4 October 2016

COAG Energy Council Secretariat
GPO Box 9839
CANBERRA ACT 2601

By email: energycouncil@industry.gov.au

Dear Sir / Madam

Review of the limited merits review regime

CitiPower, Powercor, SA Power Networks, and Australian Gas Networks (the **Businesses**) welcome the opportunity to provide a submission in response to the Consultation Paper published by the Limited Merits Review Project Team in relation to the review of the limited merits review (**LMR**) regime contained in the National Electricity and Gas Laws.

In our view, the LMR regime should be retained but with amendments to that regime and the broader regulatory framework to address concerns that have been raised as to the effectiveness of the regime in achieving the stated policy intent.

The Businesses consider that the concerns that have been raised with the LMR regime essentially fall into three categories:

- the number of reviews;
- the time involved in the resolution of reviews; and
- obstacles to consumer participation in review proceedings.

The Businesses propose a package of amendments to the regulatory framework that are directed at addressing the concerns identified above, including:

- making the Rate of Return Guideline binding, and making it a reviewable regulatory decision and, in turn, removing the ability to seek merits review of rate of return issues in respect of individual AER decisions;
- inserting a requirement for expert conferences to occur as part of the Rate of Return Guideline process;
- doubling the financial threshold to be satisfied before leave for review may be granted, and changing the threshold so that it applies to each individual issue in respect of which review is sought;

- amending the merits review process to allow for expert conferences; and
- inserting a requirement on network service providers to engage with stakeholders as part of any merits review process.

The Businesses submit that the above reforms would address the number of reviews, the time the review process takes, and consumer participation in reviews.

Making the Rate of Return Guideline binding and a reviewable regulatory decision, such that there can only be one merits review of rate of return issues, will dispense with these issues being potentially raised and dealt with in multiple and overlapping proceedings. Limiting reviews in this way will also better facilitate consumer participation, as resources will be focussed on one process, as opposed to being spread across potentially a number of processes.

Requiring expert conferences as part of the development of the Rate of Return Guideline will operate to reduce the scope of any reviews on rate of return issues through better engagement and resolution of these issues as part of the guideline process. A more collaborative approach should narrow the issues in dispute, with any consequential review process being more efficient. This proposal will also assist in maximising the conditions for the best decision to be made by the AER.

Doubling the financial threshold to be satisfied before leave for merits review may be given, and having that threshold apply to each individual matter, as opposed to the matters in aggregate, may reduce the number of applications for review, and will reduce the number of issues taken on review. Review processes will therefore be focussed on issues of significance, with consequential benefits in reducing the time involved in review processes. Consumer participation will be facilitated as review processes are more streamlined.

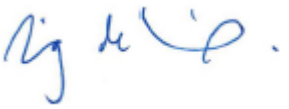
Allowing for expert conferences as part of any review process addresses concerns about reviews taking too long, and promotes the policy intent of achieving the most preferable decision and minimising material error. Improved engagement between stakeholder experts, and those experts and the Tribunal, will permit better identification of issues in dispute and understanding of those issues.

Finally, the Businesses propose that the obligation on network service providers to engage with stakeholders should continue through any review process. This would be an extension of the amendments that were made to the National Electricity Rules in November 2012 concerning stakeholder engagement. Businesses seeking merits review would be required to engage with stakeholders and to report to the Tribunal on that engagement. This will provide a further low-cost option for consumer involvement in merits review processes and complements the community consultation processes undertaken by the Tribunal in merits review proceedings.

The LMR regime is an important element of the regulatory framework. It is an appropriate safeguard that allows parties affected by AER decisions to seek review of those decisions, and for errors in those decisions to be corrected where to do so would be materially preferable in making a contribution to the objective set out in the National Electricity and Gas Laws. However, the Businesses recognise that some aspects of the LMR regime can be improved to address concerns that the regime may not be meeting the policy intent. The Businesses consider that the proposals set out above would provide an appropriate and proportionate response to the concerns that have been raised.

We would be pleased to clarify any aspect of this letter or the attached submission. We look forward to continuing to work constructively with the Limited Merits Review Project Team, the COAG Energy Council and other stakeholders through this review process.

Yours sincerely



Brent Cleeve
General Manager Regulation
CitiPower & Powercor

(03) 9683 4465

Wayne Lissner
A/General Manager
Corporate Strategy
SA Power Networks

(08) 8404 5391

Craig de Laine
General Manager – Regulation
Australian Gas Networks

(08) 8418 1129

Submission

1. This submission is made in response to the Consultation Paper published by the COAG Energy Council on 6 September 2016 relating to COAG's review of the limited merits review (**LMR**) regime in the National Electricity and Gas Laws.[1] This submission is made by:

    a. SA Power Networks—the electricity distributor in South Australia;

    b. Victoria Power Networks—comprising the CitiPower and Powercor Australia electricity distribution businesses in Victoria; and

    c. Australian Gas Networks—owner of gas distribution networks in Victoria (mostly Melbourne), South Australia (mostly Adelaide) and Queensland (mostly Brisbane), as well as in smaller centres in New South Wales (Albury, Wagga Wagga) and the Northern Territory (Alice Springs);

    collectively referred to in this submission as the **Businesses**.

2. The Consultation Paper identifies a number of concerns that have been raised by stakeholders in relation to the performance of the revised LMR framework which, in turn, has led the Energy Council to be concerned that amendments made to the limited merits review framework in 2013 have failed to deliver their policy intent.[2] The Businesses consider that the Consultation Paper and the extensive stakeholder discussions at the stakeholder consultation session held on 21 September 2016 reflected three primary areas of concern:

    a. Too many reviews: the Consultation Paper states that the 2013 legislative reforms were intended by policy makers 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.[3] The Consultation Paper notes however that over 50% of regulatory decisions on electricity network revenue and gas access arrangements since the 2013 reforms were implemented have been the subject of review.[4]

    b. Reviews take too long: the Consultation Paper states that the 2013 reforms were intended to deliver improved regulatory certainty by enhancing the rigor and transparency of the process and maintaining a legislated timeframe for completing reviews.[5] However, the Consultation Paper notes that the extended timeframes of reviews involved in the AER's determinations and Tribunal decisions have created uncertainty for consumers, the AER and network businesses.[6]

[1] COAG Energy Council, *Review of the Limited Merits Review Regime: Consultation Paper*, 6 September 2016 (**Consultation Paper**).

[2] Consultation Paper, p 10.

[3] Consultation Paper, p 10.

[4] Consultation Paper, p 10.

[5] Consultation Paper, p 12.

