energy networks association

REVIEW OF THE LIMITED MERITS REVIEW REGIME

Response to the COAG Energy Council Consultation Paper

3 October 2016

CONTENTS

1. EXECUTIVE SUMMARY

Australia's energy regulatory regime, including limited merits review, exists to serve the long-term interests of consumers. The interests of consumers and energy networks are aligned in achieving a high-quality regulatory regime that ensures that consumers pay no more than necessary for the services that they value.

Like the COAG Energy Council, the Australian Energy Regulator (AER) and consumer groups, network businesses represented by the ENA would prefer that the setting of regulated revenues for network businesses was done constructively and was not characterised by multiple protracted and adversarial appeals.

Network businesses share the view that retaining the status quo in the limited merits review regime is not appropriate and that reform options should be evaluated to serve the long-term interests of consumers. This submission sets out a range of proposals to achieve better outcomes by addressing the underlying factors which currently impact the regime while ensuring consumers retain the benefits of a robust regulatory framework. It also provides evidence supporting these solutions and their benefits to consumers.

Solutions which address the underlying drivers

There are a number of changes to the regime which network businesses have identified to address underlying drivers of appeals. These are:

1. Introduction of a single, binding and reviewable rate of return determination;
2. A doubling of the financial thresholds for appeal, and these thresholds applying to each ground of review;
3. More investigative and collaborative operation of the AER determination process; and
4. Enhancement of the investigative powers of the Australian Competition Tribunal.

Merits review is in the long term interest of consumers

Limited merits review is a feature of the Australian regulatory regime because it contributes to the long-term interests of consumers. The COAG Energy Council noted in 2012 that it served the National Electricity Objective, including by "*…maximising the conditions for the decision maker to make a correct initial decision by providing an accountability framework that drives continual improvement in its original decision making*".

Consumers have a direct interest in a workable, efficient and timely merits review regime. It allows correction of material errors and supports the quality of regulatory decision-making. It puts downward pressure on energy bills because it directly reduces the most significant cost borne by network users, the cost of capital for long-life network infrastructure.

Consumers directly benefit from lower prices arising from low-cost financing made possible by investor confidence in the presence of 'checks and balances' within the regulatory framework. This is significant in a sector with over $44 billion of existing private investment and annual debt financing requirements of over $7 billion.

Given the significant impacts that variation in financing costs have on both investors and consumers it is critically important that the appropriate checks and balances are part of the framework. To do otherwise, for example by abolishing merits review altogether, could be perceived by Australian and international investors as governments 'legislating away' appeal rights because governments did not prefer the findings of the independent Australian Competition Tribunal and have sovereign risk implications. The recent stakeholder forum heard direct evidence from capital providers that this would raise material concerns of a change in the risk profile of the Australian energy regulatory regime.

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

Access to merits review also offers protection to regulated businesses and consumers against materially erroneous or low quality regulatory decisions that would otherwise go uncorrected. It should be noted that the abolition of the LMR regime would remove the rights of consumers and their advocates to challenge the merits of AER determinations.

An international expert opinion from the former Chair of the UK Competition Commission notes merits review is a normal part of developed, high quality regulatory regimes which rely on the attraction of significant private sector investment (see Attachment C.1). This is particularly important where a high level of discretion in regulatory decision making exists. Those regimes have been subject to improvements and changes over time where appropriate. This perspective is reinforced by recent reviews and reforms in relation to both the New Zealand and UK review regimes.

Judicial review is not an appropriate or workable alternative

Judicial review cannot deliver the critical benefits and accountabilities of limited merits-based review. This has been recognised by a range of parties, including the Productivity Commission, the former ACCC Chair, and the recent COAG Energy Council Governance review.

The implementation of Option 4 in the Consultation Paper would reduce overall accountability, lower incentives for high-quality primary regulatory decisions, create a higher risk of significant regulatory errors, promote higher cost and legalistic Court-focused reviews, and increase the barriers for consumer groups to be meaningful involved in future appeal proceedings.

The Consultation Paper suggests that a recent High Court case may have significantly expanded the scope of judicial review in a way that could mitigate the abolition of limited merits review. This is not supported by independent administrative law analysis. The ENA has attached expert opinion from prominent administrative law academic, Professor Margaret Allars SC, on the recent High Court case of *Li*[1]. Professor Allars SC finds there is no basis to conclude that judicial review has recently been expanded in scope in a way that is relevant to the Energy Council's decision-making task. That is, judicial review remains narrow in scope and limited in its capacity to address potentially critical flaws in AER determinations and reasoning. These inherent limitations have previously led both the Yarrow Panel and COAG Energy Council to reject the use of judicial review as an accountability mechanism.

Abolition of limited merits review would also be inconsistent with the increasing recognition that it is required in other sectors. For instance, the independent review of telecommunications access regulation undertaken by the Vertigan Panel recently recommended merits review be introduced because of its critical impacts on the quality of regulatory decision-making and benefits to consumers.

Assessing the reforms needs take into account underlying drivers of outcomes

The 2013 package of reforms has clearly delivered on some of COAG Energy Council's stated objectives, including:

- Identifying and addressing material errors in the AER decisions in the NSW and ACT determinations;
- Increasing the use of remitted decisions, rather than remaking decisions;
- Greater consumer involvement in appeals; and
- Explicit evaluation at the leave and appeal stages of the long-term interest of consumers as per the National Electricity Objective and National Gas Objective.

In other areas, there are remaining and justifiable stakeholder concerns about the effectiveness of the 2013 SCO package of reforms, including:

- Too many reviews and multiple review processes being needed to resolve single issues
- Lack of agreed clarity on the meaning and interpretation of 'materially preferable';
- Overly adversarial determination and review proceedings;
- Delays and uncertainty over future network prices; and
- Concern over whether small or non-material errors are subject to limited merits review.

As noted in the expert opinion of the former Chair of the UK Competition Commission, the mere presence of a number of appeals of AER decisions is not evidence of frivolous or 'gaming' behaviour by networks. The ENA notes that in 2015 the AER stated it regarded appeals and appeal outcomes as indicative of the quality of its decision making:

> *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.*[2]

[1] Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

[2] AER *Submission to Review of Governance Arrangements for Australian Energy Markets - Issues Paper*, 15 May 2015, p.10

It is neither surprising nor inappropriate that appeals occur in an environment where the regulator has used new rules and regulatory processes to make historically significant decisions. Limited merits review assists the transparent clarification of new rules and the exercise of expanded regulatory discretion in a complex regulatory environment.

