Major Energy Users Inc.

2-3 Parkhaven Court, Healesville, Victoria, 3777

ABN 71 278 859 567

3 October 2016

CoAG Energy Council Secretariat
GPO Box 9838
Canberra ACT 2601

By email: energycouncil@industry.gov.au

Dear Secretariat

Review of Limited Merits Review Regime
Consultation Paper 6 September 2016

The Major Energy Users (MEU) welcomes the opportunity to provide its views to the Review of the Limited Merits Review Regime.

To a great extent, the MEU considers that many of the points it made to the SCER secretariat to the Consultation Regulation Impact Statement (RIS) regarding the framework for review of regulatory decision making in the national electricity and gas frameworks released in December 2012 are still quite relevant. Because of this, the MEU has attached its response to the Consultation RIS to this submission.However, the experiences of the MEU through the appeals processes under the 2013 revised process has resulted in a change to the conclusion it espouses in that response.

The MEU is of the view that the changes made in 2013 to the LMR process have not delivered on the Statement of Policy Intent regarding the LMR process released by SCER in December 2012. In this regard it is pertinent to provide a "score" from the LMR activities since that time to identify whether or not the policy goals have been achieved.

In its 2012 Statement of Policy Intent, the SCER asserted that the LMR should result in.

1. providing a balanced outcome between competing interests and protect the property rights of all stakeholders by:
    - ensuring that all stakeholders' interests are taken into account, including those of network service providers, and consumers; and

   - recognising efforts of stakeholders to manage competing expectations through early and continued consultation during the decision making process;
2. maximising accountability by:
   - allowing parties affected by decisions appropriate recourse to have decisions reviewed.
3. maximising regulatory certainty by:
   - providing due process to network service providers, consumers and other stakeholders; and
   - providing a robust review mechanism that encourages increased stakeholder confidence in the regulatory framework
4. 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;
5. achieving the best decisions possible by:
   - ensuring that the review process reaches justifiable overall decisions against the energy objectives;
6. 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; and
7. 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.

Reviewing the LMR processes since the changes were implements, only point 2 would appear to have been achieved, points 3 and 4 might have been partially achieved with all other elements not achieved at all.

The post 2013 LMR in practice

To support its views on this score assessment of the goals, the MEU points out that it was involved as an active consumer advocate in both the NSW network appeals in 2015 (by five networks) and the SA Power Networks (SAPN) appeal in 2016. Specifically, the MEU was involved in the consumer consultation processes and has reviewed the Tribunal decision handed down on the NSW network appeal in 2016.

The MEU notes that the SAPN appeal has not yet reached the point where the Tribunal has handed down a decision, and the Victorian networks have commenced an appeal process, but the MEU provides a view of the NSW network appeal process:

- There is no clarity on how the consumer consultation process informed the Tribunal decision or even how the Tribunal used the information provided in this process. This raises the basic question as to the value of the consumer consultation process as implemented by the Tribunal

- The Tribunal addressed the issues under the appeal in the same manner as it had in the past – looking at each of the issues in isolation and reaching a conclusion on each, rather than then looking at the impacts of each decision holistically to identify whether the changes the Tribunal sought would have resulted in a better outcome reflecting the NEO
- Throughout the decision, the Tribunal makes reference to its decisions as reflecting the NEO but doesn't explain how or why its decision is more preferable in terms of the NEO and the long term interests of consumers (LTIC).

The MEU considers that to reflect the NEO (which is based on an economics concept) there has to be an explanation as to how the NEO was interpreted for each issue addressed, yet the Tribunal made little attempt to explain how its conclusions delivered a more preferable outcome for consumers.

For example, in a number of decisions by the AEMC, it has interpreted the NEO as needing to incentivise (or not dis-incentivise) investment on the basis that the network owner needs to continue investment in its network over the long term to enable the network to continue providing the needed level of service to users both now and in the future. There was no attempt by the Tribunal in its decision to explain why its view provides a better outcome in the LTIC or why it meets the requirements of the NEO/NGO – it merely states that its decision meets the requirements of the NEO/NGO.

In contrast to the AEMC in some of its decisions, the Tribunal approach was:

- In the transition to the trailing average for debt over time rather than the immediate conversion, it looked at the specific arguments for and against what the AER proposed but did not explain why its decision provided an outcome that was more in the LTIC than the AER approach – it merely looked at whether the AER was right or wrong.
- Similarly, on the matter of gamma, it concluded the AER was wrong, but not whether (or why) the change it proposes provides a better outcome in the LTIC – it just stated its view that its assessment was in accordance with the energy Objectives without explaining why.
- In the use of benchmarking, it criticised the AER for the benchmarking it did undertake but made no reference to the fact that the benchmarking had highlighted that consumers were paying too much for opex.
- It accepted that an Enterprise Bargaining Agreement (EBA) had primacy over what are efficient costs for the same activity, but provided no explanation as to why the use of an EBA was more in the LTIC than the AER approach, especially as the AER provided detailed explanation as to why they had excluded the EBA in their deliberations.

The Tribunal then remitted back to the AER on each of the issues, the responsibility for rectifying the AER "errors" because the Tribunal recognised that it had neither the time nor the resources to deliver its own determination reflecting the holistic needs necessary under the revised LMR. This remittal process could well result in the AER proposing new outcomes for other elements of its final decision which the networks could then appeal again. This cycle could extend ad nauseam providing no regulatory certainty and exposing consumers to ever increasing risks of future high prices to recover any additional revenue delayed by the process plus the costs for providing consumer input to the new appeal process.

What has caused the failure?

What is clear that the aspirations underpinning the changes to the LMR have not been achieved – not the impact of consumer consultation, not the reduction in the numbers of appeals, not the Tribunal identifying outcomes that are specifically in the LTIC, not the reduction in time and cost in appeals, and not a reduction in "gaming".

Instead what consumers have seen is the continuing of a narrow focus on specific elements of a decision, coupled to a continuation of the legalistic process that inhibits active consumer involvement and a marginalizing of consumer input.

The MEU notes that the changes made in 2013 were to limit the numbers of appeals. The MEU also notes that rule changes made in 2012 increased the ability of the AER to use its discretion which also leads to the potential for more appeals based on an assessment of how the AER has used its discretion.

