Australian Competition & Consumer Commission

AUSTRALIAN ENERGY REGULATOR

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Dear Dr Locke

Submission to the Standing Council on Energy and Resources' Regulation Impact Statement Consultation Paper dealing with the Limited Merits Review regime

The Australian Energy Regulator (**AER**) and the Australian Competition and Consumer Commission (**ACCC**) welcome the opportunity to make a submission to the Standing Council on Energy and Resources (**SCER**) in response to its Regulation Impact Statement Consultation Paper dealing with the Limited Merits Review (**LMR**) of decision-making in the electricity and gas regulatory frameworks.

SCER's Senior Committee of Officials considers that the final report of the independent expert panel (the **Panel**) has provided evidence of regulatory failure, specifically in the areas of delivering the policy intention, the narrow focus of the review, accessibility of the regime, and timeliness of decision-making.

The AER and the ACCC agree that the current LMR regime has not delivered results in accordance with the principles agreed by the Ministerial Council on Energy in 2006. In particular, the current LMR regime:

- has not led to outcomes that can be said to be justified in the long-term interests of consumers;

- does not impose any downside risk for applicants and so creates incentives for network service providers (**NSPs**) to seek review in circumstances which would not otherwise be warranted; and
- is prohibitive for many stakeholders, including consumers, to participate in.

Options for changes to the LMR regime

Given the regulatory failure identified by the Panel, it is the view of the AER and the ACCC that Option 1, preserving the status quo, will not address the problems identified by the Panel and should not be pursued.

This is despite the economic regulation rule changes to the *National Electricity Rules* (**NER**) and the *National Gas Rules* (**NGR**) made by the Australian Energy Market Commission in November 2012 that substantially address a significant number of the problems associated with the current LMR regime.

The approach adopted by the AER and the ACCC in assessing Option 2 and Option 3 is that any changes which are implemented to the LMR regime should:

- generate the greatest net benefit for the community;
- be effective and proportional; and
- involve regulatory measures that are the minimum required to achieve the pre-determined and desirable outcomes.[1]

As discussed below, the AER and the ACCC propose a variation to Option 2 that, if implemented, we consider will result in greater benefits than either Option 2 or Option 3.

A completed copy of SCER's submission template is **attached** to this letter.

Assessment of the benefits of Option 2 and Option 3

There are significant benefits in terms of increased general economic welfare flowing from the improved regulatory determinations and regulatory outcomes which would result from the implementation of either Option 2 or Option 3.

This is because both Option 2 and Option 3 contemplate replacing the current error-focused grounds for review with a single ground for review, which is that the relevant regulatory determination is defective because there is a materially preferable decision. It is the view of the AER and the ACCC that this change would be a significant step towards ensuring that the LMR regime will result in review outcomes that are in the long-term interests of consumers. The adoption of this single ground for review also means that a materially preferable decision may not

[1] COAG, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, p 10.

necessarily be that which is proposed by the applicant. A materially preferable decision might be a regulatory determination that is less favourable to the applicant than the AER's initial regulatory determination. For example, this includes the possibility that a materially preferable decision provides a revenue allowance that is less than that sought by an applicant that is a NSP or alternatively, that is greater than that sought by an applicant that is a consumer. However, unlike under the current LMR regime, this may deter applicants (in particular, NSPs) from seeking review on minor or technical points only. Along with arrangements to improve the participation of other stakeholders including consumers in the review process,[2] the AER and the ACCC consider that either Option 2 or Option 3 will lead to improved regulatory outcomes: better regulatory determinations in the long-term interests of consumers, fewer reviews on minor or technical points and shorter review timeframes.

It is difficult to meaningfully quantify these benefits because this would require an assessment of the magnitude of the increase in general economic welfare (and reduced economic inefficiency) which would result from adopting Option 2 or Option 3 compared to the level of economic inefficiency that has resulted from the current LMR regime. Nevertheless, it can be said that the expected improvement in general economic welfare will exceed the costs incurred in moving from Option 1 to Option 2 or Option 3. These costs largely consist of direct administrative costs and, in the case of Option 3, other costs arising from investment uncertainty (discussed below) and costs arising from the potential impact on the integrity of the overall regulatory framework in Australia.[3]

Assessment of the costs of Option 2 and Option 3

The direct and other costs of establishing a new administrative review body to undertake reviews (Option 3) will be greater than the costs of the Australian Competition Tribunal (**Tribunal**) continuing to do so under either Option 1 or Option 2.

