



# **Pathway to the 2022 rate of return instrument**

## **Position Paper on 2022 Instrument Process**

August 2021

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# 1 Introduction

Two key elements of the 2018 Rate of Return review were the Concurrent Evidence Sessions and the Independent Panel, both of which will be continued in the 2022 review. Given our experience with the set-up, running and outcomes of these processes we have identified a number of alternative options to improve and refine the outcome and work towards producing the best possible Rate of Return Instrument (RORI).

We thank stakeholders for their submissions and contributions to our process since our review began back at the start of 2019. We appreciate the ongoing feedback given and efforts made by all stakeholders to provide us with their views and opinions to improve the process. We have considered these comments and feedback carefully and have refined the proposed operation of the concurrent evidence sessions and independent panel to incorporate a range of views. These refinements include:

- the question we will put to the independent panel
- the introduction of a preliminary meeting of the experts prior to the concurrent evidence sessions
- our intention for the AER to engage and remunerate the experts.

While we have accepted a range of suggestions, we have not taken up all proposals and where we have not we explain why.

## 1.1 Aims and Objectives

We undertook this targeted consultation to assist us finalise the framework for each of these important components. We highlighted the key questions where stakeholders could contribute, and have taken these submissions into account when arriving at our final position on these aspects.

## 1.2 Legislative Requirements

The CoAG Energy Council reforms introduced in 2018 had the effect of elevating the framework for setting the rate of return that applies in determining the revenue of regulated electricity network and gas pipeline businesses into law.

A key element of the legislative amendments was the establishment of a binding instrument, setting out a single approach to the calculation of rate of return parameters for all network businesses. This instrument is to be developed by the AER, through a single, industry-wide process every four years.

The reforms were intended to enhance regulatory certainty for regulated businesses, investors, consumers and the AER regarding the rate of return component of the networks' determinations and reduce the regulatory burden for all stakeholders in terms of the time and costs involved in debating rate of return issues.

They also sought to make the process more robust to enable early resolution of contested issues. In developing the instrument, and in addition to existing consultation requirements, we are required to seek input from:

- experts with appropriate qualifications or experience, with nominations to be sought at the commencement of the process; and
- an independent expert panel, comprising at least three members, who will assess and publicly report on the draft guideline.<sup>1</sup>

In particular, section 18M of the National Electricity Law states that:<sup>2</sup>

- Before publishing a draft rate of return instrument ... the AER must seek concurrent expert opinions or evidence about the proposed instrument
- The AER must call for nominations of eligible experts but may seek the expert opinions or evidence from any eligible expert.
- If practicable, the AER must seek the expert opinions or evidence from at least 3 eligible experts.

In addition, section 18P of the National Electricity Law requires the following:<sup>3</sup>

- 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.
- The panel
  - may carry out its activities, including giving the report, in the way it considers appropriate; but
  - must seek to give the report by consensus.
- The panel must
  - consist of at least 3 members, appointed by the AER, who have qualifications or experience in a field the AER considers relevant to making a rate of return instrument
  - give the report to the AER before the AER makes the instrument.
- The report must
  - 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; and
  - state whether the report is given by consensus.
- The AER must publish the report on its website.

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<sup>1</sup> CoAG, Bulletin: Consultation on binding rate of return amendments, March 2018

<sup>2</sup> Section 18M, National Electricity (South Australia) Act 1996

<sup>3</sup> Section 18P National Electricity (South Australia) Act 1996

## 2 What had we decided prior to the consultation paper?

In May 2020, we released our Pathway to 2022 Rate of Return Instrument – Position Paper (the 2020 Position Paper) setting out the process for the 2022 review.<sup>4</sup> In deciding on this process, we were guided by:

- our legislative obligations
- stakeholder submissions to our 2019 Consultation Paper, and comments made to the Brattle Group, in relation to ways of improving the 2018 review process
- our own experience of the 2018 review.

The 2020 Position Paper resolved a number of matters in relation to the establishment and operation of the Concurrent Evidence Sessions and the convening of the Independent Panel.

### **Concurrent Evidence Sessions**

#### *The Objective of the Sessions*

In 2018, we took the view that the key objective of the Concurrent Evidence Sessions should be to aid the Board in exercising its judgement when deciding on the RORI. The sessions provided an opportunity for the Board to hear from the experts as they laid out key evidence and debated disputed topics.

An alternative approach would be for the sessions to have a more determinative role in decision-making. In this context, for example, where experts are able to agree on a position (or a majority view emerges), this would be highly persuasive when the Board makes its decision.

The expert sessions will be an important component of the RORI process and we want to maximise their value. We also recognise that there will be other aspects of the process that will be important in guiding our decision-making. In particular, we point to the working paper series we are currently progressing, the submissions we expect to receive from stakeholders prior to the draft instrument and the report from the Independent Panel on the draft instrument.

As such, we have decided that the expert sessions should be focussed on assisting the Board's decision-making rather than taking a more determinative role. The sessions are not intended to develop consensus or majority views which would then bind the Board's decision making. In addition, it is important for the Board to be able engage with a balanced overview of the key topics where the breadth of expert views are available.

#### *Nominating the experts*

The legislation requires us to call for nominations for experts and to include a minimum of three experts (if practicable).

