Regulation Impact Statement

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

Decision Paper

6 June 2013

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SCER's policy position

The Standing Council on Energy and Resources (SCER) intends to retain the Australian Competition Tribunal (the Tribunal) as the review body and maintain the limited nature of merits review. However, SCER will introduce much clearer links to the long term interests of consumers through a series of changes to the national energy laws and rules which modify the test for initiation, processes, and roles of participants in a review process as below.

Limited merits review test

Limited merits review will be based on the following processes:

1. the applicant must demonstrate that the original decision-maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision and make a *prima facie* case that addressing this would lead to a materially preferable outcome in the long term interests of consumers; and
2. the Australian Competition Tribunal (the Tribunal) assesses whether, taking into account any interlinked matters, addressing the grounds and the interlinked matters would deliver a materially preferable outcome (in the context of the overall decision) in the long term interests of consumers, as set out in the National Electricity Objective (NEO) or National Gas Objective (NGO).

The role of the regulator

For regulatory determinations, the regulator must:

- develop a record of its regulatory process to be made available to the Tribunal for reviews; and
- include in its final determination an explanation of the interlinkages between different component parts of its decision and how its overall decision is in the long term interests of consumers, in accordance with the NEO or NGO.

In addition, the regulator, in regulatory determination processes, and the Tribunal, in review processes, must:

- where there is discretion around a range of decisions, make the overall decision that, on balance, it considers is materially preferable in terms of serving the long term interests of consumers as set out in the NEO or NGO; and
- undertake appropriate consultation with relevant users or consumer groups served by the network business that is the subject of the regulatory determination.

Seeking leave to appeal

In applying for leave to appeal, applicants will be required to establish:

- an error of fact, incorrect exercise of discretion or unreasonableness in the original decision; and
- that there is a *prima facie* case that correcting the alleged error, incorrect use of discretion or unreasonableness will result in a materially preferable outcome compared to the original decision for delivering the long term interests of consumers as set out in the NEO and NGO. In doing so, the applicant must identify any interlinked areas of the original decision that contribute to the overall decision.

In assessing an application for leave to appeal, the Tribunal will determine whether the applicant has established an error of fact, incorrect exercise of discretion or

unreasonableness and made a *prima facie* case that addressing these and any interlinked issues will result in a materially preferable overall decision in the long term interests of consumers.

The role of the Tribunal in undertaking a review

In making its decision, the Tribunal must:

- demonstrate that it provides, compared to the original decision, a materially preferable outcome in the long term interests of consumers as set out in the NEO and NGO;
- seek guidance from the parties to the review and any interveners on interlinked areas;
- demonstrate how it has taken into account interlinked areas when determining whether a materially preferable overall decision in the long term interests of consumers as set out in the NEO and NGO exists;
- remit decisions to the original decision-maker routinely and only vary decisions where these are not of a highly technical or economic nature; and
- remit decisions to the original decision-maker where there is likely to be a materially preferable outcome in the long term interests of consumers as set out in the NEO and NGO, but where establishing this would require redoing the entire, or a significant proportion of, the original decision-making process.

The Tribunal would be generally limited to the information that was before the original decision-maker and, in the case of decisions by the regulator that must include, but is not limited to, the record of the regulator and relevant final determination. If a party wishes to submit new information, it must demonstrate that it:

- is pertinent to the matter being heard;
- was not unreasonably withheld from the original decision-maker; and
- could reasonably be expected to have been considered by the regulator in its regulatory determination process.

Parties to reviews, costs, and consumer participation

All participants in reviews will generally be required to bear their own costs associated with participation in a review process. Network businesses will not be able to pass costs associated with reviews through to consumers as part of their regulated revenues, either prospectively or following a review.

Barriers to user and consumer participation will be addressed in the following ways:

- the record of the regulator will include any submissions that were received from user and consumer groups;
- the Tribunal will be required, as the regulator is required, to consult with users and consumers as part of its review process;
- removal of the risk that users and consumers may have legal costs incurred by network businesses or the regulator awarded against them; and
- removal of the provision that small users and consumers may have costs awarded against them on the basis that they conducted their case without due regard to submissions or arguments made to the Tribunal by another party.

Changes to the Tribunal's functions in legislation beyond the national energy laws

The *Competition and Consumer Regulations 2010* will be amended to ensure the provisions that apply to the energy sector allow the Tribunal to take a less formal and more investigative process and that it act as speedily as a proper consideration of the matter allows, having regard to the scope of the issues being reviewed.

Review of the Tribunal's role in energy matters

A review of the Tribunal's performance under these reformed arrangements will commence no later than the end of 2016. This review is intended to establish whether there is a requirement for future additional amendments to the structure of the Tribunal or the establishment of a new review body to ensure delivery of the policy intent.

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Executive Summary

The Standing Council on Energy and Resources' (SCER) Senior Committee of Officials (SCO) has considered the need for reform of the limited merits review regime applying to decision-making in the electricity and gas sectors under the national energy laws. SCO's considerations have been based on advice provided by an Expert Panel (the Panel) on the operation of the regime to date and submissions provided on the consultation Regulation Impact Statement (RIS) it developed to test options for reforms to the regime.

SCO recognises that the overarching objectives applying to the outcomes of the limited merits review framework are those set out in the national energy laws: the National Electricity Objective (NEO) and National Gas Objective (NGO). More specifically, SCO considers that the objectives for the limited merits review regime that SCER's predecessor, the Ministerial Council on Energy (MCE), set out at the time the regime was established continue to be relevant. SCO considers that the limited merits review regime should also:

- remain a limited merits review process consistent with the MCE's original policy intent;
- have clear and demonstrable links to the NEO and NGO and the revenue and pricing principles;
- be transparent around how the review and decision-making processes have taken into account the long term interests of consumers;
- place the onus on an appellant to make a *prima facie* case that a review will lead to a materially preferable outcome for consumers in terms of the NEO or NGO;
- consider the matters raised before the review body, and linkages with other aspects of the decision under review, in the context of the whole of the reviewable decision and not as individual component(s) in isolation;
- ensure that the review body has access to sufficient evidence and information, including, but not limited to, the record of the original decision-maker, in order to deliver an outcome that promotes the NEO and NGO;
- enable the review body to review the decision using information that was available at the time of the original decision, using the original decision-maker's record as the starting point, or was not unreasonably withheld from the original decision-maker;
- be as informal and inclusive as practicable;
- require the review body to use appropriate expertise around the economic regulation of the energy sector to assist in its decision-making;
- require the review body to remit more complex matters to the original decision-maker where it considers major revisions are required; and
- ensure relevant user and consumer representative views are sought as a routine and relevant part of the process.

Based on the Panel's advice, stakeholder feedback and analysis undertaken, SCO is of the view that these objectives would not be met without reform to the limited merits review framework. Specifically, SCO recognises that retaining the existing framework would fail to ameliorate risks around the accountability of the review process, the limitations in the existing legislation in practice and the constraints on what may be considered in the review process. SCO acknowledges that failing to manage these risks would embed the limitations identified by the Panel around the narrowness of reviews, the lack of accessibility and the timeliness of decision-making.

In December 2012, SCO published a consultation RIS that explored three potential options for reform of the limited merits review regime:

- Option 1: retaining the status quo;
- Option 2: changing the limited merits review framework set out in the National Electricity Law (NEL) and National Gas Law (NGL) in line with the framework changes proposed by the Panel but retaining the Australian Competition Tribunal (the Tribunal) as the review body; and
- Option 3: changing the limited merits review framework and establishing a new review body in line with the Panel's full recommendations.

Based on feedback on its consultation RIS, SCO considers that the most appropriate approach to amending the limited merits review regime is a variation on Option 2. That is, SCO recommends that SCER reform the limited merits review framework, but retain the Tribunal as the review body, with some amendments to give effect to the Panel's intent. SCO's recommended policy position, specifically the variation to Option 2, ensures that the limited nature of merits reviews of energy decisions is retained and that the Tribunal is able to adequately take into account interlinked matters in its review process.

SCO's recommended policy position has the potential to significantly address the limitations identified by the Panel, specifically in regard to issues around the narrowness of the reviews and the lack of accessibility for user and consumer groups. SCO considers this approach will also address the risks relating to:

- regulatory decisions not being accountable;
- limiting reviews in practice due to unintended constraints in the legislation; and
- unduly narrow reviews due to not being able to consider matters beyond those raised in the ground for review.

Consequently, in relation to the options outlined in its consultation RIS, SCO considers that:

- Option 1 is not capable of delivering the policy intention and retaining this approach would embed the existing narrow, error focused and inaccessible review process;
- Option 2 while addressing a number of the concerns identified, has the potential to deliver unintended consequences that could significantly broaden the decision the Tribunal is required to make without addressing the issues around the scope of reviews; and
- Option 3 is not justifiable at this stage as it is not supported by sufficient evidence and would introduce significant new risks and potential costs while being constrained from addressing risks associated with the existing arrangements, without changes similar to those flagged in SCO's recommended policy position.

SCO recognises that raising the threshold for leave to appeal and to revise the original decision, as set out in options 2 and 3, has the potential to reduce the number of appeals of decisions covered under the limited merits review regime. This would significantly impact a range of stakeholders to limited merits reviews, including in relation to:

- changes to network businesses' revenues will only occur if it is in the long term interests of consumers as set out in the NEO and NGO;
- network tariffs, which are passed through to energy prices faced by users and consumers, will not be changed in a review unless it can be determined that an increase would better deliver their long term interests;

- improving the accessibility of review processes to user and consumer groups through minimising cultural and financial barriers to participation;
- primary decision-makers would be likely to face lower costs associated with having to defend their original decisions; and
- the Australian Government would be likely to face lower administrative costs for maintaining the Tribunal due to the removal of incentives for routinely reviewing decisions of the primary regulator.

SCO recognises that these changes may be significant over time based on the impacts of previous decisions made by the Tribunal. While the policy changes will have uniform application SCO understands that, just as different jurisdictions currently face different costs of delivery for network services, the quantum of any impacts will not be evenly spread across all states and territories. SCO notes that it is not possible to quantify these costs and benefits in any meaningful way.

In adopting specific reforms, SCO recognises the need for changes to be proportionate to the issue that is being addressed. SCO notes that changes to the national framework to strengthen the economic regulation of networks and enhance consumer engagement, which are being addressed independently of this decision, are expected to address a number of issues identified by the Panel. Accordingly, at this time, SCO considers that recommending to SCER the adoption of all of the Panel's recommended changes is unwarranted, as these have the potential to go beyond what may be necessary to address the issues identified by the Panel, but could also introduce additional risks that may, inadvertently, lead to outcomes that are not in the long term interests of consumers.

SCO's recommended preferred policy position makes a number of changes to the operation of the regime that will ensure the Tribunal explicitly considers the impact decisions may have on the long term interests of consumers, consistent with the NEO and NGO. This includes the introduction of a limited merits review process, whereby:

1. an applicant must demonstrate that the original decision-maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision and make a *prima facie* case that addressing this would lead to a materially preferable outcome in the long term interest of consumers; and
2. the Tribunal must assess whether, taking into account all interlinked matters, addressing the grounds and any interlinked issues would deliver a materially preferable outcome (in the context of the overall decision) in the long term interests of consumers, as set out in the NEO or NGO.

SCO notes this approach places an additional obligation on the applicant, to establish why correcting the alleged error, incorrect use of discretion or the unreasonableness will result in an overall outcome that is materially preferable to the original decision in delivering the long term interests of consumers. Consequently, SCO considers that this will have a substantial impact on the outcomes of the regime, due to imposing a requirement on all parties to the review and the Tribunal to pay explicit consideration to the long term interests of consumers throughout the entire review process.

In addition to the application process, these reforms include some clarifications to the decision-making powers of the Australian Energy Regulator (AER) and Western Australia's Economic Regulatory Authority (ERA) in relation to regulatory determinations under the national energy rules. It is intended that this will clarify the regulators' role in making a regulatory determination and will ensure that, where there is a range of decisions that could meet the NEO and NGO, the regulator is required to make what it considers to be the best

possible decision in the long term interests of consumers. This will better align the obligations on the original decision-maker and the Tribunal so that decisions are consistent and in the long term interests of consumers with respect to the NEO and NGO.

SCO recommends that SCER remove some of the barriers to consumer participation in limited merits reviews. Specifically, the Tribunal will be required, as is now required of the regulator and businesses, to consult with users and consumers as part of its review process. In addition, the current conditions around costs being awarded against small user and consumer groups will be tightened given user and consumer representatives identified this as a major deterrent to their participation in reviews.

Finally, in addressing the Panel's recommendation that a new energy specific review body be established, SCO recommends that SCER direct that an independent review be undertaken of the Tribunal's performance under these reformed arrangements, to commence no later than the end of 2016. It is intended that this review will determine if additional amendments to the structure of the Tribunal or the establishment of a new review body are required to ensure the delivery of the policy intent.

SCO considers the main beneficiaries of the reforms to the limited merits review regime will be users and consumers. The reforms are expected to limit the risk that network service providers are awarded a substantial unwarranted increase to their allowable revenue. This will be achieved by requiring both the appellant and the Tribunal to show why such a change to the allowable revenue would be in the long term interests of consumers with respect to the NEO or NGO. However, the policy position also provides an appropriate balance of protections for investors who rely on predictable and reasonable regulatory outcomes.

Consumers are also likely to benefit from the removal of the ability of network service providers to pass through costs they incurred as a result of participating in a review process. This is expected to incentivise network service providers to have greater discipline when assessing whether they will appeal aspects of their regulatory determination, resulting in appeals only being undertaken where there is a *prima facie* case that a materially preferable decision, in the long term interests of consumers, exists and not as a routine part of the decision-making process.

SCO considers that its recommended policy position will ameliorate the risks around the accountability of the review process, limitations in the existing legislation in practice and constraints on what may be considered in the review process. SCO notes, subject to this approach being agreed, SCER intends to finalise changes to the National Electricity Law (NEL) and National Gas Law (NGL) to give effect to this approach in time for the next round of regulatory determinations commencing in mid-2014.

Acronyms

ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
APIA	Australian Pipeline Industry Association
ATCO	ATCO Gas Australia
CALC	Consumer Action Law Centre
CUAC	Consumer Utilities Advocacy Centre
ENA	Energy Networks Association
ERA	Economic Regulation Authority
FIG	Financial Investors Group
IPART	Independent Pricing and Regulatory Tribunal
MCE	Ministerial Council on Energy
MEU	Major Energy Users
NCC	National Competition Council
NEL	National Electricity Law
NEM	National Electricity Market
NEO	National Electricity Objective
NER	National Electricity Rules
NGL	National Gas Law
NGO	National Gas Objective
NGR	National Gas Rules
RIS	Regulation Impact Statement
SCER	Standing Council on Energy and Resources
SCO	Senior Committee of Officials
UE & MG	United Energy and Multinet Gas
WACC	Weighted Average Cost of Capital

Definitions

Administrative review is the review of primary decisions by internal officers within an agency and/or external review bodies of the fairness of the decision with regards to the merits of the case. In the case of decisions covered under the national energy laws, this entails a limited merits review by an external (to the primary decision) review body.

Correct decision is a decision that has been made according to law, in the context of the policy and legal objectives.

Error correction is an approach whereby reviews consider whether decisions are made strictly according to law or in applying economic principles, but without the context of the policy and legal objectives.

Judicial review relates to questions of law and holds the primary decision-maker accountable for the correct exercise of its powers and considers the process by which the primary decision was made.

Limited merits review is a merits review (see below) where the review body is limited in what it is able to consider, with that limitation defined in law.

Long term interests of consumers is the best value for consumers in terms of price, safety, reliability and security over the long term.

Merits review is the process where a body, other than the primary decision-maker, reconsiders the facts, law and policy aspects of the original decision and determines the 'correct or preferable' decision.

Preferable decision is, if there is a range of decisions that are correct in law, the decision that is the best that could have been made based on the relevant facts and policy intention with regard to the long term interests of consumers as set out in the statutory objective.

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Background and introduction

This Regulation Impact Statement (RIS) provides the Standing Council on Energy and Resources' (SCER) final policy position on administrative appeals under the National Electricity Law (NEL) and National Gas Law (NGL) in Australia.

Introduction

Energy networks require large amounts of infrastructure with high capital costs, which makes duplication inefficient and impractical. This means network services in a particular geographic area are most efficiently served by a single supplier, leading to a natural monopoly industry structure. Consequently, energy networks are regulated to manage the risk of monopoly pricing.[1]

Regulated electricity and gas network businesses must periodically apply to the appropriate regulator to assess their revenue requirements (typically, every five years). Under economic regulation the regulator is required to set a ceiling on the revenues or prices that a regulated utility can earn or charge during a regulatory period.

Electricity network businesses in the National Electricity Market (NEM)[2] are regulated by the Australian Energy Regulator (AER) under the NEL and the National Electricity Rules (NER). In Western Australia, the Economic Regulatory Authority (ERA) regulates covered electricity networks under the *Electricity Networks Access Code*[3], while in the Northern Territory the Utilities Commission regulates electricity networks under the *Electricity Networks (Third Party Access) Act*[4].

Covered gas network businesses are regulated under the NGL and National Gas Rules (NGR). The AER is responsible for regulating covered gas pipelines in Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia, Tasmania and the Northern Territory. The ERA is responsible for regulating covered gas pipelines in Western Australia.

The key objective of the national regulatory frameworks governing both electricity and gas in Australia is to promote the long term interests of energy consumers, as set out in the National Electricity Objective (NEO) and the National Gas Objectives (NGO). This is delivered through efficient investment in (that is, ensuring required investment represents the best value for consumers over the long term, taking into account cost, timing, quality, safety, reliability and security of supply), operation and use of energy infrastructure. An important part of the framework is to allow parties affected by decisions of the relevant regulator and other decision-makers under the national energy laws appropriate recourse to have the merits of these decisions reviewed.

Two forms of review are available for decisions made in the electricity and gas sectors. The first, which applies to all decisions, is judicial review. Judicial review is an assessment of whether due process has been followed and the decision is within the legal bounds prescribed by the relevant law.

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[1] Monopoly pricing is where a monopoly business can charge higher prices or provide poorer services compared with the situation where its customers could choose between competitors offering the same services. Source: http://www.aer.gov.au/node/481

[2] The NEM consists of five regions covering Queensland, New South Wales and the Australian Capital Territory, Victoria, South Australia and Tasmania.

[3] http://www.erawa.com.au/access/electricity-access/

[4] http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/94dc2855c979f76669257a4d00005abe?OpenDocument

The second form of review is merits review (a form of administrative review), where the relative merits of the decision are assessed and, if a 'correct or preferable'[5] decision is established, the decision is remitted to the primary decision-maker or an alternative decision is substituted in place of the original decision made by the primary decision-maker. Merits review is limited to those decisions that affect a specific party and not sector-wide decisions. For the electricity and gas sectors, this limited merits review is currently conducted by the Australian Competition Tribunal (the Tribunal)[6].

Limited merits review performance

Network businesses sought reviews of 22 AER determinations between 2008 and 2012—three in electricity transmission, 14 in electricity distribution and five in gas distribution. The Tribunal's decisions on these reviews increased network revenues by around $3.3 billion. Around 85 per cent of revenue impacts relate to elements of the weighted average cost of capital (WACC) and the value of tax imputation credits (gamma).[7]

In two decisions made in January 2012, the Tribunal:

- increased Victorian electricity distribution revenues by $255 million in the current regulatory period, increasing a typical electricity residential bill by 0.5−1.5 per cent; and
- increased Queensland and South Australian gas distribution revenues by $92 million in the current regulatory period, increasing a residential gas bill by 2 per cent in Queensland and 1 per cent in South Australia.[8]

SCER is not commenting on the general appropriateness of these decisions, but notes that given the significant impact that merits review decisions have had on the revenues of network businesses it is important to be confident that this regime is functioning as intended.

Expert Panel's Review of the Limited Merits Review Regime (2012)

In establishing the limited merits review, the MCE included a legislated requirement for the operation of the regime to be assessed within the first seven years of its operation. In light of concerns over increasing electricity prices driven in part by network revenues, SCER decided to bring forward this review. On 22 March 2012, it announced the establishment of an independent expert panel (the Panel) of Professor George Yarrow as Chair, Dr John Tamblyn and the Hon. Michael Egan to undertake this review. The Panel's final report was published on 9 October 2012.

As part of its assessment of the performance of the limited merits review regime, the Panel found that, in its implementation, the limited merits review regime had fallen short of the initial policy expectations in some important respects and a number of weaknesses and deficiencies with the regime were identified. The Panel found that the general approach for reviewing decisions was unduly narrow and was relatively detached from the promotion of the NEO and NGO, specifically the intention for regulatory decisions to be in the long term interests of consumers.

Consultation Regulation Impact Statement

In light of the Panel's findings, SCER's Senior Committee of Officials (SCO) agreed that there is evidence of regulatory failure, specifically in the areas of delivering the policy intention, the narrow focus of reviews to date, accessibility of the regime, and timeliness for decision-making. On 14

[5] The 'correct' decision is made in a non-discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of a discretion or a selection between possible outcomes, judgement is required to assess which decision is 'preferable'.

6 The Tribunal is established under the Australian Government's Competition and Consumer Act 2010. The Tribunal is a review body, which re-hears or re-considers a matter (albeit on limited material for some reviews), and may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review.

[7] AER, *State of the Energy Market 2012*.

[8] Ibid

December 2012, a consultation RIS was published on SCER's website[9] to test options for changes to the limited merits review regime, based on the recommendations of the Panel.

Option 1 entailed the preservation of the status quo (noting this would operate in the context of recent rule changes and reforms which effect reviewable matters) and otherwise retained the current framework set out in the NEL and NGL, with the Tribunal as the review body for all reviewable decisions.

Option 2 entailed a substantial refinement to the current regime and involved amendments to the limited merits review framework as proposed by the Panel, but retains the Tribunal as the review body for all reviewable decisions. The major change was allowing only a single ground of appeal; that is, a materially preferable decision exists. The Tribunal would be required to operate in a purely administrative and not adversarial or judicial manner as currently occurs.

Option 3 entailed the full implementation of the Panel's recommendations. This included the framework changes as per Option 2, but with the establishment of a new limited merits review body (the Review Body).

Submissions on the consultation RIS were accepted up to 8 February 2013. A list of parties who made submissions can be found at **Appendix I**.

In addition, SCER officials met with the Tribunal to seek feedback on the options from a practical perspective and identify any issues that would need consideration in the policy development process.

Stakeholder feedback

In general, stakeholders agreed that a case had been made for change; that is, the status quo would not deliver the policy intention. However, there was some divergence about how significant reform to the existing limited merits review regime needed to be to deliver this intention, particularly given the extensive changes to network regulation which were recently introduced into the rules. Generally, consumer representatives argued for structural reform and the establishment of a new review body as the current arrangements embedded practical barriers to engagement of consumers in the review process. In contrast, energy network businesses and the AER and ERA considered that amendments to the review framework alone would go a significant way to addressing the issues with the existing review process, particularly in light of changes to the NER and NGR that were made in November 2012. Details of this feedback are tabulated in **Appendix II**.

The feedback from stakeholders has been used to assess the benefits and costs associated with the different options and in the development of the SCER's agreed approach.

Report structure

This report provides SCER's policy position in light of the feedback received on the consultation RIS. The report is set out with the following sections:

- the objectives of the limited merits review regime, which includes the original policy intent, the identified regulatory failures and the objective of the regime;
- the options that were tested in the consultation RIS and alternatives identified by stakeholders in their submissions;
- the methodology used in developing the policy position;
- the consultation undertaken in the development of the policy position;
- an impact analysis of options;

[9] http://www.scer.gov.au/workstreams/energy-market-reform/limited-merits-review/

- evaluation and reasoning for the policy position;
- SCER's conclusions; and
- how the policy position will be implemented and the timeline for review.

Objectives of the limited merits review regime

The overarching objectives for the electricity and gas regimes under the national energy laws are set out in the NEO and NGO respectively.

For electricity, the NEL states that the NEO is:

> "To promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to –
>
> 1. price, quality, safety, reliability, and security of supply of electricity; and
> 2. the reliability, safety and security of the national electricity system."

