

Detailed comments and specific drafting changes to COAG Energy Council Binding rate of return amendments to the National Electricity Law (NEL) and National Gas Law (NGL)

Proposed Amendment	Reference/Section	Comments/Proposed drafting change
Definitions		
The definition of “explanatory information” requires certain information about the content of a rate of return instrument to be published with the draft and final instrument.	18F NEL/30A NGL	The definition requires the rationale for the rate of return on capital or the value of imputation credits to be stated. Energy Networks Australia considers the explanatory information should also contain an explanation of the derivation of the rate of return or value of imputation credits and proposes that subsection (a) of the definition of “explanatory information” be amended to read as follows: <i>explanatory information, for a rate of return instrument, means information about the content of the instrument, <u>and must include</u>ing (but <u>need</u> not <u>be</u> limited to) information explaining— “(a) the rationale for the rate of return on capital or the value of imputation credits stated, or to be calculated, under the instrument <u>and an explanation of how the rate or value has been determined;</u>”</i>
Binding Guideline		
A rate of return instrument is to be binding on the AER and each network.	18H NEL/30C NGL	No change proposed.
Content of Instrument		
The AER must make a rate of return instrument stating the rate of return or the value of imputation credits, or the way to calculate the rate or value.	18I NEL/30D NGL	For the reasons set out in the submission, Energy Networks Australia is concerned with the breadth of the discretion provided to the regulator by the draft Bill, which combined with the proposed removal of the rate of return rules, gives rise to uncertainty and materially increased risk to all stakeholders. This includes the discretion to specify a single value for the rate of return, without

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		<p>necessarily having to specify how that single value is derived, what parameter values have been used etc.</p> <p>The changes proposed below, together with the proposal to maintain the guidance in the rate of return rules (in the form set out in Attachment 1), seek to provide greater guidance and therefore certainty for the benefit of all stakeholders.</p>
<p>The instrument must state a rate of return on capital or the value of imputation credits, or a way to calculate the rate or value, that the AER is satisfied will or is most likely to, contribute to the achievement of the national electricity objective/national gas objective to the greatest degree.</p>	<p>18J(1) NEL/30E(1) NGL</p>	<p>No change proposed.</p>
<p>If the instrument states a rate of return or the value of imputation credits, the instrument must state a single rate or value to apply in relation to all regulated network service providers.</p>	<p>18J(2) NEL/30E(2) NGL</p>	<p>Energy Networks Australia submits that proposed section 18J(2) of the NEL should be amended as follows (with equivalent changes to proposed section 30E(2) of the NGL):</p> <p style="text-align: center;"><i>“18J</i></p> <p style="text-align: center;"><i>(2) If the instrument states a rate of return or the value of imputation credits, the instrument must state <u>how the a single rate or value has been determined, including relevant parameter values, and the rate or value is</u> to apply in relation to all regulated network service providers.</i></p>
<p>If the instrument states a way to calculate the rate of return or the value of imputation credits, the instrument must provide for the same methodology to apply to all regulated network service providers [covered pipeline service providers] and provide for the methodology to apply automatically without the exercise of any discretion by the AER. Providing a</p>	<p>18J(3) and (4) NEL/30E(3) and (4) NGL</p>	<p>No change proposed.</p>

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<p>range from which a point estimate is selected is specifically excluded.</p> <p>Subject to the above, the instrument may include other matters the AER considers appropriate.</p>		
<i>Process for making a rate of return instrument</i>		
<p>In making a rate of return instrument, the AER must have regard to:</p> <ul style="list-style-type: none"> • The revenue and pricing principles • Advice, recommendations and submissions by a consumer reference group • A report to be published by the AER on the outcomes of expert opinion/evidence • The report given by the independent panel • Any other information the AER considers appropriate 	18L NEL/30G NGL	<p>For the reasons explained in Part 5 of the submissions, Energy Networks Australia submits that a new subsection 18L(c) should be added (with equivalent addition to the NGL) as follows:</p> <p style="text-align: center;"><i>“18L</i></p> <p style="text-align: center;"><i><u>(c) any other matter specified in the Rules.”</u></i></p> <p>The purpose of this amendment is to incorporate the requirement for the AER to have regard to the matters proposed in the revised rate of return Rule contained in Attachment 1 to this submission.</p>
<p>Before publishing a draft instrument, the AER must:</p> <ul style="list-style-type: none"> • Establish a consumer reference group • Publish a notice inviting written submissions about the proposed instrument and the period for submissions, being not less than 28 days • Seek concurrent expert opinions or evidence about the proposed instrument, in any way it considers appropriate. <p>The AER must publish:</p> <ul style="list-style-type: none"> • Submissions made under this section 	18M NEL/30H NGL	<p>For the reasons set out in Energy Networks Australia’s submissions, there is insufficient process and certainty around these steps, in particular the concurrent expert opinion and evidence process. Energy Networks Australia submits that proposed section 18M of the NEL be amended as follows (with equivalent changes to proposed section 30H of the NGL):</p> <p style="text-align: center;"><i>“18M</i></p> <p style="text-align: center;"><i>(1) Before publishing a draft rate of return instrument under this Subdivision, the AER must—</i></p>

