

Mr Warwick Anderson
General Manager
Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001

9 July 2021

Dear Warwick,

Re: Advice to the Australian Energy Regulator
CRG Response to the AER's Consultation Paper on 2022 Instrument Process

The Consumer Reference Group (CRG) thanks the Australian Energy Regulator (AER) for the opportunity to respond to the above paper. In forming our views we have reflected on the AER's Consultation Paper and our observations of the Concurrent Evidence Sessions (CES) and Expert Panel for the 2018 Rate of Return review.

Importantly we note the 2018 legislative changes designed to :

*"enhance regulatory certainty for regulated businesses, investors, consumers and the AER ... and reduce the regulatory burden for all stakeholders in terms of the time and costs involved in debating rate of return issues."*¹

Consistent with this amendment, our advice also considers our well-documented and tested principles associated with consumer expectations of AER regulatory processes and outcomes.

The CRG's principles to guide its advice to the AER are as follows:²

- Principle 1 – A regulatory framework serving the long-term interests of consumers must promote behaviours that engender consumer confidence in the framework
- Principle 2 – Any change to the regulatory model must be tested against detrimental consumer impacts in relation to absolute prices and price changes

¹ AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 2.

² CRG, *Submission to AER – return on Equity* (October 2020), p. 21.

- Principle 3 – Any change to the regulatory model must be tested against acceptable consumer impacts in relation to service standards
- Principle 4 – Risks should be borne by the party best placed to manage them
- Principle 5 – There should be a high bar for change

Whilst we acknowledge the AER has decided on some aspects of the Pathway to 2022 process, such as the objectives, we have nevertheless taken the opportunity to comment broadly on all aspects of the proposed review process.

Our observations and advice are contained in the Table appended to this letter.

For the overall CES and Independent Panel to contribute to achieving the NEO/NGO, we emphasise the importance of ensuring both the CES and Independent Panel have access to, and fully consider consumers' submissions, and the CRG's evidence obtained from broad engagement with a diversity of advocates and by surveying consumers themselves.

According to the AER's *Consultation Paper*, the Independent Panel's objective is to support the AER make the best possible instrument by reviewing the draft instrument and the information available and that the Independent Panel is best suited to a role of reviewing that the AER has:³

- *“Undertaken an effective review process*
- *Engaged with the material before us with an open mind, and*
- *Reached a decision that is supported by our stated reasons and the information available to us.”*

While the CRG agrees that the above are important tasks for the Independent Panel, we believe a more important task is for the Panel to examine the extent the AER has met the NEL and NGL objectives with respect to promoting efficient investment in, **and** efficient operation and use of, the relevant electricity or gas services, for the long term interests of consumers.

We draw your attention to the 2018 *AER RoRG Expert Joint Report*⁴, it is important to establish whether the AER has explicitly and adequately addressed the second aspect of the NEO/NGO covering the efficient operation and use of electricity/gas. The CRG expects this requirement to be clearly stipulated in the AER's Terms of Reference to the CES and Independent Panel.

³ AER, *Consultation Paper on 2022 Instrument Process* (July 2021) pp. 8-9.

⁴ Cambridge Economic Policy Associates, *Rate of Return Guideline Review – Facilitation of Concurrent Expert Evidence Australian Energy Regulator Expert Joint Report* (April 2018), p. 10. Available at: <https://www.aer.gov.au/system/files/AER%20-%20Evidence%20Session%201%20%26%202%20-%20Expert%20Joint%20Report%20-%202021%20April%202018.pdf>

Any change to the 2018 RoRI must be considered in full context. This means along with ‘financial efficiency’, the AER must have considered other factors such as predictability, stability and transparency, and replicability, and any change to the RoRI must be supported by clear evidence to ensure stakeholder confidence in the AER’s decision.

Further, the CRG believes all evidence must link to the long-term interests of consumers, and should not be influenced by short term or more transient events. Hence, the AER is bound by the law to consider long term business cycles and trends.

