

Engagement process for 2022 gas rate of return instrument

Position paper

July 2021

Economic Regulation Authority

WESTERN AUSTRALIA

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About this review

The Economic Regulation Authority is currently undertaking a review of the gas rate of return instrument.

The ERA published its current gas instrument, the Final Rate of Return Guidelines (2018), on 18 December 2018. These guidelines set out the method for estimating the allowed rate of return for gas transmission and distribution service providers.

The ERA is required to complete a review of the current gas instrument and publish a final version of its new gas instrument by 18 December 2022.

This document explains how the ERA intends to engage with stakeholders to review the gas instrument.

The ERA is seeking nominations from interested and suitably experienced people to be eligible experts and for appointment to the independent panel and consumer reference group.

Invitation to make nominations

Nominations are due by 4:00 pm WST, Thursday, 5 August 2021

The ERA invites stakeholders and interested parties to nominate suitably experienced people for appointment to the independent panel and consumer reference group, and eligible experts.

We would prefer to receive your nominations via our online submission form <https://www.erawa.com.au/consultation>

You can also send comments through:

Email: publicsubmissions@erawa.com.au

Post: Level 4, Albert Facey House, 469 Wellington Street, Perth WA 6000

Please note that submissions provided electronically do not need to be provided separately in hard copy.

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1. Introduction

1. The ERA is an independent economic regulator and one of its functions is approving access arrangements for gas transmission and distribution services that facilitate third-party access to monopoly gas infrastructure in Western Australia. These include the Dampier to Bunbury Natural Gas Pipeline, the Goldfields Gas Pipeline and the Mid-West and South-West Gas Distribution Systems.
2. The ERA's responsibilities are established under the National Gas Law (NGL) and National Gas Rules (NGR) as applied in Western Australia.¹ The ERA is guided in its role by the national gas objective set out in the NGL. This objective focuses on promoting the long-term interests of consumers.
3. The NGL requires the ERA to produce a gas rate of return instrument.²
4. The ERA published a gas rate of return instrument on 18 December 2018 that set out the ERA's position at that time on determining the allowed rate of return on capital. At the date of the publication of the 2018 gas instrument it was not binding on the ERA or service providers. The ERA or service providers could depart from the guidelines when reviewing an access arrangement, provided that an adequate explanation for any proposed deviation from the guidelines was provided. In April 2019, the Western Australian NGL was subsequently revised and the 2018 gas instrument became mandatory. The 2022 gas instrument will also be binding on the ERA and service providers.
5. This document sets out the process that the ERA will undertake to produce the 2022 gas instrument.
6. The revisions to the NGL to introduce a binding instrument also introduced new consultation requirements for the development of the gas instrument.³
7. This position paper is the first step in the process towards the determination of the 2022 gas instrument. The paper outlines and initiates the ERA's planned approach to fulfilling the consultation requirements for producing the 2022 gas instrument and does not discuss substantive technical rate of return issues. Within this paper, the ERA invites stakeholders and interested parties to nominate eligible experts and members for the independent panel and consumer reference group.

1.1 About the 2022 gas rate of return instrument

8. The rate of return is the return expected by investors for investing in a business. The rate of return provides a business with the money to pay the interest on its loans and give a return on equity to investors.

¹ The *National Gas Access (WA) Act 2009* implements the National Gas Access (Western Australia) Law and National Gas Rules for Western Australia. All references to National Gas Law (NGL) and National Gas Rules (NGR) referred to throughout this document are references to the NGL and NGR which apply in Western Australia.

² NGL, chapter 2, part 1, subdivision 2, cl. 30D.

³ The consultation requirements are set out in chapter 2, part 1, subdivision 3 of the NGL.

9. For Western Australia's regulated gas pipelines, the ERA determines an allowed rate of return on service providers' projected capital bases as part of setting regulated revenues for an access arrangement period (usually for a five-year term).
10. The ERA develops, maintains and applies the gas instrument in accordance with the requirements of the NGL.⁴ The gas instrument sets out how the ERA and regulated entities will calculate the return on debt, return on equity and the value of imputation credits (gamma) for the duration of the instrument.
11. The explanatory statement that will accompany the 2022 gas instrument will explain and set out the ERA's reasons for its decision, having considered the evidence before it during the gas instrument review process.
12. The 2022 gas instrument will be a binding instrument and applies to all gas pipeline regulatory determinations made when it is in force.

