

Legislative Council—No 211

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South Australia

**Statutes Amendment (National Electricity and Gas
Laws—Limited Merits Review) Bill 2013**

A BILL FOR

An Act to amend the *National Electricity (South Australia) Act 1996* and the *National Gas (South Australia) Act 2008*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (National Electricity and Gas Laws—Limited Merits Review) Act 2013*.

5 **2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act—

- 10 (a) a provision in Part 2 amends the *National Electricity Law* set out in the Schedule to the *National Electricity (South Australia) Act 1996*; and
- (b) a provision in Part 3 amends the *National Gas Law* set out in the Schedule to the *National Gas (South Australia) Act 2008*.

Part 2—Amendment of *National Electricity Law*

4—Amendment of section 2—Definitions

- 15 (1) Section 2(1)—after the definition of *connection service* insert:

constituent components, in relation to a reviewable regulatory decision, means the matters that constitute the elements or components of the reviewable regulatory decision and on which that reviewable regulatory decision is based and includes—

- 20 (a) matters that go to the making of the reviewable regulatory decision; and
- (b) decisions made by the AER for the purposes of the reviewable regulatory decision;

- (2) Section 2(1)—after the definition of *revenue and pricing principles* insert:

25 *reviewable regulatory decision* has the meaning given by section 71A;

- (3) Section 2(1)—after the definition of *Tribunal* insert:

user or consumer association has the meaning given by section 71A;

user or consumer interest group has the meaning given by section 71A;

5—Amendment of section 16—Manner in which AER performs AER economic regulatory functions or powers

Section 16(1)(b)—delete paragraph (b) and substitute:

- 5 (b) if the function or power performed or exercised by the AER relates to the making of a distribution determination or transmission determination, ensure that—
- 10 (i) the regulated network service provider to whom the determination will apply; and
 - (ii) any affected Registered participant; and
 - 15 (iii) if AEMO is affected by the determination—AEMO; and
 - (iv) network service users or prospective network service users of the relevant services that the AER considers have an interest in the determination; and
 - (v) any user or consumer associations or user or consumer interest groups that the AER considers have an interest in the determination,
- are, in accordance with the Rules—
- 20 (vi) informed of material issues under consideration by the AER; and
 - 25 (vii) given a reasonable opportunity to make submissions in respect of the determination before it is made; and
- (c) in relation to making a reviewable regulatory decision, specify—
- 30 (i) the manner in which the constituent components of the decision relate to each other; and
 - 35 (ii) the manner in which that interrelationship has been taken into account in the making of the reviewable regulatory decision; and
- (d) if the AER is making a reviewable regulatory decision and there are 2 or more possible reviewable regulatory decisions that will or are likely to contribute to the achievement of the national electricity objective—
- (i) make the decision that the AER is satisfied will or is likely to contribute to the achievement of the national electricity objective to the greatest degree (the ***preferable reviewable regulatory decision***); and
 - (ii) specify reasons as to the basis on which the AER is satisfied that the decision is the preferable reviewable regulatory decision.

6—Insertion of section 28ZJ

After section 28ZI insert:

28ZJ—Record of reviewable regulatory decisions

(1) The AER must, in making a reviewable regulatory decision, keep a written record of decision related matter.

(2) In this section—

decision related matter, in relation to a reviewable regulatory decision, means—

(a) the decision and the written record of it and any written reasons for it; and

(b) any document, proposal or information required or allowed under the Rules to be submitted as part of the process for the making of the decision; and

(c) any written submissions made to the AER after the proposal to which the decision relates was lodged by a network service provider and before the decision was made; and

(d) any reports and materials (including (but not limited to) consultant reports, data sets, models or other documents) considered by the AER in making the decision; and

(e) any draft of the decision that has been released for consultation purposes; and

(f) any submissions on the draft of the decision or the decision itself considered by the AER; and

(g) the transcript of any hearing (if any) conducted by the AER for the purpose of making the decision.