Kind regards



Bev Hughson

Chair, Consumer Reference Group

CRG Response to the AER’s Consultation Paper on 2022 Instrument Process, 9 July 2021

Concurrent Evidence Sessions (CES)

Issue	CRG observations	CRG position/advice
Objective of the expert session	<p>(i) The CRG acknowledges the AER has decided that the expert sessions should focus on assisting the AER Board’s decision-making, rather than taking a more determinative role.</p> <p>Reflecting on the 2018 RoRI CES, CCP members who were involved in the process observed an imbalance in contributions to the debate between the multiple representatives of networks, pipelines and network investors, there appeared to be an imbalance between representations consistent with the network positions and the voice representing consumers. The CRG suggests such an imbalance is not helpful to the AER’s decision-making nor is it in the long term interests of consumers.</p>	<ul style="list-style-type: none"> • The CRG agrees with the AER’s decision, and stresses the AER must be the ultimate decision-maker, and party accountable for the final RoRI decision • In its role as an assistant to the AER Board and staff, and to achieve its objective, the CES panel members need to: <ul style="list-style-type: none"> ○ Maintain neutrality consistent with the rules imposed on expert witnesses giving evidence in a court of law⁶ ○ Have equal opportunity to express their views

⁶ Federal Court of Australia, *Expert Evidence Practice Note (GPN-EXPT)* (October 2016). Available at: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt>

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	<p>(ii) The AER also has sight of the overall regulatory framework, the decision’s context and the range of alternative views including those of consumers. The CRG believes it would be difficult for the CES experts to absorb and analyse all relevant material in the time available.</p> <p>(iii) Consumers trust the AER to make decisions in their long term interests.⁵ Any real or perceived delegation of decision making to an expert panel would be inconsistent with consumers’ expectations</p>	
Selection of experts	<p>The CRG acknowledges the legislation requires the AER to call for nominations and the AER intends to make the final decision on the selection of experts.</p> <p>While stakeholders can nominate a particular expert, any nominated expert is obliged to ensure they can advance</p>	<p>The CRG agrees with the AER’s selection of experts; i.e. the AER is:</p> <ul style="list-style-type: none"> (i) proposing that it will include those experts that “<i>will best advance our decision-making</i>”,⁸ so (ii) not all nominated experts will be included in the sessions, particularly if there is overlap in the evidence – then AER may only include one expert

⁵ The CRG’s survey of 1,000 residential energy consumers and 200 business and commercial consumers, clearly indicates most energy consumers support having an organisation (regardless of their awareness of the AER) to make decisions in their long-term interests (59% of all residential consumers and 79% of commercial consumers). An overview of the CRG’s consumer survey is included in the *CRG Response to the AER’s Draft Working Paper on the Term of the Rate of Return* (July 2021)

⁸ AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 7.

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	<p>the AER’s decision making in a balanced rather than partition way.</p> <p>In relation to the CES in the 2018 RoRI decision, the CCP noted that the networks/investors were over represented, and largely dominated the debate. This resulted an imbalanced discussion to the detriment of consumer interests.</p> <p>The CRG believes such issues stem from a lack of clarity as to the role of expert panel members. Whilst the expert panel’s formal obligation is to “support the Board’s decision-making”⁷, a potential conflict arises by virtue of the interests of the stakeholder nominated them.</p>	<p>(iii) stakeholders can make submissions after the sessions if important issues are not covered in the CES</p> <p>The CRG expects the AER to formalise a process for managing any potential or perceived conflict of interest, especially as expert panellists may have been engaged in other aspects of the current RoRI with the AER, consumer interest groups or other stakeholders.</p>
Expert conclave	<p>The CRG acknowledges the AER has made its decision regarding the expert conclave.</p> <p>The AER is proposing a private meeting between the</p>	<ul style="list-style-type: none"> • The CRG is concerned that this conclave may act as a filter on topics for discussion at the CES • The CRG is particularly concerned that there does not appear to be a

⁷ AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 6.