1.2 Use of regulatory judgement

13. The ERA is the decision maker in the gas rate of return process. As an independent regulator, it is the ERA's responsibility to ensure that its decisions are well-reasoned and based on robust consultation.
14. Decisions are made under uncertainty and therefore require the exercise of judgement when considering evidence. The ERA's decisions must satisfy the relevant law and rules which state:⁵

The [ERA] may make an instrument only if satisfied the instrument will, or is most likely to, contribute to the achievement of the national gas objective to the greatest degree.
15. The estimation of the rate of return is complex and contentious, and the rate of return is a material driver of regulated revenue.
16. In accordance with the efficiency objectives set out under the NGL and the promotion of the long-term interests of consumers, the ERA will establish the rate of return at a level sufficient to meet the cost of capital for financing investment by gas service providers.
17. The rate of return produced by the 2022 gas instrument should be neither higher or lower than is needed to match a service provider's efficient financing costs.
18. As the 2022 gas instrument will be binding, it is important that the ERA takes measures to gather and test relevant evidence when making a judgement.
19. The ERA will be transparent in its reasoning and provide detailed explanations.

⁴ NGL, Part 1, division 1A.

⁵ NGL, chapter 2, part 1, division 1A, subdivision 2.

1.3 Gas instrument review

20. The ERA is required to review the current gas instrument and replace it by the fourth anniversary of when the current instrument was published.⁶ These reviews provide an opportunity to undertake a comprehensive review of approaches for determining the allowed rate of return on capital.
21. As part of its review for the 2022 gas instrument determination, the ERA will assess its approach to setting the rate of return for covered gas pipeline and network access arrangements.
22. The NGL prescribes several consultation requirements that the ERA must fulfil to develop the 2022 gas instrument. These requirements include that the ERA must consider the advice, recommendations or submissions given by:
 - A consumer reference group.
 - Experts as part of concurrent evidence.
 - An independent panel review of the draft gas instrument.
 - Other persons invited to make written submissions about the proposed draft instrument.⁷
23. The NGL prescribes that the ERA must have regard to the revenue and pricing principles and other information the ERA considers appropriate in developing the gas instrument.⁸ Consistent with the requirements of the NGL and NGR, the ERA will focus on the overall methods, estimation methods, financial models, market data and other evidence for developing the rate of return.
24. As part of the review process the ERA will set out current indicative estimates of the rate of return and associated parameters. However, the specific values arising from the application of the ERA's approach to estimating the rate of return will be determined at each subsequent access arrangement review, by applying the approaches set out in the gas instrument.

⁶ NGL, chapter 2, part 1, division 1A, subdivision 4, cl. 30P(2).

⁷ NGL, chapter 2, part 1, division 1A, subdivision 3, cl. 30G to 30K.

⁸ NGP, chapter 2, part 1, division 1A, subdivision 2, cl. 30D.

2. The regulatory framework

25. This chapter sets out the relevant requirements of the NGL and NGR. These requirements establish the regulatory framework for the rate of return decision-making process and for the gas instrument review.

2.1 The National Gas Law

26. The NGL provides for a legislated, uniform national framework governing access to monopoly gas infrastructure, and arrangements for price oversight. The national gas objective sets out the aim of the NGL:⁹

The objective of this Law 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.

27. The NGL states that the gas instrument must set out the way to calculate the rate of return on capital and value of imputation credits that will be applied by the ERA in performing or exercising its economic regulatory functions:

30D [ERA] 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 [ERA] economic regulatory function or power.
- (2) The [ERA] 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.

28. The NGL sets out the content of a rate of return instrument, stating that the instrument may include matters the ERA considers appropriate:

30E Content of rate of return instrument

- (1) If a rate of return instrument states the value of imputation credits, the instrument must state a single value to apply in relation to all covered pipeline service providers.
- (2) If a rate of return instrument states a way to calculate the rate of return on capital or the value of imputation credits, the instrument must—
 - (a) provide for the same methodology to apply in relation to all covered pipeline service providers in calculating the rate or value; and
 - (b) provide for the methodology to apply automatically without the exercise of any discretion by the [ERA]

Example for paragraph (b)—

The instrument cannot include different methodologies or a band of values from which the [ERA] could choose in applying the instrument.

- (3) Subject to subsections (1) and (2), the instrument may include other matters the [ERA] considers appropriate.

Example—

Matters to help a covered pipeline service provider calculate a rate of return or the value of imputation credits.

⁹ NGL, chapter 1, part 3, cl. 23.

29. Additionally, the NGL sets out that the ERA must publish explanatory information for a rate of return instrument:

30D Publication of explanatory information

The [ERA] must publish explanatory information for a rate of return instrument on its website when the instrument is published under section 30N.