Nevertheless, the process appears unnecessarily protracted and has required individual businesses to appeal on the same matter. Changes to the regime can address these undesirable outcomes. However, it is important that the COAG Energy Council review addresses the genuine factors leading to these identified issues; and that it does so at an appropriate time. If changes were introduced immediately, the limited merits review arrangements would be undergoing changes within cycles that are effectively shorter than individual network pricing determinations. These considerations were the original basis for the existing NEL and NGL requirement to review the limited merits review within seven years of its commencement, rather than twice within four years.

Some of the key reasons for the current high number of reviews are attributable to a range of drivers that lie outside of the limited review framework. This implies that reforms to address these drivers will logically go beyond the review framework, and could include, for example, any findings arising from the pending review of the potential need for increased resourcing for the AER, or changes to the length and consultation steps of network determination processes.

Proposed way forward – networks propose targeted proportionate reforms under Option 2

ENA has undertaken significant analysis and sought expert advice on the options proposed. This analysis and advice concludes that the approach most consistent with achieving outcomes that promote the long-term interests of consumers, and achieve the outcomes consistent with the SCER Statement of Policy Intent, is implementation of package of proposed reforms to the merits review regime that are targeted and proportionate.

Therefore, networks propose a set of targeted and proportionate reforms consistent with Option 2. This approach will address identified issues, but continue to provide the acknowledged benefits of limited merits review.

ENA has also undertaken some evaluation of Option 3. As the Consultation Paper itself notes, there is currently insufficient detail associated with this option to provide a full assessment of its capacity to meet COAG Energy Council's stated policy objectives.

ENA recommends that the Energy Council should be advised by the Limited Merits Review Project Team that:

a) Neither Option 1 (status quo) or Option 4 (removal of limited merits review) are likely to meet the desired policy objectives for review arrangements;

b) There are a range of potential reforms which could be made under Option 2 such as a reviewable binding rate of return determination, higher materiality thresholds as well as more investigative approaches to determinations and Tribunal review processes, which should be developed for implementation; and

c) Option 3 could be further explored and defined to enable a definitive assessment to be made of its strengths, weaknesses, benefits and costs.

2. BACKGROUND

The Energy Networks Association (ENA) is the peak national body representing gas distribution and electricity transmission and distribution businesses throughout Australia.

Energy networks are the lower pressure gas pipes and low, medium and high voltage electricity lines that transmit and distribute gas and electricity from energy transmission systems directly to the doorsteps of energy customers.

Twenty-five electricity and gas network companies are members of ENA, providing governments, policy-makers and the community with a single point of reference for major energy network issues in Australia.

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

3. CONTEXT FOR REVIEW OF LIMITED MERITS REVIEW

3.1 Benefits to interests of consumers of merits review

As the COAG Energy Council has set out in its 2012 Statement of Policy Intent, the presence of merits-based review mechanisms provides a range of key benefits to the regulatory framework (See ***Information Box 1***).

The safeguards against regulatory errors provided by merits reviews reduces uncertainty for investors in regulated networks, who are typically making very long-lived investments, and so face cost recovery over long and otherwise uncertain horizons. Such safeguards contribute to lower cost of capital in funding network infrastructure and, therefore, the costs borne by consumers over the long-run.

The availability of merits review also offers protection to regulated businesses and to consumers against materially erroneous or low quality regulatory decisions that would otherwise go uncorrected. It is important to recognise that abolition of the limited merits review regime would remove consumers' rights to challenge the merits of AER determinations as much as network owners' rights.

Information Box 1 - COAG Standing Council on Energy and Resources – Statement of Policy Intent

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

By providing checks and balances, merits review enhances the accountability of the regulator, improves the incentive on the regulator to deliver the best quality decision possible, and also promotes confidence (amongst consumers and investors) in the regulatory process.

Review by an independent adjudicator protects society against unbalanced regulatory decisions. Internationally, best practice regulation recognises the need to avoid decisions influenced by either 'regulatory capture" (where the regulator favours the vested interests of businesses it regulates) or conversely by a mistaken notion that it should act as a champion of the short-term interests of consumers – to the detriment of their long-term interest in impartial decision-making.

Merits reviews can help clarify how complex regulatory rules (in this case the *National Electricity Rules* and *National Gas Rules*), and economic and legal principles, should be interpreted and applied. The regulator can use interpretive precedents to refine and improve its future decisions. In addition, if incorporated into regulatory decision-making, the precedents provided by merits review decisions also help clarify to consumers and networks how the rules and regulatory principles should be interpreted and applied. This helps support continuous improvement and best practice regulation and the development of stable and predictable regulatory frameworks over time.

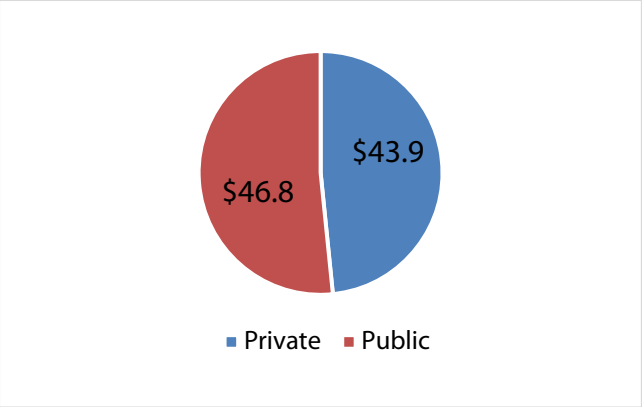
3.2 Merits review and private sector investment

Australia's energy network sector features significant existing and ongoing private sector investment, which is reliant on efficient and ready access to debt and equity capital.

Private sector capital investment in Australian energy networks totals around $44 billion, and approximately $7 billion of public and private debt financing and refinancing is required each year (**See Figure 1**). Using data and benchmark assumptions by the AER, privately-owned networks are likely to face a total private debt financing task of approximately $4.4 billion per annum to underpin the efficient financing of existing assets, and financing of new capital investment approved by the AER.

Globally, investors in network services and long-lived infrastructure make capital allocation decisions based on confidence in the transparency and stability of the relevant regulatory regimes. The review of the limited merits regime has already heard substantial evidence from a range of large infrastructure investors and providers of debt finance on this issue.

Figure 1 – Private sector network assets subject to energy access regimes



Source: AER *State of the Energy Market 2015*

The COAG Energy Council's recent public consultations heard direct evidence from banks and capital providers that:

1. The stability of the regulatory regime and the presence of sufficient checks and balances to address poor quality decisions is a key consideration which would impact the cost and availability of capital funding;
2. The issue of broad investor confidence in whether the stability and accountability of a regulatory regime is sufficient to warrant consideration for investment is 'binary'; that is, investors and capital providers will simply 'screen out' consideration of investment opportunities that do not meet a minimum level of investor confidence.