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	<p>selected experts, to narrow topics of consideration for the CES.</p> <p>Topics for discussion will also reflect the positions to be set out in the AER’s forthcoming December 2021 <i>Information Paper</i>, and submissions on that paper.</p> <p>The CRG is concerned that a ‘private conclave’ is inconsistent with consumer expectations and indeed out-of-line with the AR’s own standards.</p> <p>The CRG, in line with consumers expectations, expects the AER to be open and transparent. This expectation extends to its CES and to the prior expert conclave.⁹</p> <p>As reported on in its <i>Final Paper on Regulatory Treatment of Inflation</i>, the AER itself states:¹⁰</p> <p><i>“Transparency and replicability – An approach that is transparent and replicable can be easily verified by</i></p>	<p>transparent or objective method for selecting the topics that are included or excluded by the conclave for future discussion by the CES. Nor is the conclave obliged to provide the reasons for inclusion or exclusion of certain topics. The CRG questions why a “private meeting” is required and, if it is, why there cannot be greater transparency about its decision making</p> <ul style="list-style-type: none"> • The CRG suggests that, without published transcripts or even minutes, how will stakeholders know if their concerns will be debated and whether they can be if the enclave has decided otherwise before the CES? • The CRG is unclear whether stakeholders can make submissions as to the conclaves suggestions on the appropriate topics for further investigation by the CES, and on those topics that the conclave believe are settled.

⁹ The CRG Consumer Survey asked consumers to indicate in their own words (without prompting) the attributes they look for in an organisation they can trust. Transparency was specifically mentioned by 20% of residential consumers and 15% of commercial consumers.

¹⁰ AER, *Final Position. Regulatory treatment of inflation (December 2020)*, p. 16.

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	<p><i>stakeholders, improving regulatory certainty for stakeholders and reducing the risk that errors have been”</i></p>	
<p>Attendance by third parties</p>	<p>The CRG acknowledges the AER has made its decision on this matter</p> <p>The CCP noted a number of ‘observers’ in the 2018 RoRI interacting with CES members, and suggests that private discussions during the sessions between CES members and the parties that nominated them could conflict with the perception of an open and unbiased process.</p> <p>The CRG also notes that, COVID may force the sessions to be online in 2022, which may require further consideration of the management of third-party attendees and their influence during the sessions</p>	<p>The CRG support the following:</p> <ul style="list-style-type: none"> • The AER’s aim to make the CES more accessible to stakeholders • Limits on in-person attendance, but allowing for live streaming for all stakeholders <p>With respect to third party attendees, the AER needs to explain how:</p> <ul style="list-style-type: none"> • CES attendees will be selected and emphasise they are observers, not commentators or advisors to the CES representatives whose commitment must be to the AER Board. • The AER needs to emphasise CES members should not be convening with the parties that nominated them during the sessions (including breaks) <ul style="list-style-type: none"> ○ The AER should publish CES members’ obligations to refrain from such discussion and make this clear when appointing panel members ○ The independent facilitator needs to reinforce these obligations at

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		<p>the start of each session</p> <ul style="list-style-type: none"> • The AER may need to review its approach to the attendance of third-parties if the CES need to be held online
<p>Role of the facilitator</p>	<p>The CRG acknowledges the AER has made its decision on this matter.</p> <p>The CRG notes the facilitator will have <i>“a knowledge of the rate of return issues”</i> and <i>“their role will be to guide deliberations ...”</i>¹¹.</p>	<p>The CRG believes it is reasonable for the AER to appoint an ACCC commissioner to facilitate the CES. We expect that the facilitator will:</p> <ul style="list-style-type: none"> ○ Have experience in facilitation, not just RoR matters ○ Is able to ensure all topics are given their allocated time ○ Ensure alternative views are heard fairly and ‘claims’ are supported by evidence not presumption
<p>Expert joint report</p>	<p>The CRG acknowledges the AER has made its decision on this matter.</p> <p>In relation to the 2018 RoRI CES, the CRG notes the AER’s comment that AER that the expert report was of limited assistance, although in principle it was a good idea.</p> <p>Nevertheless, consumers expect such processes to be</p>	<ul style="list-style-type: none"> • The CRG agrees with the AER that an expert report is not required on the basis that transcripts will be made available shortly after the session • The CRG also suggests, for transparency, these transcripts need to identify participants, and this requirement needs to be made clear at the outset of the CES

¹¹AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 8.