For gas, the NGL states that the NGO is:

> "To promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas."

In making regulatory determinations for regulated electricity networks and covered gas pipelines, the regulator must take into account the revenue and pricing requirements for the business, using the high level principles set out in the NEL and NGL, whereby a regulated network service provider should:

- be able to recover efficient costs;
- have adequate incentives to promote economic efficiency;
- obtain returns that are commensurate with risk;
- obtain returns where due regard is given to the costs and risks associated with under- or over-investment; and
- obtain returns where due regard is given to the costs and risks associated with underutilisation of the asset.

In addition to these overarching objectives, following is a more detailed description of the objectives for the limited merits review regime.

Original objective of the limited merits review regime – Ministerial Council on Energy 2006

In its 2006 *Review of Decision Making in the Gas and Electricity Regulatory Frameworks*[10], the Ministerial Council on Energy (MCE) maintained the position that the review mechanism should aim for the most optimal decision possible where the benefits of delivering outcomes in the long term interests of consumers outweigh the costs of the review to stakeholders. The MCE determined the review scheme should:

- maximise accountability;
- maximise regulatory certainty;
- maximise the conditions for the decision-maker to make a correct initial decision;

[10] MCE, 2006; *Review of Decision-Making in the Gas and Electricity Regulatory Frameworks*.

- achieve the 'best' decisions possible;
- ensure that all stakeholders' interests are taken into account, including those of service and network providers, and consumers;
- minimise the risk of 'gaming'; and
- minimise time delays and cost.

Regulatory failures of the current limited merits review regime

As noted above, SCER tasked the Panel with reviewing the limited merits review regime. In its final report, the Panel found that the original MCE policy intention was sound and remained relevant; however, in its implementation, the regime had fallen short of the initial policy expectations in some important respects and a number of weaknesses and deficiencies with the regime were identified. The Panel found that the general approach for reviewing decisions was unduly narrow and was relatively detached from the promotion of the NEO and NGO, specifically the intention for regulatory decisions to be in the long term interests of consumers.

On the basis of the limitations identified, the Panel recommended changes to the NEL and NGL and the establishment of a new review body that would be better able to:

- address issues on a sufficiently wide basis, up to and including the overall regulatory determinations themselves, capturing all relevant inter-relationships between the individual aspects of decisions;
- explicitly take account of and promote the NEO and NGO, since these are the objectives against which the question of whether or not there exists a decision that is preferable to the decision of the primary decision-maker (which is a key feature of merits review) should be evaluated;
- promote consumer and user access to the relevant decision-making processes, including the review process itself, and promote network service provider engagement with consumer representatives at all stages of regulatory decision-making; and
- not be more protracted or demanding of resources than is necessary to achieve the fundamental purposes of merits review.

In general, submissions received in response to the consultation RIS agreed that there was a need to amend the limited merits review regime. This was despite the recent changes to the NER and NGR. There were, however, divergent views on the extent of any necessary and proportionate response.

SCER agrees with the Panel's finding that the current limited merits review arrangements have failed to deliver the original policy intent. In particular, as explored in the consultation RIS, SCER considers there is evidence of policy failure around the unduly narrow focus of the reviews, accessibility to participation in review for all covered stakeholders and the timeliness of the regime.

Failure to deliver the policy intention

At a high level, the objective of merits review, as set out Australian Administrative Law Policy Guide, is to deliver the 'correct or preferable' decision.[11] A number of submissions against the consultation RIS, particularly representing network business views, noted that 'error correction' was an essential part of the review process and had contributed to regulatory certainty for financial investors. Without this aspect of the review process, it was argued, the ability of the economic regulatory regime to deliver the NEO or NGO could be compromised.

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11 http://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian%20Administrative%20Law%20Policy%20Guide.pdf

However, SCER notes the objective of administrative decisions may be misleading. Consequently, for the purposes of limited merits review applying to covered electricity and gas decisions in Australia, SCER considers the objective is to ensure that a decision is correct, in the sense of being made in accordance with the relevant law, or preferable, in the sense that, if there is a range of decisions that are correct in law, the decision that is ultimately achieved is the best that could have been made on the basis of the relevant facts.

With this definition in mind, SCER considers that the majority of the reviews taken to the Tribunal to date relate to differences of opinion on components of a final decision. Consequently, the Tribunal's focus on 'error correction' in isolation was not appropriate for the highly complex interlinkages and contentious nature of the issues for which reviews were sought by monopoly electricity and gas network businesses.

The complexity of the issues being investigated has also led to situations where error correction has occurred without apparent reference to how addressing the error contributes to the NEO or NGO. For example, when considering the parameters that contribute to the rate of return that network businesses are allowed, decisions made by the Tribunal have increased the rate of return to about 10 per cent (noting there are some differences between different businesses). This amount was higher than both the original decision and the allowed rate of return previous jurisdictional regulators had set in their regulatory decisions. SCER considers such large changes, without reference to the energy objectives, undermines confidence in the review framework.

While the rate of return for monopoly businesses rightly varies between business and countries, making comparisons inappropriate, even if these decisions did support the NEO or the NGO there has been inadequate public reporting of these aspects of the decision-making process. SCER notes the notices published by the Tribunal outlining its process and reasoning behind its decisions have not included reference to how the decisions are in the long term interests of consumers with respect to price, quality, safety, reliability, and security of supply of electricity or gas, respectively.

It is this lack of information about how the review process has considered the 'facts, law and policy aspects of the original decision'[12] that restricts the limited merits review regime in the full delivery of the original and recently clarified policy intent and is likely to continue to do so in the future if it is not addressed.

In addition, SCER recognises the intention in establishing the review regime was for the review process to be used rarely and only to address issues with a material consequence in the context of delivering the NEO or NGO, and meeting the revenue and pricing principles. However, the error correction approach adopted by the Tribunal may be leading to more appeals than would otherwise be the case. As noted by the Panel, international experience suggests that focusing on error correction in the appeals process correlates with high levels of appeal activity.

Narrow focus

As identified by the Panel, SCER notes that the limited merits review regime has been used by some network businesses as a means of litigating components of the initial decision in isolation where there is disagreement with the approach taken by the regulator. This is of particular relevance in situations where the regulator has applied its judgment and discretion in setting that component, and has done so in the context as part of a broader decision.

In particular, SCER observes that the review process is much more narrowly focused than was the original policy intention. The original intention, as set out in section 71(O) of the NEL and section 258 of the NGL, was to allow the regulator to raise issues that could impact on the matter before the Tribunal. In practice, this has not occurred. The reason for this is somewhat contentious, but

[12] Administrative Review Council, 1999; *What decisions should be subject to merits review*; http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx

appears linked to the efficacy of those provisions. As noted in advice from the Acting Solicitor General to the Panel, these clauses have limited usability in this regard as they do not allow the Tribunal or regulator to expand the matter being reviewed beyond the ground for review.

In its submission, the ERA maintained that it was reasonable to focus on the component part(s) when error is perceived, as this makes the appeal process tractable, while still allowing for the merits of a decision to be reviewed. In addition, it argued there is nothing in the current regime that prevents 'logically interconnected' components from being addressed, with any issues around narrow focus being resolved through the greater emphasis on the energy objectives in the economic regulatory processes set out in the rules. This tended to be broadly representative of network business' views.

In contrast, the AER and the Australian Competition and Consumer Commission (ACCC) consider that it is important to address the failings of sections 71(O) of the NEL and 258 of the NGL, to remove impediments to the review body considering the implications for the entire regulatory determination.

SCER agrees that there appears a link between these provisions and the narrow focus of the current appeals framework, which is working against the original policy intention.

Accessibility

A key regulatory failing of the current limited merits review regime is the unequal participation of all affected stakeholders in the process. Specifically, SCER notes that the high costs associated with participation and the risks associated with doing so are a barrier for consumers engaging with the appeal process under the existing regime. In contrast, there currently would appear to be a strong incentive for network businesses to routinely appeal decisions as part of the regulatory process.

In a submission on the consultation RIS, the Australian Pipeline Industry Association (APIA) suggested that it was unnecessary for consumers or their representatives to participate in the appeal process as the regulatory determination itself was based on extensive consultation, including with consumers. Further, with the recent establishment of specific consumer engagement provisions in the rules, consumer interests would be more adequately represented in that process.

SCER agrees that improved stakeholder engagement, particularly across the entire range of consumer classes, in the regulatory determination process would lead to more robust and informed decision-making. However, with regard to the limited merits review regime, the exclusion of any affected stakeholder on grounds of prohibitive costs or unmanageable risks represents a regulatory failure that needs to be addressed.

For the gas sector, the ERA noted that major shippers have intervened successfully in appeals, which demonstrates that where they have an interest they are capable of engaging with the process. The ERA considers that, in a range of areas, the interests of larger shippers align with those of consumers; consequently, the barrier to participation for consumers should not be exaggerated.

However, consumer groups, representing both small and large consumers, have identified a number of negative factors in the current review process that effectively limit their ability to participate. In particular, the Major Energy Users (MEU) stated that its firsthand experience in attempting to participate in appeals led it to conclude it was:

- limited in its scope of what it could address;
- prevented from providing input that impacted on the issue of the appeal;
- constrained to unrealistic timeframes to develop its case and provide its written statements;
- constrained by the process from full engagement in the appeal process;
- faced with an intimidating legalistic process;

- faced with significant costs if it wanted to be involved; and
- threatened with application of costs as a method to prevent its involvement.

Consequently, MEU argued that the current structure of the limited merits review regime, incorporating both the provisions in the national energy laws and the approach adopted by the Tribunal, does not allow the active and participative involvement of consumers in issues that directly impact upon them, particularly without incurring significant legal expense.

In addition, the Consumer Action Law Centre (CALC) and the Consumer Utilities Advocacy Centre (CUAC) identified barriers to participation that arose from their experience of attempting to intervene in the Victorian distribution businesses' appeal processes on 19 November 2010. This attempt was ultimately withdrawn in January 2011. The barriers to their intervention included:

- the significant financial resources required to facilitate effective participation in the appeal process, such as legal representation, senior counsel and expert technical advice (of worldwide standing);
- the timelines for developing applications for leave to intervene;
- the NEL requirement for consumer representatives to be granted leave by the Tribunal to intervene;
- the NEL criteria for consumer intervention;
- potential risks faced by consumer interveners of a costs order against their organisations;
- the timing of the AER's determinations in Victoria which requires consumer interveners to develop their application for leave to intervene over the Christmas/summer holiday period (when staff, legal and technical consultants are commonly scheduled for leave);
- lack of access to 'commercial in confidence' information of Distributors; and
- no requirement for the AER to provide intervening parties with 'factual' information throughout the appeals process.[13]

In its submission, ATCO Gas Australia (ATCO) welcomed amendments to increase consumer engagement with and confidence in the regulatory process. However, ATCO cautioned that there are practical issues that could substantially increase the cost and time for review without a comparative improvement in the performance of the review if this engagement is not managed well.

SCER notes that the original policy intention was to allow consumers' views to be represented during the appeal process, although this was to be limited to areas where their contribution would lead to better decision-making and not unnecessarily prolong appeal processes. However, SCER considers the threshold required for consumer groups to participate in the review process to be, in general, so high as to practically inhibit the legitimate participation by most parties. Consequently, the lack of representation of valuable consumer input is evidence of regulatory failure.

With regard to the incentives for network businesses, the AER and ACCC noted that the current regime does not impose any downside risks for network businesses and so creates incentives for them to seek review in circumstances where it would otherwise not be warranted. The MEU goes further and notes the significant inequity in that the costs of an appeal for network businesses are largely recovered through their regulated revenues, yet consumers are required to pay their own costs. This approach provides the regulated entity with an effective 'no cost' regime for an appeal.

SCER considers that the unequal risks in participating for the different stakeholders is a regulatory failure in that it is a practical barrier for consumer groups, in particular, to engage in the appeal process. The risk with continuing such unbalanced incentives is that it is likely that those

[13] CALC and CUAC, 2011; *Barriers to fair network prices*; pp 8-9.

stakeholders who are currently unable to participate will continue to be disengaged from the process, resulting in less robust and representative processes.

Timeliness

Completion of the review within three months was a key aim of merits review, with the provision to extend this time if the particular case warranted it. SCER notes that a number of reviews have gone beyond three months, with some lasting a number of years, which is comparable with the amount of time required for judicial review.

SCER recognises it is important for the review process to effectively balance the trade-offs between taking the time for reaching the most robust decision with the need for a timely decision to reduce uncertainty for network businesses about the outcomes and the potential for unnecessary price impacts for consumers. However, given the consequences of extensive delays for both network businesses and consumers, SCER considers the time it has taken for limited merits review of regulatory decisions under the national energy laws as a failure of the framework to deliver its intention.

SCER notes that in the submissions received on the consultation RIS, some stakeholders noted issues that need to be considered in addressing this barrier. In particular, ATCO noted that there were risks associated with compressing the timeframe, mainly that it could greatly amplify the risk that the review would not be undertaken effectively. At best, this has the potential to produce lower quality results and, at worst, it could open up the new determination to further judicial review at much greater time and cost.

The ERA noted that one of the contributing factors to delays to the appeal process was the need to coordinate among various parties, so as to ensure they are able to be present at the same proceedings. While the ERA agreed that this was a regulatory failure of the regime, it could be mitigated through making the review process more administrative and to allow concurrent evidence, although there would be a need to address some cultural issues associated with the current framework.

Error correction

In the submissions received from a range of stakeholders there remained some confusion as to whether use of error correction was a regulatory failure or a critical part of the review process. In part, this confusion has resulted from the use of the phrase 'error correction' by both the Panel and the SCO and how this relates to 'correct decision' as the intention for administrative review to ensure that 'correct or preferable' decisions are made.

For the purposes of limited merits review applying to the energy sector under the NEL and NGL, the SCER is committed to ensuring that the approach adopted is consistent with wider administrative law, where the objective is to ensure that administrative decisions are 'correct or preferable'. That is, such decisions are:

- correct, in the sense that they are made according to law; *or*
- preferable, in the sense that, if there are a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

It is not the intention of the SCER for limited merits review to result in decisions that are not consistent with the law. However, SCER recognises that a focus on error correction may lead to less optimal outcomes, particularly in complex determination processes where there may be disputes about many interlinked matters. In this context, 'error correction' means decisions that have been made without due regard to the facts, law *and* policy aspects of the original decision or decisions that should otherwise be 'preferable' decisions, as defined above. As set out in the consultation RIS, most decisions appealed under the limited merits review framework have been on subjective

matters, where there are a range of decisions that are correct in law. Consequently, an undue focus on 'error correction', as defined above, reflects a failure of the limited merits review regime to deliver the policy intention.

SCER's assessment

SCER considers that the core of the problem identified by the Panel is that the current framework has the potential to deliver outcomes that are not expressed in the context of the long term interest of consumers; that is, there is a risk of decisions not delivering the statutory objective. In the problem section, SCER notes that this is evidenced by the narrow focus of decision-making in reviews, lack of ability to engage for a specific group of affected stakeholders, the difficulties in meeting expected timelines, and the focus on error correction of component parts of the decision in the absence of considerations that were used to arrive at the overall original decision. SCER considers that it is important to address this risk, as small changes to the component elements of a network revenue determination have the potential to translate into significant price increases for users and consumers.

Objectives of the limited merits review

As published by SCER on 19 December 2012, SCER:

- Affirms that, in interpreting the NEO and the NGO, the long term interests of consumers (with respect to price, quality, safety, reliability and security of supply) are paramount in the regulation of the energy industry.
- Affirms that the objective of the review framework, in common with the objectives of the laws, is to ensure that relevant decisions promote efficient investment in, operation, and use of energy infrastructure, and are consistent with the revenue and pricing principles of the NEL and NGL, in ways that best serve the long term interests of consumers.
- Considers that, consistent with the Australian Administrative Law Policy Guide, achieving the most preferable decision in the pursuit of this objective should be the aim of both regulator and review body alike.
- Considers furthermore that the long term interests of consumers should be the sole criterion for determining the preferable decision, both at the initial decision-making stage and at merits review.
- Considers that the review process should promote an accountable and high performing regulator such that material error is minimised and notes that the focus on the correction of selected errors is not equivalent to – and may not in itself lead to – the achievement of the most preferable overall decision in the long term interests of consumers.
- Considers that a well-designed limited merits review process can achieve the policy objectives outlined above.

Further, SCER confirms and clarifies that the limited merits review regime should deliver the above principles through:

- providing a balanced outcome between competing interests and protect the property rights of all stakeholders by:
  - ensuring that all stakeholders' interests are taken into account, including those of network service providers and consumers; and
  - recognising efforts of stakeholders to manage competing expectations through early and continued consultation during the decision-making process;
- maximising accountability by:

- allowing parties affected by decisions appropriate recourse to have decisions reviewed;

- maximising regulatory certainty by:
  - providing due process to network service providers, consumers and other stakeholders; and
  - providing a robust review mechanism that encourages increased stakeholder confidence in the regulatory framework;
- maximising the conditions for the decision-maker to make a correct initial decision by:
  - providing an accountability framework that drives continual improvement in initial decision-making;
- achieving the best decisions possible by:
  - ensuring that the review process reaches justifiable overall decisions against the energy objectives;
- minimising the risk of 'gaming' through:
  - balancing the incentives to initiate reviews with the objective of ensuring regulatory decisions are in the long term interests of consumers; and
- minimising time delays and cost by:
  - placing limitations on the review process that avoid or reduce unwarranted costs and minimise the risk of time delays for reaching the final review decision.[14]

SCER considers that these high level objectives are the minimum requirement for the limited merits review regime.

In addition to the statement of policy intent, SCER considers that the limited merits review regime should, without limiting the objectives for administrative review more generally:

- remain a limited merits review process consistent with the MCE's original policy intent;
- have clear and demonstrable links to the NEO and NGO and the revenue and pricing principles;
- be transparent around how the review and decision-making processes have taken into account the long term interests of consumers;
- place the onus on an appellant to make a *prima facie* case that a review will lead to a materially preferable outcome for consumers in terms of the statutory objective;
- consider the matters raised before the review body, and linkages with other aspects of the decision under review, in the context of the whole of the reviewable decision and not as individual component(s) in isolation;
- ensure that the review body has access to sufficient evidence and information, including, but not limited to, the record of the original decision-maker, in order to deliver an outcome that promotes the NEO and NGO;
- enable the review body to review the decision using information that was available at the time of the original decision, using the original decision-maker's record as the starting point, or was not unreasonably withheld from the original decision-maker;
- be as informal and inclusive as practicable;
- require the review body to use appropriate expertise around the economic regulation of the energy sector to assist in its decision-making;

[14] http://www.scer.gov.au/workstreams/energy-market-reform/limited-merits-review/

- require the review body to remit more complex matters to the original decision-maker where it considers major revisions are required; and
- ensure relevant user and consumer representative views are sought as a routine and relevant part of the process.

Options for limited merits review

In the consultation RIS, published on 14 December 2012, SCER's SCO identified three potential options for amending the limited merits review regime. In submissions on the consultation RIS, variants to these options were provided by the AER, the Energy Networks Association (ENA), ATCO, Envestra, the ERA, the Financial Investors Group (FIG), Grid Australia, the Independent Pricing and Regulatory Tribunal (IPART), Jemena, the Major Energy Users (MEU) and United Energy and Multinet Gas (UE & MG).

Details on these options, including the alternatives, are provided below.

Option 1: Status quo

This option retained the current framework that is set out in the NEL and NGL and the Tribunal as the review body for all reviewable decisions. That is, no change to the current review arrangements, but incorporating recent changes to the rules around how the original decision is made. The key attributes of the review framework are:

- allowing limited merits review by the Tribunal of certain regulatory decisions where, in this process, the Tribunal has the functions and powers of the original decision-maker;
- the applicant, an affected or interested party, must seek leave from the Tribunal to bring a review based on certain criteria;
- the applicant must establish one or more of four grounds of review based on regulatory errors of fact or discretion, or unreasonableness, and demonstrate there is a serious issue to be heard;
- the AER may raise a matter not raised by the applicant or an intervener and may raise a possible outcome or effect that may occur as a consequence of the Tribunal varying or setting aside a determination;
- a regulated network service provider or a Minister of a participating jurisdiction may intervene in a review without leave of the Tribunal, and the Tribunal may grant leave to intervene to a user, consumer or a person or body who is a reviewable regulatory process participant;
- an intervener may raise new grounds not raised by the applicant, although a party, other than the AER, may not raise any matter that was not raised in submissions to the AER before the reviewable regulatory decision was made;
- the Tribunal must not consider any matter other than review related matter;
- an applicant has 15 business days to bring an application for review; and
- the Tribunal has a time limit, after granting leave, of three months (which may be extended) to determine the review.

Under this framework, the review is limited by:

- only being able consider the matter raised in the ground for review;
- the material the Tribunal can consider before a ground for review has been established; and
- the time required for the Tribunal to complete its processes.

Option 2: Amendments to the merits review framework while retaining the Tribunal as the review body

This option was a substantial change to the status quo outlined above, with those amendments to the framework proposed by the Panel that did not require the establishment of a new review body. The key differences from the current framework include:

- Appeals should only be allowed or upheld if, on the basis of relevant evidence and substantiated reasoning, the Tribunal is convinced that there exists a materially preferable decision.
- There is only to be a single ground for appeal: there are reasons for believing a relevant decision may be defective in that a materially preferable decision may exist and the primary regulator's decision does not promote economic efficiency for the long term interests of consumers.
- The Tribunal will assess whether a materially preferable overall decision is available with specific reference to the NEO and NGO; that is, specific issues or errors raised by the appellant may be considered in the context of the impact on the overall decision.
- Applications for review should be open to regulated network businesses, energy ministers, consumer and user representatives, and other parties with a sufficiently material interest in the decision.
- The same body should handle the review of all decisions where the AER is the primary decision-maker.
- The AER's functions and duties in relation to the conduct of merits reviews should be set out more clearly in the NEL and NGL.
- Time limits on hearing of appeals should be retained but extended from three to six months.
- The review should be purely administrative and not adversarial or judicial in nature, with consumer views being routinely invited during the review process, where this does not amount to the admission of new information.
- The Tribunal would approach this process in accordance with specified duties, including:
  - Deciding whether a ground for review has been established and, if so, to open a review.
  - Adopting the 'record' of the primary decision-maker as the starting point for its own review.
  - Publishing a practice note outlining its processes.

Under this option, the review is limited by the material the Tribunal can consider before a ground for review has been established, using the primary decision-makers' documented process as the starting point (such that the Tribunal process is incremental to the original process) and the time required for the Tribunal to complete its processes. The intent was to ensure that the review is limited and not *de novo*.

Option 3: Amendments to the merits review framework and a new merits review body

This option entailed those changes to the framework outlined in Option 2, with differences, which are spelled out below, relating to the establishment of a new limited merits review body (the Review Body). The key aspects of the framework changes include:

- Appeals should only be allowed or upheld if the Review Body is convinced that there exists a materially preferable decision.
- There is only to be a single ground for appeal: there are reasons for believing a relevant decision may be defective in that a materially preferable decision may exist and the primary regulator's decision does not promote economic efficiency in ways that best serve the long term interests of consumers.
- The Review Body will assess whether a materially preferable overall decision is available with specific reference to the NEO and NGO; that is, specific issues or errors raised by the appellant may be considered in the context of the impact on the overall decision.