30. Under the current framework, the ERA sets the allowed rate of return to achieve the national gas objective. In setting the allowed rate of return, the NGL states that the ERA must have regard to the revenue and pricing principles:

30D [ERA] to make rate of return instrument

...

- (3) The [ERA] may make an instrument only if satisfied the instrument will, or is most likely to, contribute to the achievement of the national gas objective to the greatest degree.
- (4) Subject to subsection (3), the way to calculate a rate of return on capital must include a weighted average of an allowed return on equity and an allowed return on debt.
- (5) In making an instrument, the [ERA] must have regard to—
- (a) the revenue and pricing principles; and
 - (b) other information the [ERA] considers appropriate.

31. The NGL and the national gas objective are intended to promote economic efficiency:¹⁰

The national gas objective is an economic concept and should be interpreted as such.

The long term interest of consumers of gas requires the economic welfare of consumers, over the long term, to be maximised. If gas markets and access to pipeline services are efficient in an economic sense, the long term economic interests of consumers in respect of price, quality, reliability, safety and security of natural gas services will be maximised. By the promotion of an economic efficiency objective in access to pipeline services, competition will be promoted in upstream and downstream markets.

32. The revenue and pricing principles in the NGL give effect to the national gas objective.¹¹ The revenue and pricing principles establish that the national gas objective is to be promoted by targeting economically efficient outcomes, through effective incentives.¹² The revenue and pricing principles are detailed in section 24 of the NGL:

24—Revenue and pricing principles

- (1) The revenue and pricing principles are the principles set out in subsections (2) to (7).
- (2) A service provider should be provided with a reasonable opportunity to recover at least the efficient costs the service provider incurs in—
- (a) providing reference services; and
 - (b) complying with a regulatory obligation or requirement or making a regulatory payment.

¹⁰ Holloway, P., *Second Reading Speech: National Gas (South Australia) Bill 2008, Parliamentary Debates (SA)*, Legislative Council, 30 April 2008.

¹¹ Holloway, P., *Second Reading Speech: National Gas (South Australia) Bill 2008, Parliamentary Debates (SA)*, Legislative Council, 30 April 2008.

¹² NGL, chapter 1, part 3, cl. 24.

- (3) A service provider should be provided with effective incentives in order to promote economic efficiency with respect to reference services the service provider provides. The economic efficiency that should be promoted includes—
 - (a) efficient investment in, or in connection with, a pipeline with which the service provider provides reference services; and
 - (b) the efficient provision of pipeline services; and
 - (c) the efficient use of the pipeline.
 - (4) Regard should be had to the capital base with respect to a pipeline adopted—
 - (a) in any previous—
 - (i) full access arrangement decision; or
 - (ii) decision of a relevant Regulator under section 2 of the Gas Code;
 - (b) in the [NGR].
 - (5) A reference tariff should allow for a return commensurate with the regulatory and commercial risks involved in providing the reference service to which that tariff relates.
 - (6) Regard should be had to the economic costs and risks of the potential for under and over investment by a service provider in a pipeline with which the service provider provides pipeline services.
 - (7) Regard should be had to the economic costs and risks of the potential for under and over utilisation of a pipeline with which a service provider provides pipeline services.
33. This specification of “effective incentives in order to promote economic efficiency” in the revenue and pricing principles is consistent with an incentive regulation approach.
34. Lewis and Garmon define incentive regulation as:¹³
- [T]he use of rewards and penalties to induce a utility to achieve desired goals where the utility is afforded some discretion in achieving those goals.
35. The regulatory arrangements and associated rate of return framework constitute one form of regulation that has been developed to provide incentives to achieve economic efficiency.
36. The ERA will conduct the 2022 review of the gas instrument in accordance with the requirements set out in the NGL.

¹³ Lewis, T., and Garmon, C., *Fundamentals of Incentive Regulation*, PURC/World Bank International Training Program of Utility Regulation and Strategy, June 1997.

2.2 The National Gas Rules

37. The rate of return is detailed in section 87 of the NGR:

87—Rate of return

The return on the projected capital base for a service provider for a regulatory year of an access arrangement period for an applicable access arrangement (**RPCB_t**) is to be calculated using the following formula:

$$\text{RPCB}_t = a_t \times v_t$$

where:

a_t is the allowed rate of return for the regulatory year; and

v_t is the value, as at the beginning of the regulatory year, of the projected capital base for the regulatory year (as established under rule 78 and subject to rule 82(3)).

38. The 2022 gas instrument will set out the way to calculate the allowed rate of return, including the way to calculate the value of imputation credits, for service providers for applicable access arrangements while it is in force and will be binding on the ERA and service providers.