[6] Consultation Paper, p 12.

c. Inadequate provision for consumer participation: the Consultation Paper notes the policy intent for review processes to be as informal as practical in order to make them more accessible for stakeholders, to allow for a more interactive process, and to move away from the overly legalistic approach to the way proceedings were perceived to be run. The Consultation Paper notes feedback from stakeholders that Tribunal hearings continue to be formal and legalistic.[7]

3. After setting out some preliminary observations that the Businesses consider provide important context, this submission addresses the options that have been identified in the Consultation Paper, and sets out proposed amendments to the LMR regime that the Businesses consider address the key areas of concern identified above. The proposed amendments represent an appropriate and proportionate response to the concerns that have been identified and will significantly improve the operation of the LMR regime.

Preliminary observations

4. There clearly have been a number of merits review proceedings following the 2013 amendments to the LMR regime. These include applications for review of decisions made by the Australian Energy Regulator (**AER**) with respect to the NSW and ACT electricity distributors and the NSW gas distributor. The applicants for review of those decisions were the Public Interest Advocacy Centre (PIAC), the NSW and ACT electricity distributors, and the NSW gas distributor (the **NSW/ACT proceedings**). The key matters raised in that review related to the return on capital, operating expenditure, and the value of imputation credits. The Tribunal made determinations in those review processes earlier this year, and the AER has sought judicial review of those determinations. Applications for review have also been made in respect of decisions of the Economic Regulatory Authority of Western Australia (**ERA**) relating to ATCO Gas and the Dampier to Bunbury Natural Gas Pipeline, the decision of the AER with respect to SA Power Networks, and the AER's decisions relating to the Victorian electricity distributors and the ACT gas distributor.

5. There have been a number of AER and ERA decisions that have not been the subject of merits review since the 2013 amendments to the LMR regime. These include Australian Gas Networks, which did not seek review of the AER decision released on 26 May 2016 in respect of its South Australian distribution network (the review process for its Victorian network is scheduled to commence next year).

6. While there have been a number of merits review applications following the 2013 amendments to the LMR regime, that number should properly be considered against the background of a number of relevant matters including:

   a. the AER and ERA decisions that have been the subject of applications for merits review since the amendments to the LMR regime, have been made under the National Electricity and Gas Rules (together, the **Rules**) that were significantly amended by the Australian Energy Market Commission (**AEMC**) in late 2012, in particular with respect to the calculation of the return on capital. This had the impact of removing much of the precedent that had been set in relation to estimating rates of return;

   b. the approach taken by the AER to the assessment of forecast operating expenditure for electricity distributors, and the development of substitute

[7] Consultation Paper, p 11.

forecasts where the AER is not satisfied that the service provider's forecast is consistent with the requirements of the National Electricity Rules, is significantly different from past regulatory practice. Material aspects of the AER's approach were only made public by the AER in November 2014 and were not the subject of consultation before the approach was applied by the AER for the first time in draft decisions for the NSW and ACT electricity distributors in November 2014, and then in final decisions for those distributors in April 2015;[8]

c. the regulatory approach taken by the AER to the estimation of the value of imputation credits (gamma) (an important input to the corporate income tax building block) has changed following the AER's "re-evaluation" of the conceptual framework underpinning the value of imputation credits, and in all decisions to which the amended Rules have applied, the AER has applied a value of gamma of 0.4, despite the detailed consideration given to this topic by the Tribunal in 2011, which resulted in a gamma of 0.25; and

d. in relation to the return on debt, while the AER has adopted exactly the same approach to estimate the return on debt in all decisions to which the amended Rules have applied (being a 10 year transition from the current "on-the-day" approach to a "trailing average approach"), the AER's reasons for the adoption of that transition have differed significantly between the decisions made for the NSW/ACT network service providers, for SA Power Networks, and now for the Victorian electricity distributors.

7. The above matters provide important context as to why there have been more applications for merits review than policymakers may have envisaged when amending the LMR regime in 2013, and also the number and complexity of the issues that have been taken on review.

8. Experience under the LMR regime before it was amended in 2013 was that once the Tribunal made a determination in respect of a particular matter, the number of reviews, and the number of issues taken on review falls away. This pattern is starting to develop under the post-2013 LMR regime. For example, once the outcome of the NSW/ACT proceedings on the return on equity issue was known, SA Power Networks amended its application for review to remove the grounds for review in relation to the return on equity issue. Similarly, the South Australian Council of Social Service (**SACOSS**), which had made an application for review of the AER's decision for SA Power Networks, including in relation to the return on equity, effectively withdrew its application with respect to that issue. None of the Victorian electricity distributors have sought review of the return on equity. It is expected that once the outcome of the AER's judicial review application is known, this will further clarify the operation of the regulatory regime and, in turn, further narrow the scope for areas of disagreement between stakeholders as to key aspects of the regime and their application by the AER.

9. Therefore, to the extent there is a sense that the 2013 amendments to the LMR regime have not been effective because of the number of applications for merits review, the Businesses submit that amendments to the Rules, together with significant changes in regulatory practice, have been the primary drivers for reviews being sought of AER decisions. That is not to say of course that amendments to the Rules should not be made and regulatory practice should not evolve over time, rather that consideration should be given to the underlying causes of the number of applications for review since

[8] See for example: AER, *Final Decision: Ausgrid Distribution Determination 2015-16 to 2018-19: Overview*, April 2015, p 41.

the 2013 amendments to the LMR regime before a conclusion is reached that the amendments have been (or will be) ineffective in giving effect to the intent of the policy makers.

10. To a significant extent, the factors identified above have also contributed to the time that some of the merits review proceedings have taken and the sense that the 2013 reforms have not delivered improved regulatory certainty. The factors identified above have contributed to the number of issues taken on review (both by network service providers and user / consumer interest groups), the complexity of the issues and the amount of material associated with them.

11. The Tribunal made its determinations in the NSW/ACT proceedings and the ATCO gas proceedings within seven months of granting leave. The target time limit set out in the National Electricity and Gas Laws is three months. Given the importance of the issues involved—both in terms of revenue and the "precedential" effect the Tribunal determinations would be likely to have on future regulatory decisions and merits review proceedings—this time period and any associated perceived regulatory uncertainty should not automatically be considered disproportionate, and certainly not excessive.

12. A further factor that has contributed to the concern that recent review processes have resulted in uncertainty around pricing is the significant transitional arrangements that have applied to regulatory determination processes that have been the subject of review applications.

13. In the normal course, the AER makes its determination no less than two months prior to the commencement of the regulatory control period, and if merits review is sought of that decision, the outcome of the review process is generally known within the first year of that regulatory period and any impacts can readily be incorporated in prices in the remaining years.

14. However, the extensive transitional provisions that accompanied the November 2012 Rule amendments have had the consequence that the final decision of the AER, which is the decision that may be the subject of merits review, has been made after the five year regulatory control period has commenced (10 months after the commencement of the regulatory control period in the case of the NSW and ACT electricity distributors, four months in the case of the South Australian electricity distributor, and five months in the case of the Victorian electricity distributors).

15. The operation of the transitional provisions may have led to a heightened sense of uncertainty, however the circumstances that have given rise to that must be considered unique in the context of the major amendments to the Rules in November 2012 and the extensive accompanying transitional provisions.