- Applications for review should be open to regulated network businesses, energy ministers, consumer and user representatives, and other parties with a sufficiently material interest in the decision.
- The same body should handle the review of all decisions where the AER is the primary decision-maker.
- The AER's functions and duties in relation to the conduct of merits reviews should be set out more clearly in the NEL and NGL.
- Time limits on hearing of appeals should be retained but extended from 3 to 6 months.
- The appeals functions of the Tribunal would be transferred to a new Review Body that is fully administrative in character (i.e. is not judicial in nature).
- The Review Body comprise a standing panel of potential reviewers, of whom five would be chosen to consider individual cases.
- The members of the Review Body would be chosen on the basis of proven expertise, such as regulatory, energy market and other relevant backgrounds including commerce and business, government policy, economic regulation, finance and accounting, engineering, and legal.
- The Review Body would be supported by a small support team with relevant expertise residing within an existing relevant organisation, members of which may participate on a temporary or intermittent basis.
- The Review Body would be an independent panel but, principally for reasons of cost and staff recruitment, should be attached to an existing administrative organisation, rather than be established as a stand-alone body.
- The host agency for the Review Body would be the Australian Energy Market Commission (AEMC)[15].
- The Review Body Chair and panel members would be appointed according to established criteria, and the panels selected for individual reviews by the Review Body Chair.
- The Review Body could draw the support team from the AEMC, and engage consultants when deemed necessary.
- The overhead costs of the Review Body would be shared among network service providers in proportion to their annual revenues, of which 50 per cent would be allowed as a recoverable cost in revenue determinations, unless otherwise determined by the Review Body. The direct costs of the review panel in individual cases would be borne in the first instance by network service providers, with the Review Body making a determination in each case as to the percentage of its costs that can be recovered on the basis of the assessed merits of the appeals made. Parties would bear their own, private costs.
- It would be left to the Review Body to determine the materiality threshold in practice as this could vary significantly between appeals.
- The Review Body would adopt an investigative approach to reviews of the relevant decisions, with interested parties' views, including those of consumers, being routinely sought throughout the process.
- In performing this role, the Review Body would be subject to specific duties, including:
  - adopting the 'record' of the primary decision-maker as the starting point for its own review;

[15] http://www.aemc.gov.au/About-Us/Who-we-are.html

- supplementing the record with evidence from its own investigations;
- inviting all interested parties to give views;
- assessing whether there is a materially preferable decision and, if there is, substituting that decision or remitting the issue back to the primary decision-maker for further consideration; and
- making decisions on the allocation of costs of reviews.

- The Review Body would also be required to publish guidelines on its procedures, which would assist interested parties in initiating or engaging in a review.

Under Option 3, the review is limited by the material the Review Body can consider before a ground for review has been established, using the primary decision-maker's documented process as the starting point and the time required for the Review Body to complete its processes.

Alternatives or modifications to options

A number of submissions contained amendments to the options outlined in the consultation RIS to address specific concerns with the approaches that were identified. The majority of these alternatives are variants on Option 2, although both IPART and MEU proposed amendments to Option 3. Where appropriate, these proposals have been assessed in the Impact Analysis section. More generally, the issues identified in these proposals have been considered in developing the policy analysis that informed SCER's policy position.

Australian Energy Regulator and Australian Competition and Consumer Commission

In their joint submission against the consultation RIS, while the AER and ACCC agreed that introducing either Option 2 or Option 3 would lead to significant benefits in terms of increased economic welfare, there were limitations in both options that may limit the efficacy of either in cost-effectively addressing the issues identified by the Panel. These limitations included the potential to increase the risk of gaming should the review body not be limited to the information that was in front of the regulator and that establishing a new review body would be likely to be disproportionate to the issues being addressed.

The AER and ACCC therefore proposed a variation on Option 2 that retained the single materially preferable ground for review and the Tribunal as the review body, but would allow any party to raise any aspect of the regulatory determination in the review and limit the information the Tribunal can consider to the information before the AER. The AER and the ACCC suggest its variation on Option 2 would operate as a two-stage process:

Stage one: determining whether a prima facie case for a materially preferable decision exists

- The applicant submits an application for review to the Tribunal that sets out:
  - a statement that there is a *prima facie* case that a materially preferable decision to that of the [original decision-maker's] regulatory determination exists, with reference to the NEO or NGO, the revenue and pricing principles and the long term interests of consumers; and
  - a brief statement of the reasons for, and the evidence before the [original decision-maker] that supports, the applicant's contention that there is a *prima facie* case that a materially preferable decision exists.
- The [original decision-maker] and other interested stakeholders may make a brief written submission to the Tribunal in response to the application, dealing with the question of whether there is a *prima facie* case that a materially preferable decision exists and setting out briefly the reasons and any evidence before the [original decision-maker] which supports the submission.

- The Tribunal determines whether there is a *prima facie* case that a materially preferable decision exists, with reference to the NEO or the NGO, the revenue and pricing principles and the relevant rules in the NER or the NGR, on the basis of the application and any submissions made by the [original decision-maker] and other interested stakeholders.
- If the Tribunal determines there is no *prima facie* case that there is a materially preferable decision, then the Tribunal will dismiss the application, so the AER's initial regulatory determination stands.

Stage two: determination of the materially preferable decision

- If the Tribunal determines that there is a *prima facie* case that a materially preferable decision exists, the Tribunal will direct the applicant, the [original decision-maker], and other interested stakeholders to make further written submissions, and may, if necessary and in limited circumstances, give directions for some or all of the parties to provide any additional information required by the Tribunal.
- In addition to any written submissions made and any information specifically requested by the Tribunal, the Tribunal will be limited to considering the information that was before the [original decision-maker] during its decision-making process.
- The Tribunal will decide whether there is a materially preferable decision and, if so, either make a determination accordingly or remit the matter back to the [original decision-maker] to make the determination in accordance with directions from the Tribunal.

In both stages of the review process:

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

The AER and ACCC's proposed approach is analysed with the options detailed above in the Impact Analysis section.

Energy Networks Association

In the NERA Economic Consulting and Ashurst Australia Expert Report commissioned by the ENA, an alternative approach entailing targeted amendments to the existing limited merits review processes was proposed. This involved:

- reframe the limited merits review regime to include a two stage process, namely:
  - stage one – the substantive assessment of whether a ground for review has been made out; and
  - stage two – in circumstances where the Tribunal does decide to grant leave, the Tribunal must only make a decision to vary, substitute or remit when it is satisfied that the varied, substituted or remade decision is more likely to be consistent with the revenue and pricing principles than the decision as originally made;

- introduce an explicit obligation on the AER and the Tribunal to consider all interrelated matters; and
- impose a requirement that the Tribunal remit all decisions in all circumstances where it has insufficient information before it to correct the errors.[16]

In its submission against the consultation RIS, the ENA reaffirmed its preference for a two stage process and noted that it had concerns with the proposal for a single ground for review. This included concerns around the meaning of 'materially preferable' and how this would work in practice. Another issue raised by the ENA was its concern that the adoption of a 'materially preferable' ground for review may result in regulatory errors being left uncorrected or decisions being varied even in circumstances when there is no demonstrated error.

In an attachment to its submission, the ENA also provided an expert report that it had commissioned from Gilbert and Tobin. Building on the NERA Economic Consulting and Ashurst Australia Expert Report, ENA proposed a two-step process involving:

- Stage one – similar to the existing arrangements, the Tribunal must make a decision whether to grant leave for a review of a reviewable decision; and
- Stage two incorporates a targeted set of amendments to the existing framework that requires the Tribunal to:
  - notify the AER and all parties that participated in the AER process that it has granted leave to an applicant or an intervener once it has done so;
  - upon notifying parties of the grant of leave, invite all parties to make a submission in relation to any issue that is pertinent or linked to the issues raised in the application for review, which the Tribunal should take into account when making a determination on the application;
  - have regard to any submission received, when determining whether to affirm, set aside, vary or remit the decision for reconsideration; and
  - be satisfied that its decision is correct or preferable by reference to the relevant energy objective and taking into account the Revenue and Pricing Principles in making a determination on the application that is to set aside, vary or remit the decision for reconsideration.

ENA suggest that this model would represent a better targeted response to the concerns expressed by the Expert Panel and the SCO.[17]

In addition, ENA submitted that if any concept of 'preferability' were to be introduced into the merits review framework as a matter to be demonstrated before the Tribunal may set aside, vary or remit a determination of the AER, this should take the formulation of 'correct and preferable'.

ENA also considered that if any concept of 'preferability' is to be introduced, it should operate in conjunction with the existing grounds for review.

ATCO Gas Australia

ATCO raised concerns that options 2 and 3 had the potential to unnecessarily jeopardise certainty and accountability. Further, ATCO noted a new review body, as set out in Option 3 may not be as predicable or transparent as the Tribunal. Consequently, ATCO proposed an alternative approach that included a staged approach to reform, namely:

[16] NERA Economic Consulting and Ashurst Australia, 2012. *Review of Limited Merits Review: A joint expert report for the Energy Networks Association*, pp 17-20.
[17] Gilbert and Tobin report, attachment to ENA submission, p 28.

- initially, implementing amendment along the lines of Option 2 (with some changes which are set out below); and
- later, if it proves necessary, undertake further reforms based on further consultation.

The changes to Option 2 entail the 'materially preferable decision' test being replaced by two tests:

1. retaining the current threshold test for leave to apply for review; and
2. the new substantive ground expressed as: *a preferable alternative exists that complies with the Law and promotes the objectives and revenue and pricing principles, and would have a material impact compared with the original* decision.

Envestra

Envestra proposed some changes to Option 2 to expand the grounds for review under this option to explicitly include the requirement for a review ground to be 'correct and/or reasonable'. Envestra suggested two ways to implement this approach:

- amending the single ground for review to be based on there being a 'correct and/or reasonable or preferable decision'; or
- maintaining the existing grounds, but including a requirement that any amended decision better achieves the relevant energy objective.

Envestra noted that the latter approach is consistent with that recommended by the ENA in its previous submissions on this matter.[18]

Economic Regulation Authority (Western Australia)

The ERA, the independent economic regulator for Western Australian gas and electricity industries, noted that it would be most cost effective to retain the existing limited merits review arrangements as set out at Option 1 in the consultation RIS, but supports adopting some of the elements of Option 2 to address the deficiencies in the current regime, including:

- amending the approach of the Review Body to adopt an administrative 'inquisitorial' approach, and allowing the admissibility of concurrent evidence;
- allowing parties with a sufficiently material interest to intervene; and
- extending the time period for review.

However, the ERA had significant concerns with the following elements of Option 2:

- the proposal to limit appeals to a single ground of review; and
- the requirement that the regulator be required to construct a record of its decision, beyond its decision report.[19]

Financial Investors Group

The FIG supported Option 2, subject to variation:

- in relation to the proposed ground of review; and
- to ensure that the Tribunal acts in an administrative manner.

In relation to the ground of review, the FIG proposed a variation to explicitly recognise the position adopted in the consultation RIS that it is possible (though not necessary) for interested parties to challenge a decision on the basis of correction of error so long as that party also demonstrates that a

[18] Envestra submission to the consultation RIS, p 2.
[19] ERA submission to the consultation RIS, p 15.

materially preferable overall decision may exist. This could be addressed in a single ground, but FIG preferred that there be two separate grounds of review:

- one ground that makes the above position clear; and
- a second ground that also makes it clear that a review may be commenced solely on the basis that a materially preferable overall decision may exist.[20]

The FIG argued for the retention of the Tribunal, but welcomed legislation to broaden the Tribunal's capacity to include finance practitioners, economists and engineers. The FIG considers that people experienced in policy and administrative decision-making should also be included to address the Panel's concerns about judges being wary about getting involved in the contentious business of price control. The FIG supported the number of members on any particular review to be greater than three. [21]

The FIG also supported a clarification of the Tribunal's capacity to obtain necessary resources, including consultant and expert resources, to support an administrative function. The FIG suggests reinstating the mechanism that existed under section 38(8) of the Gas Pipelines Access Law (the predecessor to the NGL) under which the Tribunal was empowered to require the regulator to give information and other assistance and to make reports, as specified by the Tribunal.[22]

Grid Australia

Grid Australia submitted that the most appropriate and proportionate response is a modified Option 2 that retains the Tribunal as the review body, adopts a 'correct and preferable' test and takes advantage of the other changes to the broader framework already underway.

Instead of 'materially preferable', Grid Australia prefers the adoption of the 'correct and preferable' test outlined in the expert report from Gilbert and Tobin and attached to the ENA's submission. This formulation of the test is well understood in the Australian administrative review context. Combined with the two stage process, also suggested by the ENA, it would:

- continue error correction as a specific ground of appeal, thereby keeping the incentive on the AER to undertake quality decision-making; and
- make explicit the ability of the review body to take all those elements of the decision that are under review into account in arriving at a preferable outcome.[23]

Independent Pricing and Regulatory Tribunal

The IPART, independent regulator that determines the maximum prices that can be charged for certain retail energy, water and transport services in New South Wales, supports adoption of the Panel's recommendations in full. However, the IPART considers that the review body should not be able to consider evidence that was not before the first-instance decision-maker due to the time, cost and gaming opportunities it presents. IPART therefore recommend that the appeal should be 'desk top' review, relying on the information available to the first-instance regulator.

[20] FIG submission to the consultation RIS, p 7.
[21] FIG submission to the consultation RIS, p 10.
[22] FIG submission to the consultation RIS, pp 10-11.
[23] Grid Australia submission to the consultation RIS, p 5.

Jemena

Jemena noted its preference for the modified version of Option 2, as developed by the ENA. Jemena submitted that this option meets the SCER policy intent but introduces fewer risks.[24]

Major Energy Users

The MEU supported the adoption of Option 3, but considers that a new review body would be better aligned with the ACCC than the AEMC.[25]

United Energy and Multinet Gas

UE & MG advocated for adopting Option 2, with a modification to the ground of appeal. UE and MG consider that it would be preferable for the ground of review to explicitly recognise that it is possible, though not necessary, for interested parties to challenge a decision on the basis of correction of error so long as the party also demonstrates that a materially preferable overall decision may exist. This could be achieved by adopting a single ground of review that reflected the concept of 'correct and preferable'. [26]

[24] Jemena submission to the consultation RIS, p 1.
[25] MEU submission to the consultation RIS, p 7.
[26] UE & MG submission to the consultation RIS, p 6.

Methodology

This section sets out the process used for assessing the potential approaches to addressing the issues identified in the consultation RIS. This includes the framework for analysis, the identification of affected parties, potential benefits and potential costs. In conducting the analysis an on-balance assessment was made.

Framework for analysis

The different approaches for undertaking limited merits review will be assessed against the regulatory failures identified on pages 5 to 10 and the objectives set out on pages 4, 5, 10 and 11. The impacts on the identified affected parties (see below) will be assessed over the short term (five years, or one regulatory period) and the long term, which reflects both the regulatory regime and the long-lived nature of energy network assets.

Identification of affected parties

In assessing the different options the following affected parties were identified:

- network service users and consumers.
- regulated network businesses;
- regulators;
- the Australian Government and state and territory governments;
- financiers of network investments; and
- the Australian Competition Tribunal.

The limited merits review regime applies to electricity decisions in the NEM and all covered gas network regulatory determinations, including gas network regulatory determinations in Western Australia. The electricity businesses in Western Australia and the Northern Territory will not be affected by changes to the limited merits review regime.

Identification of potential benefits

In assessing the different options the following benefits were considered:

- Decisions better reflect the NEO and NGO, in particular the long term interests of consumers (with respect to price, quality, safety, reliability and security of supply);
- provision of due process for parties affected by a decision to appeal the merits of that decision;
- ability of all affected parties to engage in the review process;
- driving continuous improvement in the initial decision-making process;
- increasing confidence in the regulatory process;
- increased accountability for decision-making; and
- avoiding or minimising unwarranted costs, risks and time delays in the overall regulatory process.

Identification of potential costs

In assessing the different options the following costs were considered:

- regulatory burdens for affected parties, which includes, but is not limited to the administrative burden;

- regulatory uncertainty associated with change;
- increases in costs for affected parties;
- inequitable distribution of costs;
- timing of decision-making;
- increases in appeals under judicial review; and
- reduction in accountability for decision-making.

Comparison of benefits and costs for different categories of affected parties

It is difficult to directly compare the quantum of specific benefits and costs for different groups of stakeholders. For the purposes of this assessment, SCER has considered the benefits and costs for each of the stakeholder groups in table form and provided an on-balance assessment for each of the options.

Limitations with the assessment

As recognised in a number of submissions, it is difficult to quantify the impacts of the options on different stakeholder groups as essentially the review mechanism is a process, and the 'appropriate' price or revenue outcome of a revised process is practically impossible to quantify. In addition, it requires assumptions around a number of factors that are still unknown. This is particularly true where some of the aspects of the economic regulation of network service providers rule change (published on 29 November 2012) are still in the process of being finalised.

SCER received confidential cost information from a limited number of stakeholders. This information has not been incorporated in the impact assessment as it is commercially sensitive. However, this information was used by SCER in considering a number of factors in the process of developing the agreed option.

The difficulty with the quantification of the impacts coupled with the lack of publicly available data has led to SCER comparing qualitative impacts in the impact analysis, below.

Impact analysis

As recognised by the Panel[27], it is difficult to quantify the impact of the review process, as it currently operates or following any specific reforms, directly on consumers. This is due to the issues around the regime SCER is addressing essentially relating to the review *process* and not the outcomes *per se*. The options considered in this RIS provide mechanisms for addressing identified risks to the review process, at varying costs, rather than targeting particular price or service delivery outcomes.

While, in general, it can be expected that a 'better' process would lead to 'better' outcomes for users and consumers, these outcomes are arrived at following complex analytical processes that balance a range of factors including price and service delivery requirements, for consumers and the energy system as a whole. Given the differences between covered network businesses across Australia and the differences in investment environments between regulatory periods, comparison with historical outcomes or across businesses is both technically difficult and not informative.

The Panel's review and analysis to date has identified a range of potential sources of risk to optimal review outcomes, which includes the accountability of the review body to all stakeholders affected by a decision, limitations in the review process from interpretation of legislation, and the scope of what is being assessed as set out in the grounds for review. SCER notes it is not possible to translate these risks, and changes to address them, into consumer outcomes without 'redoing' all of the decisions that have been appealed since the limited merits review regime was introduced, based on the approach of both the original decision-maker and the Tribunal's subsequent findings.

Instead, as it is not the outcomes of the limited merits review regime that are being analysed in this RIS, rather the process by which the limited merits review is performed, the following impact analysis assesses each of the options from the perspective of how these address the risks and the potential for unintended outcomes. Given the proposed changes consider uniform application of mechanisms which a common review body applies under a national regime, SCER does not consider there will be any state-specific impacts arising from any of the options. The size and nature of the impact will of course vary, just as jurisdictions currently face different costs of network service delivery. (See Table 1 in relation to electricity networks in NEM jurisdictions, and Table 2 for covered gas networks across Australia.

[27] Yarrow, Tamblyn and Egan, 2012. *Review of the Limited Merits Review Regime; Stage One Report*, pp 16-17.

Table 1: Electricity network regulatory outcomes in the NEM[28]

State	Network	Number of Customers	Asset Base ($million)	Revenue (current period $million)	Investment (current period $million)	Next Regulatory period
New South Wales and Australian Capital Territory	Transgrid (Transmission)	-	4 485	4 720	2 455	1 Jul 2014 – 30 Jun 2015*
	AusGrid	1 619 988	8 965	9 300	8 855	1 Jul 2014 – 30 Jun 2015*
	Endeavour Energy	877 340	3 925	4 680	3 150	1 Jul 2014 – 30 Jun 2015*
	Essential Energy	1 301 626	4 595	5 920	4 415	1 Jul 2014 – 30 Jun 2015*
	ActewAGL	168 937	635	770	325	1 Jul 2014 – 30 Jun 2015*
Victoria	SP AusNet (Transmission)	-	2 365	2 940	830	1 Apr 2014 – 31 Mar 2017
	Powercor	723 094	2 260	2 570	1 600	1 Jan 2016 – 31 Dec 2020
	SP AusNet (Distribution)	637 810	2 120	2 475	1 510	1 Jan 2016 – 31 Dec 2020
	United Energy	641 130	1 410	1 700	305	1 Jan 2016 – 31 Dec 2020
	CitiPower	311 590	1 315	1 240	850	1 Jan 2016 – 31 Dec 2020
	Jemena	314 734	770	985	485	1 Jan 2016 – 31 Dec 2020
Queensland	Powerlink (Transmission)	-	6 260	4 720	2 455	1 Jul 2017 – 30 Jun 2022
	Energex	1 316 295	8 120	6 900	5 970	1 Jul 2015 – 30 Jun 2020
	Ergon Energy	689 277	7 380	6 425	5 275	1 Jul 2015 – 30 Jun 2020
South Australia	ElectraNet (Transmission)	-	1 415	1 365	840	1 Jul 2018 – 30 Jun 2023
	SA Power Networks	825 218	2 860	3 620	2 225	1 Jul 2015 – 30 Jun 2020
Tasmania	Transend (Transmission)	-	1 010	1 010	645	1 Jul 2014 – 30 Jun 2015*
	Aurora Energy	275 536	1 410	1 290	555	1 Jul 2017 – 30 Jun 2022

* One year transitional regulatory period due to new Rules. Subsequent 4 year regulatory period will apply from 1 July 2015 to 30 June 2019.

[28] AER, *State of the Energy Market*, 2012, pp. 62 -63.

Table 2: Covered gas network regulatory outcomes Australia wide[29]

State	Network	Number of Customers	Asset Base ($million)	Revenue (current period $million)	Investment (current period $million)	Next Regulatory period
	Jemena Gas Networks (NSW)	1 050 000	2 396	2 289	750	1 Jul 2015 – 30 Jun 2020
	ActewAGL	124 000	288	292	91	1 Jul 2015 – 30 Jun 2020
	Wagga Wagga	23 800	62	50	21	1 Jul 2015 – 30 Jun 2020
	SP AusNet	602 000	1 140	963	367	1 Jan 2018 – 30 Dec 2022
	Multinet	668 000	1 070	906	196	1 Jan 2018 – 30 Dec 2022
	Envestra	587 400	973	838	324	1 Jan 2018 – 30 Dec 2022
	Allgas Energy	84 400	427	339	134	1 Jul 2016 – 30 Jun 2021
	Envestra	89 100	319	312	140	1 Jul 2016 – 30 Jun 2021
Western Australia	Dampier to Bunbury Natural Gas Pipeline (Transmission)[30]	-	3 349	1 624	184	1 Jan 2016 – 31 Dec 2020
	Goldfields Gas Pipeline[31] (Transmission)[32]	-	443	321	21	1 Jan 2015 – 31 Dec 2019
	Mid-West and South-West Gas Distribution System[33]	660 288	781	548	-	1 July 2014 – 30 June 2019
South Australia	Envestra	410 700	1 024	1 033	494	1 Jul 2016 – 30 Jun 2021

* Figures related to the valuation of the pipeline ($million).

From the current regulatory cycle, the most substantial impact on consumers coming out of merits review decisions have related to the rate of return covered networks receive on their regulated asset base. Intuitively, all other things being equal, improvements to the regime would have bigger impacts on network tariffs in those regions where the per-customer asset base is higher. However, there is no *priori* reason to assume those regions are more or less likely to be affected by changes to the review framework. Given this is a uniform scheme; SCER does not consider there will be different effects on consumers in different jurisdictions.

As an example, for regulatory determinations, individual business determinations' will depend on:

[29] Data relating to covered gas networks in NSW, ACT, Victoria, Queensland, South Australia and the Northern Territory: AER, *State of the Energy Market*, 2012, pp. 106-108.

30 ERA, *Dampier to Bunbury Natural Gas Pipeline - Revised Access Arrangement – 2010: Revised Decision Access Arrangement Model*, 2012.

[31] The Goldfields Gas Pipeline's most recent access arrangement was determined under transitional arrangements from the *Third Party Access Code for Natural Gas Pipelines*. Its next access arrangement will be determined under the NGL.

[32] ERA, *Goldfields Gas Pipeline - Revised Access Arrangement – 2010: Corrected public version of the Financial Model for the Final Decision on GGT's Proposed Revisions to the Access Arrangement for the Goldfields Gas Pipeline,* 2010.

[33] ERA*, Mid-West and South-West Gas Distribution System - Revised Access Arrangement – 2010: Appendix 2 - Reference Tariff - Financial Model (Public Version)*, 2011.

- the network business' regulatory proposal, which will be driven by forecasts around demand levels, domestic and regionally-specific economic conditions, global financial market conditions, changes to input costs, among a raft of other considerations;
- the outcomes from the regulatory process, where the regulator must make decisions that will, or is likely to, deliver the long term interests of consumers with regards to price, quality, safety, reliability and security of supply, which entails a range of decisions that involve the exercise of significant discretion under a new, and as yet untested, regulatory framework; and
- the review process itself, which entails the review body assessing the merits of the regulator's decision under the same new, and as yet untested, regulatory framework.

