, would you propose to achieve the policy intent of the 2006 and 2013 LMR reforms?*
17. *Should the existing Tribunal review process be made more investigatory in nature? If so, how could this be achieved?*

### Option 3: Replace the role of the Tribunal with a new investigatory body

A detailed description of the new body, including its role and structure, would need to be informed by further advice and consultation. The following has been developed for the purpose of initiating discussion about what a fit-for-purpose review body could look like, including any risks that might be associated with implementing a new review body.

There may be a number of examples of a fit-for-purpose body that could be considered. One such Commonwealth example is the Australian Information Commissioner<sup>15</sup>. The Information Commissioner was established to provide oversight of:

- privacy functions, conferred by the *Privacy Act 1988* and other laws
- freedom of information functions, in particular, oversight of the operation of the *Freedom of Information Act 1982* (FOI Act) and review of decisions made by agencies and ministers under that Act
- government information policy functions, conferred on the Australian Information Commissioner under the *Australian Information Commissioner Act 2010*.

The Information Commissioner's responsibilities include:

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<sup>15</sup> Office of the Australian Information Commissioner, About Us, webpage <https://www.oaic.gov.au/about-us/>

- conducting investigations
- reviewing decisions made under the FOI Act
- handling complaints
- monitoring agency administration
- providing advice to the public, government agencies and businesses.

A similar, fit-for-purpose body for the energy sector may be worth exploring through a formal process.

CHARACTERISTIC	DESCRIPTION
Review body	A new fit-for-purpose body
Institutional character	An expert, investigatory body
Legislative basis	Established under Commonwealth law and performs investigations in accordance with requirements set out in the national energy laws.
Review type	Investigatory review
Grounds for review	The AER's decision is unreasonable in that it would inhibit the delivery of the long term interests of consumers as set out in the NEO/ NGO.
Decisions available	Affirm or remit the decision back to the original decision-maker to make again in light of directions from the body
Basis for decision	There is a materially preferable decision in the long term interests of consumers as set out in the NEO/ NGO

The high level description of investigatory body outlined above has been based on the 2012 Expert Panel's recommendation to establish a new review body, but modified to reflect the nature and character of Commonwealth administrative reviews<sup>16</sup>. It is important to recognise that Australia's administrative review arrangements are distinctive internationally, given our particular legal system and the development of the law in Australia.

#### *Investigatory review*

The key differences between the process that may be conducted by the proposed investigatory body and the LMR process conducted by the Tribunal could include<sup>17</sup>:

Difference	Proposed approach
<b>A more limited range of grounds for being granted an investigatory review</b>	<ul style="list-style-type: none"> <li>– Only one ground for review, that is, the AER's decision was unreasonable in the context of materially compromising the delivery of the long term interests of consumers as set out in the NEO/ NGO</li> <li>– Provide clear legislated guidance around what this means, in particular in the context of 'unreasonable' and 'materially compromising'<sup>18</sup></li> </ul>

<sup>16</sup> 2012, Yarrow, Egan and Tamblyn, Review of the Limited Merits Review Regime <http://www.coagenergycouncil.gov.au/publications/review-limited-merits-review-regime-stage-two-report-september-2012>

<sup>17</sup> That is, the table sets out changes to those already specified in the national laws; where not mentioned, it should be assumed the existing provisions would be retained unless otherwise needed to give effect to the proposed approach

<sup>18</sup> e.g. for network businesses, an impact on total revenues of 10 percent or evidence that letting the decision stand would compromise an economically efficient businesses' reasonable ability to meet its service obligations

Difference	Proposed approach
<b>A more prescribed approach to when an investigatory review can be conducted</b>	<ul style="list-style-type: none"> <li>- An investigatory review may only consider matters that were raised in the AER's regulatory process and could reasonably be expected to be considered by the AER</li> <li>- An investigatory review may only be granted for matters that have been raised in the same terms during the AER's regulatory process</li> </ul>
<b>A more prescribed approach to how a review is to be conducted</b>	<ul style="list-style-type: none"> <li>- Investigation of the AER's decisions in light of the risks of retaining the decision: <ul style="list-style-type: none"> <li>o who bears the risks – businesses or consumers?</li> <li>o if it is businesses: <ul style="list-style-type: none"> <li>▪ is this level of risk commensurate with the level of risk of other monopoly businesses around the world?</li> <li>▪ is this level of risk reasonable or would it compromise the ongoing operation of the business?</li> </ul> </li> <li>o if it is consumers: <ul style="list-style-type: none"> <li>▪ is this level of risk commensurate with the level of reasonable risk an efficient business would incur?</li> <li>▪ is this level of risk outweighed by the cost impact for consumers of varying from the AER's decision?</li> </ul> </li> </ul> </li> <li>- Based on the above, determining whether there is a decision, methodology, rationale or conclusion that would better deliver the long term interests of consumers, having regard to the overall implications for consumers in terms of risks and costs</li> </ul>
<b>A more limited range of material that can be considered during an investigatory review</b>	<ul style="list-style-type: none"> <li>- An investigatory review is limited to information that was available to the AER</li> <li>- An investigatory review is limited to hearing from participants of the AER's regulatory process, where those participants must have engaged on the matter being investigated</li> <li>- The information to be provided to a review (in context of submissions and arguments) is to be limited in length and required to be written in plain English</li> </ul>
<b>A more limited range of decisions that are available to the new body</b>	<ul style="list-style-type: none"> <li>- Affirm the AER's decision</li> <li>- Remit the decision, with directions, back to the AER to reconsider</li> </ul>