7—Amendment of section 71A—Definitions

(1) Section 71A, definition of *affected or interested person or body*, (b)—delete "user, prospective user" and substitute:

network service user, prospective network service user

(2) Section 71A, definition of *affected or interested person or body*—after paragraph (c) insert:

(d) a reviewable regulatory decision process participant;

(3) Section 71A—after the definition of *intervener* insert:

materially preferable NEO decision—see section 71P(2a)(c);

(4) Section 71A—after the definition of *reviewable regulatory decision* insert:

reviewable regulatory decision process participant means a person or body who, in relation to a reviewable regulatory decision that is being reviewed—

(a) made a submission or comment in relation to the making of that decision within the time required under this Law or the Rules following an invitation to do so by the AER; or

- (b) made a submission or comment in relation to the making of that decision outside the time required under this Law or the Rules following an invitation to do so by the AER but which the AER chose to take into account in making that decision,

5 and includes a Minister of a participating jurisdiction;

8—Amendment of section 71C—Grounds for review

- (1) Section 71C—after subsection (1) insert:

- (1a) An application under section 71B(1) must also specify the manner in which a determination made by the Tribunal varying the reviewable regulatory decision, or setting aside the reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

- (2) Section 71C(2)—after "subsection (1)" insert:

and the matter referred to in subsection (1a)

9—Amendment of section 71E—Tribunal must not grant leave unless serious issue to be heard and determined etc

Section 71E—delete "that there is a serious issue to be heard and determined as to whether a ground for review set out in section 71C(1) exists." and substitute:

—

- (a) that there is a serious issue to be heard and determined as to whether a ground for review set out in section 71C(1) exists; and
- (b) that the applicant has established a *prima facie* case that a determination made by the Tribunal varying the reviewable regulatory decision, or setting aside the reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

10—Amendment of section 71K—Leave for reviewable regulatory decision process participants

- (1) Section 71K(1)—after "participant" insert:

(other than a user or consumer intervener)

- (2) Section 71K(2)—delete subsection (2)

11—Amendment of section 71M—Interveners may raise new grounds for review

(1) Section 71M—after subsection (1) insert:

(1a) If an intervener raises a new ground for review under subsection (1), the intervener must also specify the manner in which a determination made by the Tribunal varying the reviewable regulatory decision, or setting aside the reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 1 or more grounds raised in the notice of intervention or in the application for review, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

(2) Section 71M(2)—after "subsection (1)" insert:

and the matter referred to in subsection (1a)

12—Substitution of section 71O

Section 71O—delete the section and substitute:

71O—Matters that may and may not be raised in a review

(1) The AER, in a review under this Subdivision, may—

(a) respond to any matter raised by the applicant or an intervener; and

(b) raise any other matter that relates to—

(i) a ground for review; or

(ii) a matter raised in support of a ground for review; or

(iii) a matter relevant to the issues to be considered under section 71P(2a) and (2b).

(2) In a review under this Subdivision, the following provisions apply in relation to a person or body, other than the AER (and so apply at all stages of the proceedings before the Tribunal):

(a) a regulated network service provider to whom the reviewable regulatory decision being reviewed applies may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised and maintained by the provider in submissions to the AER before the reviewable regulatory decision was made;

(b) a regulated network service provider whose commercial interests are materially affected by the reviewable regulatory decision being reviewed may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised and maintained by the provider in submissions to the AER before the reviewable regulatory decision was made;

5 (c) an affected or interested person or body (other than a provider under paragraph (a) or (b)) may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised by the person or body in a submission to the AER before the reviewable regulatory decision was made;

(d) subject to paragraphs (a), (b) and (c)—

10 (i) the applicant, or an intervener who has raised a new ground for review under section 71M, may raise any matter relevant to the issues to be considered under section 71P(2a) and (2b); and

15 (ii) any person or body, other than the applicant or an intervener who has raised a new ground for review under section 71M, may not raise any matter relevant to the issues to be considered under section 71P(2a) and (2b) unless it is in response to a matter raised by—

(A) the AER under subsection (1)(b)(iii); or

(B) the applicant under subparagraph (i); or

20 (C) an intervener under subparagraph (i).

(3) For the purposes of subsection (2)(d)—

(a) a reference to an applicant includes a reference to a person or body who has applied to the Tribunal for leave to apply for a review under this Subdivision; and

25 (b) a reference to an intervener includes a reference to a person or body who has applied to the Tribunal for leave to intervene in a review under this Subdivision.