It should be noted that the response from domestic and international capital markets would be unlikely to be uniform. The review has heard evidence that domestic providers of debt finance may seek to apply a 'deeper' holistic assessment of the changes to the regime, thereby increasing the risk assessment when determining the cost of funds. By contrast, the response of foreign capital providers may be to limit exposure to the Australian market if faced with the removal of adequate checks and balances to offset regulatory discretion. The forum was told that some capital providers may simply not consider investment or financing in the absence of such check and balances.

These insights are consistent with independent survey evidence recently published by the Royal Bank of Canada. RBC Capital Markets' *ASX Network Utilities: Investor survey on regulation* found that:

> *Overwhelmingly, investors are of the view that a merits review mechanism is a crucial aspect of the Australian regulatory regime.*[3]

Specifically, eighty-five per cent of investors surveyed considered merits review to be crucial in ensuring accountable and transparent decision-making by the AER, up from 61 per cent in a prior survey conducted in 2013 (See Figure 2 below).

The report also found that:

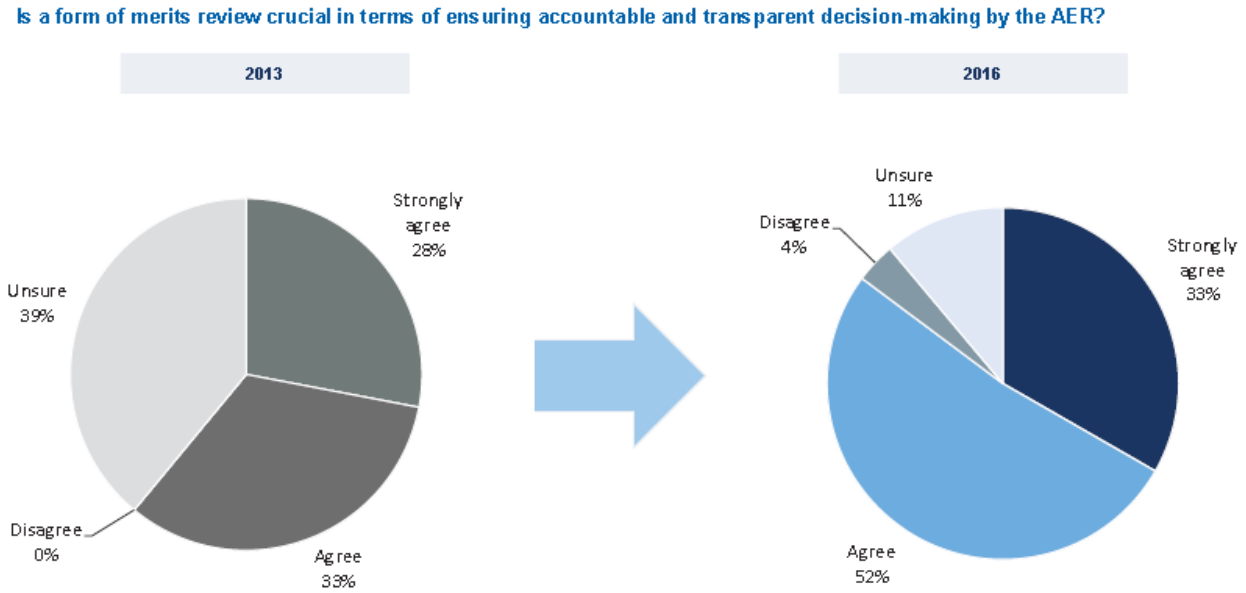
- 75 per cent of investors considered the AER's decision to seek judicial review of the Tribunal's NSW and ACT determinations added to regulatory uncertainty;
- Should the current limited merits review mechanism be removed, around 50% believe that the cost of capital will modestly or significantly increase as a result, and less than one in three (28 per cent) consider it would have no or little impact.

In addition to the perspectives raised at the forum, and prior to the review's initiation, there is also significant evidence that debt ratings agencies routinely place significant weight not just on the totality of regulatory regime arrangements, but on the specific avenues of access to review, taking into account the AER's wide discretionary powers in the current regulatory framework. As an example, Moody's recently reported that:

> ***Appeal process balances the Australian Energy Regulator's (AER) discretionary powers***. *The ability of the networks to contest the regulator's revenue/tariff decisions evidences limits on the increase since 2013 in the AER's level of discretionary power, and* ***reinforces the transparency and predictability of the regulatory framework, a fundamental credit support for the networks***.[4] (emphasis added)

Removal of limited merits review would be a concern for all parties, including consumers, because such removal risks triggering a reassessment of the transparency and predictability of the Australian energy regulatory regime, which is a critical input into ratings agency's assessments. Final energy bills have the potential to be critically impacted by small changes in financing costs associated with credit ratings.

Figure 2 – Investor views on importance of merits review – RBC Capital Survey



[3] Royal Bank of Canada Capital Markets' *ASX Network Utilities: Investor survey on regulation*, 3 August 2016, p.13

[4] *Australian Regulated Electricity and Gas Networks – 2017 Outlook*, Moody's, 14 June 2016

As an example, a mere 5 basis point (0.05%) addition to the existing weighted average cost of capital would lead to an increase in financing costs of approximately $250 million over a five-year regulatory period. A more substantial capital market response, for example flowing from a 'one-notch' downgrade in credit metrics of around 20 basis points (or 0.20%), would equate to a potential increase in financing costs borne by consumers of approximately $1 billion over five years.

The interaction between financial markets and the regulatory framework including limited merits review, albeit in a different form to the current arrangement, is important to keeping the weighted cost of capital at an appropriate rate over the long term, aligning the needs of investors with the needs of consumers. However, it is also recognised that this aspect alone can give rise to multiple appeals under the current regulatory arrangements due to the AER's current Rate of Return guideline arrangements and regulated revenue decision timings. For this reason, the ENA and its member businesses are proposing a single, binding and reviewable rate of return determination which would then apply to all regulated revenue decisions (See Section 5.1).

3.3 Merits review and the wider regulatory framework

3.3.1 Role of merits review in balancing regulatory discretion

It is important for the review to recognise that the limited merits review regime applies in the context of a regulatory regime which features, appropriately, significant regulatory discretion. Access to merits review is important where regulatory decision-making does involve relatively wide discretion in the application of law or statutory rules. It is particularly important to lowering investment risk and costs where the application of the discretion impacts substantially on private property rights.

The National Electricity and Gas Law and associated rules provide extensive discretionary powers to the Australian Energy Regulator. Illustrative examples of these powers are set out in Information Box 2

These powers occur in parallel to extensive State and Territory laws, regulation and license requirements that typically impose mandatory obligations to connect and provide a required level of service requiring some level of non-discretionary investment.