Specifically, the direct costs of establishing and administering a new administrative review body will be greater than the costs of continuing to have the Tribunal as the review body. This is likely to be the case even if arrangements are made to increase the resources available to the Tribunal.

A new administrative review body will also potentially lead to other significant costs, by adversely impacting regulatory and investment certainty in the energy sector due to uncertainty as to how a new administrative body would operate in practice. This option may also potentially put at risk the integrity of the overall regulatory regime within the framework that was envisaged by, and has been implemented since, the Hilmer review. This framework places considerable emphasis on consistent regulatory decision making (in respect of both methods and principles) as a means of, among other

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2 For example, the proposed Consumer Challenge Panel (see Prime Minister of Australia Press Release, *COAG Reaches Agreement on Electricity Market Reform*, 7 December 2012), SCER's proposed National Energy Consumer Advocacy Body (see SCER's Energy Market Reform, Bulletin Five, January 2013), and an increased focus on consumer involvement by the AER.

3 For examples of the order of magnitude of the potential benefits of regulatory reform in electricity networks, see The Productivity Commission, *Electricity Network Regulatory Frameworks: Draft Report*, October 2012.

things, reducing distortions in investment decisions across regulated industries.[4] Just as the AER and the ACCC regulate a number of industries with a focus on consistent application of regulatory principles and decision-making, it follows that there should be a single body reviewing all economic regulatory decisions.

The potential shortcomings of Option 2 and Option 3 as proposed

Although there are benefits to be gained from implementing either Option 2 or Option 3, both options have potential shortcomings and there may be additional benefits to be gained if these shortcomings can be addressed.

First, Option 2 limits the matters that a participant may raise to the matters that can be demonstrated to be pertinent or linked to issues raised by an applicant.[5] This limitation runs the real risk of repeating the failings of section 71O(1) of the *National Electricity Law* (**NEL**) and section 258(1) of the *National Gas Law* (**NGL**) in the current LMR regime, which have impeded the ability of the Tribunal to undertake an overall assessment of the entire regulatory determination. It is the view of the AER and the ACCC that enabling the Tribunal to undertake an overall assessment of the entire regulatory determination is essential and crucial to enabling outcomes of the LMR regime that are in the long-term interests of consumers.

Second, of the range of possible options available, the proposal for a new administrative review body in Option 3 is not a regulatory measure which involves the minimum required to achieve the desired outcome.[6]

As we previously submitted to the Expert Panel, the most appropriate review body to undertake a review of a regulatory determination is the Tribunal.[7]

There are real benefits associated with the Tribunal undertaking an administrative review of this kind. The Tribunal is an established review body that has existed since the commencement of Australia's competition and regulatory laws and performs an integral role in the current national competition and regulatory framework. The members appointed to the Tribunal bring significant expertise and experience to matters of economic regulation. The Tribunal has now served the interests of consumers in a number of industries for over 30 years.

Many of the criticisms of the current LMR regime arise from the NER and the NGR (now changed) or the regime itself, and not from the Tribunal as the review body.

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4 Hilmer, F., Rayner, M. and Taperell, G., *National Competition Policy* (1993), p 14.

5 Standing Council on Energy and Resources, *Limited Merits Review Consultation Regulation Impact Statement*, pp viii and ix.

6 COAG, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* October 2007, p 10.

7 AER and ACCC, *Standing Council on Energy and Resources, Expert Panel's Stage Two Report on the review of the Limited Merits Review Regime: Submission*, October 2012, p 4.

As the NER and the NGR have now been changed, the focus should be on changes to the LMR regime to address the remaining issues.