3. Timeline

39. Indicative high-level milestones for the 2022 gas instrument review are shown in Table 1.

Table 1: Indicative milestones for the 2022 gas rate of return instrument review

Milestone	Description of milestone	Date
Engagement process position paper (this document)	This paper details the process for the 2022 gas instrument review and seeks nominations for the bodies that the ERA must establish and have regard to according to the NGL consultation requirements.	July 2021
Processes to appoint experts and representatives to the consumer reference group, and the independent panel*	These processes will be conducted as described in section 4 of this paper.	July to December 2021
ERA position paper	The ERA will publish a position paper outlining its views on the technical issues for the 2022 gas rate of return instrument and inviting public submissions.	February 2022
Concurrent evidence	Concurrent expert evidence will be available. The process the ERA will follow for seeking concurrent evidence is described in section 4.3 of this paper.	February 2022
Public submissions on position paper	The ERA will receive written submissions in response to its position paper.	March 2022
2022 draft gas instrument	The ERA will publish a draft gas rate of return instrument and explanatory information, which will subsequently be reviewed by the independent panel.	June 2022
Independent panel report	The independent panel will provide a report, which will be published on the ERA's website, including the panel's assessment of the evidence and reasons supporting the rate of return on capital and the value of imputation credits under the draft 2022 gas instrument. The process the ERA will follow for engaging with the independent panel is described in section 4.1 of this paper.	August 2022
Public submissions on draft gas instrument and independent panel report	The ERA will invite public submissions on the draft 2022 gas instrument and the independent panel report.	September 2022
2022 final gas instrument	The 2022 gas instrument will be published and will be a binding instrument, applying to all regulatory determinations made while it is in force.	December 2022

**Note: Advice, recommendations and submissions from the consumer reference group may be received at any time after its appointment until the publication of the final gas instrument.*

4. Review elements

40. For the 2022 gas instrument review the ERA has new consultation requirements:
- consumer reference group input (new requirement)
 - concurrent expert evidence (new requirement)
 - independent panel review (existing requirement).
41. In considering the consultation requirements for the gas instrument review, the ERA has considered the Australian Energy Regulator's (AER) experience with the consultation processes and stakeholder feedback from the AER's 2018 rate of return review.
42. The ERA has explored ways to meet the new consultation requirements while recognising that there are not many people with relevant expertise in Western Australia, and that costs should be minimised because the rate of return instrument is industry-funded by a small number of entities.
43. The ERA will endeavour to meet these requirements as best as it can.¹⁴

4.1 Independent panel

44. The independent panel was a new addition to the 2018 review process and is now legislated to remain a part of future reviews.
45. An independent panel provided a report about the ERA's 2018 gas instrument review.
46. For the 2022 gas instrument review, the ERA will use the independent panel to review its draft gas instrument in a similar manner to its 2018 gas instrument review.
47. The objective of the independent panel will be to assist the ERA to make the best possible gas instrument by providing an independent perspective on its development:

30K – Report about draft instrument by independent panel

- (1) The [ERA] must, as soon as practicable after publishing the draft instrument, establish an independent panel to give the [ERA] a written report about the instrument.
- (2) The panel—
- (a) may carry out its activities, including giving the report, in the way it considers appropriate; but
 - (b) must seek to give the report by consensus.
- (3) The panel must—
- (a) consist of at least 3 members, appointed by the [ERA], who have qualifications or experience in a field the [ERA] considers relevant to making a rate of return instrument; and
- Examples of relevant fields—**
- Finance, economics, law, consumer affairs, institutional investment.
- (b) give the report to the [ERA] before the [ERA] makes the instrument.

¹⁴ NGL, chapter 2, part 1, clause 30M. Failure to comply with these requirements does not invalidate or otherwise affect a rate of return instrument.

- (4) The [ERA] must take reasonable steps to minimise and manage any conflicts of interest a panel member may have in relation to making the instrument.
- (5) The report must—
 - (a) include the panel's assessment of the evidence and reasons supporting the rate of return on capital or the value of imputation credits under the instrument; and
 - (b) state whether the report is given by consensus.
- (6) The [ERA] must publish the report on its website.