### Limitations

- A dedicated review body would be a new, untested approach for the energy sector. It would be complex to develop, expensive to implement, and could increase regulatory uncertainty.
- It would require further consultation and significant additional time to settle the details of the body's role and operation, to make the changes required to the national energy laws, and to establish the new investigatory body under Commonwealth legislation.

- Significant resources would be required to implement this option, given the need to appoint technical experts to conduct the investigatory functions of the new body.
- Energy decisions can involve a contest between valid expert opinions. There is no guarantee a new body, even if it is sufficiently resourced, could overcome this challenge.
- A new body would not address the concern of some stakeholders that AER determinations are vulnerable to overly lengthy appeal processes. To the extent a new body could lengthen the duration of LMR hearings, regulatory uncertainty may be increased for all stakeholders.
- There is the potential for conflicts of interests among the technical experts potentially required to conduct the new body’s investigations, given the relatively small number of participants in the LMR regime.

### Benefits

- A fit-for-purpose investigatory body could address the concerns of some stakeholders about the expertise required to review the highly technical aspects of the AER’s determinations, if the body was provided with more resources than the Tribunal under the existing regime.
- Creating a new investigatory body could contribute to a more collaborative approach to LMR in the energy sector.
- There is potential to lower barriers to consumers engaging in the review process and allowing participation without legal representation.

### Questions

18. *What are the risks of establishing a new review body? Are there any challenges associated with implementing this option?*
19. *Would it be possible to increase the clarity of grounds for review, and their relevance to the long term interests of consumers, by establishing a new body?*
20. *Could a new review body provide an appropriate balance between access to reviews where necessary and ensuring the long term interests of consumers are delivered? How would a new investigatory body help achieve this balance?*
21. *What role and structure could a new review body have? Are there any examples of a sector-specific review body that could be applied to energy?*
22. *Do you have any suggestions for how a new investigatory body could be appropriately resourced?*

### Option 4: Remove access to LMR

This option would remove access to LMR. Affected stakeholders would retain access to judicial review.

Judicial review is not the re-hearing of the merits of a particular case. Rather, the court reviews a decision to make sure that the decision maker applied the relevant law correctly and reached a decision that was within jurisdiction, not unreasonable in the final result and arrived at by following the correct legal procedures.

CHARACTERISTIC	DESCRIPTION
Review body	Federal Court
Institutional character	Courts reviewing administrative decisions are concerned with the lawfulness of the decision rather than its correctness.
Legislative basis	The Federal Court is established under Commonwealth law and its processes are guided by Commonwealth law.
Review type	Judicial review

CHARACTERISTIC	DESCRIPTION
Grounds for review	The decision maker has: <ul style="list-style-type: none"> <li>• breached the rules of natural justice</li> <li>• not observed procedures that were required by law</li> <li>• not have jurisdiction to make the decision</li> <li>• improperly exercised its powers</li> <li>• made an error of law</li> <li>• made a decision that was induced or affected by fraud</li> <li>• made a decision that was not supported by evidence, or</li> <li>• made a decision that was otherwise contrary to law.</li> </ul>
Decisions available	Affirm or set aside
Basis of decision	A decision is contrary to law

### Limitations

- Removing access to LMR could create a risk that decisions containing administrative error (that is, a decision which is not the correct or preferable decision on the facts) may not be corrected.
- Consumers may be faced with new cost challenges that do not arise under the existing LMR regime, if increased judicial review hearings eventuated as a consequence of removing access to LMR.

### Benefits

- Recent developments in the law have potentially expanded the ability of judicial review to provide further accountability for reasonable decision making.<sup>19</sup>
- Restricting the avenues for review may reduce the overall timeframes for concluding revenue determinations and access arrangements. Finalising determinations more quickly would reduce the risk of entering a regulatory period without price predictability for energy consumers.
- Restricting review opportunities may address the risk of participants seeking outcomes across multiple forums.
- Removing access to LMR may increase the focus of participants on final opportunities for consultation on various technical matters during AER determinations.
- Removing access to LMR could reduce legal costs associated with appeals, especially where judicial review of Tribunal decisions is additionally sought under the existing LMR regime.
- Removing access to LMR may minimise the risk of a decision being substituted on the basis of a 'preferred approach' compared to the original decision maker.