The Tribunal is an administrative body that operates under legislation. There are relatively simple arrangements that can be implemented, by amending the NEL and the NGL, to ensure that the Tribunal review process is an administrative one, and that the review process is accessible to other stakeholders, including consumers. For example, to ensure the broadest possible participation of all stakeholders, the NEL and the NGL could be amended so that third parties (i.e. other than the AER and the relevant NSP) would not be exposed to the risk of adverse costs orders. In addition, the NEL and the NGL could be amended to:

- require the Tribunal to publish a practice note outlining in simple form its processes for conducting a review;
- require the Tribunal to conduct its review on the papers, supplemented where the Tribunal considers it appropriate by limited oral hearings, preferably in the form of round table discussions;
- allow the Tribunal to require the parties to provide further information if necessary;
- specify that oral hearings are to be heard in a less formal setting and not a court room, and are to be conducted as round table discussions; and
- limit the role of legal advisors to assisting only on questions of law.

There are also a number of practical administrative arrangements that may be put in place to assist the Tribunal in undertaking a review, such as the provision of advice or subject matter experts by the AER, and the short term secondment of staff with the relevant expertise from other regulatory bodies.

Proposed variation to Option 2

The AER and the ACCC propose a variation to Option 2 to address the potential shortcomings of Option 2 discussed above. If varied as proposed by the AER and the ACCC, Option 2 would have the following main features:

- a single materially preferable decision ground of review;
- the Tribunal as the review body;
- the ability for parties to potentially raise any aspect of the regulatory determination in a review; and
- the Tribunal may only consider material that was before the AER.

It is expected that implementing this variation to Option 2 will result in benefits that are significantly greater than the benefits which might result from implementing either Option 2 or Option 3, without involving the additional costs associated with Option 3.

How the variation to Option 2 may work in practice

The AER and the ACCC suggest that Option 2 as varied would operate as a two-stage process, as detailed below.

Stage 1: whether there is a prima facie case that a materially preferable decision may exist

1. An applicant submits an application for review to the Tribunal that sets out:

   (a) a statement that there is a prima facie case that a materially preferable decision to that of the AER's regulatory determination exists, with reference to the national electricity objective (**NEO**) or the national gas objective (**NGO**), the revenue and pricing principles (**RPP**) and the long-term interests of consumers; and

   (b) a brief statement of the reasons for, and the evidence before the AER that supports, the applicant's contention that there is a prima facie case that a materially preferable decision exists.

2. The AER and other interested stakeholders may make a brief written submission to the Tribunal in response to the application, dealing with the question of whether there is a prima facie case that a materially preferable decision exists and setting out briefly the reasons and any evidence before the AER which supports the submission.

3. The Tribunal determines whether there is a prima facie case that a materially preferable decision exists, with reference to the NEO or the NGO, the RPP and the relevant rules in the NER or the NGR, on the basis of the application and any submissions made by the AER and other interested stakeholders.

4. If the Tribunal determines there is no prima facie case that there is a materially preferable decision, then the Tribunal will dismiss the application, so the AER's initial regulatory determination stands.

Stage 2: determination of the materially preferable decision

5. If the Tribunal determines that there is a prima facie case that a materially preferable decision exists, the Tribunal will direct the applicant, the AER, and other interested stakeholders to make further written submissions, and may, if necessary and in limited circumstances, give directions for some or all of the parties to provide any additional information required by the Tribunal.

6. In addition to any written submissions made and any information specifically requested by the Tribunal, the Tribunal will be limited to considering the information that was before the AER during its decision-making process.

7. The Tribunal will decide whether there is a materially preferable decision and, if so, either make a determination accordingly or remit the matter back to the AER to make the determination in accordance with directions from the Tribunal.

In both Stages 1 and 2:

- the Tribunal will conduct the review on the papers, if necessary supplemented at the direction of the Tribunal by brief oral hearings which preferably would take the form of round table discussions that are not held in a court room;
- interested stakeholders are limited to the applicant, the AER, the Minister of a participating jurisdiction and all stakeholders who took part in the AER's decision-making process, whether by providing information to, appearing before or by making written submissions to the AER; and
- the AER and other stakeholders may raise any matter relating to the AER's initial regulatory determination during either Stage 1 or Stage 2, and are not limited to raising matters that are pertinent or linked to issues raised by an applicant in its application for review.