16. Similarly, the time involved until final resolution of the NSW/ACT proceedings should be viewed as an exceptional case. The primary contributing factor to the length of time it will take until the issues in dispute are resolved is that the AER has not accepted the Tribunal's determination and has sought judicial review in respect of all matters that the Tribunal determined that a ground for review had been established, with the exception of one matter. It is not typically the case that judicial review is sought of Tribunal determinations relating to revenue determinations or access arrangement decisions. Indeed, under the LMR regime in the National Electricity and Gas Laws, only one other Tribunal determination has been the subject of judicial review proceedings. These proceedings were brought by SPI Electricity in relation to its Victorian electricity

distribution network and involved a narrow issue concerning the Tribunal's interpretation of section 71O(2) of the National Electricity Law.

17. The timeframes involved in any future review processes will fall as the amended regulatory regime, comprising the 2012 Rule amendments and the amended LMR regime, 'settles down', including through determinations of the Tribunal and the decision of the Federal Court in the judicial review of the NSW/ACT proceedings.[9] That is, the outcomes of these processes are likely to have the effect of addressing the identified concerns as to the number of reviews, and the time that the review process takes. Essentially, the amended regime has been in effect for too short a period for a proper conclusion to be drawn as to whether the amendments to the LMR regime achieve the intent of the policy makers.

18. In relation to the involvement of consumer participation, while more may be done to further increase consumer participation in merits review processes, the progress that has been made should be recognised.

19. The applications for review brought by PIAC in relation to the NSW distribution determinations were the first applications for review by a user or consumer interest group under the merits review provisions in the National Electricity and Gas Laws in respect of which the Tribunal has granted leave. PIAC raised grounds for review in its own applications for review with respect to the return on debt and forecast operating expenditure, and as an intervener it raised a ground for review concerning the determination of the equity beta.

20. SACOSS was not granted leave in respect of its application for leave to apply for review of the SA Power Networks distribution determination. At the leave stage the AER opposed leave to review being granted to SACOSS on the basis that, as required by section 71O(2)(c) of the National Electricity Law, SACOSS had not raised the relevant matters in a submission to the AER before the final decision was made.[10] The Tribunal found that as a consequence of the operation of section 71O(2)(c) there was no serious issue to be heard and determined as to whether a ground for review exists in respect of SACOSS's application.[11] This should not be seen as a failure of the LMR regime. In fact it highlights that those elements of the LMR regime that are directed to ensuring that all relevant issues are raised in the regulatory process, so that the regulator can consider the issue and receive submissions on that issue, and that any review by the Tribunal is a review based on the materials before the regulator, are operating as policy makers intended.

21. Since the 2013 amendments to the LMR regime, the Tribunal has instituted a community consultation process that provides a forum for any person, association or organisation to speak directly to the Tribunal on any issue in connection with the decisions being reviewed. The protocol adopted by the Tribunal provides that participants at the forum may have the assistance of legal advisers but such advisers are not to speak at the forum unless a member of the Tribunal asks the person making the submission a question, in which case the adviser may speak. The parties to the review, which includes the relevant service provider, are not permitted to speak at the public forum unless a member of the Tribunal asks them a question. At the community consultation conducted as part of the SA Power Networks merits review proceedings,

[9] In this regard, see observations made in the independent report on the telecommunications access regime, set out at paragraph 45.

[10] *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8, [20].

[11] *Application by South Australian Council of Social Service Incorporated* [2016] ACompT 8, [43].

10 user or consumer interest groups,[12] together with four users,[13] made oral submissions to the Tribunal on a range of issues. A number of written submissions were also made to the Tribunal.[14]

22. The above indicates that the experience since the 2013 amendments to the LMR regime is that the role of consumers in merits review processes has increased.

Potential options

23. The Consultation Paper identifies four options, described at a relatively high level, being:

    a. Option 1: Retain the Tribunal as the review body without legislative amendment (status quo)

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

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

    d. Option 4: Remove access to LMR

24. The Businesses submit that it is too early to form evidence-based conclusions as to whether the 2013 amendments to the LMR regime will achieve the intent of policy makers in amending the regime. Further, early indications are that the amendments are operating as intended, including in relation to consumer participation. However, the Businesses understand the concerns that have been raised and consider that thought needs to be given to amendments to the LMR regime that address those concerns and ensure the policy intentions will be met in practice. To this end, the Businesses have identified a number of amendments to the regime that should be considered, which are detailed in this submission. The Businesses support Option 2 with the suggested amendments outlined.

25. In respect of Option 3, the limitations of this option set out in the Consultation Paper are significant and, to the extent concerns have been raised as to the current merits review regime, wholesale replacement of the regime with something new and untested would be a disproportionate response.

26. Option 4 would remove access to LMR, leaving judicial review as the only avenue for seeking review of AER revenue determinations. However, as discussed in the following section, Option 4 is not a panacea for a number of concerns that have been identified, and in fact, may exacerbate some of the issues that most concern policy makers and other stakeholders, including the time that the review process adds before decisions that are the subject of review are final (regulatory uncertainty) and the extent and quality of consumer participation.

[12] National Irrigators' Council; UnitingCare Australia and Uniting Communities; Business SA; Riverland Energy Association; SACOSS; South Australian Financial Counsellors Association; Riverland Wine; Major Energy Users Inc, acting for Energy Users Coalition of SA; South Australian Chapter of the Electric Energy Society of Australia; Energy Consumers Australia. See: <http://www.competitiontribunal.gov.au/documents/act2015/ACT11of2015-Agenda.pdf>.

[13] Kym Baldock (The Better Drinks Co Pty Ltd); Gavin McMahon (Central Irrigation Trust); Barry Schier (Renmark Irrigation Trust); Brendan Sidhu (Jubilee Almonds and Century Orchards). See: <http://www.competitiontribunal.gov.au/documents/act2015/ACT11of2015-Agenda.pdf>.

[14] These included submissions from the Consumer Utilities Advocacy Centre, SACOSS, Bundaberg Regional Irrigators Group, and the National Irrigator's Council. See: http://www.competitiontribunal.gov.au/current-matters/community-consultations/act-11-of-2015/consultation-submissions>.

Assessment of judicial review

27. Unlike the LMR regime, judicial review will not provide a forum that is conducive to the participation of user or consumer interest groups.

28. First, there appears to be a real question whether user or consumer interest groups would have standing to bring judicial review proceedings,[15] as they may not be considered to be "a person aggrieved" as required by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). Therefore, the standing requirements may limit the stakeholders who may seek review of AER decisions.

29. Similarly there will be a question in any judicial review proceedings as to whether a particular user or consumer group or individual would be granted leave to intervene in those proceedings. Under the Federal Court Rules, a person may apply to the Court for leave to intervene. In deciding whether or not to grant leave, the Court may have regard to whether the intervener's contribution will be useful and different from the contribution of the parties to the proceeding and whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceedings as the parties wish.