To enhance regulatory certainty, the AER implemented a number of non-binding guidelines on how it would use its discretion so there was still significant regulatory certainty. While the networks were active in providing input during the development of the guidelines, it is clear that they also consider that the increased discretion provided to the AER has provided a new avenue for appealing AER decisions. It is apparent that this is the case, as a number of the appeals went to the heart of the guidelines and the networks re-prosecuted their case before the Tribunal after "losing" when they did this during the guideline development process.

The lack of achievement of the changes to deliver on the policy outcomes for revising the LMR would also appear to have everything to do with how the Tribunal sees its role in assessing appeals to the AER decisions. As the Tribunal has demonstrated that its approach is to correct AER decisions on specific issues (as it did before the changes were made in 2013 and precipitated the change in the LMR process) rather than addressing the holistic nature of a regulatory decision, then there is a need for change.

The MEU is also concerned that the networks see the appeals process as an integral part of the regulatory process. Whereas the concept of the regulatory process is that the AER has primacy in decision making, it is clear that the networks see the appeals process is not just to correct errors but an opportunity to re-advocate on issues that the AER has previously decided on. The MEU has seen the

networks re-craft their proposals and revised proposals with a clear view for them to use the Tribunal as the focus of their activities rather than make the AER the primary focus of their regulatory activity.

The MEU considers that the LMR process itself is driving this outcome because of the right to re-prosecute already lost arguments with the hope for a better outcome. As the appeals process is an allowable cost for regulatory purposes, the re-prosecution of arguments is almost a costless exercise for the networks, incentivizing the making of appeals.

The reality of consumer involvement

Consumers were extensively involved in the development of the AER guidelines established to reflect how the AER would use its discretionary powers. Consumers were also involved in the regulatory process for the NSW networks, SAPN and the Victorian networks where appeals have been initiated. As a general observation, the AER processes are designed to maximize the input from consumers and its decisions clearly reflect this input.

In contrast, the Tribunal appeals, while implementing consumer engagement in the process, consumer involvement was quite truncated. For example, in the Victorian network appeals, the Tribunal has stipulated that each consumer or consumer advocate can only speak at the consumer consultation for 15 minutes and submit no more than 3 pages of written material. Similar constraints applied to the NSW and SAPN consumer consultation process. This severely limits consumer involvement, especially when the issues are complex and exhibit a need to balance the discretions used by the AER.

In practice, the Tribunal heard the consumer oral submissions with little or no questioning from the Tribunal; written submissions are forwarded subsequent to the oral presentation. The Tribunal decision on the NSW networks appeals does not explain whether the consumer input influenced its decisions, nor whether, or to what extent, the consumer consultation process assisted the Tribunal reach its decisions. A review of the NSW decision implies that the consumer consultation had little, if any, impact if at all.

The Tribunal consumer consultation process was still adversarial and intimidating. While an investigatory review process might be less adversarial and more collegiate, there is still no certainty that an investigatory body would utilize consumer involvement any more than the Tribunal has. Further, it is apparent that the Tribunal sees its role as an arbiter between the AER and the networks and this militates against the Tribunal seeing consumer involvement as a part of its core function.

The MEU also notes that the involvement of consumers (via one consumer advocate – PIAC) as an intervener and as an appellant in the Tribunal formal processes was expensive. It needs to be recognised that this involvement was part funded by Energy Consumers Australia (ECA) through its grant program and ECA reports that is has funded ~$1m for consumers to be involved in appeals. This total amount needs to be seen in context with the total funding by ECA for consumer advocacy

grants which is about $2m pa. In addition to the ECA contribution, each of the consumer advocates has invested considerable resources and incurred significant costs to be a part of the consumer consolation process.

This means that devoting its resources to the appeals processes, ECA seriously limited its funding of other consumer advocacy activities in the energy markets and the input provided by consumer advocates further limited their involvement in these other aspects of the energy markets. The MEU points out that all of the energy market agencies (AER, AEMO, AEMC, CEC and governments) actively seek consumer involvement in their processes as this is seen as an essential element of their consultation processes.

Effectively, the extensive involvement in the appeals process has cost energy consumers both directly in time and cost but indirectly through a reduced involvement in other important aspects of the energy markets.

In counterpoint, it needs to be noted that the networks are incentivized to seek increased revenue through the appeals process as the regulatory process drives their profitability and many of the costs they incur in the regulatory processes are recovered as allowed costs in the regulatory build up of costs.

Remitting back to the AER

The rule changes in 2012 increased the discretion of the AER, increasing the complexity of the regulatory process because of the need to ensure the AER maintains a balance between the competing elements of the many discretions provided. This becomes important in the appeals process as the intent of the 2013 changes was to ensure the appeals process was based on the LTIC which imposes a requirement that any change required by a Tribunal decision must incorporate a rebalancing of the discretions so that the LTIC are maintained rather than the “cherry picking” of issues continuing.

It therefore becomes almost de rigueur that a decision of the appeals body must be remitted back to the AER to ensure that the correct rebalancing of the competing issues is achieved; it is most unlikely that the appeals body would have sufficient resources to carry out such rebalancing. This observation is supported by the Tribunal decision for the NSW networks where all of its decisions were remitted back to the AER.

It is also clear that remitting back introduces its own difficulties in providing a fast and low cost appeals process because, if the appeals body is either charged with remitting back to the AER or does so because of a lack of resources, the appeals process will continue to be circular with the networks appealing other aspects of the AER decision which are changed as a result of changing the remitted elements, possibly until the networks ultimately achieve the highest revenue possible.

For example, in the NSW networks appeal, the Tribunal determined that the AER was in error is setting gamma at 0.4 and should have used 0.25. A change in gamma can have an impact on other elements used to set the weighted cost of

capital (WACC). So the AER could, in assessing the impact of reducing gamma, adjust other elements of the WACC development. This in turn would provide grounds for another appeal on a different part of the WACC decision.

Remittance and a further appeal would increase the time taken for establishing a final revenue allowance. This in its self is not in the LTIC but also introduces the risk to consumers that if an increase in revenue for the entire regulatory period is determined after the appeals process is completed, this increase in revenue would have to be recovered within the few years remaining in the regulatory period imposing considerable price shock on consumers. The MEU notes that in the NSW network appeal, it was suggested that the increase in revenue allowed might have to be recovered over the next regulatory period as well to limit this price shock. This is clearly not an optimal outcome for consumers.

The MEU is of the view that remittal back to the AER after an appeal is heard is not practical

It is also clear that remittance back to the AER will not change the current networks' practice of using the LMR process to establish their proposals in such a way that they continue to effectively use the appeals process to marginalize the AER with the main focus of the proposals being on the appeals body.

