

27 June 2018

James O'Toole  
Assistant Secretary,  
Electricity Market and Networks  
Energy Division  
Department of Environment and Energy

Via email: [james.o'toole@environment.gov.au](mailto:james.o'toole@environment.gov.au)

Copy to COAG Energy Council Secretariat via email: [energycouncil@environment.gov.au](mailto:energycouncil@environment.gov.au)

Dear James,

**Re: Amendments to the binding rate of return guideline (RORG) legislation**

We refer to the meeting with yourself and James Chisholm, First Assistant Secretary, Sally McMahon from Spark Infrastructure, Stasha Prnjatovic from AMP Capital and Jason Peasley from AustralianSuper to discuss the COAG Energy Council's process for amending legislation to make the AER's RORG binding.

At the meeting we outlined our concerns with the draft legislation and suggested amendments as provided in the letter and legal advice provided by Spark Infrastructure to COAG Energy Ministers on 15 June and the further letter provided to the COAG Energy Council by the Network Shareholders Group on 20 June 2018.

A key concern outlined was the approach to elevating the RORG to a status of a delegated legislation which has the effect of considerably narrowing the grounds for judicial review and that this was not necessary to make the RORG binding. We now understand, as outlined by you, that it is the intent of the COAG Energy Council to narrow the grounds of judicial review and so elevating the RORG to be delegated legislation has the intended effect.

We appreciate the opportunity to outline our concerns and your commitment to review the remaining issues in our letters particularly regarding the need to protect regulatory certainty by:

- stating that the AER may only make the RORG if it will, or is most likely to, contribute to the achievement of the National Electricity Objective (NEO), National Gas Objective (NGO) and Revenue and Pricing Principles (RPPs) instead of simply having regard to them;
- including specific criteria in the NEL and NGL to provide that that the RORG must ensure that:
  - a. the efficient cost of capital is to be commensurate with the regulatory and commercial risks facing the service provider in provision of regulated services; and
  - b. an incentive-based approach to the rate of return will be retained so that service providers will have an opportunity to recover at least the efficient cost of capital and retain an incentive to outperform a benchmark efficient cost of capital; and
- giving the NEO, NGO and RPPs primacy over 'other information' in making the RORG.

We further request that a more recent draft of the legislation be provided to us with an explanatory statement that outlines the policy underpinning the legislative amendments. This will enable us to assist with any improvements in drafting that could alleviate our remaining concerns whilst still delivering on the policy intent. We reiterate our offer to assist with the drafting of the legislation to capture these issues effectively and proposed changes to new sections 181 and 30D of the NEL and NGL respectively is included in the appendix to this letter. These changes are not fundamental but rather reflect the policy intent more clearly.

As discussed, we look forward to the explanatory statement clarifying the policy outlined in the meeting in relation to:

- Narrowing the grounds for judicial review compared to the *Administrative Decisions (Judicial Review) Act 1977 (ADJR)*.
- The NEO, NGO and RPPs having primacy over other information and that the AER must demonstrate that the RORG is consistent with, and achieves, the NEO, NGO and RPPs and not just have regard to them.
- Consistent with the focus on the longer-term impacts on customers in the NEO and NGO, short term price outcomes are not to be given primacy over the longer-term impacts on the reliability, safety and security of services, the security of the system, or prices over the longer term.
- The legislation is considered to provide sufficient guidance to the AER to ensure that the efficient cost of capital is to be commensurate with the regulatory and commercial risks facing the NSP in provision of regulated services.
- The legislation is considered to provide sufficient guidance to the AER to ensure that an incentive-based approach to the rate of return will be retained so that NSPs will have an opportunity to recover at least the efficient cost of capital and retain an incentive to outperform a benchmark efficient cost of capital.

We remain disappointed in the policy to narrow judicial review rights which are provided to other commercial entities and individuals subject to decisions by government and regulators, particularly where the AER will have significantly more discretion. This will increase uncertainty and the risk premium sought on debt and equity required to invest in Australian energy infrastructure increasing prices to customers.

As you outlined, under this framework:

- Stakeholders will have recourse to government and policy makers rather than through the courts.
- It will be expected that stakeholders will provide more regular feedback on the AER's performance.
- Government will be open to future changes to legislation in response to issues raised by stakeholders.

To be effective and maintain independence, this framework will need to include improved access to government officials and policy makers and improved transparency in relation to policy and the process for developing legislation. We also consider this framework will be more effective if performance measures for the AER are identified and monitored over time and the COAG's previous commitment to undertaking an effectiveness review of the AER is actioned.

Please contact Sally McMahon, Economic Regulatory Advisor with Spark Infrastructure (phone: 0421 057 821, email: sally.mcmahon@sparkinfrastructure.com) for further discussion or questions.

Yours sincerely,



**Rick Francis**  
Managing Director & CEO  
Spark Infrastructure



**Andrew Faber**  
CEO  
Hastings Funds Management



**Michael Cummings**  
Global Co-Head of Asset Management  
AMP Capital



**Nik Kemp**  
Head of Infrastructure  
AustralianSuper



**Michael Hanna**  
Head of Infrastructure – Australia  
IFM Investors



**Francis Kwok**  
Co-Head of Asia-Pacific  
Macquarie Infrastructure and Real  
Assets

## Appendix – Amendments to section 18I of the NEL and 30D of the NGL

### Section 18I of the NEL

#### **18I AER to make rate of return instrument**

(1) This section applies if a rate of return on capital or the value of imputation credits is required for performing or exercising an AER economic regulatory function or power.

(2) The AER must make an instrument (a rate of return instrument) stating—

(a) for a rate of return on capital—the way to calculate the rate; and

(b) for the value of imputation credits—the value or the way to calculate the value.

(3) The AER may make an instrument only if ~~satisfied~~ the instrument will, or is most likely to, contribute to the achievement of the national electricity objective **and the revenue and pricing principles** to the greatest degree.

(4) ~~In making a rate of return instrument, the~~ **The instrument made by the AER must have regard to provide a return on investment —**

(a) ~~the revenue and pricing principles~~ **commensurate with the regulatory and commercial risks faced by a benchmark efficient entity; and**

(b) ~~other information the AER considers appropriate~~ **that provides incentives to reduce costs or otherwise improve productivity.**

### Section 30D of the NGL

#### **30D AER to make rate of return instrument**

(1) This section applies if a rate of return on capital or the value of imputation credits is required for performing or exercising an AER economic regulatory function or power.

(2) The AER must make an instrument (a rate of return instrument) stating—

(a) calculate the rate; and

(b) for the value of imputation credits—the value or the way to calculate the value.

(3) The AER may make an instrument only if ~~satisfied~~ the instrument will, or is most likely to, contribute to the achievement of the national gas objective **and the revenue and pricing principles** to the greatest degree.

(4) ~~In making a rate of return instrument, the~~ **The instrument made by the AER must have regard to provide a return on investment —**

(a) ~~the revenue and pricing principles~~ **commensurate with the regulatory and commercial risks faced by a benchmark efficient entity; and**

(b) ~~other information the AER considers appropriate~~ **that provides incentives to reduce costs or otherwise improve productivity.**