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<sup>4</sup> <https://www.aer.gov.au/system/files/Pathway%20to%202022%20rate%20of%20return%20instrument%20-%20Position%20paper%20-%20May%202020%20-%20Final.pdf>

We recognise that stakeholders may wish to engage their own experts. However, the purpose of these sessions is not to provide a representation of each stakeholder's perspectives, but rather for the Board to have access to the evidence that will best support its decision-making. This evidence should be presented objectively and be unbiased. It should support the Board's decision-making and that should be the obligation for each of the experts rather than representing the perspectives of particular stakeholders.

In this context, it is important that we include those experts that will best advance our decision-making. This means we may not include all nominated experts in the sessions. Where we think there is likely to be overlap in the evidence presented by multiple experts, we may include only one expert who is able to sufficiently present the evidence. This approach will enable us to structure the sessions so that the key material is covered and we are able to consider the span of evidence in a balanced manner. The current working paper process will enable us to identify the key topics where expert advice will assist.

Following the experts sessions, there will be a period for submissions before we make our draft instrument. If stakeholders consider that important aspects have not been covered in the sessions, the submission period is an opportunity to draw issues to our attention.

As we review the topics to be covered in the sessions and the experts that have been nominated, we will consider whether we should include additional experts in the sessions. It may be that we identify evidence that is not able to be sufficiently presented by the nominated experts and if that is the case we may decide to include additional experts.

#### *Expert Conclave*

We recognise that simply extending the time spent on the Concurrent Evidence Sessions will not necessarily improve outcomes, and potentially only serve to add costs.

Accordingly, we have resolved to implement an 'expert conclave'. This will comprise a private meeting between the selected experts, held prior to the main evidence sessions, to narrow the topics for consideration, consider how best to follow the agenda and focus discussions.

The Information Paper, published in December 2021, will identify subject matters where there is a reasonably settled view among stakeholders and those areas where there are still a number of open options and more work is required. In this context, the Information Paper, and the stakeholder submissions on that Paper, will guide the Conclave in identifying appropriate areas for discussion in the expert sessions.

Stakeholders will be given an opportunity to submit potential questions for the expert panel to debate. In the first instance, these will be provided to the AER which, in turn, will consider which ones to put forward to the conclave.

#### *Attendance at the sessions*

In our review of the 2018 process, we recognised there was strong support for greater attendance at the expert sessions. This would enable additional stakeholders to view the deliberations first hand and better understand the context of the discussion.

Accordingly, we propose to make the sessions more accessible to stakeholders.

For convenience, we will limit in-person attendance to session participants. However, to promote equity in access for all parties, the evidence sessions will be streamed for interested stakeholders.

### *Facilitator*

During the 2018 review, we held two concurrent evidence sessions which focused on different topics of discussion. Both sessions were assisted by a facilitator, who directed the discussion.

The role of the facilitator is also important in ensuring that all relevant information is put before Board Members, enabling them to make the best decision possible.

Stakeholders generally supported the presence and role of the facilitator.<sup>5</sup>

For 2022, we have decided that the sessions will be run by a Commissioner from the Australian Competition and Consumer Commission with a knowledge of rate of return issues. Their role will be to guide deliberations, allowing experts to discuss the subject matter in a manner that clearly explains alternative views and evidence at hand.

### *Expert Report*

During the 2018 process, the concurrent evidence session facilitator co-ordinated the development of a report to record the opinions of the participating experts in a single document—the expert joint report.

We have decided that an expert report will not be produced for the 2022 review. This decision reflected our experience from the 2018 process and our desired approach for more comprehensive preparation in advance.

In the 2018 process, we found the aspect that was of most assistance to us was the discussion itself, along with the opportunity to test ideas and perspectives. By contrast, the joint report was of limited assistance.

In the absence of this report, we will make the transcripts of the sessions available for all stakeholders shortly after the sessions have concluded.

## **Independent Panel**

### *Objective of the Independent Panel*

The objective of the Independent Panel will remain the same. That is, the Panel's work is intended to support the AER make the best possible instrument by reviewing the draft instrument and the information available to us in drafting the instrument.

In our view, the role of the Independent Panel should not include duplication of our regulatory judgement or to put forward an alternative or amended Instrument. Our view is that the Independent Panel is best suited to a role of reviewing that we have:

- undertaken an effective review process

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<sup>5</sup> The Brattle Group, Stakeholder feedback on the AER's process for the 2018 Rate of Return Instrument, p. 17.



- engaged with the material before us with an open mind
- reached a decision that is supported by our stated reasons and the information available to us.

The Brattle Group's review of the 2018 instrument highlighted that there was a desire for the Independent Panel to have a stronger role.<sup>6</sup> We agree with this view. Following consultation with stakeholders,<sup>7</sup> we have revised the question to be considered by the Independent Panel, splitting the previous question into two distinct parts and sharpening its focus on promoting the achievement of the energy objectives.

The questions we are intending to put to the Panel are:

*"In the panel's view, is the draft instrument supported by evidence and reasons, taking into account competing factors such as accuracy, consistency, accessibility and transparency?"*

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

We think our revised questions broaden the panel's scope. However, in making this change, we are also clear that we are not looking to replace the Limited Merits Review or create a second decision-maker.

#### *Submissions to the Independent Panel*

Once engaged, the Independent Panel will not receive communication from the AER or stakeholders, except we will respond to any questions from the panel seeking clarification. We will publish these communications and will point to existing material rather than providing new material. It is important that the Independent Panel delivers its report based on the Draft Instrument and the evidence that was put in front of us ahead of the draft.