The next steps

The MEU is convinced that the LMR process as presently constructed is not delivering the benefits sought by the policy enunciated in 2013 and nor does it deliver on the requirement for meeting the LTIC. What is also clear is that the LMR is being used by the networks to change the focus of their approach to one where the regulator has primacy in regulation to one where the networks see their regulatory process being focused on the Tribunal as the final arbiter, rather than the Tribunal being to redress major issues.

The MEU is also aware that there are comments made that the current LMR process should see a complete cycle of regulatory decisions before making change. The MEU disagrees. It is clear, even now, that the revised process has failed to engender most of the policy elements that were fundamental to making the change in 2013. It is not in the LTIC to persist with a system that still results in suboptimal outcomes for consumers and allows the networks to continue to "cherry pick" elements where they see an opportunity to increase their allowed revenue.

The MEU also notes comments by those firms that have invested in the networks that removing the LMR would result in an increase in their required return on equity and costs of debt to offset their higher risk from not having LMR process. The MEU considers that is assertion is not supported by the facts.

For example, since the 2012 network rule change and the 2013 LMR revision were implemented, there have been two actual sales of networks (Envestra to AGN) and TransGrid to Spark Infrastructure (and others). In both cases the sale of the networks significantly exceeded the Regulatory Asset Base (RAB) implying that the

returns that networks were already delivering are significantly more than the implied returns provided by the regulator. Further, both sales occurred when it was clear what the AER guideline for Return on Capital was or likely to be. As neither AGN nor TransGrid have appealed the regulatory decisions made in recent times, it would appear that the concern that removal of LMR would result in increased costs of capital is grossly overstated.

Accepting that change is needed, the question becomes what needs to be varied and the consultation paper provides three basic options for change:

- Retain LMR by the Tribunal but enhance the current approach
- Retain LMR but change the entity carrying out the review, and possibly enhance the current approach too
- Dispense with LMR and move to judicial review.

The MEU considers that retaining the Tribunal as a review body has not worked in the LTIC and the MEU is not convinced that a body based on the adversarial nature of the national legal system can operate appropriately to ensure the full participation of consumers in reaching any decision – effectively the Tribunal will tend to continue acting as an arbiter between the AER and the networks' views without addressing consumer concerns. With this in mind, the MEU is not convinced that even with attempts to vary the grounds for an appeal, greater prescription or limitation of material that can be provided will be sufficient to change the essential nature of the Tribunal – that of a body to assess the disagreements between the AER and the networks.

The MEU is concerned that the introduction of a new investigatory entity to address appeals after the AER final decision will not necessarily remove the concerns the MEU has identified with regard to speed of resolution or of marginalizing the role of the AER, as the new entity would become the focus of the proposals from the networks. Gaming would still continue. The only advantage of such a body would be that the adversarial nature of the review might disappear but the other concerns identified with using the Tribunal would still apply.

The MEU notes the attractiveness of the AER only being subject to a judicial review but sees this as effectively disenfranchising consumers from the appeals process as the costs for consumers to be involved in a judicial review process will take even more of the scarce resources available to consumers for their advocacy and so limit their ability to address other aspects of the energy markets requiring consumer attention.

An alternative proposal

The MEU considers that the view that it espoused in the 2013 consultation paper of using the ACCC as the review body still does not address the concerns of speed of resolution or the problems inherent in remitting the issues to the AER. To overcome the issues from remittal, the ACCC would have to make decisions that it assesses are in the LTIC. The concern that the ACCC would then be seen as the primary decision maker by the networks would remain.

The MEU considers that there is an alternative which retains LMR but overcomes many of the problems seen. The concept is as follows

- There would be appointed a three person expert panel including a chair appointed by the CoAG Energy Council.
- The networks or consumers would be permitted to appeal for a review of elements of a draft decision by the AER. The networks would lodge their revised proposals in the knowledge of what has been appealed.
- The expert panel would convene and hear the arguments from the appellant for change and also hear from the other party with both parties present to hear both sides of the debate. This process is similar to that used by the AER during the Better Regulation program as it developed its guidelines.
- The expert panel would decide on what elements should be changed as a result of the appeals and arguments from both networks and consumers.
- The expert panel would provide direction to the AER as to its views on the appeals made and the AER would implement these as part of its detailed review of the revised proposals and make necessary adjustments to other impacted elements of the building block elements. This process would be overseen by the expert panel to ensure that the expert panel agrees that the changes made to other elements are appropriate and in keeping with the expert panel directions.
- The expert panel would publish a report at the same time as the AER final decision and this report would identify what concerns the expert panel had, how these concerns were addressed in a holistic manner and any residual concerns the panel has.
- The AER final decision would be subject to judicial review which would also include a requirement to assess aspects where the expert panel report and the AER final decision differed.
- If there is a judicial review initiated, the AER final decision would stand until the outcome of the judicial review. If the judicial review results in a change in the revenue, then the new revenue would only apply from the time of the decision from the judicial review and not recover any under- or over-recovery of revenue prior to the judicial review. This imposes a constraint on unnecessary appeals, incentivizes quick resolution and limits price shock to consumers

The MEU considers that an approach such as this retains the concepts of the LMR, changes the approach to more investigatory and less legalistic, uses the AER to provide resources to retain a balance of the issues, and provides for a less time consuming review process with a firm end time.

The MEU also considers that this process could be used for establishing guidelines as well as regulatory proposal reviews. The MEU considers that, where practicable, the AER guidelines should be made binding rather than the current non-binding approach used.

We appreciate the opportunity to have provided this input to the review process of the LMR. Should you wish for amplification of any of the comments provided in this response, please contact our Public Officer (David Headberry) on 03 5962 3225 or at davidheadberry@bigpond.com .