Should you have any questions, please contact Michelle Groves on (03) 9290 1423 or Mark Pearson on (03) 9290 1863.

Yours sincerely

Andrew Reeves
Chair
Australian Energy Regulator

Rod Sims
Chairman
Australian Competition and Consumer Commission

Australian Energy Regulator
Australian Competition and Consumer Commission

Submission

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

Use of this template is strongly encouraged in making submissions.

In making submissions, stakeholders are requested to provide details, preferably supported by quantitative evidence, about the costs and benefits associated with each option to inform the development of the policy position. Any confidential material should be clearly identified, as it would otherwise be SCO's intention to publish how this evidence was used to inform the development of the final policy position as part of the decision RIS.

Stakeholders should focus on providing evidence of the potential impacts of the options under consideration. Given the extensive consultation already undertaken by the Panel, stakeholders should focus on providing evidence and new information to assist in the finalisation of the policy positions.

In addition, noting the complex interactions between the electricity and gas objectives with the pricing and revenue principles, and the objective for the appeal regime, SCO seeks input on the short and long term implications of each option for different stakeholders. Consequently, SCO requests that submissions provide information on short and long term outcomes and a relative weighting to provide an indication of significance.

Submissions must be lodged with the SCER Secretariat (scer@ret.gov.au) by cob Friday 8 February 2013

Consent (please select one option)	
×	**I agree that this document may be published in its entirety.**
	I agree that this document, less the sections which are clearly marked with "confidential", may be published.
	I wish the entire submission to be treated as confidential, and no part should be published.

Contact Details

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Date of submission **7 February 2013**

General feedback

Stakeholders are requested to provide general feedback against each of the options.

Option 1: Status quo

The AER and the ACCC do not support Option 1, as it will not address the problems identified by the Panel.

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

The AER and the ACCC support Option 2, other than the proposed limitation that a participant may only raise matters that can be demonstrated to be pertinent or linked to issues raised by an applicant.

The AER and the ACCC propose a variation to Option 2 that allows parties to raise any aspect of the regulatory determination once an application for review has been lodged.

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

The AER and the ACCC do not support Option 3. A new administrative review body is unnecessary and costly in circumstances where the Australian Competition Tribunal has the capacity to undertake reviews of the kind contemplated under a materially preferable decision criterion.

Answers to specific questions

General

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

   Yes, merits review should be maintained.

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

   Yes, a consistent approach to limited merits reviews of electricity and gas regulatory determinations remains appropriate. A consistent approach:

   - **is administratively simpler and therefore less costly to administer by the relevant regulatory bodies**
   - **reduces the likelihood of investment distortions between the electricity and gas industries**
   - **ensures consistency of decisions common to both electricity and gas regulatory determinations, for example, decisions concerning the cost of capital.**

   The policy considerations concerning the form of merits review equally apply to the electricity and gas industries and there is no compelling reason to adopt different merits review regimes between the two.

Other comments: **The principle of consistency is also an important consideration in designing and establishing regulatory agencies and review bodies and the same reasons as to why a consistent approach to limited merits review of electricity and gas regulatory determination should be adopted equally apply. Specifically, to introduce a new administrative review body solely for energy, whilst having the Australian Competition Tribunal as the relevant review body for other regulated industries, may potentially impact the integrity of the overall regulatory regime within the framework that was envisaged by, and has been implemented since, the Hilmer review. This framework places considerable emphasis on consistent regulatory decision making (in respect of both methods and principles) as a means of, among other things, reducing distortions in investment decisions across regulated industries.**

Option 1 – Status quo

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

   No. The problems identified by the Panel can only be addressed by moving away from the status quo. The AER and the ACCC consider that the problems are best addressed by implementing the variation to Option 2 that is have proposed in this submission.

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

   The recent network regulation rule changes to the *National Electricity Rules* and the *National Gas Rules* substantially address a significant number of the problems identified by the Panel. In particular, they better allow the AER (and therefore the relevant review body as well) to

assess the overall reasonableness of a NSP's regulatory proposal against the National Electricity Objective or the National Gas Objective in making a regulatory determination that is in the long-term interest of consumers. However, the AER and the ACCC consider that it is important that complementary changes to the LMR regime are also made to ensure that the review body is required to undertake an overall review of a regulatory determination and that the review process is accessible to stakeholders, including consumers. The Tribunal is currently unable to do so under the status quo (notwithstanding the recent rule changes).