13—Amendment of section 71P—Tribunal must make determination

(1) Section 71P(2)—delete subsection (2) and substitute:

30 (2) Subject to subsection (2a), a determination under this section may—

(a) affirm the reviewable regulatory decision; or

(b) vary the reviewable regulatory decision; or

35 (c) set aside the reviewable regulatory decision and remit the matter back to the AER to make the decision again in accordance with any direction or recommendation of the Tribunal.

(2a) Despite subsection (2), the Tribunal may only make a determination—

40 (a) to vary the reviewable regulatory decision under subsection (2)(b); or

(b) to set aside the reviewable regulatory decision and remit the matter back to the AER under subsection (2)(c),

if—

- 5 (c) the Tribunal is satisfied that to do so will, or is likely to, result in a decision that is materially preferable to the reviewable regulatory decision in making a contribution to the achievement of the national electricity objective (a *materially preferable NEO decision*) (and if the Tribunal is not so satisfied the Tribunal must affirm the decision); and
- 10 (d) in the case of a determination to vary the reviewable regulatory decision—the Tribunal is satisfied that to do so will not require the Tribunal to undertake an assessment of such complexity that the preferable course of action would be to set aside the reviewable regulatory decision and remit the matter to the AER to make the decision again.
- 15 (2b) In connection with the operation of subsection (2a) (and without limiting any other matter that may be relevant under this Law)—
- (a) the Tribunal must consider how the constituent components of the reviewable regulatory decision interrelate with each other and with the matters raised as a ground for review; and
- 20 (b) without limiting paragraph (a), the Tribunal must take into account the revenue and pricing principles (in the same manner in which the AER is to take into account these principles under section 16); and
- (c) the Tribunal must, in assessing the extent of contribution to the achievement of the national electricity objective, consider the reviewable regulatory decision as a whole; and
- 25 (d) the following matters must not, in themselves, determine the question about whether a materially preferable NEO decision exists:
- 30 (i) the establishment of a ground for review under section 71C(1);
- (ii) consequences for, or impacts on, the average annual regulated revenue of a regulated network service provider;
- 35 (iii) that the amount that is specified in or derived from the reviewable regulatory decision exceeds the amount specified in section 71F(2).
- (2c) If the Tribunal makes a determination under subsection (2)(b) or (c), the Tribunal must specify in its determination—
- 40 (a) the manner in which it has taken into account the interrelationship between the constituent components of the reviewable regulatory decision and how they relate to the matters raised as a ground for review as contemplated by subsection (2b)(a); and

- (b) in the case of a determination to vary the reviewable regulatory decision—the reasons why it is proceeding to make the variation in view of the requirements of subsection (2a)(d).

5 (2) Section 71P(3)—after "(2)(a)" insert:

or (b)

(3) Section 71P(4)—delete subsection (4)

(4) Section 71P(5)—delete "setting aside or varying" and substitute:

varying or setting aside

10 **14—Amendment of section 71R—Matters to be considered by Tribunal in making determination**

(1) Section 71R(1)—delete subsection (1) and substitute:

(1) Subject to this section, the Tribunal, in acting under this Division with respect to a reviewable regulatory decision—

15 (a) must not consider any matter other than review related matter (and any matter arising as a result of consultation under paragraph (b)); and

(b) must, before making a determination, take reasonable steps to consult with (in such manner as the Tribunal thinks appropriate)—

(i) network service users and prospective network service users of the relevant services; and

(ii) any user or consumer associations or user or consumer interest groups,

25 that the Tribunal considers have an interest in the determination, other than a user or consumer association or a user or consumer interest group that is a party to the review.

(2) Section 71R(2)—delete subsection (2)

(3) Section 71R(3)—delete subsection (3) and substitute:

30 (3) If in a review the Tribunal is of the view that a ground for review has been made out, the Tribunal may, on application by a party to the review, allow new information or material to be submitted if the party can establish to the satisfaction of the Tribunal that the information or material—

35 (a) was publicly available or known to be available to the AER when it was making the reviewable regulatory decision; or

(b) would assist the Tribunal on any aspect of the determination to be made and was not unreasonably withheld from the AER when it was making the reviewable regulatory decision,

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and was (in the opinion of the Tribunal) information or material that the AER would reasonably have been expected to have considered when it was making the reviewable regulatory decision.