Yours faithfully

David Headberry
Public Officer

The MEU notes that the responses to the specific questions need to be seen in context with the comments made in the foregoing part of this response to the discussion paper

#	LMR project team question	MEU response
1	Are there any specific factors which prevent issues being resolved through the determination process	While the intention is to limit appeals to aspects of substance, the appeals implemented clearly demonstrate that there has been little change to the appeals that occurred prior to the 2013 changes. The complexity and need to balance elements of discretion essentially require the Tribunal decisions to be remitted.
2	Are reviews generally considered a routine part of the determination process?	It is obvious that networks are structuring their proposals with the clear intent to appeal AER decisions. As noted in the earlier sections, the networks consider the appeals body as the final arbiter rather than the AER being the primary decision maker
3	Does the framework enable reviews to focus primarily on the long term interests of consumers?	No. See foregoing comments
4	To what extent does the current LMR process support materially preferable decisions being made for the long term interests of consumers?	It doesn't. The Tribunal still has made its decisions on the specific elements of the appeal without examining the holistic nature of the AER decision. While remitting the Tribunal decision to the AER as an attempt to generate a more holistic outcome, the process still leaves the AER decision after the remittal to be appealed a second time.
5	Are there any other issues which impact on the delivery of regulatory decisions that serve the long term interests of consumers?	While in its decision the Tribunal makes reference to its decision as a preferred outcome and meeting the NEO/NGO it does not explain why this is case. It certainly does not explain why its decision is in the LTIC
6	Are the current grounds for review sufficiently robust to avoid undue weight being placed on minor matters	While a higher threshold for requiring an appeal might reduce the numbers of appeals and remove appeals on minor matters, there still

	in merits reviews?	remains the problem of adequate consumer involvement (or lack thereof) and the issue of remittance back to the AER.
7	Are there any issues with the scale and scope of material that can be brought forward in relation to reviews?	It is clear from the massive amounts of information submitted to the Tribunal, that the networks considered the AER as only a first step in the process with the appeal process being the "main game". When considering the amount of material provided for just a relative few aspects of the proposals, it is clear that the Tribunal was provided with more information on those few aspects than the AER was provided with, exemplifying the view that the networks were marginalising the AER processes, with the aim of gaining a better outcome from the Tribunal. It is also clear that the amount of material provided to the Tribunal makes the process unworkable.
8	Is there a way to minimise the regulatory impost of maintaining a record of decision making as part of any future reforms?	The MEU considers that the only way of reducing appeals process is by making the AER guidelines binding instead of non-binding. The binding guidelines can be updated to reflect LMR decisions as they occur. As it stands, the considerable effort that went into developing the guidelines has been effectively marginalised as the networks have used specific proposals and appeals to re-argue the points they provided during the guideline development process but which were rejected during that extensive consultative process implemented by the AER. It is important to note that although consumers were not happy with parts of the guidelines, they tended to accept them as reasonable positions for the AER to take on the discretions it is permitted
9	Are there any barriers to the Tribunal seeking additional expert advice? If so, how could these	It would appear that the Tribunal was not constrained by anything other than the sheer volume of the information provided to it and being able to

	barriers be addressed?	read and hear all of the information. The MEU is aware that there are experts who disagree about many issues (often depending on who pays them for that advice). Similar information was provided to the AER during the development of the guidelines and the AER as an independent arbiter assessed this information in detail because it had provided the resources for this to occur. The MEU considers that the Tribunal has insufficient resources and time compared to that used by the AER in order to make a balanced assessment when considering the implications of changing one aspect of the decision and assessing the impacts of that change on other aspects.
10	Is participation without legal representation possible? Are there barriers hindering full consumer participation in the review process?	Informality did not occur to the extent that if could have for the consumer consultation. Legal representation is still essential for interveners and/or arguing the merits of an appeal. The consumer consultation process would appear to have been little more than "window dressing" based on the impact of this activity reported by the Tribunal in its decision.
11	How costly has your participation in the appeal process been and what are the implications of this participation for you?	As noted in the foregoing section the MEU is concerned at the costs for being involved in the appeals process and is concerned that these costs reduce the ability of consumers to be involved in other important issues facing consumers in the energy markets. Equally, not being involved has the potential for networks to over ride the views of the AER which is required to be a "model litigant" and limited in its ability to argue in support of its views.
12	What are/were your expectations of how the Tribunal would consider the input from consumers?	The MEU had high hopes and devoted significant resources and incurred considerable costs to participate in the community consultation processes. Unfortunately, the reality of the process leads the MEU to

		consider that its involvement (and those of the many other consumer advocates) delivered little benefit to consumers as the Tribunal appears not to have utilised the input provided by this consultation process in its decision. This view is obvious as the Tribunal continued its past practices of assessing issues in isolation, not considering the LTIC and not even explaining how its decisions were more in the LTIC than the AER decision on the same element. Essentially, the Tribunal acted in the same way as it did before the 2013 LMR changes.
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?	The MEU considers that this is not possible while the networks use the Tribunal as their primary focus with an appeal being the last stage of the standard regulatory process. The MEU considers that the increased complexity of the regulatory process due to the increased discretion allowed, coupled to the need for rebalance aspects when a change is made, also militates against quick resolution.
14	What has been the impact of the extended timeframe of review processes? How could these impacts be addressed?	The review process itself extended considerably beyond the short time frame expected; this applied to the NSW appeal and it appears to apply for the SAPN appeal. Even without the AER decision to appeal the Tribunal decision, it would have taken the AER considerable time to carry out the work that was remitted. As the remittal process has the likely outcome of the AER varying other parts of its initial decision to provide the balance required by the 2013 holistic assessment, there is the very real potential for the AER decision after remittal to be appealed again. Overall, the time frames that have resulted from the 2013 revised LMR as seen in practice and, as reasonably forecast, are expected to be excessive with the resultant negative impacts on consumers noted in the

		earlier section of this response. The MEU considers that there is little that can be done to overcome the extended timeframes while the rules provide significant discretion to the AER (discretion that the MEU supports) and the Tribunal has a requirement to look at issues holistically (which the MEU supports) rather than in isolation as a was the past (and unacceptable) practice.
15	What would be the impact of maintaining the current regime?	It would appear that the revised regime has not addressed the basic concerns that triggered the 2013 changes. Of concern to consumers are the extended time frames, the lack of certainty from the LMR process, the continuing practice of the networks using the LMR process as their key focus of their proposals and the reality that consumers have, to all intents and purposes, not really had their views integrated into the Tribunal decisions. The Tribunal process is still legalistic and this results in consumers incurring significant costs if they do get involved in the appeals process and/or seek to intervene. It is not clear whether intervention has impacted the Tribunal decisions to any significant extent. Overall, the MEU considers that retention of the 2013 process has not provided outcomes for consumers that are in their long term interests. Further, the MEU considers that the networks have shown that they can still "game" the process.
16	What amendments, if any, would you propose to achieve the policy intent of the 2006 and 2013 LMR reforms?	To some extent, over the long term, the LMR process could be improved by having the AER guidelines made binding and significantly raising the threshold for allowing appeals. While this might reduce the numbers of appeals, it still does not address the inevitable extended timeframes for achieving resolution nor the potential that networks will still use the