4.1.1 *Role of the panel*

48. The independent panel is to review the draft gas instrument and report its assessment of the evidence and reasons supporting the rate of return on capital or the value of imputation credits under the draft gas instrument.
49. The main purposes of the independent panel process are to give the ERA the benefit of an independent review, and to promote confidence amongst stakeholders that the ERA's proposed approach for the gas instrument is robust.
50. The independent panel does not have to be a panel of experts but must have qualifications or experience in a relevant field.
51. The ERA is not required to adopt any recommendations from the independent panel report, but rather has to consider them.¹⁵
52. The panel's role is to review the draft gas instrument in the context of the evidence available at the time of making the draft gas instrument.
53. The ERA will ask the independent panel to address the following question as part of its terms of reference:
 - In the panel's view, is the draft guideline supported by sound reasoning based on the available information such that it is capable of promoting achievement of the national gas objective?
54. To answer this question the independent panel will:
 - Produce a report on the draft gas instrument that the ERA will consider when making the final 2022 gas instrument.
 - Comment on the draft gas instrument but will not propose its own alternative or amended guideline.
55. The terms of reference will require the independent panel to consider the following factors:
 - The effect of the gas instrument as a whole rather than issue-by-issue analysis.
 - The revenue and pricing principles in the NGL.
 - The rate of return provisions in the NGL and NGR.
 - Whether the ERA has had regard to relevant information to reach its conclusions.

¹⁵ NGL, chapter 2, part 1.

- Whether there is a clear link between the ERA's conclusions and the information on which it relied to form those conclusions.
 - Whether, in the view of panel members, the method set out in the draft gas instrument will allow stakeholders to replicate the ERA's estimate at a point in time.
 - Interactions with other components of the ERA's regulatory determinations and the relevant rules affecting estimation of those components.
56. The role of the panel is not to propose or set particular values or to make a separate decision and effectively assume the ERA's authority to make the gas instrument. The findings from the panel are to assist the ERA to develop a gas instrument that fulfils its legislated functions and objectives.
57. Further, the ERA considers that a degree of regulatory judgement is required to make the gas instrument because the available evidence can, and does, provide contrasting information. Estimation of the rate of return is complex, and reasonable parties may reach differing opinions about estimation methods. This judgement should be exercised by the ERA. The role of the independent panel is not to have a separate body proposing its own means of promoting the national gas objective or to put forward an alternative or amended gas instrument. The independent panel is best suited to a role of reviewing whether the ERA has undertaken an effective review process; engaged with the material before it; and reached a decision that is supported by its stated reasons and the information available to it.
58. The ERA will consider the independent panel's report when making its final gas instrument. However, the panel's findings will not be binding on the ERA. The independent panel's report will be an important and useful source of evidence for the ERA when preparing the final gas instrument. Stakeholders will also be given the opportunity to comment on the independent panel's report.

4.1.2 Establishment of panel

59. As previously stated, the ERA used an independent panel to review its draft instrument for its 2018 gas instrument review.
60. For the 2018 gas instrument review, the ERA's independent panel engagement focused on meeting the following requirements at the lowest cost:
- three-member panel
 - diverse backgrounds
 - no international members.
61. The ERA proposes to apply a similar approach to engaging the independent panel for the 2022 gas instrument review as was applied for the 2018 gas instrument review.
62. The ERA invites stakeholders and interested parties to nominate members for the independent panel. The ERA will commence identifying and contacting potential panel members following the release of this paper.
63. The ERA will use the attached terms of reference (Appendix 1) as a guide to the expected role of the panel.
64. The ERA will select the panel members.

65. Where stakeholders wish to recommend an individual, they should do so confidentially to avoid creating difficulties for those nominated in case they are either unavailable or ultimately not selected to join the panel.
66. The ERA will seek to establish a panel with relevant backgrounds. However, the final panel will depend on the availability of suitable members. The skills and background the ERA is seeking for the independent panel are:
 - Experience in finance and/or economics to assist the panel to understand the technical aspects of the gas instrument development process.
 - Experience in the regulation of utilities, public policy and/or in oversight bodies to assist the panel understand the regulatory context.
 - Experience in consumer roles to assist the panel's understanding of the long-term interests of consumers.
 - Institutional investment experience to assist the panel evaluate whether the estimation method for the rate of return will promote investor confidence and efficient investment.
67. The ERA will aim to appoint three panel members to capture a range of relevant experience.
68. The ERA will only engage panel members with suitable availability over the duration of the panel's report preparation. The ERA will negotiate with prospective panel members to establish working arrangements that are suitable for both the ERA and prospective panel members. Indicatively, the ERA will seek panel members with availabilities as follows:
 - Panel members should be available for 10 weeks following the commencement of the panel.
 - The ERA does not expect that independent panel members will work full time over the 10 weeks. Rather, the ERA will aim to engage panel members for the equivalent of 1 full day per week.
 - The Chair will be required full time for a notional 15 days over the 10-week period.