Other comments: **None.**

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

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

   Moving to a single materially preferable decision criterion would have the effect of:

   - **contributing to outcomes that are in the long-term interests of consumers, given the review body would in practice be required to undertake an overall review of a regulatory determination; and**
   - **potentially reducing the number of reviews, by causing NSP's to carefully consider whether to apply for review of a determination, given that a materially preferable decision may not be the decision which is proposed by the applicant but may be the AER's initial regulatory determination or another determination which is less favourable to the NSP and/or has different implications for the NSP.**

   Implementing a single materially preferable decision criterion is compatible with retaining the Tribunal as the review body. The benefits of the Tribunal undertaking an administrative review of this kind that is accessible to stakeholders (including consumers) have been understated by the Panel, and the concerns that have been expressed regarding its potential inability to do so are misplaced. These concerns fail to recognise the significant expertise and experience that the members appointed to the Tribunal bring to matters of economic regulation.

   One limitation that might apply to the Tribunal in administering a single materially preferable decision criterion is resources. There are, however, a number of simple administrative arrangements that may be put in place to assist the Tribunal, such as the provision of advice or subject matter experts by the AER, or the short term secondment of staff with the relevant expertise from other regulatory bodies.

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

   There are no real barriers to the Tribunal effectively performing its role in a purely administrative manner. There are relatively simple arrangements that can be implemented, by amending the NEL and the NGL, to ensure that the Tribunal review process is an administrative one, and that the review process is accessible to other stakeholders, including consumers. For example, to ensure the broadest possible participation of all stakeholders, the NEL and the NGL could be amended so that third parties (i.e. other than the AER and the

relevant NSP) would not be exposed to the risk of adverse costs orders. In addition, the NEL and the NGL could be amended to:

- **require the Tribunal to publish a practice note outlining in simple form its processes for conducting a review;**
- **require the Tribunal to conduct its review on the papers, supplemented where the Tribunal considers it appropriate by limited oral hearings, preferably in the form of round table discussions;**
- **allow the Tribunal to require the parties to provide further information if necessary;**
- **specify that oral hearings are to be heard in a less formal setting and not a court room, and are to be conducted as round table discussions; and**
- **limit the role of legal advisors to assisting only on questions of law.**

A move to a more administrative approach would increase the accessibility of the review process to consumers. However, given the complexity and significant economic and financial consequences of review decisions, it is difficult to imagine an administrative approach completely removing the need for participants to engage legal counsel.

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

   After the ground for review has been established, in addition to any written submissions made and any additional information specifically requested by the Tribunal, the Tribunal should be limited to considering the information that was before the AER during its decision-making process.

   The benefits of allowing the Tribunal to consider information that the AER could not have reasonably considered in its initial decision making process would be to ensure that the regulatory determination following a review would be based on the most up-to-date information. This benefit needs to be weighed against the possibility of a NSP gaming the process by deliberately withholding information from the AER, and the risk of an extended review process if parties can introduce new information.

Other comments: **None.**

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

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

   The AER and the ACCC do not consider there are any specific benefits associated with a new administrative review body. The most appropriate review body to undertake a review of a regulatory determination is the Tribunal. A new administrative review body is unnecessary in circumstances where the Australian Competition Tribunal has the capacity to undertake reviews of the kind contemplated under a materially preferable decision criterion.

   Establishing a new administrative review body runs the risk of incurring significant other costs, namely by impacting regulatory and investment certainty in the energy sector due to uncertainty as to how a new administrative body would operate in practice. A new administrative review body may also potentially impact the integrity of the overall regulatory

regime within the framework that was envisaged by, and has been implemented since, the Hilmer review (which places considerable emphasis on consistent regulatory decision making (in respect of both methods and principles) as a means of, among other things, reducing distortions in investment decisions across regulated industries).