30. A user or consumer group or individual could make an application to the Court to be made a party to the application, but it is within the Court's discretion as to whether it will grant the application.

31. Secondly, even if user or consumer interest group had standing to bring judicial review proceedings, or otherwise participate in proceedings as a party or intervener, cost orders may act as a disincentive to such groups (or individual consumers) instigating or participating in such proceedings. The court has discretion to award or not award costs. [16] However, the general rule is that costs will follow the event and that the successful party will receive costs unless there are particular circumstances that would justify a different order being made.[17]

32. Thirdly, in judicial review proceedings a party to a proceeding or an intervener cannot raise new grounds for review. What this means is that the issues in any judicial review proceeding are framed by the application that has been made, and it is not open to other parties to the proceeding to seek to raise other matters that the applicant has not raised in its own application.

33. Finally, the procedural limitations in judicial review proceedings are unlikely to foster broader consumer participation. In order to make submissions to the Court the user or consumer interest group or individual would need to make written or oral submissions to the Court and put forward relevant evidence in support of those submissions.

34. The aspects of judicial review proceedings highlighted above can be contrasted to the position under the National Electricity and Gas Laws.

35. First, under the National Electricity and Gas Laws, a user or consumer association may apply to the Tribunal for review of a revenue determination or access arrangement

[15] See: Consultation Paper, p 18; presentation of the Energy Consumers Association (Rosemary Sinclair), *ECA's Experience and Current Observations*, 21 September 2016, p 25.

[16] *Ruddock v Vadarlis* (2001) 115 FCR 229, 234

[17] *Ruddock v Vadarlis* (2001) 115 FCR 229, 234–235.

decision. It is not necessary for the user or consumer association to demonstrate that they are an "aggrieved person".

36. A user or consumer association may also intervene in merits review proceedings. While the leave of the Tribunal is required, the threshold is not substantial and it will be sufficient if the Tribunal is satisfied that the interests of the user or consumer intervener or its members are affected by the decision being reviewed.[18] Any person can intervene in a merits review proceedings if they have made a submission to the AER in respect of the decision being reviewed and while leave of the Tribunal is required, the Tribunal must grant leave to such persons.[19]

37. Secondly, there are significant protections for small/medium users and consumer interveners against orders as to costs in merits review proceedings. The Tribunal cannot make an order requiring a small/medium user or consumer intervener to pay the costs of another party to the review unless the Tribunal considers that they have conducted their case in a manner that has unnecessarily increased the costs of another party to the review or has otherwise wasted time.[20] The practice of the Tribunal has been not to award costs in proceedings under the National Electricity and Gas Laws. In connection with the merits review regime in the Gas Pipelines Access Law, the Tribunal has commented that costs orders should only be made in proceedings before the Tribunal where there are circumstances that justify the making of an order. The Tribunal considered that the power to order costs should be "exercised sparingly, and not so as to discourage participation in the review process".[21]

38. Thirdly, it is open to interveners to raise new grounds for review in merits review proceedings.[22] Interveners have used this ability to raise grounds for review in review proceedings that are unrelated to matters raised by network applicants.

39. Finally, the Tribunal is required to conduct merits review proceedings with as little formality and technicality, and with as much expedition as a proper consideration of the matters before the Tribunal permits, and the Tribunal is not bound by the rules of evidence.[23] These requirements, together with the 2013 amendments that oblige the Tribunal to consult with any user or consumer associations or interest groups that have an interest in the determination, enable broader stakeholder participation in any review process. This is in stark contrast to what would occur in judicial review proceedings.

40. The Consultation Paper identifies that the benefits of removal of the LMR regime include that reducing the avenues for review may reduce the overall timeframes for concluding determinations and it would also address the risk of participants seeking outcomes across multiple forums.[24] These benefits should not necessarily be accepted or overstated.

41. In terms of timeframes, neither should it be assumed that judicial review will provide quicker outcomes than merits review. A recent example is provided by the judicial

---

[18] National Electricity Law, section 71L(3)(c); National Gas Law, section 255(3)(c).

[19] National Electricity Law, section 71K(1); National Gas Law, section 254(1).

[20] National Electricity Law, section 71X(2); National Gas Law, section 268(2).

[21] *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 3, [8].

[22] National Electricity Law, section 71M(1); National Gas Law, section 256(1).

[23] *Competition and Consumer Act 2010* (Cth), section 103(1)(b) and (c), which applies to electricity and gas merits review proceedings pursuant to section 44ZZR(1) of that Act. See also: *Competition and Consumer Regulations 2010* (Cth), regulation 28M(1)(a) and (b), which applies to electricity and gas merits review proceedings pursuant to regulation 7B of that Regulation and section 44ZZR(2) of the *Competition and Consumer Act 2010* (Cth).

[24] Consultation Paper, p 18.

review proceedings brought by Telstra relating to a decision of the Australian Competition and Consumer Commission (**ACCC**). On 5 November 2015, Telstra applied to the Federal Court for judicial review of the ACCC's fixed line services access determination final decision.[25] The matter was heard in March 2016 and is still awaiting decision.[26]

42. As to the restriction of review opportunities addressing the risk of participants seeking outcomes in multiple forums, it should be understood that if an application is made for merits review as well as an application for judicial review, the judicial review proceedings are typically held in abeyance until the outcome of the merits review proceedings is known. The Businesses are unaware of a circumstance in which a network service provider has lodged both a merits review application under the National Electricity Law or Gas Law and a judicial review application in respect of the same AER decision and then pursued the judicial review application following the outcome of the Tribunal's determination.

43. Provisions of the ADJR Act guard against potential duplication of proceedings. The ADJR Act provides that the Court has discretion to refuse to grant an application for review of a decision because adequate provision has been made for review of that decision under another law.[27]

44. The Federal Court in the decision of *ActewAGL Distribution v Australian Energy Regulator*[28] indicated in the strongest terms that as a consequence of the availability of merits review under the National Electricity Law, applications for review of AER decisions are appropriately made under those provisions and if relief is sought under the ADJR Act, it is likely to be refused.[29] In a case where a service provider sought both merits review and judicial review of an AER decision under Victorian-specific legislation and continued with the judicial review proceedings where it had been unsuccessful in the Tribunal proceedings, Justice Foster held that even if the AER's decision had been in error (which he did not consider it was), he would have exercised the discretion to refuse to grant relief.[30] These cases serve to demonstrate that duplication of proceedings is highly unlikely merely because both judicial review and merits review of decisions are available. Rather, and consistent with the observations of Justice Katzmann in *ActewAGL Distribution v Australian Energy Regulator*, "in the normal course, if there were to be a challenge to the correctness of a decision of the AER…then that would be heard by the Tribunal".[31]

45. Finally, the availability of merits review under the National Electricity and Gas Laws should not be viewed as exceptional. Rather, revenue determinations and access arrangement decisions are appropriately the subject of merits review.[32] Recent independent reviews commissioned by the Australian Government have recognised the importance of the Tribunal in the regulatory framework and the importance of access to

[25] See: <https://www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-fad-inquiry-2013/judicial-review>.