- (4) Section 71R(5)—delete "Subsection (5)" and substitute:

Subsection (4)

- (5) Section 71R—after subsection (5) insert:

(5a) In addition, if in a review the Tribunal is of the view—

- (a) that a ground for review has been made out; and
(b) that it would assist the Tribunal to obtain information or material under this subsection in order to determine whether a materially preferable NEO decision exists,

the Tribunal may, on its own initiative, take steps to obtain that information or material (including by seeking evidence from such persons as it thinks fit).

(5b) The action taken by a person acting in response to steps taken by the Tribunal under subsection (5a) must be limited to considering decision related matter under section 28ZJ.

- (6) Section 71R(6), definition of *review related matter*—delete the definition and substitute:

review related matter means—

- (a) the application for review; and
(b) a notice raising new grounds for review filed by an intervener; and
(c) the submissions made to the Tribunal by the parties to the review; and
(d) decision related matter under section 28ZJ; and
(e) any other matter properly before the Tribunal in connection with the relevant proceedings.

15—Amendment of section 71X—Costs in a review

Section 71X(2)(c)—before "the submissions" insert:

in the case of an order relating to the AER—

16—Amendment of section 71Y—Amount of costs

- (1) Section 71Y—after "Division," insert:

other than an order for costs against a small/medium user or consumer intervener,

- (2) Section 71Y—after its present contents as amended by this section (now to be designated as subsection (1)) insert:

- (2) If the Tribunal makes an order for costs against a small/medium user or consumer intervener in favour of another party in a review under this Division, the order must be limited to the payment of the reasonable administrative costs (as determined by the Tribunal) of that other party.

17—Insertion of section 71YA

After section 71Y insert:

71YA—Costs not to be passed on

- (1) This section applies to any expenditure or cost that a network service provider incurs, or is forecast to incur, as a result of or incidental to a review under this Division, including costs awarded under section 71X.
- (2) A network service provider—
- (a) must not, for the purposes of a network revenue or pricing determination, include as part of its capital expenditure or operating expenditure any expenditure or cost to which this section applies; and
- (b) must not recover from end users or seek a pass through of any expenditure or cost to which this section applies.
- (3) This section applies despite any provision to the contrary in this Law, the Rules or a network revenue or pricing determination (and this section prevails to the extent of any inconsistency between such a provision and this section).

18—Amendment of section 71Z—Review of Division

Section 71Z(1)—delete subsection (1) and substitute:

- (1) The MCE must initiate a review of the Tribunal's role under this Division by 1 December 2016.
- (1a) The review will be undertaken by a person nominated by the MCE.

Part 3—Amendment of *National Gas Law*

19—Amendment of section 2—Definitions

- (1) Section 2(1)—after the definition of *conduct provision* insert:

constituent components, in relation to a designated reviewable regulatory decision, means the matters that constitute the elements or components of the designated reviewable regulatory decision and on which that designated reviewable regulatory decision is based and includes—

- (a) matters that go to the making of the designated reviewable regulatory decision; and

(b) decisions made by the AER for the purposes of the designated reviewable regulatory decision;

(2) Section 2(1)—after the definition of *designated pipeline* insert:

designated reviewable regulatory decision means an applicable access arrangement decision (other than a full access arrangement decision that does not approve a full access arrangement);

(3) Section 2(1)—after the definition of *revenue and pricing principles* insert:

reviewable regulatory decision has the meaning given by section 244;

(4) Section 2(1)—after the definition of *user* insert:

user or consumer association has the meaning given by section 244;

user or consumer interest group has the meaning given by section 244;

20—Amendment of section 28—Manner in which AER must perform or exercise AER economic regulatory functions or powers

Section 28(1)—delete subsection (1) and substitute:

(1) The AER must, in performing or exercising an AER economic regulatory function or power—

(a) perform or exercise that function or power in a manner that will or is likely to contribute to the achievement of the national gas objective; and