		process as a core function of the regulatory regime, marginalising the AER in favour of the Tribunal being the prime focus by the networks.
17	Should the existing Tribunal review process be made more investigatory in nature? If so, how could this be achieved?	The MEU is unsure how this could be achieved, considering the Tribunal is based on the adversarial nature of the national legal system. Certainly, the experiences of consumers in the consumer consultation process have not indicated that the Tribunal really understands the process that was envisaged in the policy intent. The Tribunal requirements for consumers involved in the consumer consultation process do not lead to a view that they really appreciate (or want to) the value of consumer involvement. It would appear that they see the main game is the networks versus the AER without the distraction of consumer involvement.
18	What are the risks of establishing a new review body? Are there any challenges associated with implementing this option?	In its response to the 2013 consultation paper, the MEU posited that there is value in a review process. The MEU suggested that such a review process could involve the ACCC as the reviewer as it has the resources and the skills to carry out such regulatory assessments, to be able to look holistically at the issues under appeal and to provide a determination that is holistic and has considered the LTIC in reaching a preferred outcome. The MEU considers that having an external body as the appeals body still has merit. The question then becomes should a review of the AER decision be made ex ante or ex post the AER final decision. An ex ante review would allow the examination of the issues across the entire decision, including inter-relationships before the release of the final decision. An expert review body could also have input from the networks and consumers after the AER draft decision is issued allowing each of the networks and

		consumers to provide their views before it provides input/direction to the AER as the final decision is developed. The external body could review the AER final decision before it is completed to ensure that the issues raised by stakeholders about the draft decision are appropriately addressed in the final decision. Such a body would be made privy to the information provided to the AER during the post draft decision phase including the revised proposals. The MEU has developed further this concept in the first section of its response
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?	The MEU considers that the issue of the LTIC needs to be addressed regardless of what body is to review the AER decision. As noted in the earlier part of this response, the MEU considers that the economic concept of the LTIC needs to be converted into implementable actions, such as the AEMC has done in some instances. The MEU notes that changing the bases for a review (eg as outlined in the table on pages 15 and 16) might improve the LMR process, but the MEU is concerned that continuing the LMR process ex post of the AER final decision will still result in extended review times and allow the networks to continue the gaming practices they are currently using to marginalise the role as the primary regulator.
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?	A core feature of the process instigated by the AER in developing its guidelines has been the ability where networks and consumers provide input at the same forum which allows the AER to balance the competing aspects in a collegiate manner. If the review body was not bound by the strictures of the legal (adversarial) system that underpins the Tribunal,

		then it too could hear the views of consumers and networks in the same forum. It could question the networks specifically on how their issues deliver a better outcome in the LTIC than that delivered by the AER. Such an informality of process could allow consumers to counter the assertions by the networks as the networks provide their views on how their proposed change is in the LTIC and vice versa. Such a body could also identify where a change in one element of the AER decision to meet the requirements of the network or consumer appeal could impact other aspects of the AER decision, precipitating a change in other elements.
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?	The MEU considers that an expert panel from either the ACCC or embedded within the AER has the potential to provide a better outcome in the LTIC from perceived errors by the AER. The MEU has developed its concept in more depth on the earlier part of this response
22	Do you have any suggestions for how a new investigatory body could be appropriately resourced?	As outlined in the earlier section of this response, the expert panel would be embedded in the AER processes and it would effectively be resourced from within the AER staff.
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?	Investors in networks have advised that judicial review alone would require an increase in the cost of capital, which would be a cost to consumers. The MEU does not necessarily agree that this would be the case, but it is an issue that needs to be noted. The MEU considers that a judicial review process would result in effectively disenfranchising consumers from appealing an AER decision as the cost to reward would probably be outweighed by using the funds and resources for other activities under review in the energy markets

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?	The MEU is concerned that judicial review alone will not allow consumers to be part of the review process due to the high cost and the adversarial nature of legal process. The MEU considers that effectively, even if consumers were involved through intervention, the main game of the AER versus the networks will still predominate. As noted elsewhere, devoting the funds and resources to any review limits consumer's ability to be involved in other aspects of the energy markets.
25	Should all access to merits review be removed or only for electricity revenue determinations and gas access arrangement decisions?	The MEU is aware that the large proportion of appeals under LMR has been related to networks. At this stage, the MEU considers that the focus should remain on the LMR for networks and for LMR for other activities in the energy markets to be assessed separately. The MEU sees that addressing aspects of LMR for other than networks will distract from reaching a fast conclusion to what is a very concerning issue for consumers.
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?	While the MEU is aware that this review of the LMR has the ability to widen its scope beyond that of LMR for networks, as noted in the response to question 25, the MEU is concerned that widening the focus from network regulation could lead to a loss of focus on the core issue (network regulation) with a resultant less than optimal outcome which is to address the LMR process being used by networks to the disadvantage of consumers.

Attachment 1

MEU Submission

Merits Review of Decision-Making in the Electricity and Gas Regulatory Frameworks

8 February 2016

General feedback

The Major Energy Users Inc (MEU) is pleased to provide this response to the SCER consultation paper regarding the LMR regime review process. The MEU input into this response is based on its firsthand experience of being the only consumer advocate to actually be involved in an appeal under the current LMR regime. Its experiences have made the MEU well aware that the current regime does not provide outcomes which are in the long term interests of consumers.

During its involvement in an LMR review appeal, the MEU (representing consumer interests) was:

- limited in its scope of what it could address
- prevented from providing input that impacted on the issue of the appeal
- constrained to unrealistic timeframes to develop its case and provide its written statements
- constrained by the process from full engagement in the appeal process
- faced an intimidating legalistic process
- faced with significant costs if it wanted to be involved
- threatened with application of costs as a method to prevent its involvement.

This firsthand experience has demonstrated that consumer involvement in the current LMR process does not allow the active and participative involvement of consumers in issues that directly impact them and that significant legal expenses (eg retaining counsel as well as solicitors) must be incurred to ensure the voice of consumers are heard appropriately.