In this context, stakeholders may provide a short summary submission addressed to the Independent Panel, but these must be provided to the AER by the closing date for submissions on the Information Paper. Material received from stakeholders after this cut-off will not be available to the Independent Panel.

We will allow a period following the expert sessions for stakeholders to finalise their submissions. The consultation period on the AER's Information Paper will close two weeks after the final Concurrent Evidence Session.<sup>8</sup> Should stakeholders wish to make a submission to the Independent Panel, this submission can be included as part of their response to the Information Paper.

### **Indicative Timeline**

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<sup>6</sup> The Brattle Group, Stakeholder feedback on the AER's process for the 2018 Rate of Return Instrument, pp. 19-20.

<sup>7</sup> AER, Pathway to 2022 rate of return instrument, Position Paper, May 2020, pp. 16-17.

<sup>8</sup> The Information Paper, published in December 2021, will summarise and combine content from all of the Working Papers prepared by the AER in 2020 and 2021. We intend for it to provide an overview of the proposed approach to setting the rate of return, set out the topics to be considered in the expert sessions and guide submissions in advance of the draft instrument.

Table 1 sets out an indicative high-level timeline for the development of the 2022 Rate of Return Instrument following the release of the Information Paper.

Table 1 Indicative Timeline

Milestone	Date
Publish Information Paper	December 2021
Expert Conclave	February 2022
Concurrent Evidence Sessions	February 2022
Submissions on Information Paper close	February 2022
Draft 2022 Rate of Return Instrument released	June 2022
Release of Independent Panel's Report	August 2022
Submissions on Draft Instrument close	September 2022
Final 2022 Rate of Return Instrument released	December 2022

## 3 Questions from the Consultation Paper

### 3.1 How should the experts be appointed and funded?

#### 3.1.1 AER Consideration

The experts who appear in the Concurrent Evidence Sessions could be engaged and remunerated by the stakeholders who nominated them, as they were in the 2018 review, or directly by the AER. Direct engagement and remuneration by the AER would reinforce the obligation of the experts to support the AER's decision making as well as providing the AER with access to the full range of expert views. In the 2018 instrument formation process there were disparities in the resources available to stakeholders, both in financial backing and knowledge of relevant material. This disparity was reflected in the expert evidence sessions. In the 2022 process we want to be informed of the range of views relevant to our decision making.

#### 3.1.2 Stakeholder Response

Most stakeholders supported the AER's position that experts should be appointed and remunerated by the AER.<sup>9</sup> These submissions noted that remunerating the experts centrally would remove issues of funding disparity between stakeholders as well as focusing incentives to ensure experts are working to assist the board and not simply represent the views of the stakeholders who funded them.

Some stakeholders also offered additional considerations.

The ENA submitted that experts were likely to have strong pre-existing reputational incentives to provide clear, fair and well-balanced views and evidence. Due to these incentives, using stakeholder funded experts would still be workable.<sup>10</sup> We agree that reputation is important for experts in their areas of expertise. However, we consider that funding by the AER would go further to reinforce the obligation for experts to support the AER's decision making process. As a significant part of the 2022 instrument process, we aim to ensure the concurrent evidence sessions are seen as experts providing assistance to the AER, and not stakeholders engaging experts that will represent the stakeholders' views.

Both APA and the MEU noted that it was still possible for bias to occur even if the experts were funded by the AER. The MEU highlighted that in previous processes there have been more 'supply side' stakeholders submitting expert nominees raising a potential bias in selection if the AER does not consider the source of the nomination.<sup>11</sup> APA suggested that the expert engagement process should be carefully managed to avoid a preponderance of

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<sup>9</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1; CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 10; ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 10; Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4; NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 12; MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2

<sup>10</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 10.

<sup>11</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 3.

experts with a common outlook.<sup>12</sup> We agree that it is important to ensure the range of relevant views are presented. We will request nominations from stakeholders and we will be mindful to see that relevant views are presented. Once we have chosen and engaged the experts, we will publish on the AER website a list of the experts we have engaged.

### 3.1.3 AER Position

The AER will engage and remunerate the experts after considering stakeholder nominations. We acknowledge the points raised by APA and MEU and we will be mindful to select experts that can inform us of the range of views and approaches.

We have published a document on our website asking stakeholders to put forward confidential nominations. In the document we set out desirable characteristics for the experts and the criteria that will guide our final selection. We also discuss issues of independence and potential conflict of interest and how we propose to approach these issues.

We ask stakeholders to inform their prospective nominees that they will be nominated ahead of doing so. We will not publish a full list of nominations to protect privacy and confidentiality.

## 3.2 How should the sessions be scheduled?

### 3.2.1 AER Consideration

In 2018, sessions were held over two days, three weeks apart, and comprised six hours of discussion each day.

In 2022, we will be well-prepared for the expert sessions through our working paper series. Through the series, many issues have been able to be progressed and in some cases preferred positions identified. This means the expert sessions can be directed toward the key outstanding issues.

We also expect the efficiency and effectiveness of the conduct of the 2022 expert sessions to be supported by the deliberations of the expert conclave.

Accordingly, at this time, we proposed that for 2022, the Concurrent Evidence Sessions comprise four two-and-one-half-hour sessions, each potentially thematically-based, held over two days, separated by one week. This would provide time for reflection prior to and after individual sessions.