(b) if the AER is making a designated reviewable regulatory decision—

(i) ensure that—

(A) the covered pipeline service provider that provides the pipeline services to which the applicable access arrangement decision will apply; and

(B) users or prospective users of the pipeline services that the AER considers have an interest in the matter; and

(C) any user or consumer associations or user or consumer interest groups that the AER considers have an interest in the matter,

are, in accordance with the Rules—

(D) informed of the material issues under consideration by the AER; and

(E) given a reasonable opportunity to make submissions in respect of the decision before it is made; and

(ii) specify—

- (A) the manner in which the constituent components of the decision relate to each other; and
 - (B) the manner in which that interrelationship has been taken into account in the making of the decision; and
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- (iii) if there are 2 or more possible designated reviewable regulatory decisions that will or are likely to contribute to the achievement of the national gas objective—
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- (A) make the decision that the AER is satisfied will or is likely to contribute to the achievement of the national gas objective to the greatest degree (the *preferable designated reviewable regulatory decision*); and
 - (B) specify reasons as to the basis on which the AER is satisfied that the decision is the preferable designated reviewable regulatory decision.
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21—Insertion of section 68C

After section 68B insert:

68C—Record of designated reviewable regulatory decisions

- (1) The AER must, in making a designated reviewable regulatory decision, keep a written record of decision related matter.
 - (2) In this section—
decision related matter, in relation to a designated reviewable regulatory decision, means—
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- (a) the decision and the written record of it and any written reasons for it (including (if relevant) the reasons of the AER for a decision of the AER not to approve the access arrangement or proposed revisions to the applicable access arrangement (as the case may be)); and
 - (b) any document, proposal or information required or allowed under the Rules to be submitted as part of the process for the making of the decision; and
 - (c) any written submissions made to the AER after the proposed access arrangement or proposed revisions to the applicable access arrangement (as the case may be) to which the decision relates were submitted to the AER and before the decision was made; and
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- (d) any reports and materials (including (but not limited to) consultant reports, data sets, models or other documents) considered by the AER in making the decision; and
- (e) any draft of the decision that has been released for public consultation (including (if relevant) a draft of the reasons of the AER for a decision of the AER not to approve the access arrangement or proposed revisions to the applicable access arrangement (as the case may be)); and
- 10
- (f) any submissions on the draft of the decision or the decision itself (including (if relevant) submissions on the draft of the reasons of the AER for a decision of the AER not to approve the access arrangement or proposed revisions to the applicable access arrangement (as the case may be)) considered by the AER; and
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- (g) the transcript of any hearing (if any) conducted by the AER for the purpose of making the decision.

22—Amendment of section 244—Definitions

- (1) Section 244, definition of *affected or interested person or body*—after paragraph (c) insert:
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- (ca) a reviewable regulatory decision process participant;
- (2) Section 244—after the definition of *intervener* insert:
- materially preferable designated NGO decision*—see section 259(4a)(c);
- (3) Section 244, definition of *reviewable regulatory decision*, (d)—delete paragraph (d) and substitute:
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- (d) a designated reviewable regulatory decision; or
- (4) Section 244—after the definition of *reviewable regulatory decision* insert:
- reviewable regulatory decision process participant* means a person or body who, in relation to a reviewable regulatory decision that is being reviewed—
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- (a) made a submission or comment in relation to the making of that decision within the time required under this Law or the Rules following an invitation to do so by the original decision maker; or
- (b) made a submission or comment in relation to the making of that decision outside the time required under this Law or the Rules following an invitation to do so by the original decision maker but which the original decision maker chose to take into account in the
- 35
- making of that decision,
- and includes, in relation to a designated reviewable regulatory decision, a Minister of a participating jurisdiction;

23—Amendment of section 246—Grounds for review

(1) Section 246—after subsection (1) insert:

(1a) An application under section 245(1) that relates to a designated reviewable regulatory decision must also specify the manner in which a determination made by the Tribunal varying the designated reviewable regulatory decision, or setting aside the designated reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable designated NGO decision.