4.1.3 Independence and transparency

69. The panel will have full access to information that the ERA considered to develop the draft gas instrument and will be able to request clarification from the ERA when necessary.
70. The ERA recognises the importance of the panel being independent in its deliberations.
71. To give stakeholders confidence in the panel's independence, mechanisms will be put in place to preserve the panel's independence and ensure transparency. These mechanisms are particularly important as the ERA will fund participation of independent panel members.
72. To ensure the independence and transparency of the panel's review the following steps will be taken:
 - The ERA will engage the panel using a published terms of reference.
 - The ERA will review and publish the panel's report on the ERA's website.

- The panel will have responsibility for drafting its own report, which will be published in full (subject to a confidentiality check) on the ERA's website.
- The ERA expects panel members to strive to reach consensus but will not restrict panel members from expressing differences within the report if that is the ultimate view of the members.¹⁶

Request for nominations – Independent panel

The ERA invites stakeholders and interested parties to nominate members for the independent panel as part of the consultation process for the 2022 review of the gas instrument.

4.2 Consumer reference group

73. The consumer reference group (CRG) was a new addition to the 2018 gas instrument review process and is now legislated to remain a part of future reviews.
74. For the 2018 gas instrument review the ERA was exempt from this process.
75. The NGL requires that the ERA use a CRG as part of the consultation process for the 2022 gas instrument review:¹⁷

30H – Requirements before publishing draft instrument

- (1) Before publishing a draft rate of return instrument under this Subdivision, the [ERA] must—
 - (a) establish a reference group to help the [ERA] implement an effective consumer consultation process for making the proposed instrument (a **consumer reference group**); and

...

30I – Consumer reference group

- (1) A consumer reference group for making a rate of return instrument—
 - (a) is to consist of the members appointed by the [ERA]; and
 - (b) may carry out its activities, including giving advice or recommendations to the [ERA] about the instrument, in the way it considers appropriate.
- (2) Without limiting subsection (1)(b), the consumer reference group may—
 - (a) consult with consumers of natural gas; and
 - (b) facilitate consumer engagement in the process for making the instrument; and
 - (c) make written submissions to the [ERA] about the content of the instrument and the process for making it.
- (3) The [ERA] must publish on its website any written advice, recommendations or submissions given to it by the consumer reference group.

¹⁶ NGL, chapter 2, part 1, clause 30K sets out that the panel must seek to give its report by consensus, and the report must state whether the report is given by consensus.

¹⁷ NGL, chapter 2, part 1, clause 30I.

4.2.1 *Role of the consumer reference group*

76. The intent of the CRG is to provide direct and ongoing feedback to the ERA during the gas instrument review process that represents broad consumer perspectives. This is to balance what may otherwise be seen as a process in which only service providers have input to the ERA's determination.
77. The ERA is not required to adopt any recommendations from the CRG, but rather must consider them in developing the gas instrument.¹⁸

4.2.2 *Establishment of the group*

78. The CRG will be formed through a nomination process managed by the ERA and designed to represent a range of consumer interests in the development of the gas instrument.
79. The CRG will be funded by the ERA.
80. The CRG should be small enough to ensure that the group could reach a unified opinion and large enough that it will represent a range of consumers.
81. Where possible and appropriate, the ERA will draw on existing consumer interest groups and bodies.
82. The ERA proposes to establish a CRG of three to five members, to be appointed by the ERA. The final membership of the CRG will encompass representatives with a diverse range of skills and experience, which may include:
 - consumer advocacy, insight and engagement
 - regulatory decision-making
 - knowledge of the energy sector or other utilities
 - financial and economic analysis.
83. It is important that the CRG has a core consumer focus and advocates strongly for all consumers, including future consumers. The CRG may directly engage with consumers as the gas instrument review progresses so they are able to represent consumer views effectively.
84. The CRG should be formed early to maximise the opportunity for the reference group to contribute throughout the process.

¹⁸ NGL, chapter 2, part 1, clause 30H and clause 30I.

Request for nominations – Consumer reference group

The ERA invites stakeholders and interested parties to nominate members for the consumer reference group as part of the consultation process for the 2022 review of the gas instrument.

4.2.3 Support

85. From discussions with the AER and its lessons learnt from its 2018 rate of return instrument consumer reference group, the CRG for the ERA's 2022 gas instrument review will likely need substantial education on the regulatory framework and the weighted average cost of capital and will need administrative help. The CRG may also need a consultant to assist with drafting submissions and answering technical questions.
86. The ERA will support the role of the CRG early in the process and assist the CRG to build its knowledge of rate of return topics.
87. To facilitate input from the CRG, the ERA will provide funding for the group so they can gather information and contribute to stakeholder engagement processes. This may include sourcing and funding experts to assist the CRG with submissions and discussions.
88. In accordance with the NGL, the ERA will publish any written advice, recommendations or submissions given to the ERA by the CRG on the ERA's website.