Information Box 2 - Scope of AER discretionary powers under the National Electricity and Gas regime

As an example, under the National Electricity and Gas Law and statutory rules, the AER is empowered to:

- Set prices and allowed revenues on private sector infrastructure investments
- Change the types of services that are regulated and which are unregulated
- Disallow the recovery of actually incurred operating costs
- Retrospectively deem private capital investment that serves customers to be imprudent and partially or fully disallow the recovery of costs
- Control when and how network costs can be recovered over the life of the assets
- Set the level of recoverable cost of equity and debt on past investments, without reference to actually incurred costs

Consequently, the AER's regulatory powers to determine which services are regulated and to set the prices and revenues permitted to be recovered do not occur in isolation, nor do they merely impact on *discretionary* levels of future investment. Rather, they are imposed in the broader context of a mandatory ongoing obligation to invest sufficiently to deliver the required services safely and reliably into the future.

Clearly, the removal of limited merits review could be perceived as a sovereign risk event to investors of over $100 billion in capital. This matters to Australian energy consumers because the cost of capital and timeliness of infrastructure delivery has a direct impact on the bills and service quality received by Australian households and businesses.

These circumstances led the COAG Energy Council's expert panel to conclude in 2012 that:

> *We are convinced of the contribution that merits review can make to better regulatory decision making, and, more specifically, we consider it to be an important component of a system of checks and balances that supports the independence of delegated regulation.* ***It is because the Australian Energy Regulator (AER) can exercise significant discretionary powers that merits***

review has such an important potential role to play.[5] (emphasis added)

This point has been further emphasised by Professor Allan Fels AO, the former Chair of the Australian Competition and Consumer Commission who has observed:

> *There is no question that a merits review process is required under the national energy laws. The overwhelming impact that AER decision-making has on the property rights and commercial prospects of regulated businesses, the economic significance of the energy sector, and the long-term detriment and distortions which might arise from uncorrected regulatory errors, are all strong indications that energy merits review is essential. The need to maintain industry confidence in the integrity and accountability of the AER is a further indication that merits review is desirable.*[6]

The importance of merits review and the scope of regulatory discretion has been consistently recognised through previous reviews of the limited merits review regime. Put simply:

- A regime featuring a very narrow scope for regulatory discretion, capable of mechanistic application with the minimum of administrative discretion is **not** suited to merits-based review, as there is little or no discretion available to be exercised.
- A regime featuring significantly broad regulatory discretion **is** appropriately subject to some form of limited merits review – particularly where it impacts on property rights and where parties have legally binding obligations to invest further capital to meet service obligations.

ENA is not aware of any stakeholder claiming that the *National Electricity Rules* or *National Gas Rules* feature narrow regulatory discretion, or are capable of mechanistic application.

The COAG Energy Council's most recent amendments to the manner in which the AER makes its regulatory determinations under National Energy Laws and the Australian Energy Market Commission's 2012 rule on the *Economic Regulation of Network Service Providers* explicitly increased the scope of regulatory discretion.[7] The AER has stated that the 2012 rule change addressed to its satisfaction the issues of regulatory discretion considered as part of that rule change process. In making that rule decision the AEMC explicitly supported the need for accountability of the regulator through some form of merits review.[8]

This issue should be considered more fully on the basis of future SCO recommendations around Option 2[9] or if, as suggested in the stakeholder consultation forum, further consideration is given to potential law or rule changes affecting the scope of regulatory discretion.

3.3.2 Relationship between judicial review and limited merits-based review

The Consultation Paper discusses an option of the removal of limited merits review in its entirety (Option 4) and seeks to suggest that access to judicial review alone may be sufficient substitute or 'check' on reasonable decision-making under a regulatory regime featuring significant regulatory discretion.

Merits and judicial review have been repeatedly identified by a range of expert and third party commentators, including in past reviews of limited merits review, as separate and distinct in kind. These review types are complements to promote a well-founded, high quality decision, and a legally permissible decision made according to due process.

This is pointed out by the Administrative Review Council in its report *What decisions should be subject to merit review?* where it is observed:

> *... [T]he judicial review powers vested in the Federal Court are complementary to, but distinct from, merits review powers. Judicial review involves the exercise of the Commonwealth's judicial power and results in findings in law. Merits review involves the exercise of administrative powers and results in a correct and preferable decision. The different realms of operation of the two forms of review mean that they can, and often do, co-exist.*

Judicial review alone is not capable of delivering on the Energy Council's policy objectives for reviews of energy decisions. This is because judicial review is:

---

[5] COAG Energy Council Expert Panel *Review of Limited Merits Review Regime - Stage Two Report*, September 2012, p.3
[6] Professor Allan Fels AO, *The merits review provisions in the Australian Energy Laws*, March 2012, p.24
[7] For example, see AEMC Final Determination on 2012 Rule change (p.36): "*In general the final rules give the regulator greater discretion than it has currently. The objectives and factors show the regulator what it must bear in mind when it exercises that discretion.*"
[8] AEMC (2012) p.xi
[9] See Appendix II, COAG EC Consultation Paper, September 2016, p.22

- Limited in its scope to address some types of critical flaws in decisions that can harm the long-term interests of consumers;
- Less accessible to consumer and other stakeholders who are unable or unlikely to engage legal counsel;
- More formal in structure and conduct than limited merits review, with no opportunities for consultation or engagement with all affected stakeholders;
- Limited in its ability to provide feedback on decision-making to support ongoing improvements in applying economic regulation;
- Not bound by any statutory restrictions on delays and costs;
- Generally limited to setting aside or remitting (i.e. having no ability to efficiently correct simple errors), guaranteeing remittal or the entire re-making of decision found to be in error;
- Subject to the risk of correct and preferable (i.e. soundly evidenced) regulatory decisions being set aside on technical legal error grounds.

These issues, and the inability of judicial review to deliver on the COAG Energy Council policy objectives are further discussed in Attachment A, *The Role of Limited Merits Review: A response to the COAG Energy Council SCO Review* an expert report prepared by HerbertSmithFreehills.

3.3.3 Implications of Minister for Immigration and Citizenship v Li case

The Consultation Paper suggests that recent developments in law have "potentially" expanded the ability of judicial review to provide further accountability for reasonable decision-making, citing a 2013 High Court case *Minister for Immigration and Citizenship v Li*. It has suggested that this expansion should be recognised as a potential benefit around Option 4.

It is critical to rigorously evaluate the likely implications of this case if the Commonwealth proposes to rely on judicial review so as to be confident in the outcomes for the long-term interests of consumers under Option 4.

ENA engaged University of Sydney Professor of Law Margaret Allars SC to review and report on the implications of the case for the scope of judicial review in Australian law. This opinion is set out in Attachment B, *Opinion - Re Energy Networks Association and Review by COAG Energy Council of Limited Merits Review Framework in the National Electricity Law and the National Gas Law*.