(2) Section 246(2)—after "subsection (1)" insert:

and the matter referred to in subsection (1a)

24—Amendment of section 248—Tribunal must not grant leave unless serious issue to be heard and determined etc

Section 248—delete "that there is a serious issue to be heard and determined as to whether a ground for review set out in section 246(1) exists." and substitute:

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- (a) that there is a serious issue to be heard and determined as to whether a ground for review set out in section 246(1) exists; and
 - (b) in the case of a designated reviewable regulatory decision—that the applicant has established a *prima facie* case that a determination made by the Tribunal varying the designated reviewable regulatory decision, or setting aside the designated reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable designated NGO decision.

25—Amendment of section 249—Leave must be refused if application is about an error relating to revenue amounts below specified threshold

Section 249(1)(a)—after "an error in a" insert:

designated

26—Amendment of section 254—Leave for reviewable regulatory decision process participants

(1) Section 254(1)—after "participant" insert:

(other than a user or consumer intervener)

(2) Section 254(2)—delete subsection (2)

27—Amendment of section 256—Interveners may raise new grounds for review

(1) Section 256—after subsection (1) insert:

5 (1a) If an intervener raises a new ground for review under subsection (1) in relation to a designated reviewable regulatory decision, the intervener must also specify the manner in which a determination made by the Tribunal varying the designated reviewable regulatory decision, or setting aside the designated reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 10 1 or more grounds raised in the notice of intervention or in the application for review, either separately or collectively, would, or would be likely to, result in a materially preferable designated NGO decision.

15 (2) Section 256(2)—after "subsection (1)" insert:

and the matter referred to in subsection (1a)

28—Amendment of section 258—Matters that parties to a review may and may not raise in a review

Section 258—before subsection (1) insert:

20 (a1) This section does not apply to a designated reviewable regulatory decision (see section 258A).

29—Insertion of section 258A

After section 258 insert:

**258A—Matters that may and may not be raised in a review
(designated reviewable regulatory decisions)**

25 (1) This section applies to a designated reviewable regulatory decision.

(2) The AER, in a review of a decision to which this section applies, may—

30 (a) respond to any matter raised by the applicant or an intervener; and

(b) raise any other matter that relates to—

(i) a ground for review; or

(ii) a matter raised in support of a ground for review; or

35 (iii) a matter relevant to the issues to be considered under section 259(4a) and (4b).

(3) In a review of a decision to which this section applies, the following provisions apply in relation to a person or body, other than the AER (and so apply at all stages of the proceedings before the Tribunal):

5 (a) a covered pipeline service provider that provides the pipeline services to which the decision being reviewed applies may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised and maintained by the provider in submissions to the AER before the decision was made;

10 (b) a covered pipeline service provider whose commercial interests are materially affected by the decision being reviewed may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised and maintained by the provider in submissions to the AER before the decision was made;

15 (c) an affected or interested person or body (other than a provider under paragraph (a) or (b)) may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised by the person or body in a submission to the AER before the decision was made;

20 (d) subject to paragraphs (a), (b) and (c)—

25 (i) the applicant, or an intervener who has raised a new ground for review under section 256, may raise any matter relevant to the issues to be considered under section 259(4a) and (4b); and

30 (ii) any person or body, other than the applicant or an intervener who has raised a new ground for review under section 256, may not raise any matter relevant to the issues to be considered under section 259(4a) and (4b) unless it is in response to a matter raised by—

(A) the AER under subsection (2)(b)(iii); or

(B) the applicant under subparagraph (i); or

35 (C) an intervener under subparagraph (i).

(4) For the purposes of subsection (3)(d)—

(a) a reference to an applicant includes a reference to a person or body who has applied to the Tribunal for leave to apply for a review under this Division; and

40 (b) a reference to an intervener includes a reference to a person or body who has applied to the Tribunal for leave to intervene in a review under this Division.

30—Amendment of section 259—Tribunal must make determination

(1) Section 259(2)—delete subsection (2) and substitute:

(2) Subject to subsections (4) and (4a), a determination under this section may—

- (a) affirm the reviewable regulatory decision; or
- (b) vary the reviewable regulatory decision; or
- (c) set aside the reviewable regulatory decision and remit the matter back to the original decision maker to make the decision again in accordance with any direction or recommendation of the Tribunal.

