



9 July 2021

Mr Warwick Anderson
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Dear Warwick,

Submission in response to the AER's Consultation Paper on 2022 Instrument Process (Process Paper)

Thank you for the opportunity to provide a submission in relation to the 2022 Rate of Return Instrument process. The concurrent expert evidence process and independent panel review are important features of the process and we welcome the AER's consultation on these matters.

This submission is provided on behalf of Australian Gas Infrastructure Group, SA Power Networks, United Energy, CitiPower and Powercor (**the Businesses**).

The Businesses refer to and support the ENA's submission in response to the AER's Process Paper. The ENA submission refers in detail to the Brattle Report¹ commissioned by the AER to obtain feedback on the process for the 2018 Rate of Return Instrument. The Brattle Report found that the feedback was generally positive about the effort invested by the AER in designing and conducting the 2018 process and the potential for the process to work well.²

However the Brattle Report also identified concerns regarding the implementation of the process, the treatment of and engagement with evidence, the role and issues considered by the Independent Panel and a lack of stakeholder confidence in the process.³ The Brattle Report also included feedback on suggested improvements and recommendations for changes to the process.

The Businesses support the AER's willingness to review the 2018 process and indication that improvements can be made for the 2022 Instrument. However, we consider further changes to the process are necessary to address the concerns raised by stakeholders and identified in the Brattle Report and ensure the objectives of the process are met, including ensuring stakeholder confidence (which might reduce if known issues aren't addressed).

The changes to the process suggested by the ENA and the Businesses in this submission are also important to ensuring the AER can meet its task of making an Instrument that will, or is most likely to, contribute to the achievement of the national gas and national electricity objectives (**NGO/NEO**) to

¹ Brattle Group: *Stakeholder Feedback on the AER's Process for the 2018 Rate of Return Instrument*, 27 June 2019

² Eg, pages 1-2

³ See page 1-2, 6-13,

the greatest degree. This requires focus on the promotion of efficient investment, operation and use of network services for the long-term interest of consumers.

We agree with the AER that the best possible estimate of the expected rate of return will promote these objectives in the long-term interest of consumers.⁴ Stakeholder confidence in the process for setting the rate of return is also a necessary element of contributing to the NGO/NEO to the greatest degree.

A fulsome assessment and balancing of all the evidence, a robust and meaningful expert evidence process and Independent Panel review of the draft Instrument will be critical to achieving these objectives.

The attachment to this submission sets out some key features and suggested improvements put forward by the Businesses in relation to the concurrent evidence sessions and independent panel review. The Businesses also support the improvements suggested in the ENA submission.

We consider these improvements to be necessary to ensure there is confidence in the decision-making process for the 2022 Instrument and that the objective of making an instrument which contributes to the NGO/NEO to the greatest degree is met. Our concern is that the approach set out in the Process Paper and the changes proposed by the AER do not address the concerns raised by stakeholders in relation to the 2018 process. We encourage the AER to re-consider the process and make the improvements suggested for the benefit of all stakeholders.

We look forward to engaging further with the AER in respect of the expert evidence and independent panel process. If you require any further information or would like to discuss this submission, please contact [REDACTED] on [REDACTED] or [REDACTED]

Yours sincerely

[REDACTED]

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⁴ May 2021 Paper: *Assessing the long term interest of consumers*, page 2

Attachment-Specific Submissions regarding the Expert Evidence and Independent Panel Processes.

The Objective of the Concurrent Evidence Sessions

The AER has decided that the expert sessions should be focussed on assisting the Board's decision making, rather than taking a more determinative role.⁵ The Businesses agree that the expert sessions should not be determinative or bind the AER's decision making.

However, in our view the objective of the concurrent evidence session should be broader than assisting the AER Board's decision making. While assisting the decision making is an output of the process, we consider that the objective should be to assist the AER *and stakeholders* to identify and understand the key issues, to undertake a balanced assessment of the evidence and expert opinions and identify where there is agreement and where there is contention. The output of this process is to provide expert input into the AER's determination of an instrument that contributes to the achievement of the NGO/NEO to the greatest degree.

Approaching and designing the expert sessions with this broader objective in mind will assist in ensuring there is a balanced treatment of evidence, that the rate of return approach gives rise to the best estimate of market returns possible and that there is stakeholder confidence in the process.