### 3.2.2 Stakeholder Response

Stakeholders were widely supportive of the breakdown of the Concurrent Evidence Sessions into four 2.5 hour sections. There was also widespread acknowledgement that topics of discussion both for the conclave and the individual sessions should be made available prior to the sessions for stakeholder awareness.<sup>13</sup>

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<sup>12</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, pp. 1-2.

<sup>13</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2; Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4; ENA, *Pathway to the 2022 Rate of Return*

However there was some disagreement over how flexible the agenda of sessions should be once they are in action. MEU submitted that having a predetermined session time for certain subjects may cut short useful debate.<sup>14</sup> The CRG, on the other hand, stated that placing time limits on topics within the sessions, with limited flexibility to account for the divergence of views, would be most appropriate.<sup>15</sup> MEU also suggested that stakeholders should be able to raise questions between sessions to pose to the experts.<sup>16</sup> NICE suggested that the expert sessions should focus on the consequences of each choice on the decision as a whole and proposed an extra, fifth session to further quiz experts on the implications of possible decisions as a whole.<sup>17</sup>

It is natural to have a divergence of opinions on the best way of scheduling expert sessions, and more time will often seem like a solution. We understand that we need to strive to ensure these sessions are efficient and effective as they are at an important point in the instrument formation process. We believe that setting time limits for the sessions with subjects to be discussed in each will provide the best structure for the experts to provide advice to the AER.

Given our previous experience, we do not consider adding an extra session would be beneficial overall, as discussions will likely become less focused negating the intended benefit of adding extra sessions in. However we do consider that taking time to examine the implications of each choice on the decision as a whole (as described by NICE) would be a good use of time. We will add such holistic discussion as an item for consideration in the sessions. This will take place towards the end of the series of the Concurrent Evidence Sessions to allow experts full consideration.

We do not consider that benefits of allowing stakeholders to pose questions to the experts in between sessions outweigh the costs in terms of allocated time and diverting experts' attention. The purpose of the session is to provide advice to the AER to aid the board in forming the 2022 Rate of Return Instrument. Allowing questions to be posed could side-track the expert discussion. Also, this may put topics in the later sessions at a disadvantage, as more time would likely be spent discussing topics in earlier sessions. Stakeholders will have further opportunity to raise points for consideration in their submissions following the expert sessions.

We have also received some stakeholder comments on the conclave, and how the outcomes of that would be reported.<sup>18</sup> Whilst we consider that that the conclave is best held as a private meeting, we understand stakeholder concerns on this issue and have adjusted in response. After the conclave is complete, we will publish a short summary of the conclave discussions and outcomes, and how these impact the evidence session discussions.

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*Instrument*, 9 July 2021, p. 10; CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 11; APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1.

<sup>14</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>15</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, pp. 11-12.

<sup>16</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>17</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.

<sup>18</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, pp. 6-7; ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 8.

As part of our previous work we made the decision to remove the Joint Expert Report from the process. We understand some stakeholders still feel this was not the correct decision. However after considering these submission we intend to not seek a final report from the experts as we outlined in the May 2020 paper on the pathway process.<sup>19</sup> We are particularly concerned that the expert sessions are focussed toward supporting the AER's decision making process rather than attempting to identify their own preferred approach. We consider this is best achieved by focussing the sessions on the outstanding questions for our consideration. We will provide transparency on the expert sessions and stakeholders will have the opportunity to provide submissions after hearing the discussions.

### **3.2.3 AER Position**

We propose that for 2022, the Concurrent Evidence Sessions comprise four two-and-one-half-hour sessions, each thematically- or subject-based, held over two days, separated by one week. This would provide time for reflection prior to and after individual sessions.

The themes or subjects of each session will be informed by consideration of submissions on our working papers and the discussion of the expert conclave. These themes or subjects will be made public prior to the sessions.

## **3.3 How many members should comprise the Independent Panel?**

### **3.3.1 AER Consideration**

The legislation requires us to include a minimum of three experts on the Independent Panel.

In 2018, we established a five-person panel, comprising domestic and international experts.

We considered it important that the Independent Panel is comprised of members who collectively possess a range of relevant skillsets. The skills and background we are seeking for the panel to include a range of the following:

- A finance and/or economic background
- Regulatory experience
- Experience in consumer perspectives
- Institutional investment experience

We also considered that while a larger panel provides for a diversity in views and a broader mix in skills and experience, it also brings with it the risk that the panel will find it more difficult to reach conclusions.

For 2022, we were minded to establish a five-member panel to accommodate a diversity of views and experience, and to mitigate against circumstances where a panel member might need to drop out of the process due to unforeseen reasons.

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<sup>19</sup> AER, *Pathway to the 2022 rate of return instrument - Position Paper, May 2020*.

### 3.3.2 Stakeholder Response

Stakeholders were in agreement that five members was an appropriate number for the panel. Stakeholders emphasised their priority of ensuring that there was an appropriate range of skills and experience selected for the Independent Panel membership.<sup>20</sup>

There has been consistent messaging in all forms of stakeholder feedback since the 2018 instrument that the membership of the 2018 Independent Panel was appropriate.

