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***EUAA Response: Consultation on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks***

The Energy Users Association of Australia (EUAA) appreciates the opportunity to provide comments on the Standing Committee of Officials (SCO) Discussion Paper on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks.

The EUAA is a non-profit organisation focused entirely on energy issues on behalf of end users. The EUAA represents the views of over 80 members, including many large business end users of electricity and/or gas. Membership ranges across a number of sectors, including mining, manufacturing, construction, commercial property and service sector. Many of the EUAA's members operate across States.

The EUAA is particularly interested in the Consultation Paper as the "economic regulatory decisions" identified by the SCO as being subject to some form of review (AER Revenue Determinations and gas pipeline coverage) account for approximately 50 to 60 percent of a large end user final energy bill. In addition, the EUAA has direct experience in over 20 energy regulatory reviews, including several that have been the subject of appeals. This experience has been drawn on in this submission.

The attached submission sets out our views on the appropriate review regime of Decision-Making in the Gas and Electricity Regulatory Frameworks. The views are formed solely on the basis of what is in the best interests of energy users and our members have been consulted in preparing the submission.

If you have any questions about the submission or would like to discuss it further please do not hesitate to get in contact with the EUAA's Director Policy and Regulation, Mr Con Hristodoulidis, on telephone number (03) 9898 3900.

Yours sincerely

A handwritten signature in black ink, appearing to read "Roman Domanski".

Roman Domanski  
**Executive Director**



## **FINAL SUBMISSION**

# **Consultation on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks**

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## **1. Introduction**

The Energy Users Association of Australia (EUAA) appreciates the opportunity to provide comments on the Standing Committee of Officials (SCO) Discussion Paper on MCE Review of Decision-Making in the Gas and Electricity Regulatory Frameworks.

The EUAA is a non-profit organisation focused entirely on energy issues on behalf of end users. The EUAA represents the views of over 80 members, including many large business end users of electricity and/or gas. Membership ranges across a number of sectors, including mining, manufacturing, construction, commercial property and service sector. Many of the EUAA's members operate across States.

The EUAA has participated in over 20 energy regulatory reviews since its inception in 1996 and been able to observe regulatory processes from the point of view of end users. The views outlined in this submission are based on this experience. Our experience includes participation in, or observation of, a number of appeals to regulatory decisions, including the uncovering of the Eastern Gas Pipeline, the partial uncovering of the Moomba-Sydney pipeline, the appeals on the Office of the Regulator General's 2000 Electricity Distribution Price Review in Victoria, the appeal on the ACCC's review of GasNet's Transmission Revenue Determination and the review of the Essential Services Commission of South Australia's 2005 ETSA Utilities Price Review.

The EUAA is particularly interested in the Consultation Paper as the "economic regulatory decisions" identified by the SCO as being subject to some form of review (AER Revenue Determinations and gas pipeline coverage) account for approximately 50 to 60 percent of a large end user's final energy bill.

The EUAA agrees with the SCO that review of economic regulatory decisions is not an end in itself, but rather a means to ensure accountability in regulatory decision-making. We also support the notion that review of economic regulatory decisions is only one tool of a range of measures to ensure accountability of regulators. In our view, a mere appeal right has not real benefit beyond this and can also add to the length of time taken to make regulatory decisions and increase their cost.

Under section 1.10 of the Consultation Paper, the SCO also outline a number of criteria they consider appropriate in developing a review scheme. While the EUAA support the criteria, we believe the criteria need to have a clearer objective.

The EUAA would argue that the development of a review mechanism in the national energy sector must fulfill the Single Market Objective (SMO), as contained in the National Electricity Law (NEL) and the Single Market Objective proposed for the

National Gas Law, and that any criteria used to develop a Review process **must** meet this objective.

To reiterate these objectives state that, in the case of electricity:

*The national electricity market objective is to promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system.*

And in the case of gas (as currently proposed in the SCO Gas Access Pipeline Consultation Paper):

*The objective of the gas access regime is to promote efficient investment in, and efficient operation and use of, natural gas pipeline services for the long term interests of consumers of natural gas with respect to price, quality, reliability, safety and security of supply of natural gas.*

## **2. Our Preferred Model**

The Discussion Paper has proposed two models for a Review scheme to facilitate input from interested stakeholders. Specifically, the two models are:

1. **Model A:** A limited merits review<sup>1</sup> by the Australian Competition Tribunal (ACT)
2. **Model B:** A judicial review by the Federal Court of the economic regulatory decision-making of the AER. Model B is currently contained in sections 16, 35 and 36 of the new National Electricity Law.