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<ul style="list-style-type: none"> A report on the outcomes of seeking the expert opinions or evidence. 		<ul style="list-style-type: none"> (a) <i>establish a reference group to help the AER implement an effective consumer consultation process for making the proposed instrument (a consumer reference group); and</i> (b) <i>publish a notice on its website—</i> <ul style="list-style-type: none"> (i) <i>inviting persons to make a written submission to the AER about the proposed instrument; and</i> (ii) <i>stating the period, not less than 28 days, within which a submission must be made; and</i> (c) <i>seek concurrent expert opinions or evidence about the proposed instrument <u>from experts appointed in accordance with the following:</u></i> <ul style="list-style-type: none"> <u>(i) before appointing the experts the AER must publish a notice calling for nominations of experts within a period stated in the notice;</u> <u>(ii) the experts are to have finance, economic, regulatory, or institutional investment expertise or consumer perspectives relevant to the making of a rate of return instrument; and</u> <u>(iii) the AER must appoint at least three experts.</u> <p>(2) <i>A person may make a submission after the stated period only with the written approval of the AER.</i></p> <p>(3) <i>The AER may seek the expert opinions or evidence in the way it considers appropriate</i></p> <p><i>Example—</i></p>

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		<p><i>The AER might convene a conference of experts to identify key issues, and areas of dispute and agreement among the experts, about the content of the proposed instrument.</i></p> <p>(4) <i>The AER must publish on its website—</i></p> <p>(a) <i>submissions made under this section; and</i></p> <p><i><u>(b) any written opinions or written record of evidence provided by the experts appointed under this section; and</u></i></p> <p><i><u>(c) any transcript taken of concurrent expert evidence sessions or conferences; and</u></i></p> <p>(d) <i>a report on the outcomes of seeking the expert opinions or evidence.”</i></p>
<p>The AER must publish a draft instrument and explanatory information at least 6 months before making the instrument.</p>	<p>18O NEL/30J NGL</p>	<p>No proposed change.</p>
<p>After publishing the draft instrument the AER must establish an independent panel to provide a report about the instrument. Three members are appointed by the AER.</p> <p>The report must include the panel’s assessment of the evidence and reasons and whether the report is by consensus.</p>	<p>18P NEL/30K NGL</p>	<p>For the reasons set out in Energy Networks Australia’s submission, there is insufficient process and certainty around the independent panel process. Energy Networks Australia submits that proposed section 18P of the NEL should be amended as follows (with equivalent changes to proposed section 30K of the NGL):</p> <p><i>“18P</i></p> <p><i>(1) The AER must, as soon as practicable after publishing the draft instrument establish an independent panel to give the AER a written report about the instrument.</i></p>

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		<p>(2) <i>The panel—</i></p> <ul style="list-style-type: none"> (a) <i>may carry out its activities, including giving the report, in the way it considers appropriate; but</i> (b) <i>must seek to give the report by consensus.</i> <p>(3) <i>The panel must—</i></p> <ul style="list-style-type: none"> (a) <i>consist of at least 3 members appointed by the AER <u>who have finance, economic, regulatory, or institutional investment expertise or consumer perspectives relevant to the making of a rate of return instrument;</u></i> (b) <i><u>not include any person who has been engaged by the AER, a regulated network service provider, user or consumer association, user or consumer interest group on matters relevant to the making of a rate of return instrument in the preceding two years and</u></i> (c) <i>give the report to the AER before the AER makes the rate of return instrument.</i> <p>(4) <i>The report must—</i></p> <ul style="list-style-type: none"> (a) <i>include the panel’s assessment of the evidence and reasons supporting the rate of return on capital or the value of imputation credits under the instrument <u>and the panel’s view on whether the rate or value will or is most likely to contribute to the achievement of the national electricity objective; and</u></i> (b) <i>state whether the report is given by consensus.</i> <p>(5) <i>The AER must publish the report on its website.”</i></p>