There was more discussion around the question to be asked of the Panel and direct stakeholder contact.<sup>21</sup> Some stakeholders requested the ability to submit a document directly to the Independent Panel, after the draft instrument, so they could highlight their concerns directly to the panel. Network stakeholders were also very keen to add "to the greatest degree" as a qualifier on the Independent Panel questions we previously settled on.

For what is asked of the Independent Panel, we have decided to ask them two questions:

*"In the panel's view, is the draft instrument supported by evidence and reasons, taking into account competing factors such as accuracy, consistency, accessibility and transparency?"*

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

These have already expanded on the single question asked in 2018, and give the Panel more scope to examine the draft instrument. By adding "to the greatest degree" to these questions we would be asking the Panel to make a separate decision and become a decision maker in their own right. The panel is in place to assess our decision, not make its own one.

We have already acknowledged that stakeholders may submit to us a small document outlining areas of key interest to the Independent Panel, but this must be before the draft Instrument and be submitted as part of our submission periods. As part of the panel's job in assessing our decision, we remain of the view that it is important that the Independent Panel should not have regard to any material that we did not have before us. As such, there will be no submissions accepted or put before the Independent Panel that come to us after our final submission period. We will not provide the Independent Panel any new information that was not referred to in our draft Instrument, so there will be no need for stakeholders to submit anything to us in-between the publication of the draft instrument and the publication of the Panel report.

### 3.3.3 AER Position

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<sup>20</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 2; CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 14; ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 11; Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4; NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13; MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2

<sup>21</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4; ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 9

As in 2018, we expect panel members to strive to reach consensus, but will not restrict panel members from expressing differences of views within the report if that is the ultimate view of the members.

For 2022, we will endeavour to establish a five-member panel to accommodate a diversity of views and experience (as set out above).

## 3.4 How should Panel members be selected?

### 3.4.1 AER Consideration

In 2018, we considered submissions from stakeholders on the classes of individual or specific individuals to be considered for the panel. However, we made the final decision on the panel's composition. We found this part of the process worked well in 2018.

### 3.4.2 Stakeholder Response

Stakeholders agreed that the nomination process should be similar to that in 2018. Stakeholders signalled their desire to submit their nominations for consideration but understood that the final decision would remain with the AER board.<sup>22</sup> The aim of the consultation and engagement would be appointing a panel comprised of a variety of skills and experience, as set out in section 3.3.

### 3.4.3 AER Position

We believe that maintaining our 2018 approach provides us with the best foundation for appointing a panel along the specifications detailed in this paper, which is most likely to best contribute to the overall purpose of the Independent Panel. During our review period, we have not received feedback that our approach to appointing the panel needed changing or that the Panel membership was not appropriate.

We have published a document on our website asking stakeholders for confidential nominations for the Independent Panel members. In the document we set out desirable characteristics for panel nominees and the criteria that will guide our final selection. We have also provided guidance on potential conflicts of interest and the independence of panel members, as well as relevant timing. In brief, we are of the view that panel members should have a degree of separation from our process. Panel members ought not to have been active participants in our process or providing advice to participants in our process since it commenced in June 2020.

We ask stakeholders to inform their prospective nominees that they will be nominated ahead of doing so. We will not publish a full list of nominations to protect privacy and confidentiality.

## 3.5 Other Stakeholder Submissions

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<sup>22</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2; NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13; Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4; ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 11; CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, pp. 15-16;



As well as submitting on the questions raised in the consultation paper some stakeholders raised issues that were not part of the scope of this paper. Some of these issues were not process based and focused on concerns of technical evidence, other issues had been previously settled and dealt with in published papers such as our May 2020 Position Paper<sup>23</sup>.

Many of the concerns have been given time and consideration as part of other consultation and position papers, or are being dealt with as part of the technical working paper series. Our positions set out previously in these papers have not changed.

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23 <https://www.aer.gov.au/system/files/Pathway%20to%202022%20rate%20of%20return%20instrument%20-%20Position%20paper%20-%20May%202020%20-%20Final.pdf>

## 4 Summary of stakeholder submissions

This section contains a detailed summary of each submission received by the AER in response to the consultation paper. Stakeholder responses have been included in Section 3, where relevant.

**Table 2 Detailed summary of submissions**

Submitter	
<b>APA</b>	<b>Concurrent evidence sessions</b> <p>Strongly support the AER's proposal to make the 2022 sessions more accessible by having them streamed and available to all interested stakeholders.<sup>24</sup></p> <p>We see having transcripts once again available, shortly after the sessions have concluded, as being useful. However, in 2018, the transcripts were no substitute for the report on the expert deliberations.<sup>25</sup></p> <p><b>How experts should be funded?</b></p> <p>As the AER proposes, the solution to this problem may be for the regulator to engage the experts directly and to meet the reasonable costs of expert engagement. We agree that this approach would further reinforce the obligation on experts to contribute their expertise to support the AER's decision-making rather than represent stakeholder perspectives.<sup>26</sup></p> <p>However, unless the expert engagement process is carefully managed, there will, in our view, be a significant risk of bias in the support provided to the AER.<sup>27</sup></p> <p>Providing stakeholders with the prior opportunity to provide views on relevant experts, in the same way that the AER sought, in 2018, stakeholder views on the composition of the Independent Panel, might be considered as a way of avoiding the risk of bias.<sup>28</sup></p> <p><b>How should the sessions be scheduled?</b></p> <p>Structuring the sessions as four discrete and thematically based two-and-one-half-hour meetings, rather than as two one-day sessions, should further assist stakeholders with scheduling their attendance.<sup>29</sup></p> <p>The proposed preliminary "expert conclave" should, as the consultation paper indicates, narrow the topics for consideration, and allow a sharper focus on key issues during the main evidence sessions.<sup>30</sup></p> <p><b>Independent Panel</b></p>

<sup>24</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1.