[26] See Federal Court file number NSD1338/2015. Other examples include: Telstra's judicial review of ACCC decisions in access disputes relating to the line sharing service, which was filed on 29 August 2007, with a final decision being made on 7 November 2008 (see Federal Court file number NSD1744/2007; Telstra judicial review of ACCC arbitrations, which was filed on 1 January 2008, with a final decision being made on 17 July 2009 (see for example, Federal Court file number NSD69/2008).

[27] ADJR Act, s 10(2)(b).

[28] (2011) 195 FCR 143.

[29] *ActewAGL Distribution v The Australian Energy Regulator* (2011) 195 FCR 142, 184.

[30] *SPI Electricity Pty Ltd v Australian Energy Regulator* [2014] FCA 1012, [57].

[31] (2011) 195 FCR 143, 185.

[32] See discussion in: Administrative Review Council, *What Decisions should be subject to Merit Review*.

merits review.[33] The recent statutory review of telecommunications access regime, Chaired by Dr Michael Vertigan, noted the following matters which are equally, if not more, applicable to merits review under the National Electricity and Gas Laws:[34]

> The primary feature of Part XIC [of the *Competition and Consumer Act 2010* (Cth)] is that it affords the ACCC a high level of regulatory discretion…the panel is concerned that the wide-ranging discretions that the regime vests in the ACCC mean that the risks and costs of regulatory error are potentially very high, with virtually no checks and balances in place to curb any resulting harms. As a matter of principle it is inappropriate, and offensive to the norms of good government, that regulators should be left to regulate themselves.
>
> That is not to dispute the fact that regulatory delay itself carries cost for both industry and end-users. However, bad decisions taken quickly are not preferable to ensuring good decisions are taken, especially given the role those decisions play in determining the future of Australian telecommunications. Moreover, the panel believes that even were there reviews initially, and associated delays, the decisions reached in those review would help guide the process from then on, so that delays would not persist. Finally, the absence of appropriate control mechanisms may reduce regulators' incentives to ensure the quality of their decisions, underscoring the importance of ensuring effective oversight of the regulators themselves.
>
> All of these factors have contributed to the quality of decisions made under the competition provisions of the CCA, which have long been subject to full merits review…The precedents set in those reviews have been of great importance in enhancing the predictability and effectiveness of those provisions.

46. The Businesses submit that the above observations are apt in the context of merits review under the National Electricity and Gas Laws. The AER is provided with significant regulatory discretion under the Rules and the risks and costs of regulatory error are very high. Merits review by the Tribunal provides an appropriate check and balance in light of these risks and costs. The Businesses submit that removal of the LMR regime, as opposed to amendment to address properly founded concerns, would be a retrograde step.

47. The observations made in the statutory review of the telecommunications access regime extracted above are consistent with recent advice provided by the AER in its submission to the Energy Council Review of Governance Arrangements for Australian Energy Markets. The AER, in the context of a review into its own performance, noted:[35]

> The framework appropriately allows parties affected by our decisions to challenge them under merits review processes. However, it is important to note that outcomes under merits review can reflect a range of factors – uncertainty around interpretation of rules (particularly new rules), the operation of the merits review framework and the fact that there legitimately can be room for disagreement on a range of issues (such as rate of return issues) all affect outcomes under merits review.

---

[33] Ian Harper (Chair), Peter Anderson, Su McCluskey and Michael O'Bryan, *Competition Policy Review*, March 2015 (Harper Review), p 479; Michael Vertigan (Chair), Alison Deans, Henry Ergas and Tony Shaw, *Independent Cost-Benefit Analysis of Broadband and Review of Regulation: Statutory Review under section 152EOA of the Competition and Consumer Act 2010*, June 2014, pp 57–60.

[34] Michael Vertigan (Chair), Alison Deans, Henry Ergas and Tony Shaw, *Independent Cost-Benefit Analysis of Broadband and Review of Regulation: Statutory Review under section 152EOA of the Competition and Consumer Act 2010*, June 2014, p 59 (emphasis added).

[35] AER, *Review of Governance Arrangements for Australian Energy Markets: AER Submission on Issues Paper*, May 2015, pp 10–11.

> The regulator can make errors, particularly given the wide range of 'constituent decisions' involved in making a regulatory determination. During 2009 and 2010 a number of businesses successfully challenged some aspects of our determinations. In the past four years, we have seen fewer businesses seek review of our decisions, the grounds of appeal are narrowing, and even on the grounds that are being reviewed we are being more successful. To the extent these are relevant measures of the AER's performance they indicate fewer errors are being made in our decisions.

48. The comments of the AER set out above are particularly relevant insofar as they endorse the view that it can be expected that, following the introduction of a new regime or significant amendments being made to a regime, there may initially be elevated levels of review activity which eventually settles down as matters are clarified by the review body and the quality of regulatory decisions improves as a result of those review processes.

Option 2 proposal

49. The Businesses propose the following to address the primary concerns that have been identified:

    a. make the Rate of Return Guideline binding, and make it a reviewable regulatory decision and, in turn, remove the ability to seek merits review of rate of return issues in respect of individual AER decisions;

    b. insert a requirement for expert conferences to occur as part of the Rate of Return Guideline process;

    c. amend the financial threshold in the National Electricity and Gas Laws so that:

        i. the financial threshold applies to each matter in respect of which review is sought; and

        ii. the threshold is doubled to the lesser of $10 million or 4% of average annual regulated revenue;

    d. amend the merits review process to allow for expert conferences;

    e. insert a requirement on network service providers to engage with stakeholders as part of any merits review process.

50. As discussed in greater detail below the Businesses submit that, as a package, the proposal set out above addresses the three primary concerns: too many reviews; reviews take too long; and there is inadequate provision for consumer participation. This is particularly the case when considered alongside our expectation that the scope for reviews will narrow once precedent is again set on how to apply the new Rules following the conclusion of the current review processes.

51. The Businesses' Option 2 proposal is directed at reducing the number of reviews, primarily through making the Rate of Return Guideline binding and a reviewable regulatory decision, such that there can only be one merits review process of rate of return issues dealt with in the Guideline. This will do away with rate of return issues being potentially raised and dealt with in multiple, and often overlapping, proceedings. Limiting reviews on rate of return issues to one potential review process will also better facilitate consumer participation, as resources can be directed towards one process, as opposed to being spread across potentially multiple processes.

52. The insertion of a requirement for expert conferences as part of the development of the Rate of Return Guideline will operate to reduce the scope of any reviews on rate of return issues through better engagement and potential resolution of issues as part of the Rate of Return Guideline process. Further, a more collaborative approach will better crystallise issues in dispute, making any review process more efficient and effective, which will reduce the time involved in review processes. The requirement should also assist in maximising the conditions for the best decision to be made by the AER.