While the intention of the limited merits review regime is to provide accountability for decision-making in the energy sector, SCER recognises that it has the potential to drive changes to regulated network revenues, which flow through to users and consumers through their energy bills and impact network investors. Further, SCER notes that changing the requirements for being granted leave for reviews, such as through requiring an applicant to make a *prima facie* case that a materially preferable decision exists, is likely to have implications for the number of appeals for review of covered decisions, which is also likely to, in itself, have implications for revenue or price outcomes for network businesses or users and consumers, respectively. While it is not possible to predict what changes to the limited merits review regime are likely to result in, in terms of revenues or prices, in practice, previous outcomes from the Tribunal's decision-making may provide some guidance around the potential order of magnitude such decisions may have on regulatory outcomes. In this context, SCER has used outcomes from the Tribunal's decisions between 2008 and 2012 to inform this impact analysis.

In light of the above limitations, SCER has adopted an approach in this impact analysis which looks at each option in the context of whether it is likely to address the issues identified by the Panel, with more specific consideration about whether it would ameliorate the risk factors around accountability, limitations and scope. SCER's on-balance assessment is based on this analysis and the stakeholder submissions on SCER SCO's consultation RIS. As this is a qualitative assessment of the options' qualities with regards to risk management, the following does not consider the impacts of each option on specific classes of stakeholder groups. However, qualitative descriptions of the likely impacts on stakeholder groups, based on feedback on the consultation RIS, are at **Appendix III**.

The objective: improved outcomes for users and consumers

Both the original regulatory process and any subsequent reviews aim to ultimately deliver the NEO and NGO; that is, to promote efficient investment in, and efficient operation and use of, electricity and gas services respectively for the long term interests of consumers. This means that in considering the impact of appeals on outcomes from the regulatory process, a number of factors that contribute to the 'long term interests of consumers' need to be taken into account, of which price is only one component. Other factors include the impact on investment and operational decisions and how these translate into service quality and reliability outcomes, in both the short and longer terms.

Price outcomes

The energy bills paid by retail customers cover the costs of wholesale energy, transport through transmission and distribution networks, retail services and costs associated with climate change policies. From 2000 to 2007, electricity prices rose annually by around 3.6 per cent (0.8 per cent in real terms). Following this period of relative stability, energy prices began to rise significantly from 2008. Residential electricity prices rose nationally by 91 per cent (66 per cent in real terms) in the five years to 2012–13. Gas prices rose by 62 per cent (40 per cent in real terms) over this period. While price rises in themselves do not mean the system has failed, they do highlight the importance of ensuring outcomes are as efficient as possible.

Rising network costs (especially for distribution networks) were the main driver of these outcomes. In the current regulatory period, the annual increase in electricity network charges has been over 20 per cent in New South Wales and South Australia; 9-10 per cent in Queensland; and up to 15 per cent in Victoria. In gas, pipeline charges account for up to two thirds of retail bills. Wholesale energy costs typically account for a lower share of retail bills in gas than electricity, while retailer operating costs (including margins) account for a higher share.[34]

In terms of outcomes of reviews on retail prices, the Tribunal's decisions between 2008 and 2012 on these reviews increased network revenues by around $3.3 billion (to a total of approximately $60 billion). In its Stage One Report, the Panel determined that the effect of these changes on the end retail price could be estimated to be around 4.2 per cent over the regulatory period.[35] SCER also recognises that there will be differences in impact on consumer prices between and within states and territories, as there are fundamental differences to the electricity networks serving different areas, but notes that it is not feasible to quantify the impacts of outcomes from reviews on consumers for different states and territories.

SCER considers that it is likely that the changes to the grounds for review would result in a lower number of appeals and, consequently, less likelihood that the original decision is likely to be changed. All other things being equal, this has the potential to limit the user and consumer energy price increases as a result of outcomes from the Tribunal's reviews to only those situations where it can be demonstrated that those increases are in the long term interests of consumers.

Consequently, decisions relating to the economic regulation of energy network businesses have the potential to have significant implications for the prices faced by retail consumers. Larger users' energy charges have similar proportions of network costs; consequently, economic regulation has the potential to be an important consideration when they make business decisions, although it is not possible to quantify the specific magnitude of this effect.

Service delivery outcomes

The long term interests of consumers are delivered through the timely investment in energy assets to meet quality, safety or reliability requirements, and to deliver secure supplies of energy. In general, Australia enjoys a high level of supply quality and reliability, which is delivered through efficient investment. In its economic regulation of network service providers rule change determination, the AEMC noted that efficient investment requires:

- there being a level of investment in network infrastructure so that safety and reliability standards are met in circumstances where consumers pay no more than is necessary for the network services they receive;
- the costs network businesses incur in providing network services to their customers reflecting efficient financing costs. This is to allow those businesses an opportunity to attract sufficient funds for investment while minimising the resultant costs that are borne by consumers;
- the establishment of a certain, robust and transparent regulatory environment. Investors will have more confidence and may be more likely to invest in monopoly infrastructure where the regulatory process is certain and robust, with appropriate checks and balances in place. Consumers will also have more confidence that the outcomes are better in such an environment; and
- regulatory certainty in the application of the improved and strengthened rules.[36]

[34] AER, 2012. *State of the Energy Market 2012*, pp 5-8.
[35] Yarrow, Tamblyn and Egan, 2012. *Review of the Limited Merits Review Regime; Stage One Report*, p 21.
[36] AEMC, 2012. *Rule determinations: National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012* and *National Gas Amendment (Price and Revenue Regulation of Gas Services) Rule 2012* p 8.

This requires providing sufficient incentives for investment in energy networks, which depends on recovering, and making a reasonable return on, the actual costs associated with long term investments. Consequently, the adequacy and certainty of allowed regulated network revenues have significant implications for the confidence of investors and, consequently, the price, reliability and security of energy supplies in Australia.

For electricity networks, combined network revenues were forecast at $60 billion over the current cycle, comprising over $12 billion for transmission and $47 billion for distribution.[37] For gas distribution networks, revenues are forecast to increase in the current access arrangement period by an average of 18 percent.[38]

The main revenue component for network businesses is the return on capital, which may account for 40-70 per cent of total revenue due to the capital intensive nature of network businesses. Three factors determine the return on capital – the size of a network's asset base, new investment added to the base, and the rate of return on those assets (the weighted average cost of capital (WACC)). Operating and maintenance costs, account for around a further 30 per cent of revenues.

Given the relatively large proportion of network businesses' revenues represented by the return on capital, the parameters contributing to the rate of return tend to be the most contentious. From a network business and investor perspective, it is important that the WACC is set at a level that both covers the financing costs of the business and is competitive in the global financial market (noting the level of risk appropriate to network investment). For users and consumers, relatively minor changes to the WACC can materially impact on the network charge component of their energy costs.

Changes in operating environments, even over a relatively short period, can cause significant variations in investment requirements. A number of AER determinations relating to the current regulatory period that were made several years ago reflected increased capital needs to replace ageing assets, meet higher reliability and new bushfire (safety) standards, and respond to forecasts made at the time of rising peak demand. More recent determinations (for Powerlink and Aurora Energy in 2012), reflect a moderation in forecast growth in industrial and residential energy use, including peak demand.[39]

Gas transmission investment typically involves large and lumpy capital projects to expand existing pipelines (through compression, looping or extension) or construct new infrastructure. Significant investment in the regulated gas transmission sector has occurred since 2010. Additionally, a number of major projects are under construction or have been announced for development, particularly in eastern states.

Investment to augment and expand gas distribution networks in eastern Australia is forecast at around $2.6 billion in the current access arrangement periods (typically five years). The underlying drivers include rising connection numbers, the replacement of ageing networks, and the maintenance of capacity to meet customer demand. For example, a significant driver of capital expenditure for Envestra's South Australian distribution network is the replacement of cast iron and unprotected steel mains, to address leaks from older sections of the pipeline.[40]

In the Australian Government's Energy White Paper, it was estimated that for our domestic energy sector as much as $240 billion of new investment could be required by 2030, although it is important to recognise this applies to electricity generation and gas production as well as electricity and gas networks.[41]

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[37] AER, 2012. *State of the Energy Market 2012*, p 67.
[38] AER, 2012. *State of the Energy Market 2012*, pp 113-115.
[39] AER, 2012. *State of the Energy Market 2012*, p 70.
[40] AER, 2012. *State of the Energy Market 2012*, p 113.
[41] IRG (Investment Reference Group) 2011, *Report to the Commonwealth Minister for Resources and Energy,* Department of Resources, Energy and Tourism, p 4.

Changing baseline

Limited merits review is not a decision-making process that occurs in isolation, and the regulatory framework underpinning both the original and any subsequent decision-making processes has the potential to significantly affect the matters which may be subject to review and the grounds for such an appeal.

The status quo entails making no changes to either the limited merits review framework, nor the review body. However, it must be viewed in the context of the recent reforms to the NER and NGR that apply to economic regulation of energy network service providers that will apply to the next round of regulatory determinations. These changes were wide ranging, but the most significant, for an analysis of the performance of the limited merits review regime, are those that relate to how the regulator sets the regulated rate of return or WACC.

As of May 2013, the AER is in the process of progressing its Better Regulation program of work to deliver an improved regulatory framework focused on promoting the long term interests of electricity consumers. This work follows from changes to the rules that were published by the AEMC on 29 November 2012.

As part of the Better Regulation program the AER will:

- Publish a series of guidelines by 29 November 2013. These will set out the AER's approach to regulation under the new rules. These will include how the AER assesses expenditure proposals, calculates the allowed return on assets, allocates costs, and engages with consumers, among other things.
- Establish a consumer reference group to make it easier for consumer representative groups to have input into the 'Better Regulation' consultative process without necessarily writing formal submissions.
- Establish a Consumer Challenge Panel within the AER from 1 July 2013. The panel will provide an independent consumer perspective to challenge the AER and network service providers during regulatory determination processes.

As the new arrangements, in particular the guidelines, have not been finalised, it is not possible to quantify the impact of these on the number of appeals that will be lodged nor whether the review body will be constrained in its approach to how it reviews the merits of decisions, in particular those relating to the rate of return. However, the changes are fundamental enough that historical data would not be a reasonable proxy for establishing a quantifiable 'baseline' for the purposes of analysing the different options for amending the limited merits review regime.

From a practical perspective, it is SCER's view that the benefits for the entire regulatory process associated with the rule changes will outweigh the benefits (or costs) of any changes to the limited merits review regime in isolation.

Analysis of the costs and benefits of review process improvements against the baseline, under different reform options

As above, the key issue is the extent to which the options efficiently address the risks identified in meeting the objectives, both those agreed by the MCE in 2006, and those provided on pages 10 and 11. These risks relate to the accountability of the review body, limitations in the legislation that have led to processes that have not reflected the policy intent and limitations around the matters that may be considered in a review due to the scope of the grounds for review.

The impact analysis below explores each of the options in the context of how well they address these risk factors. Further, a number of additional risks were identified in the submissions on the consultation RIS. How SCER took these into account is provided at **Appendix IV**. Where SCER's

internal analysis indicated that these risks had the potential to guide the development of SCER's agreed amendments, details around these are provided in the section on the relevant option below.

Option 1: Status Quo

In general, the recent changes to the rules will substantially improve the robustness of both the primary decision-making and any subsequent reviews, particularly with respect to the rate of return parameters. This, in itself, is likely to give greater confidence and stability around regulatory costs allowances and limit growth in network charges to levels that are required to deliver the long term interests of consumers in terms of price, quality, safety, reliability and security of supply requirements.

However, these changes may result in a level of uncertainty around how investment decisions will be treated in the next regulatory period. In isolation, this is likely to introduce uncertainty into the market, although SCER considers that this is likely to be comparatively limited, given the robust, transparent and consultative process the AEMC undertook in making its final determination and the consultative process being employed by the AER in developed the associated guidelines. However, SCER expects that these changes, in particular new powers for the regulator to conduct an *ex post* review of capital expenditure above the approved amount, will introduce additional rigour around network business investment decision-making, without significantly impacting on certainty in the regulatory frameworks.

Under the new rules, Option 1 is likely to result in decisions that better reflect efficient better costs than has occurred to date. However, the Panel identified that the decision-making in review processes that led to 'economically efficient' or 'correct' decisions in isolation, without due regard to whether these will result in the best decision in the context of the long term interests of consumers, has been a failure of the limited merits review to date. SCER recognises that, without changes to the limited merits review framework, significant risks remain that there may be a misalignment between the original decision-making process and any subsequent reviews, specifically around the overall decisions being required to be made in the context of the long term interests of consumers.

Accountability of the review body

Without changes to the limited merits review framework, SCER considers that there would be a continuation of the risk that the Tribunal may lack accountability for its decision-making to all stakeholders that are affected by such decisions. SCER notes that there are currently financial and cultural barriers to consumer participation in the review process and considers that these would not be addressed without explicit changes to the review framework.

Limitations in the review process

SCER notes that this approach is likely to continue to focus on error correction without any consideration of the implications of any outcomes for the decision as a whole, being limited to only the matter raised by the applicant for review. As flagged by the Panel, this has the potential to embed cherry picking of decisions and gaming of the regime for future determinations. SCER considers that such an outcome is inconsistent with ensuring that overall regulatory determinations are in the long term interests of consumers.

Scope of grounds for review

SCER notes that under the existing regime there have been limitations around the primary decision-maker's ability to widen the matters that the Tribunal can consider. As identified in advice to the Panel, the primary decision-maker has been unable to use provisions that were intended to widen the matters the Tribunal could consider beyond those identified in the ground for review in the way

that has been intended.[42] This advice noted that, in the absence of other reforms, amending this provision alone would not address this issue.

On balance assessment

SCER considers that, in the absence of any reforms to the limited merits review regime, retaining the status quo would not address the issues identified by the Panel around the narrow focus, accessibility, timeliness and error correction focus of outcomes from the regime to date.

Option 2: Amendments to the merits review framework while retaining the Tribunal as the review body

In general, SCER considers that changes to the framework along the lines of those proposed in Option 2 have the potential to build on the improvements to the regulatory and review processes resulting from the changes to the rules. Specifically, the framework changes would improve the transparency of the review process and, ultimately, ensure that the overall regulatory determination outcomes for users and consumers are in their long term interests, as set out in the NEO and NGO. This will improve the rigour of the review process and align the requirements on decision-makers in the regulatory determination and review processes. SCER notes, however, that this approach has the potential to embed other regulatory failures, namely, barriers to user and consumer groups participation and the effective engagement of relevant Ministers in the process.

Option 2 would introduce a specific requirement on network businesses to establish, under a single ground for review, and the Tribunal to make its determinations where there is a materially preferable decision with regard to the long term interests of consumers. SCER notes that, in isolation, this has the potential to increase uncertainty with regard to how it would work in practice. In the consultation RIS, SCO noted that it considered that the existing grounds would be captured under the single ground. The FIG indicated that the risks associated with this approach would be minimised if it was clarified how this would work in practice. SCER's analysis around this risk is discussed further in the scope of grounds for review section below.

Accountability of the review body

While Option 2 would introduce a requirement on the Tribunal to seek advice from user and consumer representatives as a routine part of the review process, it would not address the financial and cultural barriers to participation for these stakeholders. Without explicitly addressing these issues, SCER retains concerns that Option 2 will preserve the legalistic approach adopted by the Tribunal and that users and consumers will continue to face the risk of having costs awarded against them, in a way that has the potential to significantly impair their advocacy in both the review process and other processes.

Limitations in the review process

Option 2 would reduce the risk of cherry-picking through only allowing the Tribunal to allow or uphold an appeal where it is convinced a materially preferable decision exists. SCER notes that this was intended to reflect the Panel's intention of allowing the review body to look into a range of matters, not just those raised in the ground for review, when reaching its decision. However, SCER notes that additional changes to the way the primary decision-maker undertakes its process and reports its decision and new requirements on the Tribunal would be required to give effect to this intention. SCER recognises that, without such changes, the Tribunal would still be limited to considering only that matter raised in the ground for review.

[42] Yarrow, Tamblyn and Egan, 2012. *Review of the Limited Merits Review Regime; Stage Two Report*.

Scope of grounds for review

Option 2 introduces a single ground for review; that there is a materially preferable decision in the long term interests of consumers. As noted above, in the consultation RIS, SCO indicated that it intended for this approach to remain limited and not a reconsideration of the entire original decision. However, in practice, there is a risk that introducing a single ground for review could open the Tribunal up for reconsidering the entire original decision, albeit using the primary decision-makers' record as the starting point. SCER notes that this is duplicative of the original process and considers that this is inconsistent with the original policy intent and would require significant augmentations to the Tribunal's existing resources.

On balance assessment

SCER recognises that this approach will impose new requirements on both the primary decision-maker and the Tribunal. However, as these costs are administrative, SCER considers that these are minor in the context of the potential outcomes of such reviews for all affected stakeholders.

On balance, SCER considers that this approach may be the most proportionate of the options considered in the consultation RIS in light of the recent significant reforms to the rules around economic regulation. However, after considering feedback on the consultation RIS and obtaining additional advice, SCER has some concerns that this approach risks becoming a full, rather than limited, merits review in practice and that adjustments to Option 2 would be required to ensure the retention of the limited nature of merits review while allowing the Tribunal to consider interlinked areas and routinely seek the views of users and consumers.

Option 3: Amendments to the merits review framework and a new merits review body

In addition to the improvements detailed for Option 1, and consistent with Option 2, Option 3 entails introducing a requirement for the review body to consult users and consumers routinely to ensure that their views on what constitutes their long term interests are adequately represented in the review process. However, Option 3 goes beyond this to establish a new review body that would be required to adopt a less formal or legalistic approach, compared to that which has been adopted by the Tribunal to date. SCER considers that this would, as the Panel intended address the financial and cultural barriers to user and consumer participation in the review process.

As with Option 2, this option would also introduce a requirement on network businesses to establish, under a single ground for review, and the Tribunal to make its determinations with regard to, outcomes that are materially preferable with regard to the long term interests of consumers, resulting in a similar increase in regulatory uncertainty. Additionally, SCER recognises that the establishment of a new review body will increase regulatory uncertainty substantially more than for the other options considered in the consultation RIS, as this body's processes, procedures and focus will take some time to establish. In addition, this approach is likely to engender concern about how long it would take to establish an effective precedent for investors to factor into their decision-making around energy networks.

Accountability of the review body

SCER considers that Option 3, despite any uncertainty around how a completely new body would behave, is most likely to be more accountable to all stakeholders. This is due to this approach removing those barriers to participation, whether financial or cultural, that prevent the views of all stakeholders from being presented.

Limitations in the review process

Option 3 would reduce the risk of 'cherry-picking' by potentially opening up any aspect of the original decision to review, so that the review body can ascertain whether it is convinced a

materially preferable decision exists. However, SCER notes that additional changes to the way the primary decision-maker undertakes its process and reports its decision, in addition to the establishment of a new review body, would be required to give effect to this intention. SCER recognises that, without such changes, the review body would be limited to considering only that matter raised in the ground for review, as is currently the case with the Tribunal.

Scope of grounds for review

Option 3, as with Option 2, introduces a single ground for review; that there is a materially preferable decision in the long term interests of consumers. As with Option 2, this approach, in practice, risks opening up the review to a reconsideration of the entire original decision, albeit using the primary decision-makers' record as the starting point. SCER notes that this is duplicative of the regulatory determination process and considers that this is both inconsistent with the original policy intent and would require significant bolstering of the Tribunal's resources. However, unlike Option 2, it might be possible to establish the new review body with this approach in mind. Nonetheless, SCER considers that this remains inconsistent with both the original policy intention and the Panel's recommendation.

Additional costs

As this is a significant change from the existing framework, there are likely to be a range of administrative costs to be borne by the state and territory governments, if the new review body is established under the AEMC, or by the Australian Government, if it is established under a body established in Commonwealth legislation. While these costs are likely to be minimal in comparison to the size of the decisions being considered and the potential impacts on stakeholder outcomes from decisions, it is still possible that costs of up to $5-10 million could be required to establish the new review body.[43]

In addition, SCER recognises that it may be difficult to secure sufficient suitably qualified but unconflicted staff for the new review body.

On balance assessment

SCER recognises the changes the Panel was trying to introduce through making its recommendations to SCER. However, SCER also notes that it was unable to fully assess how its proposed approach could work in practice. Consequently, SCER considers that substantially more work would be required to determine whether it is necessary to establish a new review body that is capable of conducting a review that is limited in nature, while improving the accessibility of the process.

SCER notes that there is a significant risk that Option 3 would approach full merits review, which could introduce significant uncertainty for how this would work in practice. This, coupled with the significant uncertainty associated with establishing a new review body, however it is constituted or established, is likely to have the impact of driving up network costs for users and consumers (for example through increased financing costs to reflect the increased regulatory uncertainty or the costs involved in reviews testing the new regime and establishing a body of precedent).

Consequently, on balance SCER considers that the risks associated with proceeding with Option 3 are too high to justify at this time, particularly in light of the recent changes to the NER and NGR. In addition, SCER notes that, as with Option 2, there are a number of limitations in the approach recommended by the Panel that would need to be addressed to deliver the policy intent. These include ensuring the limited nature of the merits review framework is retained and limitations around the review body considering interlinked matters.

[43] Estimate drawn from costs associated of establishment of the Australian Energy Market Operator. There would be many variables to consider in developing a firmer costing, including whether it was to be an entirely stand-alone body or established within an existing organisation.

However, SCER recognises the Panel's warnings about whether the Tribunal would ever be able to adopt a less formal and legal approach than it has used to date and whether the financial and cultural barriers to user, consumer or Ministerial participation in the review process could be addressed. Nevertheless, SCER considers there is insufficient evidence on this risk and notes varying views around barriers to reforming the tribunal. While SCER considers that its preferred position, set out below, will go a significant way to address these issues, SCER acknowledges some uncertainty about whether cultural barriers will be addressed and commits to a review of the Tribunal's performance in reviewing energy sector decisions under the reformed review process, to commence no later than the end of 2016.

Alternatives models proposed by stakeholders

A number of the alternatives suggested by stakeholders have the same costs and benefits as identified above. Consequently, the proposals presented by AER and ACCC, ATCO, Envestra, ERA, FIG, IPART, MEU and UE & MG were considered in developing SCER's agreed approach (see page 36). Similarly, Grid Australia and Jemena's proposals were considered with ENA's proposal.

ENA proposed a substantive alternative to the options in the consultation RIS. ENA's proposal is an amendment of Option 2 and therefore has similar costs. However, while ENA's process does address some of the issues around consumer engagement in the process, it does not address the cultural barriers that were identified by the Panel and in subsequent submissions from consumer groups. It is difficult to determine what result this would have for consumers, although it has the potential to lead to a lower reduction in costs for consumers than for either Option 2 or Option 3.

In addition, the proposal does not address the issues around timeliness of decision-making that would be mitigated by adopting the record of the original decision-maker as the starting point in review processes. For the purposes of this assessment, it is noted that, where regulatory decisions relate to a fixed period (typically five years), delays in the review mean that any revenue increases resulting from reviews need to be recovered over the, potentially much, shorter amount of time remaining in the regulatory period, thereby leading to 'price spikes'. While the costs over the long term would remain the same, this outcome would be at odds with the policy intention.

However, ENA raised some points around legal clarity regarding the single ground for review. Should these not be addressed, there is the potential for regulatory uncertainty to increase the cost of financing debt, thereby increasing costs for both consumers and network businesses. This issue has been considered in developing SCER's policy position.

Qualitative impacts on stakeholders, based on their submissions to SCER in response to the consultation RIS, are at **Appendix III**.

Evaluation and conclusion

SCER notes that the recent rule changes are likely to improve outcomes for all parties from the economic regulatory process, and will have a direct impact on the incentives for and outcomes of merits review processes. However, SCER recognises that these changes, in isolation, would not address all key risks identified in the limited merits review regime.

SCER considers that Option 1 will fail to address the risk the Panel identified of decisions being made which do not contribute to the long term interests of consumers as set out in the NEO and NGO. SCER notes that such an outcome is inconsistent with the economic regulatory framework, generally, and clearly fails to deliver the policy intention for the regime.