The key findings of Professor Allars SC are that:

> *Judicial review is fundamentally different from limited merits review, and has not become close to, or even similar to, limited merits review on account of Li, for the following reasons:*
>
> *(i) Constitutional limitations preclude federal courts from providing full merits review or limited merits review that corrects factual error.*
>
> *(ii) The Li test of unreasonableness asks whether a decision has an evident or intelligible justification, and does not ask whether the decision involves an error of fact or is unreasonable in a more general* sense.[10]

Further the opinion notes that:

> *Li unreasonableness is a ground properly argued where no reasons have been given for a decision. Where detailed reasons have been given, as is the case with reviewable regulatory decisions made by the AER, there is very little scope to establish Li unreasonableness.*

And that:

> *…The High Court made it clear that the requirement to act reasonably is not an opportunity to review the factual findings of a decision-maker in its area of decisional freedom. The Full Federal Court has consistently warned that Li does not allow it to trespass upon the merits of an exercise of discretion by placing itself in the position of the decision-maker and substituting its own view as to the weight to be given to evidence from which factual inferences are drawn. Post Li, the Court in judicial review is confined to determining whether a power was exercised lawfully, there being one legally correct answer to that question.*[11]

The contention that recent High Court outcomes have fundamentally changed or expanded the scope of judicial review in a way that is relevant for considering AER decision-making is not supported by an expert assessment by a highly respected administrative law commentator, academic, and practicing senior counsel.

As a consequence, ENA considers that in any further assessment of Option 4 it would be inappropriate to attach weight to the 'potential' for this case to ensure increased accountability for reasonable decision-making.

[10] Professor M Allars SC, *Opinion - Re Energy Networks Association and Review by COAG Energy Council of Limited Merits Review Framework in the National Electricity Law and the National Gas Law*, October 2016 [1.1]

[11] Professor M Allars SC (2016) [5.10]

4. ASSESSING THE PERFORMANCE OF THE REGIME

4.1 Capacity to fully assess the regime constrained

A significant issue facing the review of the limited merits review regime is that the current outstanding judicial review on critical aspects of the Australian Competition Tribunal's ruling in the NSW/ACT case, and pending outcomes of a number of other reviews makes definitive conclusions on the effectiveness of the regime problematic.

Under the current review timelines, the Standing Committee of Officials and the Council are not in a position to determinatively assess the performance of its previous reforms to limited merits review. For example, the final outcomes for consumers of the AER's application for judicial review of the Australian Competition Tribunal's February 2016 decision are not likely to be known prior to the planned December COAG meeting. Similarly, the implications for regulators, the interpretation of key elements of the Energy Council's prior reforms such as the interpretation of concepts of a 'materially preferable' decision will not be known. In addition, following the AER's seeking judicial review on the Tribunal's decision, there may be a further requirement for it to undertake a re-determination process applying precedents from the pending Federal Court ruling.

These circumstances mean that determining a clear view on the overall performance of the regime by December is not feasible, as any such assessment could not take into account practical evidence of the final impact of the review arrangements on the long-term interests of consumers under the national energy law objectives.

Progressing any radical reform options based on definitive conclusions on the operation of a regime, prior to the full completion of a cycle of network determinations impacted by the 2013 reforms, would appear inconsistent with the goals of a predictable and stable regulatory regime. It would also be inconsistent with the Australian Energy Market Agreement's goal to:

> *Streamline and improve the quality of economic regulation across energy markets to lower the cost and complexity of regulation facing investors, enhance regulatory certainty, and lower barriers to competition.*[12]

This is because review arrangements would be undergoing changes within cycles that were effectively shorter than individual network pricing determinations themselves. These considerations were the original basis for the existing NEL and NGL requirement to review the limited merits review within 7 years of its commencement, rather than twice within four years.

4.2 Performance of the regime since 2013 reforms

Due to the incomplete cycle of network determination and review proceedings it is not possible to draw definitive conclusions on the operation of the entire review scheme.

It is possible, however, to draw some initial observations based on those components of reviews that have already occurred.

4.2.1 Some outcomes have been consistent with the expressed policy intent

As noted in the expert opinion of the former Chair of the UK Competition Commission, the mere presence of a number of appeals of AER decisions is not evidence of frivolous or 'gaming' behaviour by networks. The ENA notes that in 2015 the AER stated it regarded appeals and appeal outcomes as indicative of the quality of its decision making:

> *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.*[13]

It is neither surprising nor inappropriate that appeals occur in an environment where the regulator has used new rules and regulatory processes to make historically significant decisions. Limited merits review assists the transparent clarification of new rules and the exercise of expanded regulatory discretion in a complex regulatory environment.

ENA considers that there is evidence to date of a mixed record of the regime's performance against the policy intent. In some aspects the review scheme has operated consistently with the intended policy intent, and in a manner consistent with explicit guidance contained in the 2013 reforms. This has occurred, for example, by:

- **Identifying and providing for the addressing of material errors** – the Tribunal has identified a range of

[12] *Australian Energy Market Agreement*, Clause 2.1 (b) (ii)

[13] AER (May 2015), p.10

weaknesses and flawed aspects of AER decisions in the NSW and ACT determinations, particularly in relation to its placing of determinative weight on previously untested benchmarking approaches, including in ways that were statistically flawed.

- **Increasing the role of remittals** – the Tribunal's decision to request the AER remake its determination, having regard to the complexity and interlinked nature of the issues under review was completely consistent with the 2013 reforms and policy guidance from the Energy Council aimed at promoting greater remittals, versus one step 'error correction' of isolated decision components.
- **Greater consumer involvement in appeals** – the participation of the Public Interest Advocacy Centre and other parties in a range of recent review proceedings is consistent with a range of increased protections from awarding costs and clarifications relating to standing that were contained in the 2013 reforms.
- **Centrality of long-term interests of consumers and wider engagement** – the Tribunal's assessment of its decision to set aside aspects of the AER's recent decisions was explicitly based on extensive consideration at both the leave appeal, and in the review stage, of the nature of the long-term interests of consumers (i.e. the NEO and NGO), and how to achieve those interests. Further, the Tribunal has sought and received detailed submissions from a wider set of consumer stakeholders outside of the proceedings to inform them of the full range of views on the interpretation of its task.

Commentary and analysis of the performance of the regime to date has insufficiently considered the extent to which these outcomes are consistent with the policy guidance and associated legislative reforms delivered by COAG Energy Council in 2013.

As an example, to the extent that greater delays may have resulted in part from deliberate guidance by legislative amendment to promote remittals, it would be perverse to seek to criticise the review body for heeding and being responsive to such guidance. Rather, in this respect, if the results following from the legislative guidance are not consistent with those anticipated, the policy assumptions and trade-offs which informed the revised guidance may need to be revisited.