A significant feature of the current regime is that the costs of an appeal are largely recovered by a network appellant through the regulatory process. In contrast, consumers (whether appealing a regulatory decision or intervening) must pay their own costs, making consumer involvement a costly exercise with likely modest rewards for the consumer participant. This single aspect (that regulated entities can recover the costs of an appeal as a regulatory charge) provides the regulated entity with an effective “no risk” cost regime for an appeal. Options 1 and 2 posit that there will be no change to the cost recovery process but under option 3, the proposal states that “parties should bear their own costs” (SCER page xi). This change does not alter the fact that as making an appeal has limited cost exposure to the regulated entity (because these are reasonable regulatory costs and therefore recoverable in the regulatory allowance) all the costs of appeals are effectively carried by consumers. The MEU considers that the costs incurred by a regulated firm in making an appeal should not be recoverable, reflecting the cost structure imposed on a consumer seeking involvement in the process.

The MEU has reviewed the Statement of Policy Intent provided by the SCER as part of this Regulatory Impact Statement assessment. The MEU considers that the

Statement provides a good assessment of what is expected from a review process although the MEU view is that any review of the merits of a regulatory decision needs to address the inter-relationships that lie throughout a regulatory decision. Therefore the MEU agrees with all of the policies noted on page 1 of the Statement of Policies, with the exception of the final policy which states that a **limited** merits review process can achieve the policy objectives above.

The MEU considers that the Expert Panel recommendations specifically require the review process to be one of more than a **limited** review. The MEU interpretation of the Expert Panel report is that the Expert Panel identified that there were many competing and related issues that are impacted by addressing a specific issue in isolation, which is how the current process has operated. Because of these inter-relationships and their wider spread impacts, the Expert Panel was of the view that limiting a review to a specific aspect of a regulatory decision will not result in the achievement of the Objective. In fact the Expert Panel report could even be considered to recommend that the entire regulatory decision should be reviewed to ensure that all inter-relationships are properly investigated.

At its most fundamental, the MEU considers that in order for the appeal process to reflect the energy Objectives, the outcome of the options for the review process must be measured in terms of enabling greater involvement of consumers in any appeal. As funding for consumer advocacy is quite limited, greater involvement of consumers dictates that the process must be low cost and avoid the need for extensive (expensive) legal representation. The MEU uses these basic realities as to the likely effectiveness of the various regimes proposed as part of its approach to this consultation process.

Option 1: Status quo

The MEU has no confidence that the retention of the status quo will provide any benefit to consumers. As noted by SCER, Tribunals have tended to take a more judicial (rather than an administrative) approach, notwithstanding policy guidance.

As comprehensively revealed by the Expert Panel, the Limited Merits Review process under the ACT “has not delivered on the NEO, NGO or the original policy intention of the MCE to date” and “has adversely affected consumer interests in the short term” (and) “that there was no evidence of countervailing consumer benefits in the longer term.” (SCER, page 14).

In practical terms, the resulting higher network and higher energy prices have reduced the competitiveness of energy intensive industrial users, reduced employment and reduced economic growth. In social terms, vulnerable consumers experienced greater economic and social hardships. At the other end of the scale, these same higher charges have imposed considerable hardship on disadvantaged residential consumers.

Under the status quo, the regulator acts as a model litigant which means that there is no countervailing voice to the arguments put by the appellant – providing counter arguments is the responsibility of the consumer. Consumer involvement in the process under the status quo will not change because the same constraints on consumer involvement apply. Without consumers to put a counter argument, outcomes will continue to be biased in favour of the supply side appellant.

The performance of the Tribunal hitherto has been poor, and the outcomes of the process imposed have been heavily in favour of appellants.

The Status Quo does not, in the view of the Expert Panel, result in the achievement of the Objectives of the gas and electricity laws and does not permit the ready involvement of consumers in the process due to its structure which consumers find intimidating. For effective consumer involvement, significant costs would have to be incurred in both addressing the issue and in the retention of solicitors and counsel to present the consumers' case to the Tribunal

The MEU therefore considers that retention of the status quo will not meet the requirement of the energy Objectives, increase the engagement of consumer involvement in the process or reduce the costs consumers face.

Therefore the Status Quo (option 1) is not a viable option and the process must be changed.

Option 2: Amendments to the framework as proposed by the Panel, but retaining the Tribunal as the review body

Retaining the Tribunal as the appeal body will most likely, as the Consultation Paper posits, retain the judicial approach that currently applies, with all the disadvantages for consumers that were identified by the Expert Panel and by the MEU from its firsthand experience. The very location of its hearings plus the chairmanship of the Tribunal by a Federal Court judge inevitably will lead to a judicial approach becoming the norm in the appeal process.

The Consultation Paper provides a good summary of the other disadvantages and inherent risks of this option.

In addition, expanding the scope of the review by the Tribunal to address all of the various inter-relationships of elements within a regulatory decision will increase both the need for expertise within and the time required by the Tribunal to reach its decisions. It is questionable whether there is sufficient expertise within the Tribunal to review the wider range of what are very complex issues which have a high degree of inter-relationship with other elements of the regulatory decision. Whilst it is feasible for the Tribunal to acquire these through advisory consultants, such advice will have to allow for the formality of the legal processes the Tribunal will require.

The very form of the Tribunal (even if it is supposed to act in an administrative role) will inevitably result in appellants and interveners having to engage counsel and other legal professionals in order to match the structure process imposed by the Tribunal.

All consumer responses to the Expert Panel support a view that they have no confidence the likely performance of the Tribunal will improve under this option.

The MEU considers that this option is unlikely to result in an increase the active involvement of consumers in the appeal process due to the potential of its continuance of the intimidating process or that that the costs consumers will face will be much less than under the status quo.

The Consultation Paper posits that other measures are to be taken to increase the involvement of consumers in the energy markets regulatory frameworks and that this will increase the ability of consumers to be involved in appeals. These measures might increase consumer activity in the appeals process but the costs that have been involved in appeals under the status quo have been considerable. The costs incurred in the appeals processes will result in a loss of funding for other consumer

advocacy, so there must be a drive to introduce an appeals process that does not require significant costs to consumers in either appealing or in intervening.
Whist the process included in option 2 might result in better outcomes for consumers there will still be little consumer involvement in the process or much reduction in the costs consumers are likely to incur.
Therefore option 2 is unlikely to meet the requirements of the energy Objective.