In developing these models, the Discussion Paper correctly states that a review regime is one of a number of tools policy-makers can implement to ensure economic regulatory decision-making is objective, and appropriately balances the needs of network service providers and end users.

In particular, paragraph 1.8 outlines five measures that have been introduced as part of the current MCE Energy Market Reform Program which aim to improve the regulatory decision-making process, namely:

- i. Strong institutional structure of the decision-makers;
- ii. Role clarity for decision-makers within the energy sector via the statutory conferral of functions and powers;

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<sup>1</sup> Under Model A, the Discussion Paper outlines a limited merits review regime whereby the Australian Competition Tribunal (ACT), would have the jurisdiction to review appeals on economic regulatory decisions made by the AER in the case of gas and electricity, and of relevant Ministers in the case of coverage of gas pipelines. The Discussion Paper states that “these decisions have both a substantial impact on the economic viability of network and service providers, and the decision-making powers involves the exercise of significant amounts of discretion, so that judicial review is arguable not sufficient and a form of merits review may be justified on policy ground.” (page 3).

- iii. Clear and effective procedural and consultative requirements in the NEL and the NER and in the Gas Pipelines Access Regime as to how the decision-makers will perform their economic functions;
- iv. Clear and effective rules for economic regulatory decision-making, removing layers of inconsistent objectives and principles in favour of a body of rules designed to structure and guide the exercise of regulatory discretion; and
- v. An appropriate review mechanism for specified decisions.

Points *i* to *iii* have recently been implemented (except for the procedural and consultative requirements in the Gas Pipelines Access Regime). Point *iv* is currently being reviewed by the MCE with an Options Paper out for discussion on a National Framework for Distribution and Retail Regulation.

Until measures *i* to *iv* have been implemented and given an opportunity to be tested, it is unclear to the EUAA that the MCE also needs to introduce a Review model beyond the current common law and Constitutional judicial review obligations<sup>2</sup>.

However, if the MCE decide to implement either Model A or B as outlined in the Discussion Paper, our clear preference would be for Model B, judicial review augmented with review for economic regulatory decision-making of the AER in the context of specific requirements (as set out in the new NEL and the proposed NGL) and an open standing regime.

The remainder of the submission provides more detailed comments in support of our preferred position.

### **3. *Balancing the needs***

Paragraph 2.28 of the Consultation Paper states that, in considering a Review model, it is important to balance the commercial interests of network and service providers against the costs associated with re-visiting a regulatory decision following an extensive and expensive consultative process.

While we support the cost/benefit principle adopted in a Review model, we are concerned that the trade-off adopted in the Discussion Paper is far too narrow. In particular, the trade-off fails to acknowledge that virtually every regulatory decision made will have an impact on end users. Indeed, it is end users who will pay all the charges associated with its implementation. The proposition put by the SCO is therefore in serious oversight of this very important fact and needs to be corrected.

Section 6.8 accepts that large users of energy can be adversely affected by regulatory error. However, the Consultation Paper fails to take into account the costs imposed on Australian industry by regulatory error, as an imperative for allowing users an equal opportunity to Appeal against a regulatory decision.

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<sup>2</sup> The judicial review procedure is concerned with the legality of what was done by the regulatory body in question, and is not concerned with the merits of the decision under review. This is to be contrasted with an appeal, where the question usually is whether the decision is right or wrong, whereas the question on a judicial review is whether the decision is in accordance with the law.

We therefore prefer a statement that balances the commercial interests of network and service providers against the costs to end users of revisiting a regulatory decision and the associated costs of re-visiting a regulatory decision following an extensive and expensive consultative process.

In developing a Review model, it is imperative that network service providers (the supply side) and users (the demand side) are treated equally and given the same rights to seek a Review.

#### **4. Who May Seek for Review**

##### **Costs associated with standing**

In paragraph 6.10 the Discussion Paper states that it is “our [SCO’s] understanding that industry participants do not support an open standing for any person to seek merits review (so called third party appeal rights), because of the costs imposed”.

The EUAA strongly argues that this is a false presumption by SCO and therefore the limited standing provisions offered to end users under Models A and B are inappropriate and seriously biased against end users. They also ignore the points we have made directly to SCO about this matter on several occasions and seem to imply that the SCO is paying more attention to industry participants than to end users?

While the Discussion Paper refers to the costs imposed by an open standing approach, the Paper fails to outline what these costs are.