Merits review is available for a small number of decisions in the energy sector in addition to revenue determinations and access arrangements. Consideration would need to be given as to whether merits review for these other kinds of decisions should be removed as well.

### Questions

23. *What are the likely consequences of removing access to merits review of revenue determinations and access arrangements? If access to LMR was removed, are there any complementary changes to the wider regulatory frameworks, or other legislative changes, that might be considered to provide accountability for regulatory decisions and deliver the long term interests of consumers?*

<sup>19</sup> *Minister for Immigration and Citizenship v Li* (2013) 248 CLR 332.

24. *In circumstances where redress is sought through judicial review processes, what mechanisms could be put in place to better support consumer and user participation?*
25. *Should all access to merits review be removed or only for electricity revenue determinations and gas access arrangement decisions?*

## Other issues

Administrative review is linked to the broader energy regulatory framework, and the ToR provide scope to explore issues with the regulatory framework that could contribute to achieving the policy intent of the 2013 reforms. These could include, for example, levels of prescription or discretion around the AER's decision making, or the treatment of regulatory tools such as benchmarking.

### Questions

26. *Are there other areas of reform to the broader regulatory framework that would assist in achieving the policy intent of the 2013 reforms to LMR and deliver outcomes in the long term interests of consumers?*

## APPENDIX I: Complete list of questions

1. Are there any specific factors which prevent issues being resolved through the determination process?
2. Are reviews generally considered a routine part of the determination process?
3. Does the framework enable reviews to focus primarily on the long term interests of consumers?
4. To what extent does the current LMR process support materially preferable decisions being made for the long term interests of consumers?
5. Are there any other issues which impact on the delivery of regulatory decisions that serve the long term interests of consumers?
6. Are the current grounds for review sufficiently robust to avoid undue weight being placed on minor matters in merits reviews?
7. Are there any issues with the scale and scope of material that can be brought forward in relation to reviews?
8. Is there a way to minimise the regulatory impost of maintaining a record of decision making as part of any future reforms?
9. Are there any barriers to the Tribunal seeking additional expert advice? If so, how could these barriers be addressed?
10. Is participation without legal representation possible? Are there barriers hindering full consumer participation in the review process?
11. How costly has your participation in the appeal process been and what are the implications of this participation for you?
12. What are/were your expectations of how the Tribunal would consider the input from consumers?
13. How can parties provide the Tribunal with sufficient evidence to inform its decision making, while still supporting the Tribunal in its aim to conclude decisions within three months?
14. What has been the impact of the extended timeframe of review processes? How could these impacts be addressed?
15. What would be the impact of maintaining the current regime?
16. What amendments, if any, would you propose to achieve the policy intent of the 2006 and 2013 LMR reforms?
17. Should the existing Tribunal review process be made more investigatory in nature? If so, how could this be achieved?
18. What are the risks of establishing a new review body? Are there any challenges associated with implementing this option?
19. Would it be possible to increase the clarity of grounds for review, and their relevance to the long term interests of consumers, by establishing a new body?
20. Could a new review body provide an appropriate balance between access to reviews where necessary and ensuring the long term interests of consumers are delivered? How would a new investigatory body help achieve this balance?
21. What role and structure could a new review body have? Are there any examples of a sector specific review body that could be applied to energy?
22. Do you have any suggestions for how a new investigatory body could be appropriately resourced?

23. What are the likely consequences of removing access to merits review of revenue determinations and access arrangements? If access to LMR was removed, are there any complementary changes to the wider regulatory frameworks, or other legislative changes, that might be considered to provide accountability for regulatory decisions and deliver the long term interests of consumers?
24. In circumstances where redress is sought through judicial review processes, what mechanisms could be put in place to better support consumer and user participation?
25. Should all access to merits review be removed or only for electricity revenue determinations and gas access arrangement decisions?
26. Are there other areas of reform to the broader regulatory framework that would assist in achieving the policy intent of the 2013 reforms to LMR and deliver outcomes in the long term interests of consumers?

