



**Standing Council on
Energy and Resources**

Expert Panel

**Review of the
Limited Merits Review Regime**

Stage Two

Submission

August 2012

1 Introduction

This submission is made in the context of the Stage Two assessment of the Expert Panel's review of the Limited Merits Review (**LMR**) regime in the *National Electricity Law (NEL)* and the *National Gas Law (NGL)*. It draws upon the Expert Panel's Final Stage One Report and Discussion Paper Three and should be read together with the AER's submission of June 2012 (**June 2012 submission**).¹

The Final Stage One Report identifies a number of weaknesses in the LMR regime. From this, the AER has identified that the LMR regime ought to be capable of delivering on the following four key objectives:

- undertaking a review that takes into account the balance of an electricity network revenue and price determination or a gas pipeline access arrangement determination (**regulatory determinations**)
- ensuring that the AER or the Australian Competition Tribunal (**Tribunal**) is properly able to broaden the scope of a review in the context of determining whether and how an error should be corrected
- ensuring that only errors that, if left uncorrected, would jeopardise the ability of the regulatory determination to contribute to the achievement of the national electricity objective (**NEO**) or the national gas objective (**NGO**) and be consistent with the revenue and pricing principles (**RPP**),² are subject to review
- providing a real opportunity for all relevant stakeholders, including consumers, to be involved.

The current LMR regime is not capable of delivering on these key objectives. These key objectives are further discussed in section 2 of this submission.

Another major focus of the Expert Panel is on the composition of the appropriate review body. Section 3 of the submission outlines the AER's views on the appropriate review body. Section 4 of the submission proposes changes to the LMR regime that can be made to better ensure that these key objectives are met.

¹ AER, *Standing Council on Energy and Resources, Expert Panel Review of the Limited Merits Review Regime, Interim Stage One Report and Consultation Papers 1 and 2, Submission*, June 2012.

² NEL, ss 7 and 7A; NGL, ss 23 and 24.

2 Key objectives

2.1 A review that takes into account the balance of a regulatory determination

A regulatory determination is a complex instrument that is more than just the sum of its constituent decisions or component parts. It represents a balance between the possible outcomes, reflecting the AER's judgment on the level of scrutiny and the form of examination afforded to all relevant material before it. That balance gives effect to the NEO, the NGO and the RPP. Any review of a regulatory determination must involve a holistic assessment that takes into account that balance.

The ability to undertake an assessment of this kind depends on the flexibility and the level of prescription in the *National Electricity Rules (NER)* and the *National Gas Rules (NGR)*. To date, the level of prescription in the NER has constrained the AER's ability to undertake this kind of assessment in the context of making electricity regulatory determinations. However, the Australian Energy Market Commission (**AEMC**) has recently proposed a suite of rule changes. The AER considers that these rule changes will allow it to undertake a holistic assessment of a regulatory determination to ensure that it will contribute to the achievement of the NEO and NGO and is consistent with the RPP.³

These changes will also be an important step in addressing the concerns identified by the Expert Panel. However, it is crucial that any changes made to the LMR regime complement the AEMC's proposed rule changes. Any changes must ensure that the review body is equipped to undertake a holistic assessment and is capable of considering the broad context of the whole regulatory determination, rather than on a narrow, issue only basis.

2.2 Broadening the scope of a review

As identified by the Expert Panel, it is clear that the intention of the Ministerial Council on Energy was for section 71O(1) of the NEL and section 258(1) of the NGL to allow the AER to open up the review to include any other aspect of the regulatory determination if it chose to.⁴ However, the legislation as drafted does not achieve that intention.

A broad reopener provision is crucial to the effective implementation of a review regime which is limited in these circumstances. Such a provision provides one of the necessary mechanisms that would allow for an assessment that takes into account the balance of a regulatory determination to be made. An error should only be corrected, if the correction contributes to the achievement of the NEO or the NGO and is consistent with the RPP. It is necessary to ensure that the review regime does not proceed on the assumption that a correction of error to one integer in a regulatory determination must

³ Australian Energy Market Commission, *Economic Regulation of Network Service Providers, and Price and Revenue Regulation of Gas Services, Draft Rule Determinations*, 23 August 2012.

⁴ Ministerial Council on Energy, *Review of Decision-making in the Gas and Electricity Regulatory Frameworks, Decision*, May 2006, p 20. See also the second reading speech accompanying the National Gas (South Australia) Bill (South Australia, House of Assembly, Debates, 9 April 2008, p 2893 (Hon PF Conlon, Minister for Energy)) and the second reading speech accompanying the National Electricity (South Australia) (National Electricity Law—Miscellaneous Amendments) Amendment Bill (South Australia, House of Assembly, Debates, 27 September 2007, p 967 (Hon PF Conlon, Minister for Energy)).

produce a change in the top line revenue figure that contributes to the achievement of the NEO or the NGO and is consistent with the RPP.