4.2.2 Identifying the underlying drivers of unintended outcomes

There are, however, clearly opportunities to improve the performance of the regime, by careful assessment of underlying causes, and targeted and proportionate remedies. In several ways, the existing regime has demonstrated some weaknesses. These include:

- Too many reviews and multiple review processes being needed to resolve single issues;
- Lack of agreed clarity on the meaning and interpretation of 'materially preferable';
- Overly adversarial determination and review proceedings;
- Delays and uncertainty over future network prices; and
- Concern over whether small or non-material errors are subject to limited merits review.

Analysis and policy responses which are based on these weaknesses justifying the removal of access to merits based review are at risk of failing to address key underlying drivers of these issue.

Table 1 overleaf provides an example of the types of underlying drivers and causes of the weaknesses experienced.

Further discussion and analysis of the operation of the 2013 reforms are set out in the:

- HerbertSmithFreehills report *The Role of Limited Merits Review: A response to the COAG Energy Council SCO Review* (at Attachment A); and
- Frontier Economics and HerbertSmithFreehills report *Options for enhancing the Australian Limited Merits Review regime*. (Attachment C)

Table 1 – Mapping observed issues to potential drivers

Issue	Potential drivers
Too many appeals and multiple review processes being needed to resolve single rate of return issues	» Absence of opportunity to undertake a single efficient review process on rate of return guideline » Decisions by AER to continue to re-litigate cost of corporate taxation issues following multiple Tribunal rulings (e.g. gamma) » Historical structure of overlapping five-year regulatory periods
Lack of clarity on the meaning and interpretation of 'materially preferable'	» Inherent uncertainty of new legal term, an issue which was highlighted by a range of parties prior the reforms
Lengthy and overly adversarial review proceedings	» Lack of appropriate inquisitorial and issues-based focus of AER regulatory determination process » Absence of co-sponsored agreed expert advice on complex rate of return issues » Lack of agreed 'hot-tub' expert evidence able to be drawn on by Tribunal
Delays and uncertainty over future network prices	» Weakness in 2013 reforms in lack of attention as to how redetermination process would proceed » AER decision to focus on exercising its judicial review rights rather than swiftly moving to redetermination process » A tightly constrained transition period arrangement following the 2012 rule change which saw final AER decisions reached only mid-way through the regulatory period coupled with application of new Rules and guidelines arrangements » Lack of flexibility in Chapter 6 Distribution rules on allowing for smoothed cross period recovery of any adjusted revenue allowances
Non-material errors being subject to review	» AER choice to not allow use of existing avenues of correcting simple transcription or mathematical errors in final decisions (gas) » Inadequate equivalent mechanisms to correct simple transcription or mathematical errors in final decisions (electricity) » Inadequacy of existing revenue determination processes to allow for the identification and correction of such acknowledged errors

4.2.3 What are the critical issues to address?

As outlined above, several elements of the regime may warrant significant attention from the Energy Council.

In assessing which are the critical issues to address, however, care must be taken to consider those issues which may already be subject to satisfactory resolution by alternative means.

Currently, the Federal Court is due to assess the AER's judicial review. The combined effect of this Court decision and any associated redetermination process is likely to further consider the issues around the scope and meaning of the making of a 'materially preferable' decision. This should provide key guidance on the future interpretation and implementation of the 'materially preferable test'.

For this reason, ENA urges the COAG Energy Council review to avoid pre-empting the outcomes of the Court judgement and redetermination processes. Such an intervention risks increasing uncertainty and delaying clarification of the interpretation and scope of the current regime, which would otherwise streamline future regulatory processes.

Similarly, the AEMC is current considering an application for a jurisdictional derogation allowing the smoothed recovery over future regulatory periods of any adjusted allowances arising from the Federal Court decision and associated AER redetermination process. Options are available under the derogation and rule change process to address such cost recovery issues more broadly. ENA also notes that substantial work has been finalised between the affected networks and the AER which broadly provides for a rolling forward of current network tariffs on a CPI basis prior to the final resolution of the AER appeal. In these circumstances the appropriate policy response is likely to be to allow these existing processes to take effect, and consider the potential for any rule changes or derogations after this should the need arise.

Taking this into account the critical remaining issues appear to be addressing:

- Too many review and multiple review processes being needed to resolve single issues;
- Overly adversarial determination and review proceedings;
- Concern over whether small or non-material errors are subject to limited merits review.

The following section proposes a range of modifications to limited merits review and network determination processes to address these potential weaknesses in the existing framework.

5. PROPOSED MODIFIED LIMITED MERITS REVIEW FRAMEWORK

5.1 ENA's proposed improvements to limited merits review

The modifications the network sector proposes are designed to form a consistent integrated package of reforms which address identified issues in a targeted and proportional manner.

ENA held discussions with a diverse range of stakeholders including consumers, government, regulators and diverse industry sectors in developing these potential reforms. The major elements of ENA's proposed reforms are discussed below.

5.1.1 A binding and reviewable rate of return determination

The existing rate of return guideline should be reformed into a binding, reviewable determination made by the Australian Energy Regulator. This would produce a number of benefits, including:

- **Maintaining accountability and incentives for high-quality decisions** - Allowing for the accountability benefits and incentives for well-founded and evidenced decisions to be maximised for one of the most significant decisions the AER makes, with impacts beyond the energy sector (as a range of other State and Territory regulators draw upon analysis in this decision).
- **Efficiency and reduced duplication of process** - Ensuring, should it be required, there is a single, efficient review process for a determination with network sector wide implications, rather than the decision needing to be tested in a later network determination process. This would address the issue of networks needing to apply for duplicative, cascading sequential reviews on similar issues to ensure any flaws in the original AER determination are remedied.[14]

[14] As an alternative to achieve this outcome, explicit scope could be provided to the Australian Competition Tribunal to defer a rate of return related appeal application if it is substantially similar to one already subject to current proceedings or where the application is not based on substantive 'new' evidence. This alternative option is discussed in Attachment C.

- **Reducing resource costs and delay** - Lowering the total resource costs of rate of return processes and permitting any review applications to occur in a timely manner.
- **Consumer-centered processes -** Realising the original policy intent of the AEMC's guideline rule change, by providing a single central focal point for consumer involvement in cost of capital issues, rather than splitting these resources between individual network determinations and the existing non-binding guideline. In addition, review of individual network determinations would be better focused on specific network regulatory proposals, investment and efficient service delivery plans and their impacts on local customers.
- **Improving certainty** - Encouraging greater consistency and predictability in application and improving transparency for stakeholders.

