Dr Kerry Schott AO
Independent Chair
COAG Energy Council
Energy Security Board

8 March 2019

Submitted via email: info@esb.org.au

Dear Dr Schott

ACCC RECOMMENDATION 1 –MARKET SHARE CAP CONSULTATION PAPER

Origin Energy Limited (Origin) welcomes the opportunity to comment on the Energy Security Board's (ESB) consultation into a proposed 20 percent market share cap on generator acquisitions in the National Electricity Market (NEM). We do not consider that a market cap is necessary, and there is uncertainty as to how it could be practically applied in an efficient manner. We also hope that this consultation process will focus on the merits of adopting the proposal and not simply move to how it can be implemented. Our key points are summarised below, with more detail provided in the attached submission:

- Competition concerns pertaining to future acquisitions in the NEM are most appropriately addressed through the ACCC's existing powers under section 50 of the Competition and Consumer Act 2010 (CCA).
- The establishment of an arbitrary market share cap that has no clear link to actual competitive outcomes, is not principled, nor is it needed given section 50 of the CCA.
- The requirement that an acquisition can only be prohibited if there is a substantial lessening of competition in a market is a reasonable threshold. If there are broader concerns regarding this requirement these would need to be addressed through changes to the CCA, not by an artificial sector specific requirement.
- The consultation paper refers to the possibility of increased levels of concentration given pending retirements of large thermal generators. However, market developments including greater levels of interconnection through the Integrated System Plan (ISP), the increasing uptake of distributed energy resources, and a new requirement for generator closure notification are likely to lessen rather than exacerbate any concerns around market concentration.
- Practically, it is not clear how market share for the purposes of enforcing the cap can be reasonably determined. Reliance on nameplate capacity is limited and does not account for several important factors such as the 'firmness' of generation capacity (as dictated by technology type and plant reliability), transmission constraints, and interconnector flows.
- Market concentration is not necessarily indicative of competitive outcomes or any misuse of market power. Given this, an individual assessment of a potential acquisition remains the most effective means of understanding 'what is really going on' to determine the impact on competition.

Should you wish to discuss this information further, please contact James Googan in the first instance via email james.googan@originenergy.com.au or phone, on (07) 3512 4138.

Yours sincerely,

Steve Reid
Group Manager, Regulatory Policy

Origin Energy Limited ABN 30 000 051 696; Level 32, Tower 1, 100 Barangaroo Avenue, Barangaroo, Sydney NSW 2000;
GPO Box 5376, Sydney NSW 2001 • Telephone (02) 8345 5000 • Facsimile (02) 9252 9244 • www.originenergy.com.au

Attachment A

1. *Competition concerns regarding acquisitions are most appropriately addressed by s.50 of the CCA, and not the by the imposition of an arbitrary market share cap*

Competition concerns pertaining to future acquisitions in the NEM are most appropriately addressed through the ACCC's existing powers under section 50 of the Competition and Consumer Act 2010 (CCA). The requirement that an acquisition can only be prohibited if there is a substantial lessening of competition is a reasonable threshold, and should not be used as a means of justifying the imposition of what can only be considered as an arbitrary market share cap. If there are broader concerns regarding this requirement it would need to be addressed through changes to the CCA, not through an artificial sector specific requirement as being contemplated here. It should also be noted that the 2015 Competition Policy Review[1] headed by Professor Ian Harper found that the merger provisions under section 50 of the CCA are working effectively and did not recommend any changes to the substantive law. The Federal Government's response to the Review also concluded that the merger provisions of the CCA are working effectively[2].

2. *After examining the underlying reasons for the proposal, we do not consider that the case for a market share cap has been made*

a. Adequacy of section 50 of the CCA. As discussed earlier, Origin considers that the CCA adequately safeguards against mergers and acquisitions that are likely to have a detrimental impact on competition in a market. No supporting evidence has been presented to suggest the contrary.

b. Plant retirement and market concentration. Notwithstanding future generator retirements, new policy and market developments are likely to mitigate, rather than exacerbate, any concerns regarding future market concentration. We discuss some of these developments below.