It must also be recognised that a provision of this kind is not in itself the sole solution to providing that a regulatory determination under review is subjected to an assessment that takes into account the balance of a regulatory determination. Ultimately, the efficacy of a single provision depends on whether the other elements of the LMR regime, both legislative and practical, are also capable of supporting that provision.

2.3 Errors that would jeopardise the regulatory determination

Only errors that if left uncorrected would leave a regulatory determination unsafe, in the sense that it would jeopardise the ability of a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP, should be considered under the LMR regime. For the reasons discussed in the June 2012 submission, the current LMR regime allows for the consideration of more than just these types of alleged errors.⁵

The requirement for there to be a serious issue to be heard and determined should be retained. A new leave threshold should also be introduced that requires a regulated business to establish that to not correct the alleged error would leave the regulatory determination unsafe in the sense that it would jeopardise its ability to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.⁶

However, the AER has reconsidered its position on the quantitative revenue threshold. Whether an error may jeopardise a regulatory determination is ultimately a qualitative question to be answered case by case. A revenue threshold is ultimately arbitrary. In certain circumstances this may have the unintended consequence of excluding the potential for errors which may nonetheless jeopardise a regulatory determination from a qualitative perspective.

Accordingly, the revenue threshold should be removed. It should be replaced with a requirement to establish that the alleged error, if uncorrected, would jeopardise the ability of a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

2.4 Involving all relevant stakeholders, particularly consumers

All stakeholders, particularly consumers, should be afforded a real and proper opportunity to participate in a review process. This is particularly so given the NEO and the NGO rests on meeting the long-term interests of consumers.

There is a clear case for consumer involvement in determining whether an alleged error should be made out. There is also a clear case for consumer involvement in determining whether and how an error is to be corrected, in the context of ensuring that a regulatory determination continues to achieve the NEO or the NGO and be consistent with the RPP.

The LMR regime needs to be capable of involving consumers at both of these stages and should provide consumers with a right to participate in a review.

⁵ AER, *Standing Council on Energy and Resources, Expert Panel Review of the Limited Merits Review Regime, Interim Stage One Report and Consultation Papers 1 and 2, Submission*, June 2012, pp 14 and 15.

⁶ *Ibid*, pp 16 and 18.

3 The review body

The Expert Panel has raised many questions about the composition of the appropriate review body. That review body must be capable of delivering on the four key objectives discussed above. These objectives can be better achieved by the LMR regime by making changes to make the review process more administrative in nature and to increase the assistance that the Tribunal is provided with.

3.1 Making the review process more administrative

As noted in section 2.3 above, the LMR regime should only allow for the consideration of alleged errors that if left uncorrected, would leave a regulatory determination unsafe in the sense that it would jeopardise the ability of a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP. Alleged errors of this kind are likely to be significant to a regulatory determination overall. Accordingly, there does need to be some structure and formality to a review. However, given the complexity and breadth of a regulatory determination, that structure and the level of formality necessary should reflect that of an administrative and not a judicial process.

The Tribunal itself is an administrative body. It was originally envisaged that the Trade Practices Tribunal (the predecessor to the Australian Competition Tribunal) would conduct proceedings to review competition matters with as little formality and technicality as possible.⁷ Indeed, in his second reading speech in the context of the Trade Practices Bill 1965, the then Attorney-General stated:

It would be a mistake to think of the procedures of this Tribunal as the procedures of a court. ... So it is that before the proposed Tribunal there will not be strict rules of evidence. The reason is that many of the matters involved will need to be provable by way of the record of some particular activity. This may be academic or by way of an article in a journal of economic record. On the other hand, it could be by way of the minutes of a meeting that had been held. Things of that kind, if put to strict proof before an administrative tribunal that is not a court, would only make the procedures long and more costly to parties and would, I think, tend to prevent the Tribunal from reaching the essential decision— the determination whether a particular activity was consistent with or contrary to the public interest.⁸

The fact that it was considered appropriate for the review of certain competition matters to be conducted with as little formality and technicality as possible suggests that the review of regulatory determinations (which are more administrative in nature than competition matters) should be conducted with at least the same, or arguably less, formality and technicality.

To this end, serious consideration should be given to the following suggestions to the Tribunal's processes. These suggestions build upon those made by Finkelstein QC in his submission to the Expert Panel dated 12 June 2012:

- the Tribunal should be required to publish a practice note outlining its processes
- the review should be conducted on the papers and supplemented by oral hearings or round table discussions
- oral hearings or round table discussions should not be heard in a court room

⁷ In the context of the Trade Practices Tribunal, the predecessor to the Australian Competition Tribunal: see *Trade Practices Act 1965* (Cth), s 70(1).