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	transparent and presented in a way that that is accessible to consumers.	
How should experts be funded?	The CRG notes the AER raised this as an open question.	<p>The CRG agree with the proposal for the AER to remunerate all experts, and the terms outlined in its paper.</p> <p>The CRG also expects:</p> <ul style="list-style-type: none"> • All experts will be engaged on common terms (e.g. they will receive the same rate of pay, irrespective of their usual charging rates) • They are contracted with the AER, not with any nominating party or other stakeholder for the purpose of their expert panel role • If a stakeholder chooses to provide additional funding or other benefits to a nominated CES member this arrangement, including the amount, to be publicly declared in advance

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Scheduling of CES	<p>The CRG notes the AER raised this as an open question.</p> <p>The AER suggests that the two days (with 2 sessions/ per day) be split up by a week, providing for <i>“time for reflection prior to and after individual sessions”</i>¹².</p>	<ul style="list-style-type: none"> • The CRG agrees with the AER’s proposed schedule of 4 x 2.5 hour sessions • The AER needs to clarify whether the “reflection time” includes time to revise/expand on positions taken in the previous session(s). The CRG cautions against allowing revisions of views, although an opportunity for clarification of matters if it contributes to the Board’s understanding rather than simply allowing stakeholders to influence outcomes through their nominated representatives • While the CRG expects all members of the expert panel to be available for all parts of all sessions a contingency plan is required if any member is unable to attend. The CRG advises the AER to: <ul style="list-style-type: none"> • Assign dates ahead of appointing experts • Confirm experts are available on the nominated dates • Develop and publicise its contingency plan if any panellist is unavailable (providing this is advised in advance) • Further to our notes on the expert conclave, the CRG advises the AER to carefully review the session topics:

¹² AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 12.

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		<ul style="list-style-type: none"> • The topics need to be balanced over the sessions, and presented discretely and in an appropriate order • If there are multiple topics in one session, then time limits on each topic should be stipulated in advance, allowing for limited flexibility depending on the topic and divergence of views • Each session should include time to summarise the outcomes of that session. • The CRG agrees on the AER’s proposal for CES members to seek consensus or a majority view if a consensus cannot be reached. • For the final session, the facilitator should explicitly seek summarise the positions on each topic by each representative, allowing each a similar amount of time to speak. This will ensure transparency as to the conclusions from the sessions, about what was agreed by consensus or otherwise, and it will assist stakeholders to better evaluate different positions.

Independent panel

Issue	CRG observations	CRG position/advice

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Objective of the IP	<p>The CRG acknowledges the AER has made its decision on this matter</p> <p>The CRG notes the AER is not aiming to replace the <i>“Limited Merits Review or create a second decision-maker”</i>¹³</p> <p>As per our comments on the CES, the IP does not have legal authority or legal accountability for its decisions, and has not necessarily engaged with the detail of the process and proposal.</p>	<p>The CRG agrees that the IP:</p> <ul style="list-style-type: none"> • Should not include duplication or review of the regulatory judgement in the Draft RoRI • Should focus on whether AER has undertaken an effective review process, engaged with the material with an open mind, and reached a decision <i>“supported by our stated reasons and the information available to us”</i>¹⁴ • Should take account of accuracy, consistency, accessibility and transparency – but need to clarify these terms, e.g. ‘consistency’ within the RoR decision, and/or across time, i.e. consistency with previous decisions • Include express reference to the contribution of the Draft RoRI to achieving NEO and NGO overall, such as ‘the RoR decision achieves the most preferable contribution to the NEO/NGO’ <ul style="list-style-type: none"> ○ Given alternatives, such as a 5-year or 10-year term, which could both contribute to the NEO/NGO

¹³ AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 9.