Expert Conclave and Concurrent Expert Sessions

The AER proposes to hold a private expert conclave between the selected experts, the purpose of which is to narrow topics for consideration, consider the agenda for the expert sessions and focus the discussions.

The Businesses support the proposed conclave, but it is unclear whether there would be any output from this private discussion. To ensure transparency and that the concurrent expert sessions meet the objectives described above, we suggest the publication of a short summary of the key areas the experts have identified for focus and those that will not be the subject of the evidence sessions (and why). The Businesses support the ENA's submission that this can be provided by way of a simple summary statement rather than formal report, for the assistance of all stakeholders.

In relation to the conduct of the concurrent evidence sessions themselves, the AER's intention to stream the sessions is noted and supported. However, the AER has decided that an expert report will not be produced for the 2022 process, but that transcripts will be made available.

The National Gas Law and the National Electricity Law (both referred to as **the Law**) require the AER to publish on its website a report on the outcomes of seeking the expert opinions or evidence.⁶ The AER must have regard to the report in making the 2022 Instrument. We do not consider that publishing a transcript is sufficient to meet the requirements of the Law.

Further, it will be a very onerous and difficult task for stakeholders to read through the transcripts and understand key issues and outcomes of the sessions. What would be of greater assistance to the AER and all stakeholders is the production of a summary report which records the key issues considered, where the experts were in agreement and those areas where there were differing opinions or

⁵ AER: *Pathway to the 2022 rate of return instrument, Consultation Paper on 2022 Instrument Process, June 2021*, page 6.

⁶ NGL, section 30H(6) and NEL section 18M(6)

contention. A summary report will also be very useful to the AER in having regard to the expert evidence given in the sessions, and to the Independent Panel when reviewing the draft Instrument. This approach will also advance the objectives of the expert evidence sessions, including increasing stakeholder confidence in the process.

The Businesses also support the ENA's submissions relating to the funding arrangements for the experts and the scheduling of the expert sessions.

Independent Panel

The question the Independent Panel is asked to consider is key to ensuring the review by the Panel is meaningful, supports the task of making an instrument that contributes to the NGO and NEO to the greatest degree and creates stakeholder confidence in the outcome.

We support the AER's decision to give the Independent Panel a stronger role and revise the question to be considered. The question posed by the AER on page 9 of the Process Paper is generally supported as an improvement from the question in the 2018 process. However, the Businesses consider that the second part of the question should align with the AER's task and be framed as:

*"In the panel's view, is the draft instrument likely to contribute to the achievement of the National Electricity Objective and National Gas Objective **to the greatest degree.**"*

The AER's task as set out in the Law acknowledges that there will be more than one approach that is capable of satisfying the NGO and NEO. The AER considers that the Independent Panel should not duplicate regulatory judgement. In making its draft Instrument, the AER will have exercised its judgment and identified the approach that it considers, as a draft position, meets those objectives to the greatest degree. The value of the Independent Panel process will be limited if it is not asked to consider this key question. This would be inconsistent with ensuring stakeholder confidence in regulatory decisions.

The Businesses also support the ENA's submission that major stakeholder groups should be provided the opportunity to provide a short submission addressing specific areas of concern or key issues with the draft Instrument. At the time the Panel considers the draft Instrument, stakeholders will not have had an opportunity to respond to it. This proposed step is important to ensuring a meaningful independent review by the Panel and increasing stakeholder confidence.

Limiting the scope and length of any such submissions will assist in balancing the objectives of ensuring the Panel has all the necessary information and fully understands the issues, while ensuring the process is efficient and the amount of material before the Panel is manageable.

The Businesses support the AER's proposal to establish a five-person Independent Panel with a range of skill sets. In particular, we support the inclusion of institutional investment experience. We also support the ENA's submissions around the value of the inclusion of this field of experience.

Timing

One suggested slight amendment to the AER's Indicative Timeline in the Process Paper is to allow for submissions on the AER's Information Paper (published in December 2021) to be extended to March 2022. This timing will enable stakeholders to have regard to the outcomes of the concurrent expert sessions and should not impact on the overall timetable.