Further, in a question and answer meeting conducted by the Federal Department of Industry, Tourism and Resources on 25 October, SCO failed to outline what these costs are when asked.

We now formally seek an urgent and detailed response from SCO as to the nature and extent of these costs.

The EUAA believes that the costs of a Review regime are centred on the breadth of the Review regime rather than who has standing. In particular, a Review model with judicial, merits review and limited standing will be far more costly than a judicial and open standing model. That is, an open grounds merits review model provides for more opportunities for network owners to challenge a regulator’s decision based on their own vested interests. Hence, service network owners will use more resources reviewing regulators’ decisions for possible appeals and delay decisions. Limiting the grounds of appeal will limit these costs of appeal.

Moreover, our experience with virtually every regulatory review to date is that the network owners know full well that they can lodge an appeal and be virtually guaranteed of recouping the costs of the appeal many times over if they win it. In fact, the track record is that they have done this on virtually every occasion. The ‘pay back’ period on appeals for monopoly network service providers is among the lowest available to them. We calculate it to be around “one month”<sup>3</sup> and providing a very handsome ‘return on their investment’.

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<sup>3</sup> The pay back period is estimated as the cost of running an appeal and the favourable change achieved in revenue in the 2000 Office of Regulator-General of Victoria’s Final Decision appeal by the

Network owners also know full well that they have a number of other advantages in terms of review that ‘stack the decks’ massively in their favour:

- They are appealing to bodies that have limited technical and economic knowledge of the complex matters before them; and
- They are most unlikely to strike opposition from consumers (or their representatives), who are not singly sufficiently commercially motivated to appeal (as the gains/losses to consumers are wide spread and dispersed) and their representatives do not/will not have sufficient standing to make up for this; and

This makes it virtually certain that network owners will lodge appeals if they are permitted to do so and the broader the grounds, the more likely they are to do so. It also makes it far more likely that the appeal body will not even hear from consumers, let alone be in a situation where it can make a balanced and well-informed decision. This has been the outcome with virtually every appeal to date.

Further and importantly, network service owners are able to recoup the costs of determining a decision through the revenue/price re-set. Hence, the discipline on network service providers to appropriately consider if there are legitimate grounds for review are diminished. Network service owners know that if they run an appeal (regardless of the strength of their case) they will be able to re-coup these costs.

Allowing for merits review of AER’s economic decisions is likely to lead to a situation whereby network service owners see merits review as another step in the Determination process. This is counter to the objective of the MCE that a merits review mechanism is one of a number of tools to ensure that the AER will undertake economic regulation in an objective manner.

Alternatively, end users will often need to absorb the costs associated with running an appeal. For example, large users often compete to provide their goods and services in competitive national and/or international markets. They are unable to pass on the costs associated with seeking an Appeal. Hence, end users are less likely to seek appeals.

It is our strong view that the current appeal processes have only worked to the disadvantage of consumers and not resulted in better decisions. One of the main reasons for this has been the lack of balanced input into the reviews from consumers. One of the biggest costs of the appeal processes to date have been the additional costs forced on consumers by the inroads made by network owners by accessing reviews. Yet this “cost” is not even mentioned by the SCO, much to our dismay.

The SCO paper instead focuses on relatively minor costs and seems to have been unduly influenced by the arguments of network owners. These people have a clear

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Victorian Distribution Businesses. The EUAA estimates that the Victorian Distribution Businesses spent around \$2 million on legal and other costs associated with their Appeals. The forecast expenditure and revenue they were able to clawback as a consequence of the appeals and the re-determination by the ESC was at least \$170 million and \$80 to \$100 million respectively. Hence, the cost of the Appeal was around 2% of revenue they were able to clawback for the 5 years, which equates to a payback of around 1 month (2% multiplied by 60 months – length of the Determination).

vested interest in convincing the SCO to focus on these matters so that they can continue to have access to appeals without opposition from consumers to put added pressure on them to justify their reasons for appeal. The SCO has a responsibility to ensure the introduction of sound public policy, not self-interested public policy.

Clearly, limiting who has standing on the grounds of costs is inappropriate. A limited standing model as outlined in the Discussion Paper for both Models A and B disadvantages end users and favours network owners and is therefore unlikely to fulfill the SMO.

## **Materiality Test and Interveners**

In paragraph 6.22, the Consultation Paper argues that “standing to commence proceedings could be limited to only service providers, the regulator, and affected users who meet some sort of “materiality” test. However, once proceedings have been commenced in relation to a particular regulatory decision, a wider range of persons could be permitted to intervene in the proceedings to put their views, for example, persons “adversely affected” or “aggrieved” by the decision and/or those with a “sufficient interests” in the matter”.