## APPENDIX II: Areas within the national laws that may require further consideration

Provisions <sup>20</sup>	Purpose
s16 Manner in which AER performs AER economic regulatory functions or powers	Sets out the obligations on the AER when it performs its economic regulatory functions or powers
s28ZJ Record of reviewable regulatory decisions	Obliges the AER to keep a database of all the information provided to it through its regulatory process (for reviewable decisions)
s 71B Application for review	Sets out what must be included in a request for a review
s71C Grounds for review	Sets out the basis on which a review can be sought
s71E Tribunal must not grant leave...	Requires the Tribunal to only grant leave for a review in specified circumstances
s71O Matters that may and may not be raised in a review	Sets out, for each type of party to a review, the matters that can and cannot be raised
s 71P Tribunal must make determination	Requires the Tribunal to make a decision, what those decisions could be and under what circumstances
s71R Matters to be considered by Tribunal in making determination	Limits the type of information the Tribunal is able to consider on a review to only prescribed matters

<sup>20</sup> References are in the NEL; comparable provisions are also in the NGL

## Limited Merits Review – Terms of Reference

**19 August 2016**

### Review of the limited merits review framework in the National Electricity Law and the National Gas Law

A limited merits review regime was introduced into both the National Electricity Law (NEL) and the National Gas Law (NGL) in 2008<sup>1</sup>. The regime allows parties affected by prescribed decisions to have those decisions reviewed by the Australian Competition Tribunal where it can be established that there is a serious issue and grounds for review.

In 2013, significant changes were made to the limited merits review framework in light of regulatory failures identified by an Expert Panel in 2012. Included in the 2013 reforms was a requirement established under the NEL<sup>2</sup> and NGL<sup>3</sup> for the Council of Australian Governments (COAG) Energy Council<sup>4</sup> to initiate a review, by 1 December 2016, of the Tribunal's role under the amended legislative regime.

In line with section 71Z of the NEL and section 270 of the NGL, the Energy Council tasks its Senior Committee of Officials (SCO), as the relevant persons for the purposes of the NEL and NGL, with undertaking this Review.

The Review is to assess the effectiveness of the merits review regime under the NEL and the NGL since the 2013 reforms were implemented. In addition to considering the role of the Tribunal under the amended legislative regime, SCO is to explore all feasible options, including the removal of limited merits review, to achieve the objectives of administrative review generally and the energy sector specifically.

The Review is to be:

- centred on delivery of the National Electricity Objective (NEO) and National Gas Objective (NGO)
- open, transparent and consultative
- consistent with best practice regulation

SCO is required to invite public comment and submissions on the Review. Public consultation must inform SCO's final advice to the Energy Council in December 2016. The Energy Council considers an expedited timeframe is required to increase policy and legislative certainty for the Australian Energy Regulator and regulated energy businesses.

The Review will assess whether and to what extent the limited merits review regime has met policy expectations set out in SCER's Statement of Policy Intent (December 2012) *Review Framework for the Electricity and Gas Regulatory Decision Making*<sup>5</sup> and Regulation Impact Statement Decision Paper *Limited Merits Review of Decision-Making in the Gas and*

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<sup>1</sup> The NEL is set out in the schedule to the *National Electricity (South Australia) Act 1996 (SA)* and the NGL is set out in the schedule to the *National Gas (South Australia) Act 2008 (SA)*. The NEL and NGL are each applied as law by legislation in force in those States and Territories participating in each cooperative scheme and by the Commonwealth in the circumstances provided for in the *Australian Energy Market Act 2004 (Cth)*.

<sup>2</sup> National Electricity Law, s71Z

<sup>3</sup> National Gas Law, s270

<sup>4</sup> Previously the Ministerial Council on Energy

<sup>5</sup> Statement of policy intent, Review framework for the electricity and gas regulatory decision making, December 2012, <http://www.coagenergycouncil.gov.au/publications/statement-policy-intent-review-framework-electricity-and-gas-regulatory-decision-making>.

*Electricity Regulatory Frameworks*<sup>6</sup> (June 2013). These establish that the objective of the regime is to ensure that relevant decisions promote efficient investment, operation and use of energy infrastructure, and are consistent with the revenue and pricing principles of the NEL and NGL, in ways that best serve the long-term interests of consumers.

In undertaking the Review, SCO will:

- provide an overview of how the limited merits review regime in the NEL and NGL has operated since its reform in 2013.
- assess the extent to which the limited merits review framework as a whole has met its policy intent.
- undertake targeted and public consultations on any areas where a need for reform has been identified.
- outline options to address any areas identified as requiring reform.
- advise on the optimal mechanism, including alternatives to limited merits review, to achieve the objective of efficient investment, operation and use of energy infrastructure in ways that best serve the long-term interests of consumers.

Recommendations for the Energy Council should include consideration of, but not be limited to:

- amendments to the limited merits review regime
- amendments to other aspects of the NEL and NGL
- National Electricity Rules and National Gas Rules change proposals
- the costs and benefits associated with the recommendations, in line with the NEO and NGO
- guidance on how the recommendations should be implemented and evaluated.

SCO is required to provide its final advice to the Energy Council in December 2016.

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<sup>6</sup> 2013, SCER, Regulation impact statement, Limited merits review of decision making in the electricity and gas regulatory frameworks decision paper, 6 June 2013, <http://www.coagenergycouncil.gov.au/publications/limited-merits-review-regulation-impact-statement-decision-paper-june-2013>