<sup>25</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1.

<sup>26</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1.

<sup>27</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 2.

<sup>28</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 2.

<sup>29</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1.

<sup>30</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 1.

## How many members should be on the panel?

The final decision on a revised rate of return instrument is a decision to be made by the AER Board, and we saw size and composition as matters for the Board.<sup>31</sup>

### CRG

#### Concurrent evidence sessions

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.<sup>32</sup>

The CRG agrees with the AER's selection of experts.<sup>33</sup>

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.<sup>34</sup>

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 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.<sup>35</sup>

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?<sup>36</sup>

The CRG support the AER's aim to make the CES more accessible to stakeholders and limits on in-person attendance, but allowing for live streaming for all stakeholders.<sup>37</sup>

The AER may need to review its approach to the attendance of third-parties if the CES need to be held online.<sup>38</sup>

The CRG believes it is reasonable for the AER to appoint an ACCC commissioner to facilitate the CES.<sup>39</sup>

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.<sup>40</sup>

<sup>31</sup> APA, *Submission to Pathway to 2022 rate of return instrument consultation paper*, 9 July 2021, p. 2.

<sup>32</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.

<sup>33</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 5.

<sup>34</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 6.

<sup>35</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, pp. 6-7.

<sup>36</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 7.

<sup>37</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 8.

<sup>38</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 8.

<sup>39</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 9.

<sup>40</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 9.

### **How experts should be funded?**

The CRG agree with the proposal for the AER to remunerate all experts, and the terms outlined in its paper.<sup>41</sup>

The CRG also expects:

- 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.<sup>42</sup>

### **How should the sessions be scheduled?**

The CRG agrees with the AER's proposed schedule of 4 x 2.5 hour sessions.<sup>43</sup>

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.<sup>44</sup>

Each session should include time to summarise the outcomes of that session.<sup>45</sup>

The CRG agrees on the AER's proposal for CES members to seek consensus or a majority view if a consensus cannot be reached.<sup>46</sup>

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.<sup>47</sup>

### **Independent Panel**

The CRG agrees that submissions should not be made directly to the IP once it is engaged and the AER should publish communications with the IP on matters of clarification.<sup>48</sup>

### **How many members should be on the panel?**

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.<sup>49</sup>

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<sup>41</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 10.

<sup>42</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 10.

<sup>43</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 11.

<sup>44</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 11.

<sup>45</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 12.

<sup>46</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 12.

<sup>47</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 12.

<sup>48</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 14.

<sup>49</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 14.

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.<sup>50</sup>

#### **How should panel members be selected?**

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.<sup>51</sup>

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.<sup>52</sup>

It is also important that the IP members are aware of the AER's consumer engagement activities and 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.<sup>53</sup>

### **ENA Concurrent evidence sessions**

For appropriate process transparency, it will be important for all stakeholders to fully understand the role and outputs of this expert conclave.<sup>54</sup>

ENA considers that, to assist stakeholders seeking to follow the consideration of material issues raised through the review, the Conclave should provide a short summary of its outcomes.<sup>55</sup>

#### **How experts should be funded?**

ENA supports the proposals for experts who appear in the Concurrent Evidence Sessions to be remunerated by the AER.<sup>56</sup>

ENA notes that experts are also likely to have strong pre-existing reputational incentives to provide clear, fair and well-balanced views and evidence. Due to these reputational incentives, ENA considers the alternative of retaining of stakeholder-based funding would also be workable, alongside clear agreed obligations to provide views independently.<sup>57</sup>

#### **How should the sessions be scheduled?**

ENA supports to proposal for the scheduling of four two-and-a-half hour sessions, thematically based to enable a good opportunity for high priority issues to be discussed.<sup>58</sup>

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<sup>50</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 14.

<sup>51</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 15.

<sup>52</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 15.

<sup>53</sup> CRG, *Response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 16.

<sup>54</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 8.

<sup>55</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 8.

<sup>56</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 10.

<sup>57</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 10.

<sup>58</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 10.

To maximise transparency and utility of the session, ENA suggests that it will be important for the topics and questions to be discussed by the Concurrent Sessions to be identified and published in advance of each session.<sup>59</sup>

### **Independent Panel**

Energy network businesses remain concerned at the potential risk – which was realised in 2018 – for the Independent Panel to not have sufficient information to clearly assess areas of specific and strong concerns with the Draft Instrument.<sup>60</sup>

It remains unclear the extent to which the 2018 Independent Panel had any reference – as opposed to access – to any stakeholder submissions or associated expert materials. The detailed analysis and focus on matters that no stakeholder considered material, and the lack of any detailed commentary on several central contentious issues in the review, appears to indicate that Energy Networks Australia’s submission and materials may not have been reviewed by the Panel.<sup>61</sup>

Energy network businesses continue to consider that major stakeholder groups such as ENA, the Consumer Reference Group, and investor representative stakeholders, should be able to make a short submission (for example, limited to 2-5 pages) highlighting specific areas of concern with the draft Instrument – if necessary, strictly constrained to referring the Panel to previously submitted material on the highlighted priority issues.<sup>62</sup>