Option 3: Amendments to the framework as proposed by the Panel and establishing a new limited merits review body

The MEU notes that this is the preferred option of the SCO, subject to assessment of the details of how the Review Body will be structured. The SCO also notes that it is the option supported by all consumer input to the Expert Panel process. The MEU concurs with option 3 as being its preferred option and also notes concerns regarding the affiliation of the Review Body.
Given the failure of the LMR regime and the poor performance of the Tribunal in addressing issues, the new proposals and proposed Review Body approach are strongly supported. The reasons for this support reflect that the process will provide a less intimidatory structure and provide a process more like the AER regulatory process which has resulted in significant consumer involvement. Costs for both appellants and interveners should be considerably less under this option as there will be little need for legal representation – a feature obvious in the AER regulatory processes.
Inherently, option 3 provides the overall maximum benefit in a holistic way, but the Consultation Paper lists three key risks and disadvantages; viz its operation, impact on financing of investments and compromised independence. The MEU considers the first and third issues as real concerns which must be addressed, but it has serious doubt as to the significance of the second risk which is raised by the Financial Investment Group (FIG).
The implication of the FIG comment is that the entire financing risk for networks is increased significantly. This is a gross overstatement. Whilst the decisions of the ACT have increased revenues to regulated networks, the total amount of increases relative to the total revenue allowed by the AER is quite modest. This means that the AER is being seen to “get it right for the bulk of allowed revenue”. Investment decisions are made more on the initial regulatory decision than on what might be generated from appeals. Option 3 still provides an avenue for seeking inequitable outcomes for networks so the risk that they might face would be a significant difference between what might be awarded under an appeal assessed under option 2 compared to option 3. When seen in this light, this risk is effectively immaterial. The MEU considers that the FIG has significantly overstated the apparent risk in this regard.
In contrast, the ability of consumers to be actively involved in the appeals process is significantly increased and can be achieved with modest costs, reflecting the similar costs they incurred in the initial regulatory process, especially so because there will not be a need for significant legal representation.

The major risk that the MEU sees is that of the proposal the Review Body being aligned with the AEMC. The AEMC is the rule maker and to have it involved in a review of an AER decision (even on a peripheral basis) compromises the independence of the rule maker. Further, the resources (staff) of the AEMC are more aligned to the development of rules rather than to their implementation; there is a significant difference in the skill set between rule making and rule implementation as is currently being seen as the AER develops the guidelines needed to implement the changed network regulation rules.

It was for these two reasons that the MEU proposed to the Expert Panel that the ACCC would provide a better alignment with the Review Body than that with the AEMC. It is accepted that the AER is part of the ACCC and therefore there is a view that this close relationship could compromise appropriate reviews. This is a concern but the MEU considers that appropriate ring fencing could overcome this concern. Such internal ring fencing is common in legal and accountancy firms, and even some government bodies such as Police Ethical Standards Review groups. To assume that the ACCC could not provide such ring fencing is akin to alleging that these other bodies are equally not able to manage such separations.

Use of the ACCC as the "home" for the Review Body provides the Review Body with an organisation that understands the economic regulatory processes and provides it with access to staff with the necessary regulatory skill sets and an understanding of the processes required for competent regulation.

The MEU agrees with the SCO that option 3 provides the most appropriate outcome for achieving the energy Objectives and shares SCO's concerns with the appropriateness of the Review Body being supported by the AEMC.

Answers to specific questions

General

1. **Do stakeholders agree access to merits review should be maintained? Stakeholders may wish to offer comment on their reasons for wishing to pursue or not pursue this alternative.**

MEU: Yes, access to merits review should be maintained but the review must focus on more than the very specific aspects that typifies the current approach. The proposed more holistic focus on whether a materially preferable decision will result as a result of a review is appropriate and recognises the inter-dependencies that typify economic regulation.

2. **Do stakeholders consider that a consistent approach to limited merits reviews of electricity and gas regulatory decisions remains appropriate? Please provide your reasoning for this position.**

MEU: Yes, a consistent approach to merits reviews of electricity and gas regulatory decisions remain appropriate. All stakeholders must have access to such a regime. The principles underpinning regulation of both gas and electricity networks are much the same for both forms of energy so there seems little reason to have differing approaches when assessing appeals to regulatory

decisions purely based on the form of energy. It is the regulatory approach that should determine the process for an appeal – not the form of energy.

Option 1 – Status quo

3. Are there any minor amendments to the NEL or NGL that could address the problems identified by the Panel?

MEU: No, the problems identified by the Panel are so significant and substantial that minor amendments to the NEL and NGL would be inadequate and would not achieve the purpose of the energy Objectives. In particular, the problems identified with regard to the Tribunal's poor performance require drastic amendments.

4. To what extent do recent reforms, most notably recent network regulation rule changes, address the concerns identified by the Panel?

MEU: The most recent network rule changes have the potential to reduce the numbers of appeals and should address a number of the concerns identified by the Expert Panel. But as the new network rules allow increased exercise of judgement and discretion by the regulator, this opens up another avenue for appeals. The issue of the most appropriate body to review appeals regarding economic regulation and the appropriate resourcing of expertise can best be addressed by option 3.

Option 2 – Amendments to the framework as proposed by the Panel, but retaining the Tribunal as the review body

5. What impact would the move to a single "materially preferable decision" criterion have on the outcomes of the limited merits review regime? Specifically, to what extent would such a criterion be compatible with retaining the Tribunal as the Review Body and what limitations might apply to the Tribunal in administering such a criterion?

MEU: Imposing a requirement of a single "materially preferable decision" should minimise the number of appeals and the opportunities for 'gaming' but the introduction of the rules allowing greater discretion by the AER has the potential to increase the numbers of appeals. Whilst it is likely to reduce the frequency of appeals, it results in a need for a greater amount of work to be carried out for each appeal and this will increase problems of timelines and costs of the regime (which are ultimately paid for by consumers).

6. **Are there any barriers to the Tribunal effectively performing its role in a purely administrative manner? What impacts would a move to a more administrative, less judicial approach have on the review process including the extent to which it would reduce or remove the need for participants to engage legal counsel?**

MEU: The composition of the Tribunal, and its very location, lends itself to a more judicial approach being used regardless of a directive for administrative review. The current performance of the Tribunal has been largely judicial in approach and in its other functions it will continue to take this judicial approach.

For these reasons, the MEU (and other consumer advocates) have little confidence that the Tribunal could easily move to an administrative review role and thereby avoid the need to engage legal counsel and other legal representation.

7. **What, if any, restriction should be applied to the information the Tribunal can consider after the ground for review has been established? Are there any benefits associated with allowing the Tribunal to consider information that the regulator could not have reasonably considered in its initial decision making process.**

MEU: The retention of the Tribunal to review decisions is not supported. The risks of doing so and identified in the RIS Consultation Paper are convincing. In the view of the MEU, this question is therefore hypothetical.