A binding rate of return was proposed by the AER in its original 2011 rule change application.

Implementation

The mechanism of implementation of this option is further described in Attachment C, but broadly would simply require the identification of the rate of return methodology (including gamma) to be recognised as a separate reviewable determination, and the removal of a capacity of the review body to review elements of this determination in individual network determinations.

Note that to provide the accountability and other benefits arising from merits review other elements of individual network determination processes would continue to feature access to merits, though it would be expected that fewer reviews would either be required, or meet materiality thresholds.

5.1.2 Double the financial materiality thresholds for review applications and apply to each ground

A second recommended option to address the potential for applications for review being made on non-material issues is to raise the financial threshold for parties seeking review. It is noted that there are significant costs to network service providers in undertaking appeals under the current regime, which already deter minor matters. Nevertheless, the ENA would be open to an appropriate increase in the threshold to increase confidence that non-material appeals are not undertaken.

Currently, financial thresholds for review are the lesser of two per cent of annual regulated revenues, or $5 million. It would be feasible to double these thresholds to ensure a better balance between minimum likely review costs, and the revenue amounts at issue.

It is noted that, in combination with the other reforms proposed, it would be expected that the total number of reviews would likely be lower, and that highly financial material rate of return issues would be addressed separately. This combination is likely to mean a reduced number of review proceedings in any case.

To provide further assurance that the intended effect of this change was not frustrated in practice, a further element of reform could be a requirement that each individual review matter be sufficient to meet the financial thresholds, rather than only their collective impact needing to exceed the threshold.

This would avoid any claims that a number of smaller less meritorious matters were capable of being combined for the purpose of meeting the threshold.

Implementation

This option would require relatively straightforward amendments to existing review provisions. These are further described in Attachment C.

5.1.3 More investigative approach to revenue determination processes

There are also opportunities to consider the introduction of a range of mechanisms to revenue determination processes.

There are opportunities, for example, to undertake:

- **Expert so-called 'hot-tubbing' forums** – allowing the questioning of experts, and to better define areas of potential consensus and difference.
- **More 'issues centric' review processes** – where approaches to broad emerging cross-industry issues may be considered at a conceptual level outside of an individual determination process.
- **Routine use of Commissioner-level workshops and hearings** - allowing the AER to question and hear directly from network service provider staff.

The benefits of this type of more investigative approach are that it would:

- **Reduce the adversarial nature of determination processes** - focusing attention instead on issues of closest interest to consumers.
- **Provide direct access to expertise** – providing a capacity for the regulatory body to directly engage and question qualified economic experts.

Implementation

Greater use of these investigative options would require few if any changes to the existing rules framework. Some possible areas of amendments to existing provisions are further described in Attachment C.

5.1.4 Greater inquisitorial review process

A further measure to build on the above reforms would be introduction of more inquisitorial features within the merits review process.

The objective of these changes would be to reduce any unnecessary adversarial characteristics of the review process, noting that in a process of contesting a regulatory determination, there will inevitably be a measure of robust testing of evidence and decision-making approaches.

Opportunities exist, however, to make review processes more collaborative and issues-led than the current model. A number of reforms would make this possible. These include:

- **A role for collaborative expert exchanges** – such as opportunities for so-called expert 'hot-tub' processes, where experts are able to engage directly to develop agreed shared positions or a consensus on relevant issues for empirical testing.
- **Providing review body with direct access to expertise** – including capacity for the review body to directly engage and question qualified economic experts
- **Processes to better focus issues in dispute** – a greater use of statements of agreed facts or collaborative clarification during the pre-hearing stage of the relevant issues in dispute

The adoption of these approaches would permit the Tribunal to assess expert evidence in a more efficient and less costly manner, permitting the identification of common ground between parties in an adversarial review.

These collaborative and direct engagement processes are also intended to discourage any adversarial and duplicative approaches by each party which would otherwise lead it to accentuate a preferred position, while ignoring empirical or logical weaknesses. These recommendations seek to reinforce the intended operating principle that in a merits review, experts have an overriding duty to the review body, not their commissioning party. Similarly, a greater focus on defining the issues in dispute would potentially narrow the breadth of issues the review body needs to evaluate, thereby reducing the time and resource costs of individual disputes.

Implementation

Amendments to bring about a more inquisitorial review process largely sit within the power of the Tribunal. Some specific empowering amendments to individual rules and laws may be required. These are detailed and further described in Attachment C.

6. SUMMARY RESPONSE TO CONSULTATION PAPER PROPOSED OPTIONS

The ENA provides the following summary response to the proposed Consultation Paper options.

Option 1 – Retain the Tribunal as the review body with no legislative amendments

ENA does not support the status quo arrangements as an option, and considers that a 'no change' option will not promote the National Electricity or Gas Objectives.

Rather, it is critical that a robust evidence-based assessment of the current regime, including a full identification of the underlying drivers of the outcomes under the current regime, and its full impact on consumers' long-term interests is used in determining any adjustments.

Such an approach is consistent with development of Options 2 or Option 3, but not a radical decision to remove limited merits review avenues prior to the completion of a full round of network determinations and related reviews.

Option 2 – Retain the Tribunal with legislative amendments

ENA supports Option 2 and considers that the potential reforms outlined in Section 5 and the associated expert report (Attachment C) provides a basis for positive legislative adjustments to address, in a targeted and proportional way, identified issues with the current regime to meet its policy objectives, which remain relevant.

Option 3 – Replace the Tribunal with a new investigatory body

The adoption of Option 3 may have the potential to satisfy some elements of the COAG Energy Council's objectives for limited merits review, but may not have the capacity to meet all.

This option is not able to be fully assessed at this time, as its benefits, limitations and implementation issues will differ according to its key design features and proposed operating model.

As the Consultation Paper advises, these would require further detailed specification prior to a meaningful assessment of the strengths and weaknesses of the option compared to Option 2 with ENA's proposed package of reforms. Critically, further development of Option 3 would require further detailed consideration by legal and economic experts, in particular in relation to those elements which differed from the 2012 Yarrow expert report recommendations for a new review body.

Option 4 – Removal of access to LMR

As outlined in this submission and the attached expert reports, removal of access to merits-based review would not be consistent with critical requirements for a stable, predictable regulatory regime which underpins low cost financing and refinancing of significant ongoing private sector network investments. Removal is therefore not in the long term interests of consumers.

Removal of access to limited merits review entirely would fail to achieve to outcomes set out for a review scheme under the SCER's 2012 *Statement of Policy Intent*. Implementation of this option would reduce overall accountability, lower incentives for high-quality primary regulatory decisions, create a higher risk of significant regulatory errors, promote higher cost and legalistic Court-focused reviews, and potentially lock consumer groups out of meaningful involvement in future appeal proceedings.