The AER has indicated that stakeholders may include a submission to the Independent Panel in response to the AER’s December 2021 Information Paper. This proposed approach has several significant weaknesses. In particular, consistent with occurrences in the 2013 and 2018 reviews, the AER could potentially:

- materially change its approach on an estimation approach or methodology in a way not previously signalled, meaning that the Independent Panel has no alternative materials, data or views on the record to inform its independent assessment on this changes approach; or
- rely on evidence (for example, new expert reports) not known or available to stakeholders in February 2022, leaving the Independent Panel with no means of testing the strength or quality of this new evidence with reference to materials on the record.<sup>63</sup>

ENA broadly concurs with the observations of the Consultation Paper with respect to the Independent Panel but would make three points:

- Steering the Independent Panel towards substantive review and testing, rather than editorial suggestions;
- ENA supports the panel including participants with strong institutional investment expertise; and

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<sup>59</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 11.

<sup>60</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 8.

<sup>61</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 9.

<sup>62</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 9.

<sup>63</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, pp. 9-10.

- the Panel should also be tasked with assessing whether applying the AER's draft Instrument is likely to result in an unbiased estimate of the required market rate of return over the period of its operation, thereby producing the outcome of efficient investment in, and use of, the regulated services to the greatest degree.<sup>64</sup>

#### **How many members should be on the panel?**

ENA supports the appointment of a 5-person panel drawing on a diversity of skills and experience.<sup>65</sup>

#### **Other**

One consistently reported theme of feedback provided to the AER through the Brattle Report was that a range of network, consumer and investor stakeholders had concerns around the AER's engagement with, and the balanced treatment of, evidence in relation to rate of return approached, data and methodologies. The 2022 review process, including future Working Papers, provides an opportunity to address these views.<sup>66</sup>

The current Consultation Paper is solely focused on relatively technical process design details. It addresses a narrow set of technical design questions around two aspects of the process – the independent panel membership and the timing of expert sessions.<sup>67</sup>

ENA is not aware of a specific process or mechanism by which the substantial stakeholder concerns around the balanced treatment of evidence is being addressed. These unaddressed concerns held by network businesses are reinforced by some initial directions apparent in early Working Papers through late 2020 and early 2021.<sup>68</sup>

ENA cannot clearly identify any proposed AER approach or methodology change in the Working Paper series to date that would lead to an increase in the rate of return estimate. This highlights the continuing opportunity that exists in the AER process to demonstrate a symmetrical consideration of estimation issues.<sup>69</sup>

At several points in the Consultation Paper preferred technical design choices are selected on the basis of what would best assist the AER in reaching its final instrument determination. This criterion does not encompass the full policy purpose in introductions of the mandatory review steps.<sup>70</sup>

Network stakeholders raised a number of significant concerns with AER staff, senior leadership and the AER Board through the 2018 review around the treatment of evidence, the outcomes of the review, and the AER's explanations of its reasoning.<sup>71</sup>

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<sup>64</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, pp. 11-12.

<sup>65</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 11.

<sup>66</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 3.

<sup>67</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 4.

<sup>68</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 4.

<sup>69</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 4.

<sup>70</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 5.

<sup>71</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 5.

Symmetrical consideration of estimation issues is a practical opportunity to strengthen stakeholder confidence in the 2022 process.<sup>72</sup>

**Joint Networks**

AGIG

SAPN

CitiPower

Powercor

UE

**Concurrent evidence sessions**

The Businesses agree that the expert sessions should not be determinative or bind the AER's decision making.<sup>73</sup>

In our view the objective of the concurrent evidence session should be broader than assisting the AER Board's decision making. 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.<sup>74</sup>

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).<sup>75</sup>

The AER's intention to stream the sessions is noted and supported.<sup>76</sup>

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. 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.<sup>77</sup>

**How experts should be funded?**

The Businesses also support the ENA's submissions relating to the funding arrangements for the experts and the scheduling of the expert sessions.<sup>78</sup>

**How should the sessions be scheduled?**

The Businesses also support the ENA's submissions relating to the funding arrangements for the experts and the scheduling of the expert sessions.<sup>79</sup>

**Independent Panel**

We support the AER's decision to give the Independent Panel a stronger role and revise the question to be considered.<sup>80</sup>

The Businesses consider that the second part of the question should align with the AER's task and be framed as:

<sup>72</sup> ENA, *Pathway to the 2022 Rate of Return Instrument*, 9 July 2021, p. 7.

<sup>73</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 3.

<sup>74</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 3.

<sup>75</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 3.

<sup>76</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 3.

<sup>77</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, pp. 3-4.

<sup>78</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.

<sup>79</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.

<sup>80</sup> Joint Networks, *Submission in response to the AER's Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.