Paragraph 6.23 then argues that specific provisions could allow for consumer advocacy groups, or particular group or groups to intervene once a proceeding has been brought forward.

A regulatory decision impacts on ALL users (large, medium and small businesses and households). Hence, the costs of regulatory error are spread across a large population of users. Depending on how ‘materiality’ and the other terms used by SCO are defined by legislators and/or interpreted by courts, may potentially exclude a large range of end users from pursuing an appeal. Further, as the costs of regulatory error are spread across ALL users, it is very unlikely that an individual user will pursue an Appeal as they will bear the costs of the Appeal, but any benefits from the correction of the regulatory error will be spread across ALL users.

Hence, there is a ‘free rider’ problem associated with individual users pursuing an appeal. SCO needs to recognise this and make allowance for it in developing appeals procedures.

Further, allowing organisations to represent the interests of end-users collectively (by having primary standing not just intervener status), will assist in reducing the time and expense associated with the appeal process. If limited standing, as proposed in the Consultation Paper were to remain as is, the authority of the *Orica MSP* case (and other such cases) would likely result in the EUAA recommending that members concerned about specific decisions pursue such decisions individually (and seek the EUAA’s support to facilitate an array of separate appeals by individual users). This approach has the potential to greatly increase the time and public resources required to resolve such matters, as well as adding to the expense of all parties involved.

The SCO should be quite clear that the EUAA sees this review as a means of efficiently addressing fundamental problems with existing appeals mechanisms to ensure that users are no longer disadvantaged by these. If the MCE decides to provide for appeals mechanisms in future and also limits the standing and resource of users to

access appeals, then we will have no option but to recommend that our members undertake separate appeals and to assist as many of them as possible to do so.

Accordingly, we consider that companies or associations whose objects, purposes or member's collective interests are affected by a given decision should have their standing expressly recognised and not just limited to intervention status. In addition, it should be possible for particular organisations to be prescribed by regulations to avoid any misunderstanding.

Paragraph 6.24 argues that interveners would not be entitled to raise additional grounds for review, as it would involve unjustified costs and delay the proceedings to the other parties in the proceedings. The Consultation Paper then argues that "this could particularly be so where the regulator is a party to the proceedings, because arguably, the regulator represents the interests of the public including consumers".

In the first place, this is another apparent example of the asymmetry in the SCO paper towards network owners. We would point out that the lack of equal appeal rights for end users risks imposing additional costs associated with failing to permit review bodies from hearing both sides of the argument. We also note the SCO's lack of concern for the alternative position where end users appeal and network owners are still given the opportunity to also appeal and be fully heard without restriction. The SCO needs to be far more balanced in this matter.

In light of the SMO, the EUAA believes only end-users - whether acting individually or collectively - are in a position to advocate the interests of end-users and hence should have sole responsibility to raise additional grounds for review. Further, the interests of end-users may not, and in some cases almost certainly will not, coincide with the interests of the registered participants and/or the Regulator.

It is also apparent that the regulator has an important job to do to deliver independent and sound decisions and is required by legislation to balance the interests of network owners and end users in doing so. The regulator should not be placed in the position of having to "represent" the interests of consumers, or anyone else for that matter.

The SCO's reasoning on this matter is therefore fundamentally flawed and likely to result in poor public policy outcomes, as well as compromising the position of independent regulators.

If the SCO persists with this position, then we shall argue directly to the MCE that they must expressly provide for the regulator to represent the interests of end users in appeals, as there will be no other effective way for their interests to be considered.

Furthermore, in accordance with the *Hardiman Principle*<sup>4</sup>, it may be considered inappropriate for the AER to advocate for these interests in any review process. As noted by the High Court in that case: "If a tribunal [or, in this case, the AER] becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings..." (at pages 35-36). We note that this could threaten the very nature of the performance and the

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<sup>4</sup> *R v The Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13.

credibility of the AER and its standing. This would not be in the interests of either end-users or market participants.

It is also worth the SCO considering that bodies representing end users have unfettered access to all regulatory determinations, including submissions, public forums, meetings, etc. There is no restriction on their participation, or upon their ability to raise issues. It is inconsistent and illogical for limitations to be put on them in the last and final process in regulatory decision-making, the right to appeal decisions of the very regulators that they have provided evidence to.