The investigative process envisaged to be undertaken by the new administrative review body also runs the risk of a review approximating a de novo review. As discussed in the response to question 7, one way to guard against this risk would be to limit the information the new administrative body is able to consider to that which was before the AER. Such a limitation would hinder the effectiveness of a true investigative process. However, this is acceptable given that the AER and the ACCC do not consider an investigative process is appropriate in a review of a regulatory determination.

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

The AER and the ACCC do not have any specific views as to the necessary level of prescription around the establishment and operation of such a body. That said, it is the AER and the ACCC's view that it would be necessary for at least one of the members sitting on the review body to have legal experience, given the complexity of the legislation and rules that govern regulatory determinations. Given this requirement, there is a real question as to why the review body should not be the Tribunal, with a Federal Court judge presiding.

Other comments: **None.**

Impact analysis

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

As discussed previously, the AER and the ACCC do not consider Option 1 is a viable solution in the circumstances and has therefore not set out the costs and benefits of Option 1. The AER and the ACCC agree with SCER's risk and benefit analysis, subject to also including the other costs of Options 2 and 3 that are discussed above and summarised below, and SCER's allocation of costs as set out on pages 35 and 36 of the Consultation Paper.

As to whether the overall costs of Option 2 and Option 3 may be lower due to fewer reviews being conducted and in a less legalistic manner, the AER and the ACCC do not have a specific view. On the one hand, both Option 2 and Option 3 may have the effect of deterring applicants (in particular, NSPs) from seeking review. On the other hand, given the broader scope of a review under a materially preferable decision criterion, it is possible that a single review under Option 2 or Option 3 may cost more than a single review under the current LMR regime. Further, as discussed in the response to question 6, whilst a more administrative approach may reduce the need for legal argument, given the complexity and significant economic and financial consequences of review decisions, it is difficult to imagine this completely removing the need for participants to engage legal counsel.

By way of summary, the main costs and benefits of Option 2, Option 3 and the AER and the ACCC's proposed variation to Option 2 are:

Option 2	Option 3	Variation to Option 2	Comment
Benefits			
Increase in general economic welfare to be gained from improved regulatory determinations and regulatory outcomes.	Increase in general economic welfare to be gained from improved regulatory determinations and regulatory outcomes.	Increase in general economic welfare to be gained from improved regulatory determinations and regulatory outcomes, in particular improved regulatory outcomes resulting from the ability of the Tribunal to consider the overall decision and improved accessibility of the the review process to stakeholders, including consumers.	These benefits cannot be quantified.
Costs			
Direct administrative costs of the Tribunal and other assistance if necessary.	Direct administrative costs of the new administrative review body.	Direct administrative costs of the Tribunal and other assistance if necessary.	Direct administrative costs of Option 2 and proposed variation to Option 2 are likely to be less than that of Option 3.
Other costs of the risk that the overall regulatory determination may not be reviewed because of the limitation on matters that may be raised before the Tribunal.	Other costs arising from by impacting regulatory and investment certainty in the energy sector due to uncertainty as to how a new administrative body would operate in practice.		These other costs cannot be quantified.
	Other costs arising from the potential impact on the integrity of the overall regulatory regime within the framework that was envisaged by, and has been implemented since, the Hilmer review.		These other costs cannot be quantified.

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

    Whether the overall costs of Option 2 or Option 3 are lower or higher than Option 1 will depend on the number of reviews sought and the scope of those reviews. As noted above, NSPs may be less inclined to seek review under Option 2 or Option 3 so there may be fewer reviews. On the other hand, given the broader scope of a review under a materially preferable decision criterion, it is possible that a single review under Option 2 or Option 3 may cost more than a single review under the current LMR regime.

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

    The AER and the ACCC do not have a view as to whether covered Ministerial and NCC decisions could be treated under each of the options or whether it is appropriate for these decisions to only be reviewable through judicial review.

Other comments: **None.**

Stakeholders are requested to provide a breakdown of the costs of the options, including operational costs, financing costs and disputation costs, in a separate, confidential document. SCO will aggregate any information on costs to gain an industry-wide perspective and the data will not be able to be attributed to any one entity.