However, limiting the access to information which would be useful to the Tribunal in reaching an appropriate decision is counter-productive. Pragmatically, most appeals will still be generated by the regulated entities and they will only raise issues where they consider they will receive an increase in revenue and/or a reduction of risk. The Expert Panel identified that an economic regulatory decision is a combination of many competing elements. Therefore it is unacceptable to limit access to information that might provide a countervailing view (and impact) of a related issue. It is essential that the final outcome reflects all of the inter-relationships embedded in the regulatory decision, and limiting information will prevent this occurring.

Option 3 – Amendments to the framework as proposed by the Panel and establishing a new limited merits review body

8. **Are there specific benefits and risks associated with the Panel's model for the Review Body? Do stakeholders have any views on how the model could be modified to address these risks? This might include, but not limited to, the restrictions around information or process. How might those modifications affect the effectiveness of the investigative process?**

MEU: Option 3 is supported. The benefits identified in the RIS Consultation Paper are convincing.

The RIS identifies three significant risks associated with this option and the MEU has addressed these in its general feedback in relation to option 3.

The MEU does have a real concern regarding the AEMC being the "home" of the Review Body. The MEU has questions about the likely performance of the AEMC which will likely compromise the independence of the Review Body and that the combination of rule setting (by the AEMC) with implementation of the rules (by the Review Body) has the potential to compromise the primary activity of the AEMC; mechanisms could be in place to ensure independence but these might be difficult to impose if the AEMC is to provide staff to the Review Body to carry out its functions. The AEMC in particular, must not have any authority or decision-making functions, but only provides services of administrative support; the provision of AEMC staff to the Review Body could compromise the independence of both the AEMC and the Review Body.

An alternative mechanism is preferable.

9. What level of prescription around the establishment and operation of the Review Body do stakeholders consider necessary? Specifically, how would introducing a requirement for a judicial member, whether current or retired, to the Review Body (be it as a Deputy Chair or standing member) ameliorate concerns that the Review Body would not give due consideration to the legal issues? Is there a risk that this may create a pseudo Tribunal?

MEU: The degree of prescription should be minimised to ensure that the Review Body has the remit to fully analyse the regulatory decision to ensure that the outcome of the appeal reflects a materially preferable decision. At most, the level of prescription should replicate that of the AER which carries out the primary review and should not constrain the Review Body from reaching an outcome which reflects the allowance of efficient costs and the long term interests of consumers.

The MEU does not consider that the presence of a judicial member is necessary or even appropriate. The presence of such a person could lead to a reduction in the easy exchanges between appellant, regulator, consumers and the Review Body which are expected to result in a more preferable outcome. If legal advice is required, this can be sought on an "as needs" basis in the same way that other professional consultants are used. Consumers have seen the introduction of strong legal representation in economic regulation has tended to reduce consumer involvement and constrain the search for the "correct" answer.

Impact analysis

10. What are the costs and benefits of each option for stakeholders? Do stakeholders agree with the risk and benefit analysis? Do stakeholders agree that the allocation of costs is appropriate? Do stakeholders consider that overall costs of options 2 and 3 may be lower due to less reviews being conducted and in a less legalistic manner?

MEU: Option 1 is likely to produce the highest costs for very minimal benefit (if at all) for consumers. The main beneficiaries are likely to be the appellants (ie mainly network service providers) and the legal profession.
This is demonstrated in the analysis provided in the RIS, where the result of the appeal process has significantly increased costs for consumers. The MEU accepts that the regulator might make errors, but not that the correction of all its errors should be in favour of the regulated entities. If there was a balanced appeal process, there should be a number of outcomes that reduce revenue to regulated firms.
When analysing the costs of the different options, it is essential that the costs assessed for each option include costs to consumers of the outcomes of the review process. Option 1 is biased to only to increase costs to consumers if the regulator has erred.
Option 2 is potentially less biased in favour of regulated entities than option 1 but the costs will likely include legal representation. Increasing legal representation increases costs and reduces consumer involvement, thereby increasing the likelihood of an outcome that favours the regulated entity.
Option 3 has the greatest likelihood that the review will result in a more balanced outcome.

11. In assessing the overall costs of options 2 and 3, how might these be lower or higher that Option 1? For example, what impact would reducing the number of reviews or the changes from a legalistic approach have on costs?

MEU: Option 2 is more likely to have lower costs than option 1 arising from there being fewer appeals, but the likelihood is that it will drift into a judicial process will benefit nobody other than the legal profession and network businesses. The largest cost is likely the continued disenfranchisement of consumers from the appeals process and the resultant bias that the process has in favour of the regulated firms.

Option 3 is preferred from the standpoint that consumers will be better enfranchised. Fewer reviews are likely compared to option 1. Consumers will be more empowered than in option 2 to provide countervailing arguments to claims by the regulated firm.

A significant concern with the merits review process is the uncapped regulatory costs that network businesses can pass through to consumers – these can easily increase costs for consumers whereas consumer appellants must carry their own costs with no opportunity to recover these.

If there is no effective constraint on network appellants recovering their appeal costs through the regulatory process (including the high cost lawyers used) then the frequency of appeals might not be constrained. The MEU considers there must be a limit on how much of the appeal costs can be

added to the regulatory costs allowed (and effectively paid for by consumers). There should be a cap of (say) 50% on review costs that appellants are able to pass through to consumers. Applying such a limit on cost recovery will require the network entities to balance the likelihood and benefit of overall success of an appeal against the costs they are likely to incur without being able to pass them onto consumers. The absence of some cost limitation will result in the new system being no different to the current flawed (and expensive) system, with its emphasis on legal teams and processes

12. How could currently covered Ministerial and NCC decisions be treated under each of the options? Would it be appropriate for such decisions to only be reviewable through judicial review?

MEU: The main area of concern the MEU has with the current LMR process relates to the approach regulated firms have taken in response to AER decisions. AER decisions are very complex and have extensive inter-relationships.

In contrast Ministerial and NCC decisions for energy issues tend to be less complex and much less frequent. However they are also less appropriate for having a "limited merits review" as currently required under the energy Laws. Ministerial and NCC decisions should be subject to a total review of the decision and are more likely to require judicial review rather than a limited merits review.

In contrast, reviews of such decisions are not appropriate by the Review Body which is being established to review regulatory decisions which are more subjective and balance competing aspects. As such it is not well structured to address Ministerial and NCC decisions.

The MEU therefore considers that Ministerial and NCC decisions should be subject to judicial review.