⁸ See the second reading speech accompanying the Trade Practices Bill 1965 (House of Representatives, Debates, 30 November 1965, pp 3357 and 3358 (B Sneddon, Attorney-General)).

- the involvement of legal advisers should be limited to resolving questions of law
- the requirement to apply for leave should be removed.⁹

The Tribunal should also be encouraged to develop practice notes and guidelines that encourage flexibility and involvement by all stakeholders. One way of implementing that flexibility would be to require the Tribunal, at the beginning of a review, to exercise its judgement to determine how that review is to be best conducted. That would involve the Tribunal making judgments regarding the extent to which the review should be conducted on the papers, the scope of any hearings or round table discussions and how stakeholders should be best involved, on a case by case basis.

3.2 Increasing the assistance provided to the Tribunal

Resources, capacity and expertise are significant factors in determining whether a review body is able to undertake a review that takes into account the balance of a regulatory determination, or to broaden the scope of a review. There have been suggestions that a new administrative body should be established or that new responsibilities should be conferred on an existing administrative body to undertake this task. This would involve substantial costs. The case for doing so has not yet been made out given that there are some pragmatic options that should be available to the Tribunal which could provide it with the resources, capacity and expertise to ensure that a regulatory determination under review is subjected to the requisite holistic assessment to ensure it continues to achieve the NEO or the NGO and be consistent with the RPP.

As discussed in the June 2012 submission, one option is to remit the regulatory determination to the AER following the finding of an error by the Tribunal, unless a simple correction is all that is required.¹⁰ This would allow the AER to supplement the LMR regime with the requisite resources, capacity and expertise. It would also allow the AER to provide more opportunities for stakeholders such as consumers to be involved. Another option would be for the AER to provide advice, re-examination or subject matter experts to the Tribunal as it requires or for the Tribunal to be assisted by additional staff with the relevant expertise from existing regulatory bodies.¹¹

Finally, increasing the assistance available to the Tribunal to allow it to undertake an assessment that takes into account the balance of a regulatory determination is likely to require the current target timeframes in the LMR regime to be extended.

⁹ See R Finkelstein QC, *Submission to Expert Panel*, 12 June 2012, pp 2, 3 and 7.

¹⁰ AER, *Standing Council on Energy and Resources, Expert Panel Review of the Limited Merits Review Regime, Interim Stage One Report and Consultation Papers 1 and 2, Submission*, June 2012, pp 14 and 18.

¹¹ For example, arrangements could be made for the Tribunal to be assisted by staff of the Australian Competition and Consumer Commission (ACCC), given that the staff assisting the ACCC and the Tribunal are both engaged under the *Public Service Act 1999* (Cth): *Competition and Consumer Act 2010* (Cth), ss 27(1) and 44(3).

4 Proposed changes to the LMR regime

To summarise the AER's positions, the Expert Panel should consider the following changes to the LMR regime as part of its advice to the Standing Council on Energy and Resources:

▪ **Making the review process more administrative in nature**

There are a number of changes that should be made to the LMR regime, including requiring:

- the Tribunal to publish a practice note outlining its processes
- the review to be conducted on the papers and supplemented by oral hearings or round table discussions
- oral hearings or round table discussions to not be heard in a court room
- the involvement of legal advisers at oral hearings to be limited to resolving questions of law
- removing the requirement to apply for leave.

▪ **Increasing the assistance provided to the Tribunal**

The LMR regime should be amended to allow for a regulatory determination to be remitted to the AER following the finding of an error by the Tribunal. The Tribunal should retain the ability to vary a regulatory determination if a simple correction is all that is required. The Tribunal should also have the option of requesting the AER to assist it as it requires, through the provision of advice, re-examination or subject matter experts or to be assisted by additional staff with the relevant expertise from existing regulatory bodies.

▪ **Remove the unreasonable ground of review**

For the reasons discussed in the June 2012 submission, the unreasonable ground of review should be removed. Alternatively, it should be replaced with a ground of review that better captures the notion that 'the decision was not made in accordance with the law or the rules'.

▪ **Introduce a leave threshold referring to the NEO or the NGO and the RPP**

The leave thresholds should be amended to require the Tribunal to refuse to grant an applicant leave to apply for the review of an individual alleged error if left uncorrected, the alleged error will not jeopardise the ability of the total revenue or prices in a regulatory determination to contribute to the achievement of the NEO or the NGO and be consistent with the RPP.

▪ **Remove the revenue threshold**

The current revenue threshold of the lesser of \$5 million or 2 per cent of the average annual regulated revenue of a regulated business should be removed.

▪ **Increase the target time frame by when a review is to be completed**

The target timeframe by when a review is to be completed should be increased to 6 months.

- **Consumers should be provided with a right to participate in a review**

There is a clear case for the participation of consumers in a review, particularly given the NEO and the NGO rests on meeting the long-term interests of consumers. Consumers should be provided with a right to participate.