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A failure to comply with the process for making the Instrument as outlined in this section does not invalidate or otherwise affect the instrument.	18R NEL/30M NGL	For the reasons set out in Energy Networks Australia’s submission, this provision is potentially beyond power and undermines a policy goal of providing enhanced process accountability and should be deleted.
The AER must review each instrument and make a new instrument to replace the reviewed instrument.	18U(1) NEL /30P(1) NGL	<p>The time for commencement of the review is not specified, but it is noted that the AER must publish a draft of the proposed instrument at least 6 months before making the instrument. There are various other procedural steps to be taken in the review pursuant to proposed Subdivision 3. Consistent with the current review of the Rate of Return Guideline by the AER, Energy Networks Australia considers that a 12 month period should be allowed for the review and submits the following amendment to proposed section 18U(1) of the NEL should be made (with equivalent changes to proposed section 30P(1) of the NGL):</p> <p style="padding-left: 40px;"><i>“18U</i></p> <p style="padding-left: 40px;"><i>(1) The AER must</i></p> <p style="padding-left: 80px;"><i>(a) review each rate of return instrument, <u>which review must commence no later than 36 months after the publication of each instrument</u>; and</i></p> <p style="padding-left: 80px;"><i>(b) make a new rate of return instrument under this Division to replace the reviewed instrument.”</i></p>
The AER must replace the reviewed instrument by publishing the new instrument on its website on the day that is the fourth anniversary of the day the reviewed instrument was published.	18U(2) NEL/30P(2) NGL	No proposed change
The AER may replace the reviewed instrument before the end of four years if satisfied it should be replaced earlier to ensure the rate of return instrument will, or is likely to, contribute to the achievement of the national electricity objective [national gas objective] to the greatest degree.	18U(3)/NEL/30P(3) NGL	Based on the discretion proposed to be given to the regulator in making the instrument and the very broad nature of the concepts captured in the national electricity and gas objectives, there is insufficient certainty as to when a rate of return instrument would be re-opened. On the current drafting, even dramatic changes in market conditions may not lead to a revisiting of the instrument.

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		<p>Further, the allowed rate of return rests upon certain assumptions about the risks faced by the service provider and the regulatory framework applicable to it. If there were a material change to the assumptions underpinning the derivation of the allowed rate of return, then the instrument would need to be revisited. There may also be cases where a particular data source used to estimate a parameter is no longer available, or new data sources are introduced. These sorts of circumstances should lead to a review of the instrument to see whether it should be replaced earlier than its fourth anniversary, but there is no certainty this would occur under the current drafting.</p> <p>Energy Networks Australia submits that proposed section 18U(3) of the NEL should be amended as follows (with equivalent changes to proposed section 30P(3) of the NGL):</p> <p style="padding-left: 40px;"><i>“18U</i></p> <p style="padding-left: 40px;"><i>(3) Despite subsection (2), the AER may replace the reviewed instrument before the day mentioned in that subsection if:</i></p> <p style="padding-left: 80px;"><i><u>(a) there is a material change in market conditions;</u></i></p> <p style="padding-left: 80px;"><i><u>(b) there is a material change to the assumptions on which the rate of return or value of imputation credits in the reviewed instrument was based;</u></i></p> <p style="padding-left: 80px;"><i><u>(c) the reviewed instrument states a way to calculate the rate of return or the value of imputation credits and the data or information relied upon to calculate the rate or value becomes unavailable or no longer appropriate to use; or</u></i></p> <p style="padding-left: 80px;"><i><u>(d) if the AER is satisfied it should be replaced earlier to ensure the rate of return instrument will, or is likely to, contribute to the achievement of the national electricity objective to the greatest degree.</u></i></p>

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		<p><i><u>(4) For the avoidance of doubt, the AER may only replace the reviewed instrument under subsection (3)(a), (b) or (c) above if it is satisfied it should be replaced earlier to ensure the rate of return instrument will, or is likely to, contribute to the achievement of the national electricity objective to the greatest degree.</u></i></p>
<p>Transition</p>		
<p>The effect of the transitional provisions is to exclude the AER from having to comply with the process outlined above in making the first binding Instrument, provided the AER has:</p> <ul style="list-style-type: none"> (a) commenced a review of a non-binding guideline; (b) sought advice or comment from stakeholders about the guideline; (c) at least three months before making the Instrument, published a draft of the non-binding guideline or Instrument; and (d) the draft guideline or Instrument has been reviewed by an independent panel consisting of at least three members with qualifications or experience the AER considers appropriate to conduct the review. 	<p>Part 15 Section 28 NEL/Part 15, Section 90 NGL</p>	<p>No proposed changes.</p>
<p>The proposed amendments to the Law will apply in relation to an AER economic regulatory decision made after the commencement of the legislation, even if any actual process for making the decision started before the commencement.</p>	<p>29 NEL/91 NGL</p>	<p>No proposed changes</p>

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<i>Rule-making power</i>		
<p>The proposed amendments to Schedule 1 of the National Electricity Law and National Gas Law (subject matter of the Rules) seeks to remove rate of return on assets as a subject matter the AEMC may make rules about.</p>	<p>Section 10 and 20 of the draft Bill</p>	<p>For the reasons set out in the submission, Energy Networks Australia does not consider there is any reason for this amendment to be made and the AEMC's rule making power should remain. This proposed amendment to Schedule 1 should be deleted.</p>