In addition, Option 1 retains the existing arrangements that the Panel identified have led to the exclusion of users and consumers from the process. SCER considers that Option 1 is inconsistent with its enhanced national energy market reform package, announced on 23 November 2012, that reinforces the focus of energy markets on the long term interests of consumers.[44] SCER notes that it is also incompatible with the Statement of Policy Intent SCER released on 19 December 2012 that applies to the limited merits review regime.

SCER also notes the Panel's cautions that retaining the existing arrangements, as proposed in Option 1, would result in reviews that are of significantly narrower scope than was intended, allowing network businesses to 'cherry pick' and, in future, game the review process. The Panel noted that failing to address the limitations within the existing framework has the potential to lead to a loss of confidence in limited merits review, thereby compromising the regulatory certainty that is necessary to deliver necessary investment.

In contrast, Option 2, as outlined in the consultation RIS, addresses the key concern of narrowness by introducing the Panel's concept of a single ground of review which network businesses must establish, namely that a 'materially preferable decision in the long term interests of consumers' exists. SCER recognises that this approach would raise the threshold for appellants to meet in applying for leave to appeal. In doing so, it would be expected that appeals would only be made in circumstances where a *prima facie* case could be made that a materially preferable decision exists, thereby reducing the number of appeals being made or upheld.

Option 2 also entails introducing explicit requirements around who the Tribunal needs to seek advice from as part of the review process. An explicit requirement for user and consumer groups to be consulted not only aligns the regulatory and review processes, but also would assist the Tribunal in establishing what the 'long term interests of consumers' are. However, a risk remains that users and consumers may be unable to participate in reviews due to cultural and financial barriers, leaving them unrepresented in the process.

While attracted to the more consumer focused nature of Option 2, SCER recognises there is some merit to the concerns raised by stakeholders that the 'single ground' test brings with it a risk of becoming in practice an unlimited, full, or something akin to a *de novo* review. There is some question about how the Tribunal would establish whether an applicant has established that a materially preferable decision exists without redoing the entire original decision again. This is inconsistent with SCER's intention to retain the limited nature of reviews of energy decisions.

Option 3 builds on options 1 and 2, by introducing the establishment of a new review body. The new body would be intended to have a less formal or legalistic approach than the one used by the Tribunal to date and, in doing so, would better facilitate consumer participation. In addition to the risks noted in relation to Option 2, the establishment of a new review body brings with it inherent uncertainty about how it would operate in practice. This includes uncertainty about how it would interpret the rules under which it, and the original decision-maker, operate. SCER recognises this is

[44] SCER, 2012. http://www.scer.gov.au/meetings/, 23 November 2012.

of real importance to network businesses and their investors at this time, given the significant reforms to the rules that will come into effect for the next round of regulatory determinations, commencing in mid-2014. In as much as the costs of uncertainty and a new institution will be passed on to consumers, Option 3 would have to represent a major advance on what could be achieved under Option 2 at this time for it to be worthwhile.

SCER considers that, at this time, these risks and resultant costs of Option 3 are not warranted, given that the changes to the rules and the targeted changes to the framework, as reflected in SCER's policy position, are likely to go a significant way to address the risks identified by the Panel. However, SCER considers that if the Tribunal's formal and legalistic approaches continue to prevent the delivery of the policy intent, it is important that this issue is addressed. Accordingly SCER commits to a review of the Tribunal's performance under the reformed regime to determine whether more substantive amendments to the merits review framework to achieve the policy intent are necessary, which is to commence no later than 2016.

In terms of the impacts, SCER recognises that both options 2 and 3 have limitations that may constrain the extent to which these will address the risks identified by the Panel. In relation to both options, changing to a single ground for review has a high risk of removing the limited nature of the review process and, would open the process up to remaking the full original decision. SCER notes that this was not the intention of the Panel. To this Option 3 adds the question of whether a new institution, which is only conceptual at this stage, could improve on the Tribunal operating under revised regulatory arrangements

Consequently, SCER considers the best approach at this time is based on Option 2, but with some variations to address the risk of establishing an unlimited or full review and, to the greatest extent practical, the existing barriers to the effective participation for user and consumer groups and relevant Ministers. This is set out in more detail in SCER's policy position starting on page 39.

SCER feels that this approach will involve minimal additional costs compared to the existing arrangements. The most significant of these are likely to be around the need for the regulator and Tribunal to demonstrate how the overall decision will, or is likely to, contribute to the long term interests of consumers. SCER considers these costs are proportionate, as it will improve the transparency around decision-making processes.

As SCER's approach retains the Tribunal as the review body, SCER considers that it is both a proportionate response and will deliver the greatest net benefits in terms of delivering efficient outcomes for users and consumers, as well as maximising certainty for network businesses and investors.

Table 3 summarises the overall costs and benefits of the different options.

Table 3: Summary of the costs and benefits of the options

Option	Estimated cost	Benefits in controlling key areas of risk			Ranking	Comments
		Improvement to the accountability of decision-making	Addresses the limitations in the legislation identified by the panel	Scope of reviews better reflect policy intent		
Option 1	Low	Very low	Very low	Very low	3	Fails to address the risk factors
Option 2	Low	Medium	Medium if issues in the framework around scope of the review and matters the Tribunal can consider are addressed	Medium if issues in the framework are addressed	1	Proposed changes to the framework have the potential to mitigate against the risk of narrow interpretation of the legislation and limitations in going beyond the matter raised in the ground for review.
Option 3	High	High	Low, given the risks associated with establishing a new review body. This could rise to medium if that risk is mitigated and issues in the framework around scope of the review and matters the Tribunal can consider are addressed	Medium if issues in the framework are addressed	2 This may ultimately be SCER's approach should the risk that the Tribunal cannot deliver the policy intention be realised, even with substantive changes to the existing frameworks	Introduces significant new risks associated with establishing a new review body and there is insufficient evidence to support change. There may be additional costs to governments and other stakeholders that have not been quantified, depending on how the new body is established. Proposed changes to the framework have the potential to mitigate against the risk of narrow interpretation of the legislation and limitations in going beyond the matter raised in the ground for review.

SCER's policy position

Policy Considerations

SCER notes the changes to the national energy legislation and to the AER to strengthen the economic regulation of network businesses, coupled with other measures being progressed by SCER to enhance consumer engagement, are expected to assist in addressing a number of the issues identified by the Panel as contributing to the shortcomings of the limited merits review regime. In light of this, SCER considers that the highest priority reform required at this stage is to ensure that the limited review regime delivers 'materially preferable' decisions in the long term interests of consumers.

SCER notes that while the Panel recommended the establishment of a new review body, the evidence to support the establishment of this body, particularly in conjunction with the other reforms contemplated, was limited. In addition, the potential impact of the changes to the broader national energy legislation, particularly in regard to the economic regulation of network businesses, cannot be understated. Accordingly, SCER considers that it may add undue uncertainty to the market to move to a new review body without appropriately assessing the impact that the broader changes will have on the operation of the regime.

Agreed policy approach

The overarching objective for both decisions under the national energy laws (including regulatory determinations and review processes) is to deliver regulatory outcomes that serve the long term interests of consumers as defined in the NEO and the NGO. This is consistent with other aspects of the NEL and NGL.

In addition, any review process should be appropriately limited in its scope so as to ensure it does not amount to a duplication of the original decision process, but is a 'value adding' process which allows the review body scope for consideration of interlinked matters. Any review process should also be accessible to competing interests in a balanced way, including due consideration of whether an increase or a reduction in revenues, as compared to those specified in the original decision, would be materially preferable in the context of the long term interests of consumers as set out in the NEO and NGO.

Changes in the national energy laws

Aligning the original decision process and limited merits review

As the Tribunal has powers to affirm, remit or vary the original decision, it is appropriate that the obligations on the original decision-maker and the Tribunal align. Consequently, SCER considers that it is prudent to make it explicit that the Tribunal must perform or exercise its functions in a way that would, or is likely to, contribute to the achievement of the NEO or NGO and, for regulatory determinations, take into account the revenue and pricing principles set out in the NEL and NGL.

For regulatory determinations, there are a range of areas where the role of the relevant original decision-maker in making regulatory decisions and the Tribunal in assessing the merits of those decisions could be clarified to ensure that both the regulatory regime and the review processes are appropriately aligned. These include expressly stating that the original decision-maker and Tribunal must:

- where there is discretion around a range of component decisions, make an overall decision that, on balance, is materially preferable in terms of serving the long term interests of consumers as set out in the NEO or NGO; and
- undertake appropriate consultation with relevant users or consumer groups served by the network business that is the subject of the regulatory determination.

For regulatory determination processes, the relevant regulator will be required to compile a record of the information it used to support its regulatory considerations and this will form the primary information source for any future review processes. This may include, but is not limited to submissions, consultant reports, data sets, models, regulatory proposals and any other documents the regulator considers pertinent.

In addition, to supplement this record, the regulator will be required to provide an explanation of its decision-making process in its final determination and how its overall decision will contribute to delivering the long term interests of consumers as set out in the NEO and NGO. It is intended that this would provide both an explanation of the regulator's decision-making considerations and the logic that underpins its assumptions and approach, including the objectives and key interlinkages between components of the regulatory decision.

It is intended that the record and the final determination will provide a clear starting point for the Tribunal in considering the merits of the matter before it and will ensure that it is explicit how the long term interests of consumers with regard to price, quality, reliability, safety and security of supply were taken into account in the original regulatory process.

As noted below, the Tribunal will be required to base its review primarily on the record of the primary decision-maker and its final determination, which will also help to align the regulatory and review processes.

Limited merits review framework

SCER considers it is important that the grounds for review maintain the limited nature of the merits review process; it is not the SCER's intention that a *de novo* review will be permitted. However, given the objective of the limited merits review framework is to ensure that outcomes from this process are those that are materially preferable in the context of the long term interests of consumers as set out in the NEO and NGO, the existing grounds for review will be amended so that an additional obligation will be placed on the applicant to establish a *prima facie* case that addressing a matter raised in its application for review (in the case of revenue determinations, this would presumably be either through increasing or decreasing overall revenues) would deliver a materially preferable outcome in the long term interest of consumers as expressed in the NEO and NGO.

SCER considers that this is achieved through a process where:

1. applicants must demonstrate that the original decision-maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision and make a *prima facie* case that addressing this would lead to a materially preferable outcome in the long term interests of consumers; and
2. the Tribunal assesses whether, taking into account any interlinked matters, addressing the grounds and the interlinked matters would deliver a materially preferable outcome (in the context of the overall decision) in the long term interests of consumers, as set out in the NEO or NGO.

SCER considers that the above changes will introduce a higher threshold for reviews (in addition to the existing materiality threshold of $5,000,000 or 2 per cent of the overall revenue determination) and is likely to reduce the use of the review mechanism as a routine part of the regulatory process as well as address current concerns regarding 'cherry-picking' of issues for review.

Requirements for applicants

This process will require that the applicant, in applying for leave to appeal, will need to establish that there is a *prima facie* case that there is a materially preferable outcome in the long term interests of consumers. Under this approach, the onus is on the applicant to establish why correcting the

alleged error, incorrect use of discretion or unreasonableness will result in an overall outcome that is materially preferable to the original decision for delivering the long term interests of consumers.

Requirements on the Tribunal in its decision-making

SCER agrees with the Panel's major conclusion that limited merits review has failed to deliver on the policy intent in that its decisions have not been linked back to the long term interests of consumers as set out in the NEO and NGO. It is SCER's view that this link to the statutory objectives needs to be made explicit in the limited merits review framework. Consequently, SCER considers that, consistent with requirements in the original decision process, the Tribunal should be required to demonstrate that its decision is materially preferable to the decision under review in the context of the long term interests of consumers as set out in the NEO or NGO.

SCER also agrees with the Panel's finding that reviews to date have been unduly narrow in focus, which is inconsistent with the original intention in establishing the framework. Consequently, SCER considers that it should be explicit that the Tribunal should take into account matters which are interlinked with the matter(s) raised as the grounds for review.

In making its decision, the Tribunal must consider these interlinked matters and how, in combination, these contribute to the delivery of the NEO and NGO. SCER considers that this will ensure that relevant balancing factors and contradictory views are able to be given due regard during reviews, thereby aligning the original decision process and the review process. Ultimately, this will contribute to ensuring that the long term interests of consumers as set out in the NEO and NGO are the primary focus of both the original decision-maker and the Tribunal.

It is expected that the Tribunal will not simply focus on whether a particular ground for review has been established. The Tribunal will be limited in its decision-making powers to make a decision which is materially preferable to the original decision; one that is materially preferable in the context of the relevant statutory objective (in the long term interest of consumers) to the decision under review. If the Tribunal cannot make such a decision it will have to affirm the original decision. Where the Tribunal determines that the original decision is correct in law and reasonable, that the regulator has acted within the bounds of its discretion or that on the basis of its consideration of the appeal there is not an outcome materially preferable to the original decision in the long term interests of consumers (as relevant), the Tribunal would be expected to affirm the decision of the original decision-maker.

In general, SCER expects that the Tribunal will remit matters to the original decision-maker for its consideration where it believes that there is a materially preferable decision to the original decision, in particular where the matter is highly complex. In addition, should the Tribunal consider that there is likely to be a decision that provides for an overall outcome that is materially preferable in the context of the NEO and NGO, but to reach this would effectively require remaking the original determination, it will be required to remit the decision to the original decision-maker with advice on factors it must take into account in revisiting the original decision.

To give effect to the above requirements on the Tribunal, SCER expects that new provisions will be required in the NEL and NGL that will allow the Tribunal to consider interlinked areas as part of its review process.

SCER considers that the current timeframes for an application for review and for the Tribunal making a determination remain appropriate, as they reflect SCER's expectation for reviews to be carried out in a timely fashion in advance of the commencement of the regulatory determination period. SCER considers that the extent to which reviews adhere to these timeframes will be considered in the future review of the Tribunal's role in energy matters, so as to guide further development if necessary.

Parties to a review

SCER considers that any party that participated in the relevant original decision-making process should be able to make an application for review. SCER does not intend this to prevent other parties applying for leave to appeal a decision as currently provided for in the NEL and NGL, rather to make it explicit that there should be no barriers to participants in the original decision-making process applying for leave to appeal.

Under the current arrangements, the following persons or bodies can gain intervener status in a review:

- the regulated network service provider and a Minister of a participating jurisdiction can intervene without the leave of the Tribunal;
- other persons or bodies can apply to the Tribunal for leave to intervene if they were a participant in the reviewable regulatory decision process; and
- user or consumer interveners can apply to the Tribunal for leave to intervene if their interests (or the interests of their members) are affected by the decision being reviewed or if the material that the user or consumer intervener wishes to present is likely to be best presented by the user or consumer intervener rather than another party to the review.

SCER considers the current provisions relating to who may intervene in a review and the parties to the review should remain.

Information that may be considered

Stakeholders, in particular the AER and Australian Competition and Consumer Commission, the Economic Regulatory Authority and the Independent Pricing and Regulatory Tribunal, identified that there was a risk of gaming by participants in the regulatory determination process, should the Tribunal not be limited to material that was in front of the original decision-maker. SCER agrees that this risk should be ameliorated by the Tribunal being limited to consideration of information that was before the original decision-maker. Further, SCER notes, in the case of regulatory determinations, this will generally be provided by the relevant regulator as part of its record in the event of a review.

However, SCER notes that there may be limited circumstances where there was information available which the original decision-maker could reasonably have been expected to consider, but which was not identified at the time, nor provided in the record. In this event, it must be established by the party that wishes to table the information that it was publicly available or known to be available to the original decision-maker and could reasonably have been expected to be considered during the original decision-making process. SCER notes that the Tribunal will ultimately be responsible for deciding what information it allows parties to submit in a review.

SCER considers that the above approach will balance the need for the Tribunal to have adequate information to undertake its review, without opening up the regulatory process to the risk of gaming by parties intentionally withholding information from the original decision-maker.

SCER considers that, to inform the Tribunal's deliberations into a matter, the Tribunal could receive concurrent evidence and allow experts to question each other. SCER notes that the Tribunal is able to seek expert advice as part of its existing processes and encourages the Tribunal to make use of this ability for energy matters, in particular where it is in a complex or purely economic area.

Costs of participation

SCER also considers that there is merit in reforming the provisions in the existing regime that deal with the costs associated with participating in reviews. SCER considers it is appropriate that all participants in reviews are generally required to bear their own costs. In addition, as a means of limiting the use of reviews as a routine part of the regulatory process, SCER thinks that network businesses should not be able to pass costs associated with reviews through to consumers. SCER considers that this would encourage network businesses to be more discerning in their consideration of which matters to take to review.

Awarding of costs in reviews

As a means of discouraging trivial or vexatious claims, it is recognised that currently the NEL and NGL set out when the Tribunal may award costs against users, consumers and the regulator. User and consumer representatives identified the potential for having costs awarded against them to be a major deterrent to applying for leave to intervene in a review. SCER notes that this was not the intention in establishing the framework originally, and that there may be merit in tightening the conditions around costs being awarded against small user and consumer groups to reduce the scope for adverse cost orders without increasing incentives for trivial or vexatious claims.

SCER recognises that the intent of the provisions in the first instance was to minimise the risk of applicants for intervener status doing so on the basis of trivial or vexatious matters. Consequently, some legislative provisions should be retained to discourage review being sought on trivial matters. These provisions should reflect the additional costs that raising these issues could cause the applicant, the original decision-maker and the Tribunal, from an administrative perspective rather than costs associated with retaining legal counsel. SCER considers that this approach reflects the intention for reviews to be informal, with no requirement to have legal representation.

Consumer interests

SCER agrees with the Panel's finding that user and consumer groups have, in general, not been able to participate in the review process as intended. As the primary focus of the review process should be on ensuring outcomes are materially preferable in the long term interests of consumers, it is important that user and consumer views inform the review process. SCER notes that the new framework will ensure that the Tribunal gives due regard to user and consumer views in a number of ways:

- the record of the regulator will include any submissions that were received from user and consumer groups;
- the Tribunal will be required, as the regulator is required, to consult with users and consumers as part of its review process;
- the Tribunal will be required to seek user and consumer advice on interlinked areas, where appropriate;
- removal of the risk that users and consumers may have legal costs incurred by network businesses or the regulator awarded against them; and
- removal of the provision that small users and consumers may have costs awarded against them on the basis that they conducted their case without due regard to submissions or arguments made to the Tribunal by another party.

Changes to the Tribunal's functions in legislation beyond the national energy laws

In general, it is SCER's intention for the provisions around the energy sector in the Competition and Consumer Act 2010 (CCA) to support the overall intention of the limited merits review regime as set

out above. In addition, SCER considers it is important that there are no barriers to the Tribunal operating in a way that will, or is likely to, deliver this intent, noting the Panel identified the court-like formality of the process and barriers to participation as issues with retaining the Tribunal as the review body. SCER considers that it is important, where these barriers arise from provisions of the CCA, these should be resolved in a way that does not compromise the integrity of the Tribunal in undertaking administrative reviews.

There is an opportunity for the Australian Government to amend the Competition and Consumer Regulations 2010 to reflect the intention that the Tribunal undertake a less formal and more investigative process in energy merits review matters and that it act as speedily as a proper consideration of the matter allows, having regard to the scope of the issues being reviewed. SCER notes there are precedents within the Competition and Consumer Regulations for these types of arrangements. In addition, should other regulations be required for energy reviews to ensure the Tribunal will act in a way that is consistent with the overall policy objectives, these regulations should be in place prior to the commencement of the next round of regulatory determinations in mid-2014.

Review of the Tribunal's role in energy matters

SCER recognises the Panel raised a number of concerns regarding retaining the Tribunal as the review body. While SCER considers these matters should be addressed to a large degree by the overall package of proposed reforms to the regulatory framework, the wide ranging nature of the changes proposed create a sufficient case for further independent review of the institutional issues, when data on the outcomes of these reforms is available. This would focus on requirements for future additional amendments to the structure of the Tribunal or the establishment of a new review body.

This review should consider, but not be limited to:

- whether reviews have been conducted in an informal manner that allows for the ready participation of all stakeholders, whether they have legal representation or not;
- whether consumer engagement has improved;
- whether reviews have met the timeframes and, if not, an explanation around why this has not occurred; and
- whether decisions have been justified on the basis of delivering the NEO or NGO.

If the independent review determines that the Tribunal's review function in the energy sector should be reformed, it should identify the optimal way of delivering the policy intention. Should the review identify that it is not feasible or possible to change the Tribunal, it should provide advice on the need for a new review body, how it should be constituted and where it should be established. In doing so, the review would need to recognise that a new review body would be subject to the Administrative Decision (Judicial Review) Act 1977 in the same way as the Tribunal.

In recognition that it is preferable to have any required changes introduced prior to the next round of regulatory determinations in mid-2019 and that any such changes as can currently be envisaged are likely to be significant and require complex analyses, SCER considers that it is necessary to commence this review no later than the end of 2016. This would allow for due consideration of determinations for the majority of network businesses under the new arrangements now being

considered and would be able to take into account changes to the regulatory regime and consumer engagement which may have implications for future reforms.

SCER notes that the Productivity Commission is currently exploring similar issues to those identified by the Panel in its inquiry into the National Access Regime. Given the synergies between that inquiry and any future review of the Tribunal's performance, SCER considers that the independent review could build on any relevant outcomes from the Australian Government's response to the Productivity Commission's findings.

Assessment against SCER's Statement of Policy Intent

On 19 December 2012, SCER released a Statement of Policy Intent that provides a clear statement of policy about the merits review regime, this is set out on pages 10 and 11. SCER considers that its policy position will deliver the objectives contained in this Statement. Table 4 provides an assessment of SCER's policy position against this Statement.

Table 4: SCER's assessment of its policy position against the Statement of Policy Intent

Policy intent	SCER's assessment
Provide balanced outcome between competing interests and protect the property rights of all stakeholders by: • ensuring that all stakeholders' interests are taken into account, including those of network service providers, and consumers; and • recognising efforts of stakeholders to manage competing expectations through early and continued consultation during the decision-making process.	SCER's policy position delivers this outcome by introducing requirements into the NEL and NGL for the original decision-maker and the Tribunal to consult with all affected stakeholders, including the affected network businesses, registered market participants and consumers. SCER is also introducing new provisions that are aimed at addressing barriers to participation.
Maximise accountability by allowing parties affected by decisions appropriate recourse to have decisions reviewed.	SCER's policy position maintains the ability for affected parties to appeal material issues in decisions through both administrative and judicial review.
Maximise regulatory certainty by: • providing due process to network service providers, consumers and other stakeholders; and • providing a robust review mechanism that encourages increased stakeholder confidence in the regulatory framework.	SCER's policy position delivers this outcome through introducing requirements in the NEL and NGL to make the review process more robust and transparent.
Maximise conditions for the decision-maker to make a correct initial decision by providing an accountability framework that drives continual improvement in initial decision-making.	SCER's policy position includes a requirement for both the original decision-maker and the Tribunal to be more transparent around its decision-making, particularly with regard to how its decision is in the long term interests of consumers.
Achieve the best decisions possible by ensuring that the review process reaches justifiable overall decisions against the energy objectives.	See above.
Minimise the risk of 'gaming' through balancing the incentives to initiate reviews with the objective of ensuring regulatory decisions are in the long term interests of consumers.	SCER's policy position requires an applicant not only to establish an error of fact or discretion but also to make a *prima facie* case that a materially preferable decision in the long term interests of consumers exists.
Minimise time delays and cost by placing limitations on the review process that avoid or reduce unwarranted costs and minimise the risk of time delays for reaching the final review decision.	SCER's policy position retains the requirements for reviews to be conducted in a legislated timeframe, if possible. However, the effectiveness and need for this requirement is something that will be considered further following the 2016 review of the performance of the Tribunal.

Implementation and review

The changes to the limited merits review regime will be implemented through changes to the NEL and NGL and including additional provisions in the *Competition and Consumer Regulations 2010* to apply to energy decisions. Consistent with the Council of Australian Governments' agreed timeline[45], it is intended for these amendments to be introduced by the end of 2013. This will allow the arrangements to be fully in place prior to the commencement of the next round of regulatory determinations, starting in mid-2014.

