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Dr Kerry Schott
Independent Chair
Energy Security Board

Sent electronically: info@esb.org.au

Dear Dr Schott

Re: Consultation on ACCC Retail Electricity Pricing Inquiry: Recommendation 1

Thank you for the opportunity to provide comment to the Energy Security Board (ESB) public consultation on Recommendation 1 of the ACCC's 2018 *Retail Electricity Pricing Inquiry* (REPI).

The ACCC welcomes the consultation process and we recognise that there are technical details that need to be considered as part of the implementation process. Recommendation 1 is designed to limit market concentration and thus promote competition between generators in the National Electricity Market (NEM). Competition is essential to deliver affordable prices for end users. We found in the REPI that concentration in generation ownership throughout the NEM is a contributing factor to higher wholesale prices and prices for end users. Market concentration, both within specific NEM regions and across the NEM, has recently increased due to acquisitions and closures of significant assets.

In an energy-only market like the NEM, competition between generators is crucial to ensure that wholesale prices reflect the cost of generation. The NEM is structured such that there are minimal restrictions on how generators can bid into the market other than the price caps and good faith rebidding rules. Neither of these rules limit participants from raising prices should they be in a position to do so. Concentration can significantly affect bidding behaviour, particularly where generators can bid in a manner knowing that their capacity will need to be dispatched in order to meet demand. Further, a rational business will seek to optimise the returns from its portfolio rather than an individual generator.

Under section 50 of the *Competition and Consumer Act 2010* (Cth) (CCA), the ACCC can seek to prevent any mergers or acquisitions which have the effect or likely effect of 'substantially lessening competition'. Acquisitions of generation capacity by large incumbent businesses may lessen competition, but not in a manner that is considered substantial given the already high levels of concentration in the NEM. Therefore, while the ACCC does not typically favour market share caps as a means to protect competition, special measures are warranted in the NEM to limit further concentration. Such use of a market share cap is not unprecedented, with similar restrictions present in other sectors in Australia, such as airports, and abroad in the energy-only markets of Texas, United States and Alberta, Canada. The cap on acquisitions would operate in addition to section 50 of the CCA and would work to constrain greater levels of concentration. Further, it would not preclude the ACCC from considering (and potentially objecting to) any acquisitions that fall below the 20 per cent threshold under section 50 of the CCA.

Although a cap on concentration may not have an immediate impact on the market, it is an important safeguard for the future, particularly in this period of major market transition.

The ACCC is of the view that current and future investment in new generation capacity should be encouraged, and so the cap should not apply to increases in a firm's market share as a result of new investment. The provision should also allow for relevant exceptions; for example, the case where a market participant with a share of more than 20 per cent is acquired by a new entrant. Regarding the ESB's question about whether owning a very small amount of generation should preclude that market participant from purchasing a generation portfolio that would exceed the 20 per cent cap, the ACCC considers that such an exemption may be appropriate so long as the threshold for existing generation is sufficiently low. Though we also note that such situations could be resolved with structural remedies, such as divestment of relevant assets, approved by the AER.

The ACCC considers that 20 per cent is the appropriate cap on the ownership or control of generation capacity in any NEM region or across the NEM as a whole in order to prevent any further concentration of power in an already concentrated sector. A threshold of 20 per cent should limit the ability of larger participants to further entrench their positions, while not preventing small players from expanding. At the time of the REPI, there was one market participant that controlled more than 20 per cent across the NEM, while in each NEM region at least one firm controlled greater than 20 per cent of that region's capacity.

The cap should apply to both ownership and control from all generators affiliated with a market participant, including through arrangements such as power purchase agreements (PPAs). In terms of how to measure the capacity of each generator, we appreciate that there will be some technical details to consider for different types of generators. As a general guide, we noted in the REPI that the calculation of capacity should:

- be based on the nameplate capacity of thermal/dispatchable generation units. For other types of generation, where maximum capacity is infrequently achieved (including renewable solar and wind), that capacity should have an adjustment based on some measure of average dispatch. Similarly, capacity subject to PPAs should have an adjustment based on some measure of average purchases
- account for a market participant's capacity that is available in adjoining NEM regions, adjusted for interconnector limits across regions.

The AER should have responsibility for enforcement of the cap on acquisitions. Its assessment should extend only to whether or not a proposed acquisition (or contractual arrangement) results in the threshold being exceeded. That is, the AER should not undertake an assessment of competition in order to determine a breach of the cap. To enforce the provision, the AER should have the appropriate investigative powers, and be able to seek injunctions, declarations and divestiture as appropriate to prevent or unwind any such acquisitions. Penalties should apply in line with the highest available penalties under the National Electricity Law (NEL).

The ACCC is willing to provide further information to the ESB on any of the matters discussed. If you have any questions in relation to this submission, please contact Lyn Camilleri, General Manager Electricity Markets Branch, on (03) 9290 1973.

Yours sincerely



Rod Sims
Chair