“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*.”<sup>81</sup>

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.<sup>82</sup>

#### **How many members should be on the panel?**

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.<sup>83</sup>

#### **Other**

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.<sup>84</sup>

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.<sup>85</sup>

## **NICE**

### **Concurrent evidence sessions**

We disagree that the expert sessions should be an aid to ‘the Board exercising its judgement’. As we have outlined in our earlier submission in response to the most recent draft working papers, there is no right scientific answer to the question of what the Allowed Rate of Return should be. The value to the AER of the sessions is to confirm for the AER what the range of potentially reasonable rates should be.<sup>86</sup>

We submit that it would be preferable for the sessions to be run by one of the AER Board.<sup>87</sup>

We agree with the AER’s decision not to seek a summary report from the expert sessions. However, we equally find the prospect of participants responding to the expert sessions in their submissions problematic without any guidance on what the AER itself has ‘heard’. We therefore propose that before submissions close the AER should issue a form of ‘directions paper’ or ‘preliminary observations paper’ that summarises what the AER understands to have occurred.<sup>88</sup>

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81 Joint Networks, *Submission in response to the AER’s Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.  
82 Joint Networks, *Submission in response to the AER’s Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.  
83 Joint Networks, *Submission in response to the AER’s Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.  
84 Joint Networks, *Submission in response to the AER’s Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 1.  
85 Joint Networks, *Submission in response to the AER’s Consultation Paper on 2022 Instrument Process*, 9 July 2021, p. 4.  
86 NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 11.  
87 NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 12.  
88 NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.

### **How experts should be funded?**

The AER's observations that there is a significant imbalance in the resources available to different stakeholders is valid, and the decision that the engagement of experts be funded by the AER is supported. If the AER is funding the experts, then we believe it is appropriate that the AER directly engage the experts.<sup>89</sup>

We have some concerns, however, that ACCC processes may then require the AER to undertake a tender process for experts rather than be able to appoint the experts nominated by stakeholders.<sup>90</sup>

### **How should the sessions be scheduled?**

We think the purpose of the sessions needs to focus not so much on which of the competing methodologies is 'right' but what the consequence of each choice is on the decision as a whole. In this format the four two and a half sessions over two days seems reasonable.<sup>91</sup>

However, we submit that the AER should schedule an additional three hour session at which experts are quizzed on the implications of possible decisions as a whole within the ranges identified by application of the methods and procedures discussed at the earlier sessions.<sup>92</sup>

### **Independent Panel**

We note the AER has decided that there will be no communication with the Panel other than the Draft Determination and response to questions. We encourage the AER to reconsider this point, and instead allow any stakeholder once the Draft Determination is published to specify in no more than two pages any aspect of the Draft were they would like the Independent Panel to pay particular attention to the reasoning.<sup>93</sup>

### **How many members should be on the panel?**

Submitted that the size and diversity of the Panel in 2018 provided confidence to stakeholders that all perspectives were well represented and see no benefit to changing the number of members.<sup>94</sup>

### **How should panel members be selected?**

The size and diversity of the panel for the 2018 RoRI provided stakeholders with confidence that all perspectives were well represented. We see no benefit in changing the number of members.<sup>95</sup>

Similarly, the approach of calling for nominations helped significantly in ensuring this diversity. If the AER wanted to strengthen this aspect the final stage of selection, before recommendation to the AER Board, could be a three member selection committee comprising the AER Board member in charge of the process,

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<sup>89</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 12.  
<sup>90</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 12.  
<sup>91</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 12.  
<sup>92</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.  
<sup>93</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.  
<sup>94</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.  
<sup>95</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.

and a nominee from each of Energy Networks Australia and the Consumer Reference Group.<sup>96</sup>

## MEU

### Concurrent evidence sessions

The introduction of the Expert Conclave has benefits and detriments. The benefit is that aspects where there is no contention will not detract from more discussion of disputed issues. The detriment is that this discussion is not held in open forum where stakeholders might learn but might also have differing views as to whether the aspects are indeed non-contentious.<sup>97</sup>

The expert conclave should be held as an additional forum, but where stakeholders can hear the discussion but cannot provide input during the conclave.<sup>98</sup>

The MEU agrees with the AER that production of a report from the expert sessions is unlikely to provide either agreements or sufficient arguments to support one view or another, but if the sessions are recorded, the AER would have access to more detailed arguments in multiple directions via the recording than it might from a written report.<sup>99</sup>

#### How should the sessions be scheduled?

The MEU supports the Expert Sessions being more focused and potentially shorter in time, but more accessible to greater stakeholder attendance.<sup>100</sup>

The MEU suggests that the AER allow stakeholders to question aspects after the conclave and each session and for answers to be provided by the experts at the start of the next session. This might require a slightly longer time allowance for each expert session.<sup>101</sup>

#### How experts should be funded?

Members of the Expert Panel should be directly employed by the AER and not employed by the nominating parties.<sup>102</sup>

The MEU suggests that the AER needs to take care in its decisions about which experts are accepted onto the Expert Panel and should ensure that there is balance in numbers of experts nominated by supply side entities (especially networks) and those nominated by consumers.<sup>103</sup>

### Independent Panel

The MEU supports the AER approach to the establishment of the Independent Panel and its operation.<sup>104</sup>

<sup>96</sup> NICE, *AER Consultation Paper on the use of Concurrent Expert Evidence and the Independent Panel*, 19 July 2021, p. 13.

<sup>97</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>98</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>99</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>100</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>101</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>102</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

<sup>103</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 3.

<sup>104</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, p. 2.

The MEU does not support the ability of stakeholders to directly provide submissions (or even short summary submissions) to the Independent Panel.<sup>105</sup>

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<sup>105</sup> MEU, *Pathway to the 2022 RoRI CP on Instrument Process*, 9 July 2021, pp. 2-3.