To ensure that these new arrangements are delivering against the policy intention and the Panel's findings from its *Review of the Limited Merits Review Regime*, SCER will undertake a review of the Tribunal's performance under the reformed regime by 2016, to ensure that, if necessary, any substantive changes to the regime or review body can be introduced prior to the round of regulatory determinations commencing in mid-2019.

[45] http://www.coag.gov.au/sites/default/files/COAG%20Energy%20Market%20Reform%20Implementation%20Plan%20-%20FINAL%20-%2028%20November%202012.pdf

Appendix I: List of stakeholders who made submissions

Submissions were received from:

ATCO Gas Australia

Australian Energy Regulator and Australian Competition and Consumer Commission

Australian Pipeline Industry Association

Consumer Action Law Centre

Consumer Utilities Advocacy Centre

Economic Regulatory Authority

Energy Networks Association

Energy Supply Association of Australia

Energy Users Association of Australia

Envestra

Financial Investors Group

Grid Australia

Independent Pricing and Regulatory Tribunal

Jemena Limited

Major Energy Users

United Energy and Multinet Gas

Appendix II: Stakeholder feedback

Stakeholder	Issue	Comment
ATCO	Preferred option	The limited merits review regime does not need and should not receive radical reform. ATCO does not support Option 2 in the form proposed by SCO, but proposes a modified form of Option 2 for consideration. ATCO submits that Option 3 is unviable.
	Retaining merits review	ATCO supports retaining merits review.
	Consistency between electricity and gas regimes	ATCO does not in principle oppose a consistent regime being maintained across gas and electricity, and agrees that it could bring obvious benefits and efficiencies. However, it also does not believe that consistency/convergence is the most important goal for access regulation.
	Potential for minor amendments to NEL and NGL	ATCO considers that it would be possible by relatively minor amendments to increase the focus on the NGO and RPPs, increase consumer involvement and reduce formality, without otherwise changing the limited merits review regime which in ATCO's view is working reasonably satisfactorily.
	Extent recent reforms address issues raised by the Panel	It's too early to tell, which is why SCO should proceed slowly and proportionately in these reforms. Also some of the assumptions which led the Panel and SCO to conclude that there are perceived regulatory failures could be re-examined.
	Impact of a move to a 'materially preferable' ground for review	The 'materially preferable decision' test is unclear and conflates two different tests. If used in the form proposed in the consultation RIS there would be more litigation, and reviews would become more complex, slower and more costly. However if the test was separated into a threshold test (preferably the current one) for leave, and a substantive ground of review, and the substantive ground was clarified in the manner proposed by ATCO, then the Tribunal would have no difficulty applying it and it would be entirely compatible with the Tribunal being retained.
	Barriers to the Tribunal performing this role	ATCO supports the Tribunal acting administratively to determine a preferable decision. It must continue to act judicially to assess error or unreasonableness – this is a critical constitutional protection for all interested parties and especially investors which must not be diluted. The Tribunal has experience acting administratively and ATCO has no doubt it can continue to do so very competently. The suggestion that parties would not or should not engage lawyers is misguided, and the assumption that the process would be improved as a result is unsubstantiated and wrong.
	Information the Tribunal should consider	ATCO considers that in the interests of speed and efficiency, as well as securing the highest quality first-instance decisions and maximising regulatory certainty, the review should as far as possible be conducted based on material before the original regulator. The Tribunal should, as now, have discretion to admit further information if doing so will better advance the NGO and RPPs, but this discretion should be used sparingly.

Stakeholder	Issue	Comment
	Benefits and risks of new review body	The specific risk is that this experimental, novel body, lacking judicial guidance, will jeopardise investor confidence and undermine the credibility of the limited merits review regime and the NGL, while at the same time increase costs and delay and risk poorer decision quality. It should not be pursued. The body must include and be led by a judge. Otherwise it will not be equipped to deal with the complex legal issues involved. The process should not be a full open investigation of new information. If it was, it would trend to being a full merits review of the whole decision.
	Comparison of the options	ATCO does not believe that the overall costs of Options 2 or 3 would be lower. Reducing the number of reviews would reduce review transaction costs. However that would be a false economy if the reduction were achieved at the cost of less reputable, less accountable or lower quality regulatory outcomes. ATCO considers that the per-appeal costs of Option 2 (as proposed in the consultation RIS) and Option 3 would in fact likely be considerably higher than Option 1. While ATCO supports changes to make the review process as informal as possible it does not consider that making it less 'legalistic' is desirable.
AER and ACCC	Preferred option	Support Option 2, but propose a variant that allows parties to raise any aspect of a regulatory determination once an application for review has been lodged.
	Retaining merits review	Yes, merits review should be maintained.
	Consistency between electricity and gas regimes	Yes, a consistent approach remains appropriate. Consistency with other regulated industries is also important to reduce distortions in investments across regulated industries.
	Extent recent reforms address issues raised by the Panel	Recent network regulation rule changes to the NER and NGR address a significant number of the problems identified by the Panel, but complementary changes to the limited merits review regime are needed to ensure that the review body is required to undertake an overall review of a regulatory determination and that the review process is accessible to all stakeholders.
	Impact of a move to a 'materially preferable' ground for review	Moving to a single materially preferable decision criterion would: - contribute to outcomes that are in the long term interests of consumers; and - potentially reduce the number of reviews, by introducing risk into appeals for NSPs. A single materially preferable decision criterion is compatible with retaining the Tribunal as the review body.
	Barriers to the Tribunal performing this role	There are no real barriers to the Tribunal effectively performing its role in a purely administrative manner. Amendments to the NEL and NGL could ensure that the Tribunal review process is an administrative one and that the review process is accessible to all stakeholders.
	Information the Tribunal could	After a ground for review has been established, in addition to any written submissions made and any additional

Stakeholder	Issue	Comment
	consider	information specifically requested by the Tribunal, the Tribunal should be limited to considering any information that was before the AER during its decision-making process.
	Benefits and risks of new review body	Do not consider there are any specific benefits associated with a new administrative body. The most appropriate review body is the Tribunal. A new review body runs the risk of incurring significant other costs, namely by impacting regulatory and investment certainty in the energy sector. An investigative process also runs the risk of approximating a *de novo* review.
	Prescriptiveness of requirements on new review body	Do not have specific views about the level of prescription around the establishment and operation of such a body. However, at least one of the members sitting on the review body should have legal experience given the complexity of the legislation and rules that govern regulatory determinations. Given this, there is a question as to why the review body should not be the Tribunal.
	Comparison of the options	"Option 2 and Option 3 may have the effect of deterring applicants from seeking review. But, given the broader scope of review, it is possible that a single review under Option 2 or Option 3 may cost more than a single review under the current limited merits review regime. It is difficult to imagine completely removing the need for legal counsel. " Whether the overall costs of Option 2 or Option 3 are higher or lower than Option 1 will depend on the number of reviews sought and the scope of those reviews.
APIA	Preferred option	Prefers option 1; Does not agree that a shift in the Tribunal's mode of operation to administrative from judicial will improve regulatory decision-making.
	Retaining merits review	Yes. Merits review provides a necessary check and balance to discretionary decision-making where there is the likelihood of direct impact on the property rights of infrastructure providers and a significant impact on consumers and the broader public interest.
	Consistency between electricity and gas regimes	Supports a consistent approach to limited merits review of electricity and gas regulatory decisions.
	Potential for minor amendments to NEL and NGL	- Modify the NEL and NGL so that the regulator must identify related matters to the grounds of appeal. - Any related matters must be specified in the original decision to encourage transparency of decisions. - A requirement that the regulator should adopt the role of contradictor in any appeal. - A requirement for an explicit statement and explanation as to how the decision meets the NEO, for both the regulator and the Tribunal.

Stakeholder	Issue	Comment
	Extent recent reforms address issues raised by the Panel	Many of the issues identified by the Expert Panel are being addressed and the limited merits review regime does not need to be modified drastically to enhance the outcomes anticipated from recent and foreshadowed reforms. With substantial changes made to the NER and NGR frameworks in 2012, it is reasonable to expect a further round of frequent challenges to decisions testing the new framework.
	Impact of a move to a 'materially preferable' ground for review	The single materially preferable decision ground raises the prospect that a finding of error may not be sufficient to give rise to an appeal, even if the materiality of that error exceeds the threshold for review. This risk perpetuating some errors from one regulatory decision to the next. In failing to correct some errors, the implementation of this single, legally uncertain ground of appeal is likely to reduce transparency and accountability for the regulator's decisions. The wording of the ground should wholly replicate the language of the NEO and NGO to avoid any confusion with the interpretation and interaction with the objectives.
	Barriers to the Tribunal performing this role	The current nature, processes and composition of the review body are appropriate to the circumstances. A highly formalised process should ensure consistency between appeals. The regulator's decisions can be assumed to be consistent in the current framework and it is therefore necessary that appeals are treated in the same manner. This may be more problematic if the change to a single 'materially preferable decision' criterion is made and the Tribunal's process is to be made purely administrative in nature. An administrative panel may have different views in this regard from decision to decision.
	Information the Tribunal could consider	There should be very strong restrictions applied to information that can be considered. Only in circumstance when genuinely new information is available after the regulator's decision that would have a substantial impact on the decision should it be considered.
	Specific comments on Option 2	The establishment of an administrative review function that permits new information to be considered would not create an effective limited merits review regime, it would be a repetition of the initial decision-making process (*de novo* review) with tighter timeframes and less public consultation.
	Benefits and risks of new review body	The key risk associated with the Panel's model is the risk to investor confidence which could lead to under investment if the allowed rate of return is not commensurate with prevailing conditions in the market for funds. It is very difficult to ensure an investigative approach will be conducted consistently at each appeal. Investigative approach is closer to *de novo* review that limited merits review. Removing the ground of review of error correction will increase concerns that regulators are not correctly applying the law.
	Prescriptiveness of requirements on new review body	A high level of prescription is necessary. Consistency is paramount in the conduct of appeal processes. If the establishment and operation of the Review Body is not tightly controlled, consistency is not guaranteed. APIA's key concern with the Expert Panel's proposed review body model is the lack of judicial representation.

Stakeholder	Issue	Comment
		There is no question that judicial representation must be present in the Review Body.
	Comparison of the options	APIA does not agree with the risk and benefit analysis. In terms of the overall cost of review, APIA considers this is not an appropriate metric to consider. The overall cost of a single review is negligible compared to the sums at stake in the review. The number of reviews will be determined by the regulator's ability to deliver quality decisions not the appeals framework, unless the appeals framework is specifically designed to enable regulatory error.
	Coverage of Minister decisions	It is important that these decisions are reviewable under the limited merits review regime.
	Other comments	Given the reforms delivered by the AEMC in 2012 and the reforms foreshadowed by SCER, it is appropriate that minor reforms that achieve the primary goals of SCER are considered for the appeals regime.
CALC	Preferred option	Option 3; full implementation of the Panel's recommendations
	Retaining merits review	Access to merits review should only be maintained if the Panel's recommendations are fully implemented or if a *de novo* review is introduced.
	Consistency between electricity and gas regimes	CALC is supportive of a consistent approach to review of electricity and gas regulatory decisions, but does not support a limited merits review approach in either market.
	Potential for minor amendments to NEL and NGL	Minor amendments to the NEL and NGL will not address the fundamental problems identified by the Panel.
	Extent recent reforms address issues raised by the Panel	Both the rule change finalised by the AEMC in November 2012 and the package of reforms agreed to by the Standing Council on Energy and Resources in December 2012 should improve consumer outcomes. However, without fundamental reform to the framework for limited merits review, these reforms will not achieve their objectives.
	Impact of a move to a 'materially preferable' ground for review	Broadly supportive of a single ground for appeal, that is, that there is reason to believe that there is a materially preferable decision. Such a criterion will change the risk/reward calculation for energy networks considering an appeal and reduce the number of appeals.
	Barriers to the Tribunal performing this role	An investigatory approach is likely to be required under a single criterion and while the Tribunal may be able to adopt a more investigatory approach, this seems unlikely in the context of its other functions. CALC does not support the Tribunal being the review body.
	Information the Tribunal could consider	CALC are supportive of the review being limited by the Tribunal being only able to access the information that was before regulator at the time of its decision.
	Benefits and risks of new review	The design for a new body could ensure that it operates in an administrative and inquisitorial manner rather than

Stakeholder	Issue	Comment
	body	an adversarial manner, thereby ensuring that the interests of consumers remain primary throughout the review process.
	Prescriptiveness of requirements on new review body	The constitution of the review body should be set by governments. The constitution could be broad, and involve those with expertise in regulatory economics, the energy industry, consumer interests and legal knowledge.
	Comparison of the options	There would be costs in establishing the review body, and network businesses would fund these costs—costs which would flow through to consumers through network charges. Despite this, the cost would be relatively modest should Option 3 be implemented in full. Option 3 should produce fewer reviews which would mean a less overall cost. Option 3 would also mean a reduction in legal and other costs incurred from administering the existing review system. These costs reductions should easily offset any costs incurred in the establishment of the review body.
CUAC	Preferred option	Option 3 is an innovative and creative approach to substantially reforming the merits review regime in the interest of consumers.
	Retaining merits review	CUAC is content with the retention of a merits review regime provided it is of the type outlined by the Expert Panel.
	Consistency between electricity and gas regimes	CUAC supports a consistent approach to merits review across electricity and gas. Having different regimes between electricity and gas acts as a barrier to participation for smaller organisations who would need to familiarise themselves with the different features of the regimes.
	Potential for minor amendments to NEL and NGL	The poor outcomes of the current regime that were clearly articulated by the Expert Panel are not likely to be overcome by 'tweaks' to existing arrangements.
	Extent recent reforms address issues raised by the Panel	Recent rule changes do not address the problems associated with the current review process. The rules need to be supported by an appropriate review mechanism to ensure the integrity of their implementation.
	Impact of a move to a 'materially preferable' ground for review	CUAC believes that the move to the 'materially preferable decision' should result in improved outcomes as it reduces the incentive to 'cherry pick' particular aspects of a regulatory decision.
	Barriers to the Tribunal performing this role	Changing the culture and operation of an organisation that has been operating for some time in the manner of the judiciary is a significant challenge. It is preferable to start with a new agency that has been designed to function in a manner that is complementary to the style of the review.
	Benefits and risks of new review body	The clear benefit associated with Option 3 is the fact that it vastly improves the scope for the participation of consumers and their representatives in a meaningful way.
	Prescriptiveness of requirements on new review body	CUAC is against any prescription as to the composition of the review body. At a high level, the review body should seek membership that includes a range of skills and a thorough understanding of customer issues and

Stakeholder	Issue	Comment
		preferences.
	Comparison of the options	CUAC believes that the Option 3 model will substantially reduce the costs of merits review process.
ERA	Preferred option	Option 1, with some of the changes proposed for Option 2.
	Retaining merits review	The ERA supports continuation of the limited merits review regime, but with amendments.
	Consistency between electricity and gas regimes	The ERA considers that a consistent approach to limited merits review regime of both electricity and gas regulation is desirable. This follows from the equally desirable need to align the rules for electricity and gas, so as to ensure that there are no distortions in the incentives for investment.
	Potential for minor amendments to NEL and NGL	Some minor amendments from Option 2 could assist in making the limited merits review regime closer to what was intended, including: reviews could be conducted on an administrative not adversarial basis, such that legal representation is not expected; and explicit reference is made in the national energy laws allowing the Tribunal to use concurrent evidence.
	Extent recent reforms address issues raised by the Panel	The recent reforms will largely address many of the concerns raised by the Panel.
	Impact of a move to a 'materially preferable' ground for review	The move to a single 'materially preferable' decision would have the undesirable consequence of creating a *de novo* review.
	Barriers to the Tribunal performing this role	The barrier to a more administrative approach is cultural. This could be changed, although it would require strong leadership by the Chair of the Tribunal. However, a purely administrative approach is probably unachievable, nor desirable.
	Information the Tribunal could consider	The ERA considers that it is vitally important that the information on which the review body makes its decision be limited to that which was available to the regulator before the final decision. This is to avoid incentives for the service provider to withhold information from the regulator.
	Benefits and risks of new review body	Option 3 is to be avoided as it would further cement the likelihood of *de novo* review, even more than the establishment of the single ground of appeal. In addition, ERA considers that the proposed new Review Body would have significant incentives to vary the regulator's decision, as a means to justify its existence and resourcing
	Prescriptiveness of requirements on new review body	The ERA considers that the establishment of a new review body would have significant net costs.
	Comparison of the options	The ERA does not agree that the overall net costs of Options 2 and 3 may be lower than Option 1.
	Coverage of Minister decisions	Covered Ministerial and National Competition Council (NCC) decisions would still be subject to review by the

Stakeholder	Issue	Comment
		Tribunal under Option 1.
ENA	Preferred option	An amended Option 2 model, with the introduction of a two-stage review model.
	Retaining merits review	The merits review framework in energy provides confidence and a fundamental underpinning for network service providers and asset owners to undertake major network investments
	Potential for minor amendments to NEL and NGL	The ENA does not support a 'no change' option.
	Extent recent reforms address issues raised by the Panel	The recent reforms diminish the case for any radical modifications to the existing merits review regime. Such modifications will negatively impact regulatory certainty and investor confidence in the regime without any clearly identified benefit.
	Impact of a move to a 'materially preferable' ground for review	There will likely be significant uncertainties around interpretation and practical application of the proposed ground for review and materiality threshold. It is unlikely that specification of the threshold requirements in the NEL and NGL or a requirement on the review body to publish a guideline will remove such an ambiguity. Introducing a 'materially preferable'-based ground for review is likely to have a number of unintended consequences and is unlikely to achieve the SCO's stated policy intent.
	Barriers to the Tribunal performing this role	In supporting the Tribunal as the review body, the network sector has identified some changes to the guidance, operation, membership and resourcing of the body which could improve its capacity to meet SCER's policy objectives, including building wider stakeholder confidence in the review model.
	Benefits and risks of new review body	The experience of the operation of jurisdictional administrative review bodies provides evidence on some of the likely issues that could arise under the design and implementation of an entirely new review body, and a practical test of some of the claimed advantages of providing for a purely administrative review body.
	Comparison of the options	ENA considers that the proposed two-stage process model has a number of advantages over the Option 2 proposed by the SCER. In particular, it would operate on the basis of well-understood and sufficiently wide grounds for the review. It would also facilitate an improved participation of a broad range of industry stakeholders in the review process. Under this proposed model, a number of issues before the Tribunal would become broader than just the set of issues raised by the applicant and the interveners. However, the number of issues would not become unlimited. ENA considers that only its proposed two-stage approach meets all the objectives of the SCER Statement of Policy Intent.
ESAA	Preferred option	Amendments to Option 1.
	Retaining merits review	The appeal mechanism is very important for a regulatory regime that provides significant discretion. As the

Stakeholder	Issue	Comment
		regulation of network businesses affords the AER a degree of discretion the esaa believes it is completely inappropriate to seek to limit access to appeals.
	Extent recent reforms address issues raised by the Panel	The new network rules (the Rules) will enable the AER to bring any interrelated matter to the attention of the appeals body, ensuring that an appeal does not just focus on the initial error. By relying on the Rule changes, instead of implementing Option 3, it would limit the focus of an appeal to the elements impacted by the part of the decision that is being contested, rather than opening up areas no party believes warrants reconsideration
	Impact of a move to a 'materially preferable' ground for review	Requiring appellants to meet an additional test for a successful appeal, over and above identifying an error, is inconsistent with the regulatory framework. The Rules are designed to give effect to the NEO and the NGO. Therefore, if an error is identified there is by definition a materially preferable decision based on the correction of that error.
	Benefits and risks of new review body	The investigative design of Option 3 would seem to significantly expand the scope of the limited merits review regime, making it much closer to full merits review. Allowing the review body, without any request from the various interested parties, to pursue any line of inquiry adds unnecessary cost and delay to the process.
EUAA	Preferred option	Option 3.
	Retaining merits review	Yes. EUAA support the analysis undertaken by the Limited Merits Review Panel, and their conclusions in relation to this.
	Consistency between electricity and gas regimes	Yes. Differences in technology are not sufficiently large to justify differences in review arrangements.
	Potential for minor amendments to NEL and NGL	No. EUAA support the analysis undertaken by the Limited Merits Review Panel, and their conclusions in relation to this.
	Extent recent reforms address issues raised by the Panel	The recent reforms make no difference to the issues raised by the Panel.
	Impact of a move to a 'materially preferable' ground for review	EUAA support the analysis undertaken by the Limited Merits Review Panel, and their conclusions in relation to this.
	Barriers to the Tribunal performing this role	EUAA fail to see how the Tribunal will be able to adopt a different manner of working, even following requests from the SCER, the Australian or State and Territory Governments. The Tribunal should rightly be able to decide how it wishes to meet its obligations, free from prescription by the Government.
	Information the Tribunal could consider	EUAA do not believe the Tribunal is the appropriate body and so considerations of restrictions on it are not relevant.

Stakeholder	Issue	Comment
	Benefits and risks of new review body	EUAA agree with the Panel's assessments of the benefits associated with their recommendations. There are not any particular concerns about risks associated with the new body that cannot be mitigated through proper consideration of institutional design. Do not accept the view that the establishment of a new appeal body is necessarily a threat to investment. EUAA do not agree with SCO's characterisation of the creation of a new body as necessarily representing additional risk. SCO's argument is that the additional risk arises because it is uncertain how the new body would operate. Such risks are easily managed.
	Prescriptiveness of requirements on new review body	EUAA suggest minimal prescription. The review body's brief should be to assess whether a materially preferable decisions can be found to be in the long term interest of consumers. There is no need to specify that representation on the Review Body should include a lawyer.
	Comparison of the options	A review mechanism such as the Panel has recommended would cost significantly less to operate than reviews undertaken by the limited merits review regime. Whatever the administrative costs of a review body may be, they will be small compared to the values at play in appeal decisions.
	Coverage of Minister decisions	Consideration of Ministerial and NCC decisions is beyond the scope of our consideration.
Envestra	Preferred option	Envestra supports Option 2 with some key changes relating to the ground for review.
	Extent recent reforms address issues raised by the Panel	Envestra considers that the impact of the rule changes is to provide greater alignment between the previously prescriptive NER with the broader NGR, where the latter provides the AER with far more discretion in how it makes a regulatory decision. Given recent changes, the limited merits review regime does not need to be amended on the basis of improving accessibility.
	Impact of a move to a 'materially preferable' ground for review	The proposed review ground should be stated in the more conventional 'correct and/or reasonable and preferable decision' which will retain the focus on error correction while allowing for a wider scope of issues to be considered in the review process.
	Barriers to the Tribunal performing this role	There is no material impediment to the Tribunal continuing to carry out the legislative functions imposed on it. It is appropriate to modify the NGL to change the legislative obligations of the Tribunal rather than creating a whole new review body.
	Comparison of the options	The proposed changes to the limited merits review regime (Option 3) will create considerable regulatory uncertainty and risk in the energy networks sector.