53. Amending the threshold for review should address concerns that too many issues are being taken on review that are not sufficiently material. Increasing the threshold and having it apply to individual matters that are raised as part of an application for review is likely to reduce the number of applications for review, and will reduce the number of issues taken on review. This will have the consequence that review processes are more streamlined and focussed on issues of significance, which should reduce the time that review processes take. Further, more focussed review processes should also assist consumer participation as review processes become more limited in scope.

54. Allowing for expert conferences as part of any review process addresses concerns about reviews taking to long. It also promotes the policy intent of achieving the most preferable decision and minimising material error. Providing for a better engagement between stakeholder experts, and the Tribunal, will allow for better identification of the issues in dispute and understanding of those issues. This should have consequential impacts in terms of reducing the time involved in merits review processes.

55. The final proposal, that there is a positive requirement on network service providers seeking review to engage with stakeholders, is an extension of the amendments that were made in the November 2012 rule change around engagement. The Businesses submit that continuing stakeholder engagement through any review process will provide another low-cost option for consumer involvement in regulatory processes.

56. More background and detail on the amendments the Businesses propose as part of supporting Option 2 is set out below.

Make the Rate of Return Guideline binding, and make it a reviewable regulatory decision

57. Currently the Rules provide for the AER to make a Rate of Return Guideline that sets out:

    a. the methodologies that the AER proposes to use in estimating the allowed rate of return; and

    b. the estimation methods, financial models, market data and other evidence the AER proposes to take into account in estimating the return on equity, the return on debt and the value of imputation credits.[36]

58. The Rate of Return Guideline is not binding, but if the AER makes a decision that is not in accordance with the guideline it must set out its reasons for departing from the guideline.[37]

[36] National Electricity Rules, clause 6.5.2(m) and (n) and 6A.6.2(m) and (n); National Gas Rules, rule 87(13) and (14).

[37] National Electricity Rules, clause 6.2.8(c) and 6A.2.3(c); National Gas Rules, rule 87(18).

59. The first (and so far only) Rate of Return Guideline was published by the AER on 17 December 2013.[38]

60. The Businesses propose that the Rules and the National Electricity and Gas Laws be amended to provide that the Rate of Return Guideline (which would need to be renamed to indicate its mandatory nature) is binding and that merits review may be sought of the Rate of Return Guideline decision, with no merits review of rate of return issues that are covered by the guideline in AER decisions that apply to individual network service providers.

61. The most significant issues that have been the subject of merits review proceedings, in terms of number and financial impact, have been in relation to the return on capital. Further, these issues are typically the most technical and document-intensive. The Businesses consider that if the Rate of Return Guideline was made both binding and a reviewable regulatory decision, and, in turn, rate of return issues dealt with in the guideline could no longer be the subject of merits review applications for individual network service provider decisions:

    a. there would be a significant reduction in the number of applications for merits review (particularly when considered alongside the expected natural reduction in appeals once precedent is set through the current review processes);

    b. to the extent merits review was sought of AER decisions, there would be fewer issues raised in those applications, making any such applications more streamlined and easier to deal with for all stakeholders, including the AER, user and consumer interveners, and the Tribunal;

    c. user or consumer intervener involvement may be better facilitated as any review on rate of return issues will be limited to, at most, one focussed review, as opposed to the issues potentially being dealt with in a number of different individual proceedings.

62. The Businesses recognise that a potential downside to making the Rate of Return Guideline binding is that it may reduce flexibility in dealing with changing market circumstances. However, as the Rate of Return Guideline is to set out methodologies that the AER proposes to use, together with estimation methods, financial models, market data and evidence it proposes to take into account, the Businesses expect that there will be sufficient flexibility in those matters to deal responsively to market conditions.

Requirement for expert conferences as part of the Rate of Return Guideline development

63. The Businesses propose that there should be a requirement for expert conferences to be held as part of the development of the Rate of Return Guideline. Expert conferences would assist in the following:

    a. narrowing the scope of issues, as the experts would be required to clearly identify areas of agreement and disagreement;

    b. providing a more efficient and focussed process that is directed to resolving, where possible, areas of disagreement;

[38] AER, *Rate of Return Guideline*, December 2013 (see: http://www.aer.gov.au/system/files/AER%20Rate%20of%20return%20guideline%20-%20December%202013.pdf>).

c. ensuring proper engagement by each of the stakeholders on the key issues, as opposed to the current process, which involves exchange of written expert material that may be at cross-purposes;

d. minimising the number of rate of return issues taken on review as a consequence of:

   i. improved decision making;

   ii. stakeholders feeling that the issues they have raised have been squarely engaged in by other participants in the process;

e. minimising the scope of the rate of return issues taken on review and the volume of materials involved as a consequence of:

   i. clear identification of areas of agreement and disagreement; and

   ii. the preparation of expert reports that are targeted to issues in dispute and that are directly engaged with these; and

f. increased confidence in the regulatory process for all stakeholders as the expert conferences will provide a constructive forum for the proper testing of the views held by experts.

64. The Businesses consider that a requirement for expert conferences in the development of the Rate of Return Guideline has much to recommend it. The current process, which largely revolves around exchange of written expert material, does not provide any sense that there is real and constructive engagement on the relevant issues. While there was significant consultation with stakeholders at the initial stages of the AER's "Better Regulation" project undertaken throughout 2013, with the use of working groups constituted by a range of stakeholders, that level of engagement was not maintained through the finalisation of AER positions on key issues. A requirement for expert conferences would go a significant way to addressing some concerns that stakeholders have about current regulatory processes.

Amendments to the financial threshold in the National Electricity and Gas Laws

65. Currently the financial threshold in the National Electricity and Gas Laws that must be satisfied before the Tribunal may grant leave is the lesser of $5 million or 2% of the average annual regulated revenue of the network service provider.[39] The Tribunal has held that the threshold applies to the matters raised in an application for review in aggregate, as opposed to applying to each matter individually.[40]

66. The Businesses consider that some of the concerns identified as to the number of reviews, the number of issues taken on review and, as a consequence, the time taken to resolve merits review proceedings, would be addressed if the financial threshold applied to each individual issue taken on review and was doubled to the lesser of $10 million or 4% of average annual regulated revenue. This would also assist in addressing the concern that not all matters taken on review are of such significance

[39] National Electricity Law, section 71F(2); National Gas Law, section 249(2).

[40] *Application by Energex Limited (No 4)* [2011] ACompT 4, [50]–[52].

that a decision different to the one made by the AER on that issue would be "materially preferable".

67. The Businesses recognise that increasing the threshold in this way may be in tension with the policy intent that material error is minimised and that the most preferable decision should be the aim of both the regulator and review body. However, policy makers may consider that increasing the threshold strikes an appropriate balance between the costs involved in the merits review process and the importance of the issues in respect of which review is sought, while assisting to address concerns as to the number of reviews and number of issues raised.