¹⁴ AER, *Consultation Paper on 2022 Instrument Process* (July 2021) p. 9.

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Submissions to the IP	<p>The CRG acknowledges the AER has made its decision on this matter.</p> <p>In 2018, the CCP noted that networks were keen to make further submissions to the AR or present ‘new evidence’ to the IP after the AER published the Draft RoRI.</p> <p>If submissions cannot be made directly to the IP directly once it is appointed, then agree with the AER that it would be valuable to allow stakeholders to include comments to the IP, as part of a stakeholder’s response to the AER’s forthcoming February 2022 <i>Information Paper</i>.</p>	<p>The CRG agrees that:</p> <ul style="list-style-type: none"> • Submissions should not be made directly to the IP once it is engaged. • The AER should publish communications with the IP on matters of clarification
How many members should comprise the IP?	<p>The CRG notes the AER raised this as an open question.</p>	<p>The CRG agrees:</p> <ul style="list-style-type: none"> • The IP should include members who possess a range of relevant skills, although all members should have, or be able to achieve a working knowledge of the Law/Rules and the regulatory rate of return process and objectives • A 5-member IP is an appropriate size and will allow sufficient diversity, without compromising the ability of the Panel to come to a consensus on all or most issues

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		<ul style="list-style-type: none"> ○ The AER will need a clear policy on substitutes, or define a quorum if some members are not available ○ If the AER opts for substitute members they should be nominated in advance (e.g. from an approved reserve list) ● To avoid any real or perceived conflict of interest IP members should not have represented particular stakeholders, or the AER, in previous work on the AER’s 2022 RoR
Panel skills and composition	<p>The CRG notes the AER raised this as an open question.</p> <p>The CRG has reviewed the 2018 Independent Panel report¹⁵ and notes from the Panel members’ CVs, that although highly qualified and experienced their areas of expertise are predominantly finance, law and economics, rather than consumer engagement expertise. Perhaps as a result their commentary on consumer perceptions is limited compared to the reviews strong economic focus.</p> <p>The CRG notes the legislative requirement for the AER to</p>	<p>The CRG agrees:</p> <ul style="list-style-type: none"> ● The AER should recruit IP members as for the 2018 review, noting that IP membership should include a member who able to provide a view on whether the Draft RoRI is in the long-term interests of consumers, from a consumer perspective, beyond an economic or financial assessment of the Draft RoRI ● That stakeholders can provide the AER with names of nominees, but the AER should decide the final IP membership and has no obligation to accept any nominee

¹⁵ Independent Panel, *Review of the Australian Energy Regulator’s Rate of Return Draft Guidelines* (September 2018). Available at: <https://www.aer.gov.au/system/files/Independent%20Panel%20Report%20-%207%20September%202018.pdf>

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	<p>include a minimum of three experts on the Independent Panel, and that in 2018, it established a five-person panel.</p> <p>The CRG also notes the following AER requirements:</p> <ul style="list-style-type: none"> • Members are expected to <i>collectively</i> possess a range of relevant skillsets, including: <ul style="list-style-type: none"> ○ Finance and/or economic background ○ Regulatory experience ○ Experience in consumer perspectives ○ Investment experience beyond technical familiarity with rate of return issues. 	<p>The CRG also recommends that:</p> <ul style="list-style-type: none"> • All IP members must demonstrate to the AER an understanding of the long term interests of consumers in the context of the RoR, in addition to their other areas of expertise • It is also important that the IP members are aware of: <ul style="list-style-type: none"> • The AER’s consumer engagement activities • The CRG’s role, its test principles, the evidence it has gathered of consumers’ perspectives and its advice to the AER to represent the long-run interests of consumers as per the NEO/NGO