4.3 Concurrent evidence

89. The concurrent evidence requirement was a new addition to the 2018 review process and is now legislated to remain a part of future reviews.
90. For the 2018 gas instrument review the ERA was exempt from this process.
91. The NGL requires that the ERA seek concurrent expert evidence for the 2022 gas instrument review:¹⁹

30H – Requirements before publishing draft instrument

- (1) Before publishing a draft rate of return instrument under this Subdivision, the [ERA] must—
 - ...
 - (c) seek concurrent expert opinions or evidence about the proposed instrument.
 - ...
- (3) Subject to subsections (4) and (5), the [ERA] may seek the expert opinions or evidence in the way it considers appropriate.

Example—

The [ERA] might convene a conference of experts to identify key issues, and areas of dispute and agreement among the experts, about the content of the proposed instrument.

¹⁹ NGL, chapter 2, part 1, clause 30G and cl. 30H.

- (4) The [ERA] must call for nominations of eligible experts but may seek the expert opinions or evidence from any eligible expert.
- (5) If practicable, the [ERA] must seek the expert opinions or evidence from at least 3 eligible experts.
- (6) The [ERA] must publish on its website—
 - (a) submissions made under this section; and
 - (b) a report on the outcomes of seeking the expert opinions or evidence.
- (7) In this section—

eligible expert means a person with qualifications or experience in a field the [ERA] considers relevant to making a rate of return instrument.

Examples of relevant fields—

Finance, economics, law, consumer affairs, institutional investment.

4.3.1 Role of concurrent expert evidence

92. Concurrent evidence involves the ERA receiving expert advice on specific rate of return matters to assist in its consideration of material that it must respond to during the gas instrument review process.
93. The ERA is required to seek concurrent expert evidence on the rate of return to assist it with its considerations for the 2022 gas instrument review. The ultimate purpose of concurrent evidence is to assist the ERA to make decisions that result in a gas instrument that will, or is most likely to, contribute to the achievement of the national gas objective.
94. The ERA is not required to adopt any positions coming from the concurrent expert evidence, but rather must consider them.²⁰
95. Concurrent expert evidence is in addition to the expert evidence received from experts representing differing stakeholders throughout the ERA's review process.

4.3.2 ERA process for expert evidence

96. Given the requirement to seek concurrent expert evidence is a new requirement for the ERA, the ERA has considered the AER's experience with this process for its 2018 rate of return instrument review, its stakeholder feedback on the process and its lessons learnt, and its final improved consultation process.
97. The AER found that there were areas for improvement in its process for seeking concurrent expert evidence and strengthened its 2022 concurrent expert evidence process through:^{21 22 23}
 - Engaging experts for a longer period of time before the concurrent expert sessions. The planned format for the AER's 2022 expert sessions is outlined in paragraph 104.

²⁰ NGL, chapter 2, part 1, clause. 30H.

²¹ Australian Energy Regulation, *Pathway to the 2022 rate of return instrument – Consultation Paper on 2022 Instrument Process*, June 2021.

²² Australian Energy Regulation, *Pathway to the 2022 rate of return instrument – Position Paper*, May 2020.

²³ Brattle Group, *Stakeholder Feedback on the AER's Process for the 2018 Rate of Return Instrument*, June 2019.