68. If the proposal to change the operation and quantum of the financial threshold is taken up, consideration could be given to the threshold not applying to particular matters where at least one other issue satisfies the threshold and the AER agrees that the threshold should not apply to other particular matters. It has been the case on a number of occasions that the AER has agreed with the service provider that an error has been made in respect of a particular issue (usually an error of calculation or transcription) following the filing of an application for merits review. Where the AER agrees, the financial threshold should not operate to prevent those errors from being addressed as part of any merits review process.

Amendment of merits review processes to allow for expert conferences

69. Related to the proposal above for expert conferences as part of the development of the Rate of Return Guideline is the proposal that the merits review provisions are amended to allow for expert conferences in Tribunal proceedings.

70. Allowing the Tribunal to hear directly from the experts that have been engaged by the parties to a proceeding would have a number of benefits including:

    a. allowing the Tribunal to get to the heart of an issue quicker, by understanding where there is consensus and where there is disagreement, with consequential benefits in reducing the time involved in merits review proceedings;

    b. permitting the Tribunal members to ask the experts the questions that they feel they need the answers to in order to understand any of the expert material, or to clarify it, so that the Tribunal makes the best decision possible;

    c. accountability of the parties and experts in developing and relying on expert material in the regulatory process before the AER which in turn is likely to maximise the conditions for the AER to make a correct initial decision; and

    d. a more robust review mechanism that encourages increased stakeholder confidence in the regulatory framework.

71. The Businesses recognise that amendments to the merits review provisions to allow for expert conferences as part of the merits review process should not undermine those elements of the framework that are directed at ensuring issues are properly ventilated as part of the regulatory process. That is, expert conferences should not provide a backdoor way for the introduction of material that was not before the regulator. The Businesses consider that it would be possible to craft the amendments to provide that the expert conferences are limited to, for example:

    a. clarifying the issues in dispute;

b. understanding or clarifying expert material that was provided to the AER;

c. testing propositions in expert material that was provided to the AER; and

d. issues that may be relevant to the Tribunal's determination of whether a materially preferable decision exists.

Require network service providers to engage with stakeholders as part of review process

72. Significant changes were made to the National Electricity Rules as part of the 2012 amendments that were directed at ensuring a greater level of engagement between network service providers and stakeholders. Amendments were made which required service providers to provide an overview paper with their regulatory proposal that set out:

    a. a description of how the service provider engaged with consumers in developing the regulatory proposal and has sought to address the concerns identified as a result of that engagement; and

    b. a summary of the regulatory proposal that explained the proposal in reasonably plain language to consumers.[41]

73. The Businesses propose that the requirement for stakeholder engagement should extend to any merits review process. The Businesses propose that where a service provider seeks merits review, the Business should be required to continue to engage with stakeholders as part of the review process and incorporate the outcomes of this engagement in submissions to the Tribunal.

74. This proposal for continued stakeholder engagement would provide consumers with another option to become involved in merits review processes. This option provides stakeholders with more choices vis-à-vis the merits review "involvement" spectrum, which already ranges from the stakeholder making its own application for review, being an intervener in a review, or participating in community consultation. It would add a further option for engagement and a low cost means for consumer engagement in LMR, in addition to the other options for engagement that presently exist. It also complements the Tribunal community consultation processes.

75. The Businesses submit that the proposal to continue stakeholder engagement as part of any merits review process would assist in addressing concerns about the engagement of stakeholders other than the service provider and the AER in merits review proceedings..

<u>Process and next steps</u>

76. The LMR regime is an important element of the overall regulatory framework. Appropriate time and care must be taken to ensure that decisions about the regime are properly informed and any changes that are made take into account the entire operation of the decision-making framework. Rushed changes that do not allow time for genuine consultation and consideration by stakeholders undermines confidence in the broader regulatory scheme and erodes goodwill.

[41] See for example, National Electricity Rules, clause 6.8.2(c1)(1) and (2).

77. The Businesses therefore commend to the Senior Committee of Officials, and the Energy Council, that they adopt a process that is proportionate to the issues involved. At a minimum, once the Senior Committee of Officials has provided its final advice to the Energy Council in December 2016, there should be a stage 2 process that explores viable options in sufficient depth, and preferably involving suitable independent expertise.

Summary response to complete list of questions

Question	Response
1. Are there any specific factors which prevent issues being resolved through the determination process?	The Businesses consider that better, and earlier, engagement on key issues would assist in resolving more issues (or at least narrowing their scope). To this end the Businesses have proposed with respect to return on capital issues that there is a requirement for expert conferences as part of the Rate of Return Guideline processes: see paragraphs 63–64. There would be considerable benefit in adopting such an approach in other key areas where new regulatory approaches are being adopted, for example, the assessment and determination of forecast operating expenditure requirements (referred to at paragraph 6.b).
2. Are reviews generally considered a routine part of the determination process?	Reviews are not considered a routine part of the determination process. The Businesses fully engage in the determination process with a view to resolving any areas of difference and a final determination being made that is consistent with the requirements of the Rules and the Laws.
3. Does the framework enable reviews to focus primarily on the long term interests of consumers?	Reviews are focussed on the long term interests of consumers. This starts with the Rules, which may only be made if the AEMC is satisfied that the Rule will or is likely to contribute to the achievement of the objective—which is the promotion of efficient investment in, and efficient operation and use of, electricity services / natural gas services for the long term interests of consumers. The Tribunal may only vary or remit a decision where there has been an error made which has the effect that the requirements of the Rules and the Law have not been met. That is, the AER has made an error or errors of fact, exercised its discretion incorrectly, or the decision is unreasonable. The 2013 amendments to the LMR regime then operate to ensure that correction of any such errors is undertaken in a broader context that considers interrelationships and the decision as a whole against the achievement of the objective.

Question	Response
4. To what extent does the current LMR process support materially preferable decisions being made for the long term interests of consumers?	For the reasons given in response to question 3 above, the current LMR process supports materially preferable decisions being made for the long term interests of consumers. Further, not only does the Tribunal have to be satisfied of error in the AER's decision before it can vary or remit the decision, the Tribunal must separately consider whether it is satisfied that if it did vary or remit the decision, this will, or is likely to, result in a decision that is materially preferable to the achievement of the objective.
5. Are there any other issues which impact on the delivery of regulatory decisions that serve the long term interests of consumers?	To the extent issues have been identified with the operation of the regulatory regime and the impact of these issues on the delivery of regulatory decisions that serve the long term interests of consumers, the package of proposals set out at paragraph 49 will address these issues, as explained in paragraphs 51–55.
6. Are the current grounds for review sufficiently robust to avoid undue weight being placed on minor matters in merits reviews?	The various elements of the LMR regime combine to avoid undue weight being placed on minor matters in merits reviews. These elements include the "materially preferable" threshold. However, it is recognised that more can be done to address concerns that minor issues are being taken on review, and to this end the Businesses have proposed doubling the financial threshold that applies before leave may be granted to make an application for review, and also to apply that threshold to individual issues taken on review: see discussion at paragraphs 53, 65–68.
7. Are there any issues with the scale and scope of material that can be brought forward in relation to reviews?	The Businesses have not identified any issues with the scale and scope of material that can be brought forward in relation to reviews. Recent decisions have indicated that those elements of the Laws that are directed at the policy intent of ensuring that matters raised as part of a review were raised before the AER are working: see discussion at paragraph 20.