In all our past experience with regulatory determinations and appeals, we have seen no evidence that any end user or body representing them has used their right to participate to raise frivolous or vexatious matters that waste the time of either regulators or appeals bodies or cause increased costs.

On the contrary, users have limited resources and their incentive is to limit input and appeals to matters of interest to them and where they are likely to get a favourable result. The SCO should not be influenced on this matter by spurious and uninformed arguments from the network owners. It is clearly in their interests to use arguments such as these to try and ensure an outcome that avoids end user input as much as possible.

The EUAA recommends that the ‘materiality’ test be removed and that an open standing model be adopted. Further, we recommend that the new NEL and proposed NGL should *expressly* provide that organisations clearly representing end-users, such as the EUAA, have standing and not just intervener status. This would be entirely consistent with the spirit of the SMO and the stated desire of the MCE to include end-users in energy reform debates and issues.

Finally, if the SCO does decide to only provide organisations representing end users intervener status, then, at a minimum, these organisations should be given the power to raise new grounds. Otherwise there can be no effective means by which we could raise our own issues for review.

## **5. Grounds of Review**

We support the Discussion Paper’s notion that the grounds of Review are the “key design feature of a review regime that will most influence the “reach” of a review body”.

As stated above, the introduction of a review process is only one tool that will create discipline on the AER to get the decision right. The reforms recently introduced in the electricity sector (and currently proposed for gas) are also aimed at improving the accountability of the regulator, mainly:

- New Single Market Objective to focus decisions on the “long term interests of consumers of energy”;
- New institutional structures with greater clarity of roles;

- New transparent procedural and consultative requirements as to how the new regulators will perform their economic functions; and
- New rules for economic regulatory decision-making.

Further, Sections 16, 35 and 36 of the NEL, which are aimed at augmenting judicial review for electricity regulatory decisions, are yet to be tested. Paragraph 2.40 of the Discussion Paper clearly states that “failure to comply with these requirements [referring to Section 16, 35 and 36 of the NEL] will be a basis for judicial review. More importantly, the Court will, in light of these requirements, be able to examine in detail both the nature of the decision required to be made and how the decision-maker has carried out its functions”. Paragraph 2.44 outlines the applicable legislative requirements as currently contained in Section 16, 35 and 36 of the NEL.

The EUAA believes that judicial review combined with the new institutional and procedural processes provide ample discipline on the AER to get the decision right.

Introducing a merits review model on top of the new measures seems like an additional and unnecessary insurance policy that is likely to impose unnecessary costs and delays. These costs are clearly outlined in paragraphs 2.50 to 2.59 in the Discussion Paper.

The imposition of additional delays and costs is contrary to the stated objective of the MCE in reforming the regulatory structure and institutions of the NEM, and gas access, to make them less costly, more efficient and less time consuming.

We note that regulated businesses strongly supported regulatory ‘streamlining’ when it came to the role of regulators, but now (quite inconsistently) are arguing for added costs and delays in relation to appeals mechanisms. Could it be that they are more concerned with protecting their commercial interests rather than arguing consistently for decisions that will result in better public policy outcomes?

Therefore, the EUAA believes that Model B’s grounds of review as proposed in the Discussion Paper better balances the costs of the regulatory process with the commercial interests of end users and network service providers.

Finally, while we do not support Model A’s grounds of review. If however, the MCE decides to adopt Model A’s grounds of review, the EUAA reiterates that standing should not be limited by some type of high threshold or “materiality” test. In addition, organisations representing end users, such as the EUAA, should have standing to seek a review and not have their status reduced to mere interveners with a limited ability to react to other parties’ reasons for appeal.

## ***6. Power and Remedies***

The EUAA supports the proposition that the adjudicating body does not have the power to substitute the AER’s decision. Rather, the adjudicating body’s powers should be limited to remitting matters back to the AER for re-determination with specific direction(s).



The EUAA believes the costs associated with providing the adjudicating body with the power “to step in the regulators shoes” are far too high given the length and expertise required to conduct a Determination (often 1-2 years). Further, the new NEL clearly outlines the procedures that the AER must follow in conducting a Determination, as well as requiring the AER to outline the basis and the evidence used in reaching the final Determination.

It is the EUAA’s experience with regulatory reviews that any appeals mechanism works best and most efficiently where matters are remitted back to the “experts” for re-determination. Appeals bodies are not well suited or skilled enough to undertake this detailed and complex process themselves.