Stakeholder	Issue	Comment
		The need for legal input on review is unavoidable given the extensive legislation governing economic regulation.
FIG	Preferred option	FIG supports Option 2, subject to variation in relation to grounds for review.
	Retaining merits review	An effective merits review is a fundamental protection for investors. The long term benefits for consumers from privately owned network infrastructure depends critically on investor confidence in the economic regulatory framework, including confidence in the merits review regime.
	Consistency between electricity and gas regimes	A common approach to energy access favours a consistent approach to limited merits reviews of electricity and gas regulatory decisions on the condition that the review regime is able to adequately address the differences between electricity and gas systems and the markets in which they operate.
	Potential for minor amendments to NEL and NGL	FIG agrees that the merits of the decision should be administratively reviewed; however, appropriate legislative amendment to address the concerns identified by Mr Howe QC, regarding the ability of the regulator to raise issues related to the review, would be sufficient to encourage such a form of review.
	Extent recent reforms address issues raised by the Panel	The recent network regulation rule changes reduce the prescription faced by the AER and ERA and, in a range of areas, significantly broaden the regulators' discretion. FIG's view is that these changes would make it significantly more difficult for network service providers to bring successful appeals under the current grounds for review.
	Impact of a move to a 'materially preferable' ground for review	FIG supports Option 2 subject to a variation to the ground of review to explicitly recognise the position adopted in the consultation RIS that it is possible for interested parties to challenge a decision on the basis of correction of error so long as that party also demonstrates that a materially preferable overall decision may exist.
	Barriers to the Tribunal performing this role	FIG is comfortable with the administrative model for the Tribunal model having many features of the so called investigatory model of Option 3. It recognises this is necessary to address the perceived fundamental problem of the reviews being conducted too narrowly.
	Information the Tribunal could consider	The Tribunal's enquiry cannot be unlimited. FIG adopts the scope of review as those matters raised by appellants and matters logically connected to them.
	Benefits and risks of new review body	Loss of investor confidence is the primary risk from Option 3. Loss of investor confidence and certainty carries with it the consequent risk of the economic cost of under-investment. FIG is unequivocal in its rejection of the Panel's model for a new Review Body and does not consider modifications can address the investment risk from the destabilisation the new body creates.
	Prescriptiveness of requirements on new review body	FIG does not believe introducing a requirement for a judicial member to the Review Body will ameliorate concerns that the Review Body would not give due consideration to the legal issues.
	Comparison of the options	The direct transactional costs of Option 3 are significantly higher than Option 2. Reviews under Option 3 will be

Stakeholder	Issue	Comment
		more resource intensive, longer and more costly than the status quo. If the RIS is wrong in supposing that there will be fewer reviews, which may well be the case given the wider range of appellants having an incentive under the new model to appeal, the ongoing costs of Option 3 will climb dramatically.
	Coverage of Minister decisions	Consistent with FIG's support for Option 2, FIG believes Ministerial and NCC decisions should be retained within the existing Tribunal review structure.
Grid Australia	Preferred option	Supports a modified Option 2, retaining the Tribunal as the review body, but adopting a 'correct and preferable' test.
	Retaining merits review	Endorses the SCO's position that limited merits review should be retained for AER decisions.
	Extent recent reforms address issues raised by the Panel	Grid Australia submits that the solution adopted by the SCER must take into account other changes already underway that will contribute to the desired improvement and that the approach taken to address the remaining concerns be proportionate, cost effective and deliver against the SCER's policy principles for the review regime.
	Impact of a move to a 'materially preferable' ground for review	The 'materially preferable' test is problematic in a number of important ways: - there is no assurance that an error by the AER with material effect would be corrected; - all parties would be able to raise issues on the basis that their consideration was likely to contribute to the outcome, even if there were no demonstrable error; - for the review body to satisfy itself that its decision was a materially preferable outcome, it would need to consider all other possible preferable outcomes — in effect, a *de novo* mechanism; and - the test confuses the grounds for appeal with the threshold for doing so. Grid Australia recommends retaining the existing thresholds for leave to appeal. Instead of 'materially preferable', Grid Australia prefers the adoption of the 'correct and preferable' test outlined in the expert report from Gilbert and Tobin and attached to the ENA's submission. Grid Australia notes that there is no domestic or international precedent for the introduction of a 'materially preferable' test. This would add considerably to the stakeholder uncertainty.
	Barriers to the Tribunal performing this role	Grid Australia supports the introduction by the Tribunal of a practice note, similar to those adopted by other administrative review bodies that would make the conduct of reviews less 'legalistic'.
	Benefits and risks of new review body	A new administrative review body 'hosted' by the AEMC would introduce new uncertainty into the regime. Grid Australia sees particular risks in relation to: how the new body would operate, the development of standing in the eyes of stakeholders, additional costs and importantly, the risk of compromising the essential separation of Rule-maker and the adjudicator of decision-making under those Rules.

Stakeholder	Issue	Comment
	Other comments	Grid Australia endorses the ENA's submission.
IPART	Preferred option	Option 3, full implementation of the Panel's recommendations.
	Impact of a move to a 'materially preferable' ground for review	Providing a single ground of review (that a materially preferable decision exists) will require the appeal body to balance its decisions and therefore will limit the 'cherry-picking' concerns with the current regime. It will also complement the changes that the AEMC has made to the way that electricity network businesses are regulated.
	Barriers to the Tribunal performing this role	A court-like body such as the Tribunal is not necessarily experienced in broader stakeholder management or the exercise of regulatory discretion. It is questionable as to whether the Tribunal could effectively shift away from operating in a judicial manner and undergo the necessary 'cultural change' required to consider whether a materially preferable decision exists.
	Information the Tribunal could consider	Not convinced that the appeal body should be able to hear evidence that was not before the first-instance decision-maker due to the time, cost and gaming opportunities that it presents.
	Benefits and risks of new review body	A merits review body should be able to undertake the same balancing process as the regulator.
	Prescriptiveness of requirements on new review body	Recommend the establishment of an appeal body that is capable of standing in the shoes of the regulator, undertaking the balancing of competing interests and exercising discretion and judgement in the context of the overall objective of the long term interests of customers.
	Specific comments on Option 3	Appeal should be a 'desk top' review, relying on information available to the first-instance regulator. No new or further information should be able to be introduced by the parties.
	Comparison of the options	Having the appeal body hear new evidence would increase the time and cost involved in the appeal process and might provide incentives for gaming by withholding information as part of the original decision.
Jemena	Preferred option	A modified Option 2.
	Retaining merits review	Access to merits review is an essential element in the overall framework of network regulation. An effective merits review scheme provides confidence for stakeholders by maintaining regulatory accountability, promoting good regulatory practice and anchoring investor confidence. It also improves regulator decision-making over time by establishing precedents.
	Consistency between electricity and gas regimes	A consistent approach for electricity and gas limited merits review remains appropriate. Cross-synergies arise from a common approach including the application of precedent. Investment distortion between gas and electricity could occur were different merits review regimes to be in place in each sector.
	Potential for minor amendments	The two stage solution presented to the Panel by the ENA would address the key concerns identified by the Panel.

Stakeholder	Issue	Comment
	to NEL and NGL	While further refinements may have been necessary, this solution sought to address the two key Panel criticisms of the regime; that reviews have been unduly narrow and there has been insufficient attention to the NEO and NGO. This solution would maintain a high degree of investor confidence.
	Extent recent reforms address issues raised by the Panel	The recent reforms have been significant and wide-reaching. Much of the benefit perceived by the Panel of re-balancing of the framework back towards consumers has already occurred suggesting that the SCER need to consider carefully what would be a proportionate response to the review of the limited merits review regime.
	Impact of a move to a 'materially preferable' ground for review	A 'materially preferable' criterion for the threshold and ground would be inconsistent with the SCER statement of policy intent. Jemena urges SCER to consider the modification to option 2 provided by the ENA.
	Barriers to the Tribunal performing this role	There are no barriers to the Tribunal performing its role in an administrative manner. Jemena supports the AER's proposal to make a series of adjustments to strengthen the use of the Tribunal as the review body including publishing a practice note and moving proceedings out of courtrooms.
	Information the Tribunal could consider	Jemena supports the Tribunal being given power and resource to widen reviews. Restriction on what the Tribunal can consider could be lifted once the threshold for review has been met. This would mitigate the risk that appellants bypass full cooperation with the original decision-maker and would allow the Tribunal to consider any part of an original determination that it believes could impact its ability to assess the amended or varied decision against the NEO/NGO.
	Benefits and risks of new review body	There are a number of significant risks associated with the Panel's model for a new review body. These include: - the potential to bypass the original determination process; - an increased potential for participants to seek judicial review; - time delays and increased costs; - cost allocation principles that necessarily make energy customers worse off and would unduly limit appeals; and - perception of conflict of interest. The ENA variation of option 2 would result in a solution that mitigates the risks identified.
	Prescriptiveness of requirements on new review body	Jemena does not support a review body being attached to the AEMC as this does not maintain separation of powers and risks a perception of conflict of interest. If the review body is attached to the AEMC, it is critical that there is some separation of the review body from the AEMC in order to ensure the independence of the review body. There is a need for each review panel formed to contain a 'legal mind' as the review body will be applying the

Stakeholder	Issue	Comment
		law and question sof law are likely to arise.
	Comparison of the options	Options 2 and 3 would lead to materially higher direct NSP costs than option 1 and the ENA option. This is largely due to the increased scope of review requiring additional internal labour and external consultant/legal costs. Reviews will only be reduced where all stakeholders are satisfied that the AER has acted reasonably within its powers – this element is not a function of the merits review regime.
MEU	Preferred option	Support Option 3, but do not consider the body should be attached to the AEMC.
	Retaining merits review	Access to merits review should be maintained but the review must focus on more than the very specific aspects that typifies the current approach.
	Consistency between electricity and gas regimes	A consistent approach to merits reviews of electricity and gas regulatory decisions remain appropriate.
	Potential for minor amendments to NEL and NGL	The problems identified by the Panel are significant and substantial. Minor amendments to the NEL and NGL would be inadequate and would not achieve the purpose of the NEO and NGO.
	Extent recent reforms address issues raised by the Panel	The recent network rule changes have the potential to reduce the number of appeals and should address a number of the concerns identified by the Expert Panel. However, the new network rules allow increased exercise of judgement and discretion by the regulator, this opens up another avenue for appeals
	Impact of a move to a 'materially preferable' ground for review	Imposing a requirement of a single 'materially preferable decision' should minimise the number of appeals and the opportunities for 'gaming' but the introduction of the rules allowing greater discretion by the AER has the potential to increase the numbers of appeals.
	Barriers to the Tribunal performing this role	The Tribunal will not be capable of performing an administrative role. The composition of the Tribunal, and its location, lends itself to a more judicial approach being used regardless of a directive for administrative review.
	Information the Tribunal could consider	Restriction on information the Tribunal can consider in reaching an appropriate decision is counterproductive. It is unacceptable to limit access to information that might provide a countervailing view of a related issue. It is essential that the final outcome reflects all of the inter-relationships embedded in the regulatory decision, and limiting information will prevent this occurring.
	Benefits and risks of new review body	The MEU does have a real concern regarding the AEMC being the 'home' of the Review Body. This would likely compromise the independence of the Review Body. Mechanisms could be put in place to ensure independence but these might be difficult to impose if the AEMC is to provide staff to the Review Body to carry out its functions.
	Prescriptiveness of requirements	The degree of prescription should be minimised to ensure that the Review Body has the remit to fully analyse the

Stakeholder	Issue	Comment
	on new review body	regulatory decision to ensure that the outcome of the appeal reflects a materially preferable decision. The MEU does not consider that the presence of a judicial member as necessary or appropriate.
	Comparison of the options	MEU considers costs for each Option as: - Option 1 is likely to produce the highest costs for minimal benefit for consumers. - Option 2 is potentially less biased in favour of regulated entities than option 1 but the costs will likely include legal representation. - Option 3 has the greatest likelihood that the review will result in a more balanced outcome. Option 2 is more likely to have lower costs than option 1 arising from there being fewer appeals. The largest cost is the continued disenfranchisement of consumers from the appeals process and the resultant bias that the process has in favour of the regulated firms. Option 3 is preferred from the standpoint that consumers will be better enfranchised. Fewer reviews are likely compared to option 1. There must be a limit on how much of the appeal costs can be added to the regulatory costs allowed
	Coverage of Minister decisions	Ministerial and NCC decisions should be subject to a total review of the decision and are more likely to require judicial review rather than a limited merits review.
UE & MG	Preferred option	UE and MG support adoption of Option 2 but consider it essential it also includes amended appeal grounds. The appeal grounds should allow the Tribunal to correct errors and provide valuable body of regulatory precedent.
	Retaining merits review	Merits review should be maintained.
	Consistency between electricity and gas regimes	There are sound reasons for the continued application of a consistent approach to limited merits reviews of electricity and gas regulatory decisions.
	Potential for minor amendments to NEL and NGL	UE and MG do not consider that there are any further amendments that could or should be made to the NEL and NGL to address the problems identified by the Panel.
	Extent recent reforms address issues raised by the Panel	EU and MG note development and changes since the Panel's Stage 2 Report adequately address the Panel's concerns, and would suggest that Option 2 would be preferable to Option 3 because it represents a solution to the problem being addressed.
	Impact of a move to a 'materially preferable' ground for review	UE and MG are concerned the Panel's proposed ground of appeal is an unusual and novel construction in Australia. In addition, it would remove the Review Body's ability to correct error. It would be preferable for the ground of review to explicitly recognise that it is possible for interested parties to challenge a decision on the basis of correction of error as long as that party also demonstrates that a materially

Stakeholder	Issue	Comment
		preferable decision may exists. This could be achieved by adopting a single ground of review that reflected the concept of 'correct and preferable.'
	Barriers to the Tribunal performing this role	UE and MG generally concur with the AER's suggested methods to make the Tribunal more administrative. However, UE and MG note that lawyers play an important role in assisting parties presenting their views. The Tribunal is capable of acting administratively if it is properly resourced with non-legal part time members who have appropriate technical skills, and who are skilled in administrative decision-making and it operates under appropriately framed legislation.
	Information the Tribunal could consider	UE and MG state that once the ground for review is established, with appropriate input from the regulator and the Tribunal, the Tribunal should not subsequently widen the scope of the appeal. UE and MG have issues with allowing the Tribunal to consider information that was not necessarily available to the initial decision-maker as it raises practical questions relating to procedural fairness due process and regulatory certainty.
	Benefits and risks of new review body	UE and MG have concerns that Option 3 entails practically all of the uncertainty and potential costs inherent in a *de novo* approach.
	Prescriptiveness of requirements on new review body	Regardless of the new limited merits review arrangements adopted, there are good reasons to expect parties to engage lawyers to assist in a merits review. This consideration suggests there is sound reason for ensuring that the Review Body has a judicial member.
	Comparison of the options	UE and MG note all risks can be addressed effectively if the Tribunal is guided by appropriate legislation and is provided with appropriate resources. The costs would be higher under Option 2 than Option 3. It would be reasonable to expect that under either option, parties will still engage lawyers to assist in the preparation and representation during the course of a merits review. Also, legal counsel will still be sought to oversee the fairness of an administrative review process, and to ensure that they are adequately prepared to initiate judicial review proceedings if necessary. Therefore, Option 3 may involve a significant increase in legal costs over Options 2 and 1.
	Coverage of Minister decisions	Current arrangements should remain in place.

Appendix III: Qualitative costs and benefits

Option 1: Status quo

Benefits

Affected party	Impact
Australian Government	In the short term, the status quo will provide certainty around budgetary implications of appeals as it is responsible for funding the Tribunal; while over the long term, this will maintain consistency with other regulatory regimes covered under the *Competition and Consumer Act 2010*.
State and territory governments	In the short term, the status quo would not result in new budgetary requirements.
Australian Competition Tribunal	In the short term, the status quo will provide certainty around its role; while over the long term the Tribunal will be able to continue to develop precedents to ensure the consistency of future appeal processes.
Regulators	In the short term, the status quo will engender certainty about the appeal process.
Regulated network businesses	In the short term, the status quo will provide certainty around the appeal scope and process and provides confidence that potential regulatory errors would be resolved.
Financiers	In the short term, the status quo minimises sovereign risk and provides confidence that potential regulatory errors would be resolved; while in the long term the growing body of evidence would support more accurate estimations of regulatory risk.
Consumers	Subject to being granted leave to appeal or intervene, has the potential for regulatory errors to be resolved.

Costs

Affected party	Impact
Australian Government	Over the medium to longer term, retaining the status quo would lead to a loss of confidence in the limited merits review regime and its ability to meet the energy objectives. Retaining the status quo will continue to promote appeal activity as a routine part of the economic regulatory process, with flow on costs.
State and territory governments	Over the medium to longer term, retaining the status quo would lead to a loss of confidence in the limited merits review regime and its ability to meet the energy objectives.
Australian Competition Tribunal	Over the short term, retaining the status quo would give rise to questions about the Tribunal's ability to settle questions of a complex regulatory nature, which could have implications for the long term about its reputation for making such decisions in the energy sector. Retaining the status quo will continue to promote appeal activity as a routine part of the economic regulatory process, with flow on costs.
Regulators	Over the long term, the status quo is likely to compromise the legitimacy of the overall regulatory framework.
Regulated network businesses	Retaining the status quo will continue to promote appeal activity as a routine part of the economic regulation process, with flow-on costs.
Financiers	Over the long term, sovereign risk will increase as the limitations in the status quo become embedded making more extreme responses to regulatory risk likely.
Consumers	Ongoing inability to engage in the appeal process, ensuring regulatory decisions resulting from the process are made in the absence of sufficient consumer representation. This option will be a continuation of a review process that is apparently remote from consideration of the long term interests of consumers. Retaining the status quo will continue to promote appeal activity as a routine part of the economic regulatory process, with flow on costs.

Option 2: Amendments to the merits review framework while retaining the Tribunal as the review body

Benefits

Affected party	Impact
Australian Government	In the short and long terms, Option 2 will better deliver the national energy objectives and be more consistent with the original policy intention; while over the long term, this will maintain consistency with other regulatory regimes covered under the *Competition and Consumer Act 2010* and will enhance accountability.
State and territory governments	In the short term and long terms, Option 2 will better deliver the national energy objectives and be more consistent with the original policy intention; while over the long term, this will maintain consistency with other regulatory regimes covered under the *Competition and Consumer Act 2010* and will enhance accountability.
Australian Competition Tribunal	In the short term, Option 2 will provide certainty around what is expected of the Tribunal during appeals. Over the long term, Option 2 may assist the Tribunal in developing procedures that increase confidence in reviews and could be used in other regulated sectors. Over the medium to long term this would reduce the number of appeals.
Regulators	In the short term, Option 2 reduces costs for participating in an appeal; while in the long term, the regulator will be better equipped to make better original decisions. Over the medium to long term this would be expected to reduce the number of appeals.
Regulated network businesses	Appeals will no longer be a routine part of the regulatory process, leading to less ongoing legal costs. Retains the ability to apply for leave for review on grounds of material error of fact; constituted an incorrect exercise of discretion; or was unreasonable.
Financiers	Enhances longer term regulatory certainty and generates greater confidence in the overall regulatory framework.
Consumers	In the short and long terms Option 2 will better deliver confidence that outcomes reflect the NEO and NGO. In the short term, Option 2 reduces barriers to consumer participation in the review process. Over the medium to long term this would reduce the number of appeals.

Costs

Affected party	Impact
Australian Government	In the short term, Option 2 is likely to result in higher costs of funding the Tribunal, although this is likely to trail off over the longer term, as a greater understanding of how the Tribunal will apply the new ground for review and associated changes is established.
State and territory governments	Option 2 is unlikely to increase costs for state and territory governments.
Australian Competition Tribunal	In the short term, Option 2 is likely to result in the Tribunal being required to procure additional services to support its new functions. In addition, the new approach to appeals (being less adversarial) would require significant cultural change to deliver a more administrative style in practice.
Regulators	Over the short term there is likely to be some uncertainty regarding how existing precedent of the Tribunal will be applied in the new framework and about its new method of operation. Over the long term, if the Tribunal is unable to operate in a more administrative manner, there is a risk that the appeal framework and new review body will require reconsideration, resulting in more uncertainty for all stakeholders.
Regulated network businesses	Over the short term there is likely to be some uncertainty regarding how existing precedent of the Tribunal will be applied in the new framework and about its new method of operation. Over the long term, if the Tribunal is unable to operate in a more administrative manner, there is a risk that the appeal framework and new review body will require reconsideration, resulting in more uncertainty for all stakeholders.
Financiers	Over the short term there is likely to be some uncertainty regarding how existing precedent of the Tribunal will be applied in the new framework and about its new method of operation. Over the long term, if the Tribunal is unable to operate in a more administrative manner, there is a risk that the appeal framework and new review body will require reconsideration, resulting in more uncertainty for all stakeholders.
Consumers	In the long term, Option 2 will not reduce legal costs for consumers, if the Tribunal is unable to change its current processes. Over the long term, if the Tribunal is unable to operate in a more administrative manner, there is a risk that the appeal framework and new review body will require reconsideration, resulting in more uncertainty for all stakeholders.

Option 3: Amendments to the merits review framework and a new merits review body

Benefits

Affected party	Impact
Australian Government	In the short term, the Australian Government would no longer be required to fund additional resources for the Tribunal to adequately consider regulatory determinations for the energy sector. Over the long term, there is likely to be increased certainty that the limited merits review regime is delivering the policy intention as set out in SCER's statement of policy intent. Over the medium to long term this would reduce the number of appeals.
State and territory governments	Over the long term, there is likely to be increased certainty that the limited merits review regime is delivering the policy intention as set out in SCER's statement of policy intent.
Australian Competition Tribunal	Over the short term, the Tribunal members would no longer need to juggle limited merits review for energy sector regulatory determinations with their other areas of responsibility.
Regulators	Over the short term, Option 3 will reduce the number of appeals and subsequent legal costs. In the longer term, it is expected the regulators will be equipped to make better original decisions. Over the medium to long term this would be expected to reduce the number of appeals.
Regulated network businesses	Over the long term, there would be greater regulatory certainty about the structure of the appeal framework and the body applying it. In addition, over time the review body would establish a body of work to guide network businesses' development of regulatory proposals. Over the medium to long term this would reduce the number of appeals.
Financiers	Subject to a consistent approach being adopted for each appeal, over time the review body would establish a body of work to assist financiers determining risk of investment decisions.
Consumers	In the short and long terms Option 3 will better deliver confidence that outcomes reflect the NEO and NGO. Consumer views would be sought in the process routinely. There would be no risk of others' legal costs being awarded and direct legal costs would be removed or reduced due to a less legalistic approach. Over the long term, there would be more confidence that regulatory determinations reflect the long term interests of consumers. Over the medium to long term this would reduce the number of appeals.

Costs

Affected party	Impact
Australian Government	Depending on the funding model selected, the Commonwealth may incur some costs in the short term. However, it is envisioned that these costs would be recovered from industry over the long term. There would be no ongoing financial costs to the Commonwealth under this model.
State and territory governments	Depending on the funding model selected, the state and territory governments may incur some costs in the short term. However, it is envisioned that these costs would be recovered from industry over the long term. There would be no ongoing financial costs to the state and territory governments under this model.
Australian Competition Tribunal	N/A
Regulators	The regulators could be expected to face higher costs in complying with the new regime, as the requirement that they provide a more detailed summary of the decision may have resource implications in terms of staffing. The regulators may also be called upon by the review body in appeals to provide more assistance. It may be difficult to recruit sufficient independent and expert staff to the new review body in the timeframes available.
Regulated network businesses	Regulated network businesses will face more uncertainty, which may impact on their ability to procure finance over the short term.
Financiers	In the short term, financiers would face increased uncertainty, which would increase the risk profile of investing in network infrastructure. Over the long term, as the review body established a body of work, this uncertainty would be expected to decrease.
Consumers	Over the short term consumers would be faced with higher network costs as part of their energy bills due to regulatory risk, although this is likely to even out over the long term.