(2) Section 259(3)—after "(2)(a)" insert:

or (b)

(3) Section 259(4)—after "decision again" insert:

, other than in a case where the decision is a designated reviewable regulatory decision

(4) Section 259—after subsection (4) insert:

(4a) In a case where the decision is a designated reviewable regulatory decision, the Tribunal may only make a determination—

- (a) to vary the designated reviewable regulatory decision under subsection (2)(b); or
- (b) to set aside the designated reviewable regulatory decision and remit the matter back to the AER under subsection (2)(c),

if—

- (c) the Tribunal is satisfied that to do so will, or is likely to, result in a decision that is materially preferable to the designated reviewable regulatory decision in making a contribution to the achievement of the national gas objective (a *materially preferable designated NGO decision*) (and if the Tribunal is not so satisfied the Tribunal must affirm the decision); and
- (d) in the case of a determination to vary the designated reviewable regulatory decision—the Tribunal is satisfied that to do so will not require the Tribunal to undertake an assessment of such complexity that the preferable course of action would be to set aside the decision and remit the matter to the AER to make the decision again.

(4b) In connection with the operation of subsection (4a) (and without limiting any other matter that may be relevant under this Law)—

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- (a) the Tribunal must consider how the constituent components of the designated reviewable regulatory decision interrelate with each other and with the matters raised as a ground for review; and
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- (b) without limiting paragraph (a), the Tribunal must take into account the revenue and pricing principles (in the same manner in which the AER is to take into account these principles under section 28); and
- (c) the Tribunal must, in assessing the extent of contribution to the achievement of the national gas objective, consider the designated reviewable regulatory decision as a whole; and
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- (d) the following matters must not, in themselves, determine the question about whether a materially preferable designated NGO decision exists:
- (i) the establishment of a ground for review under section 246(1);
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- (ii) consequences for, or impacts on, the average annual regulated revenue of a covered pipeline service provider;
- (iii) that the amount that is specified in or derived from the designated reviewable regulatory decision exceeds the amount specified in section 249(2).

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(4c) If the Tribunal makes a determination under subsection (2)(b) or (c), the Tribunal must specify in its determination—

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- (a) the manner in which it has taken into account the interrelationship between the constituent components of the designated reviewable regulatory decision and how they relate to the matters raised as a ground for review as contemplated by subsection (4b)(a); and
- (b) in the case of a determination to vary the designated reviewable regulatory decision—the reasons why it is proceeding to make the variation in view of the requirements of subsection (4a)(d).
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(5) Section 259(5)—delete "setting aside or varying" and substitute:
varying or setting aside

31—Amendment of section 261—Matters to be considered by Tribunal in making determination

(1) Section 261(1)—delete subsection (1) and substitute:

(1) Subject to this section, the Tribunal, in acting under this Division in relation to a reviewable regulatory decision—

(a) must not consider any matter other than review related matter (and any matter arising as a result of consultation under paragraph (b)); and

(b) must, before making a determination that relates to a designated reviewable regulatory decision, take reasonable steps to consult with (in such manner as the Tribunal thinks appropriate)—

(i) users and prospective users of the pipeline services; and

(ii) any user or consumer associations or user or consumer interest groups,

that the Tribunal considers have an interest in the determination, other than a user or consumer association or a user or consumer interest group that is a party to the review.

(2) Section 261(2)—delete subsection (2)

(3) Section 261(3)—delete "In addition, if in a review," and substitute:

If in a review, other than a review that relates to a designated reviewable regulatory decision,

(4) Section 261(3)—delete "has been established" and substitute:

has been made out

(5) Section 261—after subsection (3) insert:

(3a) If in a review that relates to a designated reviewable regulatory decision the Tribunal is of the view that a ground for review has been made out, the Tribunal may, on application by a party to the review, allow new information or material to be submitted if the party can establish to the satisfaction of the Tribunal that the information or material—

(a) was publicly available or known to be publicly available to the AER when it was making the designated reviewable regulatory decision; or

(b) would assist the Tribunal on any aspect of the determination to be made and was not unreasonably withheld from the AER when it was making the designated reviewable regulatory decision,

and was (in the opinion of the Tribunal) information or material that the AER would reasonably have been expected to have considered when it was making the designated reviewable regulatory decision.