Finally, the EUAA acknowledges that merits and judicial review are not substitutes in the strict definition of the terms. However, we believe that augmenting judicial review with review of the AER’s economic decision-making powers targets the review regime to the issues in which the AER has discretion under the law. An augmenting form of judicial review will allow the adjudicating body to undertake an effective review of the AER’s decision where the AER may have inappropriately exercised its discretion.

## **7. Funds to Appeal**

Finally but importantly (and as outlined above), a significant ‘free-rider’ problem exists in terms of an individual end user bearing the costs of pursuing a review of a regulatory decision and the benefits of correction of the regulatory error being disbursed among ALL users.

The MCE has acknowledged the need for robust consumer advocacy in the energy sector and has, as recently as Friday 4 November 2005, agreed to strengthen the consumer advocacy funding arrangements. The EUAA strongly recommends that the scope of the new funding arrangements allow individual end users or a representative body of end users to access consumer advocacy funds for purposes of an appeal.

Allowing individual end users or an end user representative body to access consumer advocacy funds to finance an appeal overcomes the ‘free rider’ problem as the costs of an appeal are spread across ALL end users, as are any benefits that flow from the correction of regulatory error.

Providing end users access to consumer advocacy funds is also consistent with the SMO and the MCE’s desire to obtain a more even balance between end user and supply side input into the energy market policy and regulatory process.

We also note that end users already effectively pay for most of the appeals run by regulated businesses. They do this through the payment of regulated or monopoly network service charges. Regulatory costs are one component of the Opex component of the building blocks approach to regulation of energy networks.

Denying users access to appeals mechanism, or to the resources to allow them to participate, only helps to preserve this inequitable and inefficient situation.

The EUAA wishes to impress on SCO that it would only support a right of appeal that included full access and participation by end users (and bodies representing them) and funding to allow them to do so. If this is not the case, then users have nothing to gain from an appeals mechanism (and will more than likely only loose from it) and would be better off without one.

## **8. Conclusion**

Under the energy market reform program, the MCE wishes to develop a single review process for the gas and electricity sectors. As part of this process, the MCE released a Discussion Paper that outlines two options for review of AER's regulatory decisions, mainly:

1. **Option A:** Judicial and merits review combined with limited standing for 'affected parties'. Under this model, 'interested parties' can act as interveners once a review has been lodged.
2. **Option B:** Augmented Judicial Review, that is, the MCE will outline principles and processes in the new Electricity and Gas Laws that the AER must adhere to in undertaking a regulatory review. If industry participants and end users believe that the AER has not followed these principles and processes they would be entitled to seek a judicial review of the decision. Option B also contains limited standing provisions based on a 'materiality' test (ie only those that have been 'materially' affected by a decision will be entitled to seek a review).

EUAA members' do not support the introduction of a merits review regime (Model A). Further, EUAA members do not support extending current common and Constitutional law judicial review requirements.

However, if the MCE determines that it would prefer extending the judicial review regime, we recommend that the MCE adopt a modified Model B applying to both gas and electricity frameworks.

The key features of EUAA's modified Model B are:

- Judicial review;
- Augmentation of judicial review along the lines as contained in the Sections 16, 36 and 36 of the new National Electricity Law;
- Open standing status for 'any interested party', including industry associations representing a class of end users.

Such a review model, combined with the new Single Market Objective, new economic regulatory review procedures and greater clarity of the role of the AER, will ensure that appropriate accountability is applied on the AER to objectively balance the needs of end users and network service owners/providers. This is a clear purpose of any review mechanism.

Modified Model B also ensures that the review process is low cost, targeted to the issues in which the AER has discretion, does not unnecessary delay the



commencement of the final determination, and is not subject to any opportunities for potential gaming by network owners.

EUAA members do not consider Model A as an appropriate or workable review model. Model A provides too much scope and opportunities to network owners to ‘cherry pick’ the AER’s Final Determination. Further, service network owners will treat Model A as another step in the Determination process. This outcome is contrary to the reason for introducing a Review regime, mainly, to institute accountability and objectivity in AER’s decision-making process.

The EUAA also recommends that the adjudicating body should not have the power to change the AER's decision, but rather the adjudicating body’s powers should be limited to remitting matters back to the AER for re-determination with specific direction(s)

Finally, the EUAA proposes that the National Advocacy Panel criteria should be extended to allow end users, or their industry associations, to seek funds from the Panel to undertake a review. This is based on the notion that any benefits from a successful review by end users are disbursed across all users whereas the end user instigating the Appeal will bear the full costs associated with an Appeal. In addition, without this funding, it is far less likely that end users would be able to access the review mechanism, leaving its usefulness and purpose compromised.