Appendix IV: Stakeholder concerns and SCER's response

Raised By	Comment	Response
General Feedback		
AER & ACCC, ATCO	The costliness of each option will depend on the number of appeals sought. While Option 2 or Option 3 may discourage network businesses from applying for review, the broader scope of materially preferable may mean that appeals under Option 2 or Option 3 are costlier than the status quo in practice.	SCER agrees with this assessment and has developed constraints in its preferred position to limit the scope of reviews from becoming too broad.
AER & ACCC	Either Option 2 or Option 3 will lead to improved regulatory outcomes: better regulatory determinations in the long term interests of consumers, fewer reviews on minor or technical points and shorter review timeframes. The expected improvement in general economic welfare will exceed the cost of moving from the status quo to either Option 2 or Option 3.	SCER agrees with this assessment, but notes the new Rules governing network regulation make it difficult to quantify what the regulatory outcomes under the status quo would be.
MEU	Option 2 is potentially less biased in favour of regulated entities than Option 1 and is likely to have lower costs than Option 1 arising from there being fewer appeals. However, Option 3 is preferred from the standpoint that consumers will be better enfranchised.	While SCER notes that Option 3 may best enfranchise consumers there are other risks and it considers the measures in its preferred position will facilitate improved consumer engagement in appeal processes.
ATCO, Jemena	Option 2 and Option 3 will lead to higher direct costs for network businesses as a result of the additional internal labour, external consultant and legal costs that will be required under an expanded scope of reviews.	SCER notes that there is no formal requirement under its approach for network businesses to engage external consultants or legal representation. SCER considers that this is a business decision for all participants. In addition, network businesses will be incentivised to be more discerning in bringing appeals with potential benefits from a reduction in the number of appeals overall.
Jemena	The number of reviews would increase under Option 2 or Option 3 as compared with the status quo. This is because stakeholders, aside from network businesses, would be likely to raise appeals under the materially preferable criterion without identifying an error in the original decision.	SCER's preferred position recognises this issue and has maintained the requirement that an error in the original decision before a review can be sought.
MEU	If there is no effective constraint on network applicants recovering their appeal costs through the regulatory process then the frequency of the appeals might not be constrained and will result in the new system being no different to the current system with its emphasis on legal teams and processes.	SCER agrees with this assessment and proposes that network businesses may not recover the costs incurred as a result of their participation in a review process through their regulated revenues.
AER & ACCC, APIA	It is important that the review process for energy is consistent with other access regimes.	SCER recognises that it is important that the regulatory environment for energy is consistent with other regulated industries. However, SCER notes that there may be energy specific issues that may warrant a specific approach at a process

Raised By	Comment	Response
		level.
APIA, UE & MG, MEU	Under any option, it is likely that parties will still engage legal counsel to assist in preparation and representation during merits review.	SCER considers that this is a business decision for the relevant party and not a requirement for participation in the regime.
Option One - Status Quo		
APIA, ERA	Many of the features identified by the Panel as desirable are a feature of the status quo, such as the ability of the Tribunal to consider related matters, the ability of the Tribunal to be consistent with the NEO and NGO and the role of the regulator.	SCER notes that while these features were intended to be integral in the review process. However, in practice these features have not operated as intended and specific changes are required to give effect to this policy intent.
ERA, ESAA, IPART, UE & MG	The status quo serves to highlight areas where a decision may be improved while limiting the costs of the review. There is no merit in revisiting an element of the regulator's decision about which no-one has raised concerns and which is not related to the grounds of appeal.	SCER agrees that there is no merit in exploring issues that are not related to the grounds of review or the matter that is subject to appeal. However, SCER considers that it is appropriate that inter-linked issues are explored as part of the consideration of an appeal.
APIA, Envestra , FIG, Jemena, ESAA, UE & MG	Recent changes to the NER and NGR as well as COAG's consumer advocacy work should address many of the issues with the status quo and reduce the level of appeal activity.	SCER notes that there is some uncertainty about what effect changes to the NER and NGR will have on outcomes from reviews through the limited merits review regime. However, while SCER considers that these changes are likely to significantly address limitations in the economic regulatory frameworks more broadly which have contributed to issues with the review regime, changes to the limited merits review framework are required to give effect to the policy intent.
CALC, CUAC, MEU	The Rule changes do not address the problems with the review mechanism and without reform to the limited merits review regime these changes will not achieve their objectives.	SCER considers that while the Rule changes are likely to significantly address limitations in the economic regulatory frameworks more broadly, changes to the limited merits review framework are required to give effect to the policy intent.
CALC, CUAC	Consumers do not understand the status quo and are unable to participate in the overly legalistic process due to an imbalance of information, short timeframes to engage, grounds that make a case for intervention difficult to make out and the risk of adverse costs.	SCER agrees that the status quo does not facilitate meaningful consumer engagement in appeal processes. SCER has removed many of the barriers to consumer engagement in its preferred position.
APIA, ERA, UE & MG	Under the status quo, a significant body of precedent has been developed, which will reduce the number of matters that go to appeal.	SCER notes that given the significance of the Rule changes, precedent may no longer have lesser relevance for future regulatory decisions.
ERA	The most cost effective option is to retain the existing limited merits review arrangements.	SCER does not consider that the benefits of maintaining the status quo outweigh the costs.
Option 2 – Amendments to the framework, but retain the Tribunal		

Raised By	Comment	Response
AER & ACCC	Option 2 limits the matters that a participant may raise to the matters that can be demonstrated to be pertinent or linked to the issues raised by the applicant. This limitation runs the real risk of repeating the failings of section 710(1) in the NEL and section 258(1) in the NGL.	SCER considers that it is appropriate that only issues that are inter-linked to the matter under appeal are considered by the Tribunal, however, recognises that additional reforms are required to allow s 71O and s258 to operate as intended.
CUAC	While Option 2 represents a significant improvement on Option 1, it does not offer substantial improvement. The problems with the current regime suggest that a more transformative change to existing arrangements is required.	SCER considers that its preferred position is proportionate to the problems in the status quo.
FIG, Jemena, UE & MG	Given that the changes to the regulatory environment outside the limited merits review process are likely to solve many of the issues in the current regime, the proportionate response to the problem is Option 2.	SCER agrees with this assessment.
ENA, ESAA, Jemena	This option is likely to weaken the accountability of the regulator as its decision will be subject to less scrutiny.	SCER does not agree with this assessment. The possibility of an appeal of its decision will encourage the regulator to make the best possible decision with the information available to it.
The Tribunal		
Envestra, FIG, Grid Australia, Jemena, UE & MG	There is no material impediment to the Tribunal continuing to carry out the legislative obligations imposed on it.	SCER agrees that reform to the frameworks are required to ensure the Tribunal's current legislative obligations align with the objectives of the regulatory framework more broadly. However, SCER recognises there is still come uncertainty about whether its approach will address cultural issues identified by the Panel and a further review of the performance of the Tribunal is therefore planned.
FIG	It can be ensured that the Tribunal can act administratively through properly directive legislation and appropriate resourcing.	SCER intends to amend the legislation so that the expectations of the Tribunal are made clear. However, SCER recognises there is still come uncertainty about whether its approach will address cultural issues identified by the Panel and a further review of the performance of the Tribunal is therefore planned.
CALC, CUAC, IPART, EUAA, MEU	While the Tribunal may be able to adopt a more investigatory approach, this seems unlikely in the context of its other regulatory functions and given the significance of the cultural shift needed. This means the judicial approach that currently applies is likely to be retained with all the disadvantages for consumers as identified by the Expert Panel.	SCER recognises these concerns and considers that the changes it has identified in its policy position will go a significant way to addressing the barriers to consideration of consumer interests and consumer participation identified by the Panel. However, SCER recognises there is still come uncertainty about whether its approach will address cultural issues identified by the Panel and a further review of the performance of the Tribunal is therefore planned.

Raised By	Comment	Response
Jemena	Requiring the Tribunal to provide its reasons as to why upholding a review would serve the revenue and pricing principles, and hence the NEO and NGO would increase the legitimacy of the regime.	SCER agrees that it is appropriate that obligations should be the same for both the original decision-maker and the Tribunal and will align these obligations, including decisions being made that will contribute to the long term interests of consumers as set out in the NEO and NGO.
Jemena	The Tribunal should be given the power and resources to widen reviews. Restriction on what the Tribunal can consider could be lifted once the threshold for review has been met. This would mitigate the risk that appellants bypass full cooperation with the original decision-maker.	SCER does not consider it appropriate that the Tribunal has the power and resources to widen a review further than consideration of interlinkages with the grounds for review as this has the potential to become a full merits review and not limited.
MEU	Expanding the scope of the Tribunal to address all of the various inter-relationships of elements within a regulatory decision will increase both the need for expertise and the time required by the Tribunal to reach its decisions.	SCER recognises that there is the potential to increase the time it takes to undertake a single review, but notes the incidence of reviews should be reduced. SCER considers it is important to have a robust review process that allows for consideration of all the related factors that were considered in the original decision. SCER agrees it is important that reviews routinely meets the timelines set out in the legislation and intends to consider whether this is feasible in light of outcomes of the Tribunal's performance under SCER's approach.
ATCO, Envestra	The Tribunal should be given discretion to accept new information, but only in extraordinary circumstances. It is not practical to expect the Tribunal to consider all documents from the regulatory review in addition to other information.	SCER's approach allows the Tribunal to consider material that was public at the time of the original decision-maker's process and not unreasonably withheld from the original decision-maker and could be reasonably be expected to have been considered in the original process.
ERA	Allowing additional information beyond that presented to the regulator in the appeal process could incline an active review body to undertake a *de novo* review. Requiring that the primary decision-maker construct a record of evidence collected during its evaluations is likely to have a small impact on limiting the *de novo* nature of the proposed merits review.	SCER considers that its policy position will result in the review regime remaining limited in nature.
IPART	Giving the Tribunal the ability to consider new information would increase the time and cost of an appeal process and could provide incentives for gaming.	SCER agrees with this assessment and considers that it is only in exceptional circumstances that new information would be able to be considered and that there is an onus on the party wishing to submit the information to prove that it was public at the time of the original decision-maker's process, was not unreasonably withheld and could be reasonably be expected to have been considered in the original process.
MEU	Limiting access to information that might provide a countervailing view (and	SCER considers that it is appropriate that all information relevant

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	impact) of a related issue will not allow for inter-relationships embedded in the regulatory decision to be explored. Only those inter-relationships which benefit the NSP will be considered.	to the regulatory determination be provided to the regulator in the first instance and is conscious of unintentionally creating incentives to game the review process by withholding information from the original decision-maker.
IPART	The Tribunal is not necessarily experienced in broader stakeholder management or the exercise of regulatory discretion. It should be able to undertake the same balancing process as the regulator. However, the Tribunal undertakes its balancing process without the benefit of hearing directly from all stakeholders who participated in the regulatory process.	SCER's preferred position would require the Tribunal to undertake similar consultation processes as those required of the original decision-maker.
Single ground of appeal		
ENA	The existing grounds for review are sufficiently broad to address a range of errors. Maintaining the existing grounds for review does not mean that the review process is unable to become more holistic, nor does it mean that one cannot be confident that the review process results in outcomes which are more consistent with the NEO and NGO.	SCER agrees that the existing grounds of review are sufficiently broad, but considers it is essential for decisions, in both the original and any subsequent review processes, to be made on the basis of the decision being preferable in the context of the long term interests of consumers as defined in the NEO and NGO.
APIA, ENA, Envestra, Jemena	Concept of a materially preferable decision introduces new uncertainty to the regime. In particular, the intended meaning and practical application of materially preferable creates uncertainty. It is also unclear what types of deficiencies in the original decision an applicant would need to demonstrate.	SCER considers that the risks associated with interpreting 'material' are marginal as it is defined in the context of being preferable for the long term interests of consumers as defined in the NEO and NGO.
Envestra, ESAA, FIG	The uncertainty created by a single ground of review will manifest itself into the credit ratings given to the industry by ratings agencies.	Noted. However, SCER considers it has minimised risks of investment uncertainty by clarifying how a materially preferable decision requirement would work in conjunction with the existing grounds for review.
CALC	The single ground for appeal, that is, that there is reason to believe that there is a materially preferable decision, will change the risk/reward calculation for energy networks considering an appeal and reduce the number of appeals. It is the nature of any proper appeal processes that the outcome is uncertain. Certainty is provided by the original regulatory decision.	SCER agrees that the single ground of appeal would reduce the number of appeals. However, SCER recognises that the single ground for review risks appeal processes becoming a full merits review, which is inconsistent with the intention for merits review of electricity and gas decisions to remain limited.
ATCO, FIG, Grid Australia, Jemena	The materially preferable decision test conflates two different tests; the threshold test for leave and a substantive ground of review. As proposed in the consultation RIS, it would lead to more litigation, and reviews would become more complex, slower and more costly.	SCER notes this concern and its approach retains the existing threshold, but requires an applicant to make a *prima facie* case that a materially preferable decision exists. SCER notes that, separately, the Tribunal would only be able to vary or remit a decision where this will be materially preferable in the context of the long term interests of consumers.
Grid Australia	The materially preferable test would set the threshold unacceptably high and appears to override the revenue and pricing principles.	SCER considers it is important to have a review mechanism that provides accountability for decision-making in the energy sector,

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		but that it is important for such decisions to have the deliver the same objective of the original decision, that is, deliver the NEO and NGO and take account of the revenue and pricing principles.
Envestra, ERA, FIG, Grid Australia, Jemena	A broad review ground risks an appeal being broadened into a *de novo* review which is not practical, will not incentivise best initial decisions, will increase uncertainty, is resource and time intensive and may lead to unintended consequences. It will not achieve the 2006 objectives as set by the MCE.	SCER notes that this may be a risk and considers that Panel's intention would be better delivered through retaining the existing grounds for an applicant to make a *prima facie* case that a materially preferable decision exists.
MEU, ESAA	While a single ground of appeal would be likely to reduce the frequency of appeals, it results in a need for a greater amount of work to be carried out for each appeal and this will increase problems of timeliness and costs of the regime.	SCER agrees that this is a risk that will need to be assessed as part of the review of the Tribunal's performance, to commence in 2016.
ENA, Grid Australia, UE & MG, APIA, FIG	The adoption of a materially preferable ground for review may result in regulatory errors being left uncorrected, which would mute any strong incentives on the regulator to provide high quality primary decisions and reduce investor confidence.	SCER does not agree. The risk of any type of review will incentivise the regulator to make the best decision based on the material available to it. In addition, SCER considers that it would be unlikely that material error in an original decision would not be addressed under a review process that will, or is likely to, deliver the NEO or NGO.
ESAA	Requiring appellants to meet an additional test for successful appeal, over and above identifying error is inconsistent with the regulatory framework.	SCER does not agree with this assessment. SCER notes that the NEO and NGO set out the objective of the regulatory framework as promoting efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of energy.
Grid Australia	All parties, including the review body, would be able to raise issues on the basis that their consideration was likely to contribute to a better outcome, even if there were no demonstrable error made by the regulator.	SCER does not consider that the risk of this occurring is significant and notes that under its approach, parties would still need to make out one of the four existing grounds for review.
ENA, UE & MG	Decisions under the status quo are consistent with existing Australian administrative legal norms. The proposed single ground of appeal is an unusual and novel construction in Australia.	SCER notes that there are a range of administrative reviews that occur in Australia that have different approaches adopted by the relevant review bodies, some of which were comparable to the Panel's recommendations.
CUAC, IPART, MEU	A move to the materially preferable decision should result in improved outcomes and less reviews as it reduces the ability of network businesses to 'cherry pick' particular aspects of a regulatory decision and minimises the opportunities for gaming.	SCER considers that it is important to ensure that any inter-linked matters that would contribute to determining whether addressing the matter being appealed would deliver a materially preferable outcome are considered by the Tribunal. However, SCER notes that this would not be achieved through the adoption of a single ground for review without additional reforms to other aspects of the regulatory framework. SCER's approach addresses this

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		through explicit requirements on the Tribunal to consider interlinked matters as part of the review process.
Option 3 – Amendments to the framework and a new review body		
AER & ACCC	Option 3 would increase general economic welfare from improved regulatory determinations and regulatory outcomes.	SCER accepts the benefits associated with Option 3, but is concerned it introduces additional risks that may not be proportionate to the issues being addressed, particularly given the recent changes to the rules and other changes to the review framework under SCER's approach.
CUAC	The benefits of the full implementation of the recommendations of the Expert Panel far outweigh the costs and best reflects the policy intent of the SCER.	SCER considers that there is currently insufficient evidence to evaluate the costs and benefits of Option 3, particularly in conjunction with the other reforms currently underway or recently completed. As part of SCER's proposed independent review of the Tribunal's performance, to commence no later than 2016, it will be considered whether it is necessary to establish a new review body.
CALC, EUAA	Option 3 would cost less to operate than reviews under the status quo and would likely produce a lesser quantum of reviews. These cost reductions should easily offset any costs incurred in the establishment of the new review body.	SCER considers that it is likely that there will be less appeals under both options 2 and 3, but notes that, in the short term, there may be a number of appeals to test the interpretation of the recently changed rules.
CALC	Option 3 would significantly change the risk/reward calculation for energy networks considering an appeal. It appears that the approach suggested would significantly reduce the number of appeals.	SCER agrees with this assessment over the medium to longer term, but notes that it has the potential to have adverse outcomes for the original decision-maker and, potentially, any other parties to a review. Under SCER's approach, network businesses will be required to consider a number of factors when appealing a decision, which includes whether there is a *prima facie* case for a materially preferable decision. In addition, SCER considers that removing the ability to pass through costs of appeals will introduce more rigour around deciding to appeal covered decisions.
CUAC, MEU	An alternative framework that results in a less adversarial model and that seeks to incorporate a diversity of views will undoubtedly result in cost saving and will allow for meaningful consumer participation without such significant investment of time and resources as it currently required.	SCER has attempted to incorporate these benefits into its approach, but notes there is some uncertainty about whether cultural aspects will be addressed. Consequently, this will be considered in the review of the Tribunal's performance under the reformed regime in 2016.
ATCO, Grid Australia	Removing legal considerations from the review process is unrealistic, not desirable and would not lead to cost reductions. It would risk other adverse	SCER recognises that, ultimately, all administrative decisions should be based on legally correct processes and considerations.

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	consequences. Legal input plays a valuable role to ensure procedural fairness for all parties and a clear identification of the issues under review.	However, SCER considers that it is not necessary for legal representation to participate in reviews and its approach addresses some barriers in this regard.
FIG, UE & MG	Option 3 is so novel, board, intrusive and potentially damaging to rights that it is likely to involve a significant increase in legal costs over Option 2.	SCER notes that similar approaches have been adopted for other administrative reviews in Australia.
ERA, UE & MG	Option 3 would remove the check on political and bureaucratic excess that is implicit in the separation of powers in the current arrangements and a move to Option 3 could be seen as the politicisation of the regulatory framework in response to concerns about short term electricity prices.	SCER considers that any changes to the review body, either the Tribunal or a new body, would retain the formal and legal independence of the review body.
FIG, Envestra	Option 3 carries the highest risk to investor confidence and hence risk to the long term efficient investments required for capacity and service enhancement to existing networks over time.	SCER acknowledges this risk and has factored it into its assessment of Option 3.
FIG, UE & MG	Option 3 is a disproportionate regulatory response to the problem, especially given parallel reforms which already address aspects of the perceived regulatory failure.	SCER acknowledges this risk and has factored it into its assessment of Option 3. However, SCER will review the performance of the Tribunal as the review body in 2016.
ESAA, Jemena	Option 3 is likely to weaken the accountability of the regulators, as its decisions are subjected to less scrutiny.	The risk of any type of review of its decisions will incentivise the original decision-maker to make the best decision based on the material available to it.
Jemena, UE & MG	Option 3 increases the potential for participants to seek judicial review.	SCER has recognised this risk in considering changes to the framework and notes that this risk would have to be ameliorated in establishing a new review body, should one be required in the future.
Jemena	An increase to the delays and length of time required to conduct a review will impact the adjustment made to prices following the conclusion of a review. This could lead to price shocks.	SCER is conscious of this issue and maintains that reviews should be conducted in a timely manner to allow the maximum amount of time for network businesses to recover the adjustment to their allowable revenue base. Further, timeliness of the review process is to be considered as part of the future review of the Tribunal's performance under the reformed regime.
New Review Body		
AER & ACCC, ENA, UE & MG, Envestra, Grid Australia	The Tribunal has strong and well-established capacity and expertise on national competition and regulatory matters. It is recognised by a wide range of parties, including current and potential investors in long-lived network infrastructure as providing a credible, accessible and predictable review function.	SCER recognises that there may be a degree of uncertainty associated with establishing a new review body that has the potential to be passed through to consumers as higher prices.
UE & MG, ATCO,	The status of the Tribunal as an independent, evidence based quasi-judicial	SCER recognises that there may be a degree of uncertainty

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ENA, Grid Australia, FIG	body ensures the transparency, fairness and integrity of the process and the improvement of regulatory decisions over time. These matters are important to maintaining investor confidence. Making the review process as informal as possible and less legalistic may risk other adverse consequences.	associated with establishing a new review body that has the potential to be passed through to consumers as higher prices.
AER & ACCC, CALC	There are direct and other costs of establishing a new administrative review body to undertake reviews. If network businesses fund these costs, as proposed, these would flow through to consumers through network charges. However, these costs will be relatively modest in comparison to the $3 billion transferred from consumers to businesses under the current appeal regime	SCER recognises these risks and considers these would have to be ameliorated in establishing a new review body, should one be required in the future.
CALC, CUAC, MEU	The design for a new body could ensure that it operates in an administrative and inquisitorial manner rather than an adversarial manner, more consistent with the processes of the regulator, and thereby ensuring that the views of consumers are actively sought and included in reviews. This can be achieved at modest cost to consumers, similar to the costs incurred in participating in the initial regulatory process.	SCER policy position has been informed by many of these benefits. Any residual risks due to cultural issues will be considered as part of the review of the Tribunal's performance in 2016.
AER & ACCC, APIA, Envestra, ERA, ESAA, FIG, Grid Australia, UE & MG,	The investigative process to be undertaken by the new administrative review body runs the risk of a review approximating a *de novo* review.	SCER considers that it is important that the limited merits review regime remains limited and has considered this risk in developing its policy position.
AER & ACCC, APIA, ATCO, ENA, FIG, Jemena, UE & MG	A new administrative review body will also potentially lead to other significant costs, by adversely impacting regulatory and investment certainty in the energy sector due to uncertainty as to how a new administrative body would operate in practice.	SCER has considered this risk in developing its policy position.
APIA	It is difficult to ensure that the investigative approach will be conducted consistently at each appeal. Consistency and formality are important to investor confidence.	SCER notes that all administrative review bodies face this risk.
UE & MG	The investigative approach of the review body is likely to be more costly and slower than the status quo.	SCER notes that this may be a risk but considers that it is important that a review body, be it the Tribunal or a new body, are able to utilise an approach that best serves the outcomes it is required to deliver.
ATCO, ESAA, FIG, Jemena	New body will undermine the credibility of the limited merits review regime, while at the same time increase costs and delays and risk poorer decision quality.	SCER recognises these risks and considers these would have to be ameliorated in establishing a new review body, should one be required in the future. However, SCER notes that such risks have previously been managed in setting up new administrative review bodies.

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ATCO, Jemena	The body must include and be led by a judge. Otherwise it will not be equipped to deal with the legal issues involved and will not protect parties' important legal rights.	SCER notes that there are valid policy reasons for having a judge as a presiding member to make rulings around the legality of the review body's decision-making.
FIG	The new Review Body would still exist within the Australian legal system and therefore some of the benefits that are claimed by Option 3 will not be realised.	SCER recognises that a new review body would be subject to judicial review of its decisions and, consequently, will be covered under the *Administrative Decisions (Judicial Review) Act 1977*.
Envestra	The establishment of a new review body would diminish the value of the significant regulatory precedent that has been established by the regulator and the Tribunal. This would lead to considerable uncertainty as to how the review body will carry out its functions.	SCER notes that given the significance of the Rule changes, this precedent may no longer be applicable.
ENA	Previous jurisdictional administrative review bodies faced significant challenges: ensuring focus on material issues under contention; the quality and evidencing of claims made by parties and interveners; lack of transparent or predictable procedures; and insufficient specialist expertise on the review body.	SCER notes that all administrative review bodies face these risks as these are not limited to the energy sector.
ATCO, CALC, FIG, Grid Australia, Jemena, MEU, UE & MG	The new body will face both the perception and reality of conflict if it is closely aligned with the AEMC.	SCER notes this view and considers that, should evidence demonstrate the need for a new review body in future, this issue should be considered further at that time.
CUAC	The benefits of the single ground of review are further reinforced under Option 3, with significant improvements to the governance structure for the Review Body.	SCER notes that the Panel recommended the single ground of review and new review body as a package, but considers they are not interdependent on each other to realise the benefits associated with reforming the existing regime.
ERA	The new Review Body would have significant incentives to vary the regulator's decision, as a means to justify its existence and resourcing. This could add an incentive for stakeholders to appeal any regulatory decision.	Noted. However, SCER notes that all administrative review bodies face these risks as these are not limited to the energy sector.
ESAA	There is no clear policy rationale as to why a new Review Body should be funded differently to all other bodies.	SCER notes this view and considers that, should evidence demonstrate the need for a new review body in future, this issue should be considered further at that time.