- Releasing information papers for experts earlier.
 - Having more engagement with experts prior to the sessions.
 - Ensuring there is a fair balance of perspectives represented.
 - Making sessions more accessible to stakeholders.
 - Preferring an approach where the AER engages and remunerates all the experts.
98. This indicates that, even with significant time and resources invested in the AER's 2018 concurrent evidence sessions, there was room for improvement and more time and resources were required to ensure an effective process.
99. In this context, the ERA has explored options on how to meet the concurrent expert evidence requirement.
100. This consultation requirement may be difficult for the ERA to successfully achieve as Australian expert consultants will likely be committed to the AER's concurrent evidence sessions from December 2021 to March 2022. This will require the expert consultants participating in the AER's 2022 rate of return instrument review process to prepare for the concurrent evidence sessions between the time of the publication of the AER's information papers (planned for December 2021) and when the concurrent evidence sessions are conducted. This timing coincides with the expected timing of the ERA's options for concurrent evidence sessions. This also increases the risk of not having a fair balance of perspectives represented.
101. The ERA's 2022 gas rate of return instrument review is industry funded by the three gas pipelines it regulates and any large expenditure required for the concurrent evidence review would be passed on to these providers and their consumers.
102. Given the anticipated constraints on the availability of relevant experts and the costs of such processes, and the ERA's discretion in s30H(3), the ERA considers that the most practical and effective approach for seeking concurrent evidence will be to:
- Gather expert evidence from the concurrent evidence sessions conducted by the AER.
 - Call for nomination of eligible experts. The ERA may choose to supplement the evidence from the AER's concurrent expert sessions through seeking further evidence on issues relevant to the ERA's 2022 gas instrument review.
103. The issues which will be addressed by the expert consultants as part of the AER's 2022 rate of return instrument review process are likely to be materially the same as those relevant to the ERA's 2022 gas instrument review given the AER's and the ERA's reviews address the same subject area.
104. The AER's intended process for its concurrent evidence for the 2022 rate of return instrument review process is as follows:
- December 2021 - The AER will release a series of information papers designed to inform experts of topics identified for discussion and presenting questions for discussion during the concurrent evidence sessions.

- February 2022 – The AER will conduct the concurrent evidence sessions over two days, separated by one week. Stakeholders will be invited to submit questions for the expert consultants to address during the session to identify topics for discussion during the sessions. The sessions will be assisted by a facilitator whose function will be to direct the sessions to focus the discussion on the relevant topics identified and to ensure that the views of all the consultant experts are heard. The sessions will be streamed for interested stakeholders. The ERA will observe the sessions conducted by the AER to hear the expert evidence expressed during the sessions. Following the sessions, the AER will make transcripts of the sessions available for all stakeholders.

Request for nominations – Eligible experts

The ERA invites eligible experts to nominate as part of the consultation process for the 2022 review of the gas instrument.

Appendix 1 Terms of reference for the Independent Panel

Background

The ERA will publish a draft gas rate of return instrument (draft gas instrument) which sets out the method the ERA plans to use to estimate the rate of return in its revenue determinations for gas pipeline service providers.

This draft gas instrument will be made under a framework set out in the National Gas Law and the National Gas Rules. The overall objective of the framework is set out in the national gas objective:²⁴

The objective of this law 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.

Task

In your view, is the draft instrument supported by sound reasoning based on the available information such that it is capable of promoting achievement of the national gas objective?

In your review, please have regard to the following factors:

- The effect of the draft gas instrument as a whole rather than issue-by-issue analysis.
- The revenue and pricing principles in the National Gas Law.
- The rate of return provisions in the National Gas Law and the National Gas Rules.
- Whether the ERA has had regard to relevant information in reaching its conclusions.
- Whether there is a clear link between the ERA's conclusions and the information on which it relied to form those conclusions.
- Whether, in the panel's view, the method set out in the draft gas instrument will allow stakeholders to replicate the ERA's estimate at a point in time.
- Interactions with other components of the ERA's regulatory determinations and the relevant rules affecting estimation of those components.

Please set out your conclusions in a publishable report that will be available to all stakeholders via the ERA's website. Where the panel does not agree on conclusions or recommendations in the report, the report should set out the range of final views by panel members without specifically attributing them to individuals.

Information

To assist in your review, you will have access to all source material available to the ERA in making its draft gas instrument, including but not limited to:

- submissions

²⁴ NGL, s. 23.

- independent expert reports
- underlying datasets
- relevant calculations or models.

The panel is also able to ask questions of the ERA.

The panel should take minutes of meetings.

Timing

The report is due no later than 50 business days after release of the draft instrument.

Secretariat support

The panel will have access to secretariat support from ERA staff for organising meetings, document templates, publication of the report, office space (where necessary) and IT support.

However, drafting of the report will be the panel's responsibility.

Conflicts of Interest

The ERA must take reasonable steps to minimise and manage any conflicts of interest that a panel member may have regarding their participation in the consultation process for the 2022 gas instrument review. Independent panel members will be required to consider, disclose and manage any conflicts of interest.

Confidentiality

Independent panel members will be required to sign a confidentiality undertaking with the ERA to allow access to confidential and proprietary information.

Five business days prior to publication of the report on the ERA's website, the panel will provide the ERA with the final report for confidentiality checking. The ERA will confirm any suggested redactions with the panel prior to publication.

Appendix 2 Abbreviations

Abbreviation	Full term
AER	Australian Energy Regulator
CRG	Consumer Reference Group
ERA	Economic Regulation Authority
gas instrument	Gas rate of return instrument
NGL	National Gas Law
NGR	National Gas Rules