(3b) In addition, if in a review of a designated reviewable regulatory decision the Tribunal is of the view—

- (a) that a ground for review has been made out; and
- (b) that it would assist the Tribunal to obtain information or material under this subsection in order to determine whether a materially preferable designated NGO decision exists,

the Tribunal may, on its own initiative, take steps to obtain that information or material (including by seeking evidence from such persons as it thinks fit).

(3c) The action taken by a person acting in response to steps taken by the Tribunal under subsection (3b) must be limited to considering decision related matter under section 68C.

(3d) In addition, in the case of a review of a designated reviewable regulatory decision that is a decision to make a full access arrangement decision in place of an access arrangement that the AER did not approve, the Tribunal may consider the reasons of the AER for its decision not to approve the access arrangement or proposed revisions to the applicable access arrangement (as the case may be).

(6) Section 261(4)—after "subsection (3)(b)" insert:

and (3a)(b)

(7) Section 261(4)—delete "or the NCC" twice occurring and substitute, in each case:
, the NCC or the AER

(8) Section 261(6)—delete subsection (6)

(9) Section 261(7), definition of *review related matter*—delete the definition and substitute:

review related matter means—

- (a) the application for review; and
- (b) a notice raising new grounds for review filed by an intervener; and
- (c) the submissions made to the Tribunal by the parties to the review; and
- (d) —
 - (i) in the case of a designated reviewable regulatory decision—
decision related matter under section 68C; or
 - (ii) in any other case—
 - (A) the reviewable regulatory decision and the written record of it and any written reasons for it; and
 - (B) any written submissions made to the original decision maker before the reviewable regulatory decision was made or the NCC before the making of an NCC recommendation; and

(C) any reports and materials relied on by the original decision maker in making the reviewable regulatory decision or the NCC in making an NCC recommendation; and

(D) any draft of the reviewable regulatory decision or NCC recommendation; and

(E) any submissions on—

- the draft of the reviewable regulatory decision or the reviewable regulatory decision itself considered by the original decision maker; or
- the draft of an NCC recommendation or the NCC recommendation itself considered by the NCC; and

(F) the transcript of any hearing (if any) conducted by the original decision maker for the purpose of making the reviewable regulatory decision; and

(e) any other matter properly before the Tribunal in connection with the relevant proceedings.

32—Amendment of section 268—Costs in a review

Section 268(2)(c)—before "the submissions" insert:

in the case of the AER in a review of a designated reviewable regulatory decision—

33—Amendment of section 269—Amount of costs

Section 269—after its present contents (now to be designated as subsection (1)) insert:

(2) However, in the case of a review that relates to a designated reviewable regulatory decision—

(a) subsection (1) does not apply in relation to an order for costs against a small/medium user or consumer intervener; and

(b) if the Tribunal makes an order for costs against a small/medium user or consumer intervener in favour of another party, the costs must be limited to the payment of reasonable administrative costs (as determined by the Tribunal) of that other party.

34—Insertion of section 269A

After section 269 insert:

269A—Costs not to be passed on

(1) This section applies to any expenditure or cost that a service provider incurs, or is forecast to incur, as a result of or incidental to a review that relates to a designated reviewable regulatory decision under this Part, including costs awarded under section 268.

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- (2) A service provider—
- (a) must not, for the purposes of an applicable access arrangement decision, include as part of its capital expenditure or operating expenditure any expenditure or cost to which this section applies; and
 - (b) must not recover from end users or seek a pass through of any expenditure or cost to which this section applies.
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- (3) This section applies despite any provision to the contrary in this Law, the Rules, an applicable access arrangement or an applicable access arrangement decision (and this section prevails to the extent of any inconsistency between such a provision and this section).

35—Amendment of section 270—Review of Part

Section 270(1)—delete subsection (1) and substitute:

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- (1) The MCE must initiate a review of the Tribunal's role under this Part by 1 December 2016.
 - (1a) The review will be undertaken by a person nominated by the MCE.