A summary of the outcomes of ENA's analysis of the potential reform options is set out in Table 2 overleaf.

7. LIST OF ATTACHMENTS

Attachment A *The Role of Limited Merits Review: A response to the COAG Energy Council SCO Review* an expert report prepared by HerbertSmithFreehills

Attachment B *Opinion - Re Energy Networks Association and Review by COAG Energy Council of Limited Merits Review Framework in the National Electricity Law and the National Gas Law*

Attachment C *Options for enhancing the Australian Limited Merits Review regime* a report by Frontier Economics and HerbertSmithFreehills

Attachment C.1 Letter from Sir Derek Morris, ex-Chair of UK Competition Commission on LMR Consultation.

Table 2 – Summary assessment of Consultation Paper reform options

SCER Principles and desired outcomes	Retain ACT with changes (Option 2)	New investigatory body (Option 3)	Remove access to LMR (Option 4)
All stakeholders interests accounted for	✓	✓ - depending on design	✗
Recognising early consultation efforts	✓	✗	✗
Allowing affected parties appropriate recourse	✓	Unknown	✗
Due process	✓	Unknown	✗
Robust review mechanism increasing confidence	✓	Unknown	✗
Accountability and increasing initial decision quality	✓	Unknown	✗
Justifiable overall decisions	✓	✓ - depending on design	✗
Balanced incentives to initiate reviews	✓	Unknown	✗
Limitations that reduce delays and costs	✓	✓ - depending on design	✗

8. RESPONSE TO CONSULTATION PAPER QUESTIONS

Consultation Paper Question	ENA Response
1. Are there any specific factors which prevent issues being resolved through the determination process?	See Section 4.2 for an assessment of the underlying drivers of unintended outcomes and recent reviews.
2. Are reviews generally considered a routine part of the determination process?	No. Reviews are costly, involve potential reputational harm, and are sought to be avoided.
3. Does the framework enable reviews to focus primarily on the long term interests of consumers?	Yes. This is the impact of the 2013 reforms, and current Tribunal decisions and pending AER redetermination processes will rightly centre on this objective.
4. To what extent does the current LMR process support materially preferable decisions being made for the long term interests of consumers?	See Attachment A and Attachment C for full discussion of this issue.
5. Are there any other issues which impact on the delivery of regulatory decisions that serve the long term interests of consumers?	Yes. Table 1 sets out a discussion of a complex range of underlying drivers for existing experiences with the limited merits review scheme.
6. Are the current grounds for review sufficiently robust to avoid undue weight being placed on minor matters in merits reviews?	Yes, however, ENA has proposed further potential reforms in this area to address this issue. See Section 5.1.
7. Are there any issues with the scale and scope of material that can be brought forward in relation to reviews?	The scale and scope of the material that can be brought forward in a review is currently a function of the scale and scope of material generated by the AER regulatory determination. It is directly related to the form of limited merits review which is intended to avoid new issues or material being raised in appeals. Consequently, the material provided is the same material as was before the original decision-maker.
8. Is there a way to minimise the regulatory impost of maintaining a record of decision making as part of any future reforms?	Reforms enabling the review body to more directly and informally engage with experts, via opportunities for direct interaction in proceedings, for example, may assist in addressing this. See Section 5.1
9. Are there any barriers to the Tribunal seeking additional expert advice? If so, how could these barriers be addressed?	These barriers should be addressed by clear policy and any required legislative changes. Attachment C specifically consider implementation of these measures.
10. Is participation without legal representation possible? Are there barriers hindering full consumer participation in the review process?	Participation in reviews without legal representation has occurred, through the Tribunal's community consultation processes. This is likely to be enhanced by ensuring more investigative revenue determination and review processes, discussed in Section 5.1 and in more detail in Attachment C.

11. How costly has your participation in the appeal process been and what are the implications of this participation for you?	N/A.
12. What are/were your expectations of how the Tribunal would consider the input from consumers?	Attachment B and Attachment C provide a detailed summary on how the Tribunal considered the input from consumers in recent merits reviews.
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?	ENA considers a range of its proposed reforms, including more investigative revenue determination processes and merits review processes, and introduction of a separate binding rate of return methodology would assist in maintaining timely focused reviews.
14. What has been the impact of the extended timeframe of review processes? How could these impacts be addressed?	This matter is discussed in Section 4.2.2. Rule changes, practical interim arrangements administered by AER and the existing derogation mechanisms which are being used can address these issues.
15. What would be the impact of maintaining the current regime?	ENA does not support the maintenance of the existing regime with no changes.
16. What amendments, if any, would you propose to achieve the policy intent of the 2006 and 2013 LMR reforms?	These amendments are discussed at a broad level in Section 5.1 and detailed further in Attachment C.
17. Should the existing Tribunal review process be made more investigatory in nature? If so, how could this be achieved?	Yes, see Section 5.1.
18. What are the risks of establishing a new review body? Are there any challenges associated with implementing this option?	ENA considers there are material risks that the establishment of a new review body will not achieve outcomes consistent with the SCER's 2012 Statement of Policy Intent. A range of design and implementation issues would need to be addressed prior to any detailed assessment of Option 3 being able to be made, as the Consultation Paper notes.
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?	It is unclear how the grounds of review would be clarified by establishment of a new body. Rather, there is the potential for significantly increased regulatory uncertainty arising from the unknown record of a new body, lack of clarity over how it would interpret and approach its task, and the nature of that task.
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?	This is unclear from the limited description provided of Option 3. As the Consultation Paper notes, further detailing of the nature of the new body and its framework is required before it can be properly assessed. See Section 6.
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?	As above. ENA recommends further work on these questions, including detailed consideration by legal and economic experts.
22. Do you have any suggestions for how a new investigatory body could be appropriately resourced?	As above. ENA recommends further work on these questions, including detailed consideration by legal and economic experts.

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 likely consequences are the loss of benefits identified in the SCER Statement of Policy Intent and significant harm to the long-term interests of consumers. Section 1 and 3 of the submission details this issue further, as does Attachment A and Attachment C. Section 3.3 discusses the relationship between limited merits review and the wider regulatory framework, including the issue of the interaction of regulatory discretion and merits-based review.
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?	Judicial review has inherent process, jurisdictional and constitutional limitations which make it an unsatisfactory and inadequate avenue for consumer or user participation in appeals.
25. Should all access to merits review be removed or only for electricity revenue determinations and gas access arrangement decisions?	No. There is no justification for a distinction to be introduced between types of regulatory determinations that materially impact the long-term interests of consumers and the existing property rights of infrastructure owners.
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?	Yes, ENA outlines these reforms in Section 5.1 and they are further detailed in Attachment C.