Question	Response
8. Is there a way to minimise the regulatory impost of maintaining a record of decision making as part of any future reforms?	The Businesses are not aware of any particular issue that has been raised as to the regulatory impost of maintaining a record of decision making. However, if there is an issue about this, the Businesses would be happy to work with the AER and other stakeholders to identify any improvements to the regulatory process to reduce such impost.
9. Are there any barriers to the Tribunal seeking additional expert advice? If so, how could these barriers be addressed?	It is likely that the elements of the LMR regime that have been interpreted to limit the matters that may be considered by the Tribunal in making a determination are a barrier to the Tribunal seeking additional expert advice, to the extent that advice raises matters that were not raised as part of the regulatory process. The Tribunal is permitted to have regard to new information where it is of the view that a ground for review has been made out, but the limitations placed on that material are probably such that they also would operate as a barrier to the Tribunal seeking additional expert advice. The Businesses have proposed that expert conferences could be held as part of the Tribunal process (see discussion at paragraphs 69–70) and suggest some limitations to that process in order to balance the policy intent that issues are raised as part of the regulatory process, while allowing the Tribunal more direct access to expert views (see paragraph 71).
10. Is participation without legal representation possible? Are there barriers hindering full consumer participation in the review process?	The Businesses do not offer a view on this question.
11. How costly has your participation in the appeal process been and what are the implications of this participation for you?	The experience of the Businesses is that, as an applicant for review, the external legal costs associated with a merits review process is in the order of $350,000 - $850,000 depending on the number of issues raised. There are of course internal costs incurred in any review process that will be taken into account in deciding whether review should be sought of a decision, including diversion of resources to the review process.

Question	Response
12. What are/were your expectations of how the Tribunal would consider the input from consumers?	Of the Businesses, only SA Power Networks has been a party to a merits review process post the 2013 amendments to the LMR regime. The Tribunal has not yet delivered a determination in that matter, but SA Power Networks expects that the Tribunal will reflect on the submissions that were made as part of the community consultation process in considering whether grounds for review have been established, and whether a materially preferable decision exists.
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 Businesses consider that their proposal to allow expert conferences as part of the merits review process will assist in ensuring the Tribunal has sufficient evidence to inform its decision making and will also assist in reducing the time involved in the merits review process. See discussion at paragraphs 54, 69–71. Further, the proposal for expert conferences to be held as part of the development of the Rate of Return Guideline may also assist in this endeavour. See discussion at paragraph 52.
14. What has been the impact of the extended timeframe of review processes? How could these impacts be addressed?	From the Businesses' perspective, they are not aware of any particular impacts of the timeframes associated with review processes that need to be addressed. In relation to the SA Power Networks merits review process, the Tribunal has indicated that it will hand down its determination this month (October 2016), which will be five months after the Tribunal gave leave to apply. There is some ongoing uncertainty as a consequence of the AER's appeal of the NSW/ACT proceedings in relation to the valuation of imputation credits, which has broader implications for the regulated energy sector and stakeholders. However, for the Businesses' part, it is recognised that this uncertainty is part and parcel of the regime settling down post the 2012 amendments to the rules and the 2013 amendments to the LMR regime.

Question	Response
15. What would be the impact of maintaining the current regime?	The Businesses consider that it is important the current regime is maintained as it provides an important avenue for addressing errors in AER decisions, which is important for all stakeholders. That said, the Businesses recognise that some elements of the regime can be improved to better achieve the stated policy intent, and therefore has set out a proposal to address the concerns that have been raised. See paragraph 49 for the elements of that proposal, and paragraphs 51–55 for a discussion of how those elements go to addressing the concerns identified.
16. What amendments, if any, would you propose to achieve the policy intent of the 2006 and 2013 LMR reforms?	See paragraph 49 for the elements of the Businesses' proposal, and paragraphs 51–55 for a discussion of how the various elements of the proposal would 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?	The Businesses have proposed that expert conferences be allowed as part of the LMR regime and consider that this will assist in better clarifying issues and the Tribunal making the best decision possible. See paragraphs 69–71.
18. What are the risks of establishing a new review body? Are there any challenges associated with implementing this option?	The Businesses do not support replacement of the Tribunal with a new investigatory body: see paragraph 25. There are considerable risks with establishing a new body and the Businesses do not consider that the evidence as to the operation of the LMR regime to date support replacement of the Tribunal as the review body. Consideration should be given to further refinements to the LMR regime to address identified difficulties with the regime. To this end the Businesses have set out a package of proposals at paragraph 49.
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?	See response to question 18.

Question	Response
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?	See response to question 18.
21. What role and structure could a new review body have? Are there any examples of a sector specific body that could be applied to energy?	See response to question 18.
22. Do you have any suggestions for how a new investigatory body could be appropriately resourced?	See response to question 18.
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?	The Businesses do not support removal of LMR: see paragraph 24. A discussion of the potential consequences of judicial review being the only review mechanism is set out at paragraphs 27–41. The Businesses consider that removal of merits review will have a number of significant consequences, including giving rise to considerable regulatory uncertainty and reducing the accountability of the AER. These consequences will, in turn, have implications for efficient investment in, and operation of, electricity services for the long term interests of consumers. If access to LMR was removed, detailed and serious consideration would need to be given to the economic regulatory rules applying to electricity and gas networks. This would be necessary to ensure that the decision-making rules applying to each of the constituent decisions was appropriate in light of the possibility of regulatory error occurring and that such regulatory errors could no longer be corrected through merits review.

Question	Response
24. In circumstances where redress is sought through judicial review processes, what mechanisms could be put in place to better support consumer or user participation?	As identified at paragraphs 28–33, judicial review processes are not conducive to consumer or user participation (other than large user participation). It is difficult to see what mechanisms could be put in place to support consumer or user participation in judicial review processes without fundamentally changing the nature of judicial review.
25. Should all access to merits review be removed or only for electricity revenue determinations and gas access arrangement decisions?	As the Businesses do not consider that LMR should be removed, they do not offer any comment on this question.
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?	See paragraph 49 for the elements of the Businesses' proposal, and paragraphs 51–55 for a discussion of how the various elements of the proposal would achieve the policy intent of the 2006 and 2013 LMR reforms.