   - AEMO's ISP has set out a plan for significantly greater levels of interconnection across the NEM which will lower the degree to which regional concentration can impact pricing and competition outcomes. The ESB is currently fast tracking 'priority 1' projects identified in the ISP, with a view to increasing interconnector capacity in the near term.

   - The new requirement for 3-year advanced notice for generator closure will help to reduce the likelihood of future increases in market concentration due to sudden generator exit such as the retirement of the Hazelwood power station.

   - The NEM is undergoing a fundamental transition from a market primarily dependent on large baseload generation with the increasing entry of renewables, distributed energy, and storage. AEMO's recent statement of opportunities (ESOO) modelled over 5.6 gigawatts (GW) of committed new generation and storage capacity, and upgrades to existing generation. This includes 2.7 GW of utility-scale wind and solar generation added in the past quarter alone, mainly in Victoria[3]. The changing generation mix alongside more interconnection is likely to further promote competition, rather than exacerbate any concerns regarding concentration.

---

[1] Competition Policy Review, March 2015, p.332.
http://competitionpolicyreview.gov.au/files/2015/03/Part4_final-report_online.pdf

[2] Australian Government response to the Competition Policy Review, 2015, p.28
https://static.treasury.gov.au/uploads/sites/1/2017/06/Govt_response_CPR.pdf

[3] AEMO Electricity Statement of Opportunities 2018, p.3
https://www.aemo.com.au/-/media/Files/Electricity/NEM/Planning_and_Forecasting/NEM_ESOO/2018/2018-Electricity-Statement-of-Opportunities.pdf

c. Market structure concerns in Queensland. In referring to the Queensland region, the consultation paper states that the ACCC's preference is for a structural solution rather than government directions or regulated bidding constraints. However, the direct link between this view and the proposed market share cap is not immediately clear. If structural issues have been identified in Queensland, these should be addressed separately. Imposition of a cap on future acquisitions will have no bearing on current market conditions in the State.

d. International precedence. The ESB notes that there have been international and Australian precedents to limit market concentration. However, we would caution against drawing any conclusions from this, absent a thorough analysis of the markets in question, and an in-depth understanding of the nature of the restrictions. We note for example, (as set out in the Retail Electricity Pricing Inquiry final report), Alberta restricts the ability for firms to own or control more than 30 percent generation capacity in the state[4]. It is our understanding, however, that Alberta has limited interconnection with other Canadian provinces. This differs from the NEM which is highly interconnected, with plans to become even more so.

3. *An individual assessment of a future acquisition is the most effective means of determining the likely impact on competition*

Market concentration does not necessarily equate to a substantial lessening of competition nor does it necessarily enable the exercise of market power. There are many other factors (some of which are interrelated) that would need to be considered, including:

Generation type. The type and nature of the generation in question will have a significant bearing on the potential impact an acquisition will have on market outcomes, beyond what can be deduced from a generator's nameplate capacity. Specifically, issues such as technology type (i.e. peaking, intermittent, baseload); age and reliability of the plant; ramping capability; and short run marginal cost relative to other generators, are all important factors. Older generators are likely to have lower levels of reliability and more planned and unplanned outages. Additionally, baseload plant could be susceptible to the changing market dynamics with the influx of zero short run marginal cost renewables providing more energy in the middle of the day and during windy periods.

Transmission constraints. AEMO can impose constraints to ensure the integrity of the power system, which can in turn limit the extent to which a generator is able to be dispatched.

Interconnector flows. Energy from an adjoining region competes with native generation within the importing region and will therefore have implications for competition. Any consideration of market share would not need to account for interconnected energy which essentially serves as another generator within the imported region.

Contracting and retail load. Where a generator has long term contracts in place or its own retail load, this is likely to diminish any benefit from high spot price outcomes or exercise of market power.

The above further highlights the need for an individual assessment of each proposed acquisition as opposed to a blanket restriction based on a predetermined threshold.

4. *Determining market share as a means of enforcing the cap is complex and it is not clear that this can be done in an efficient manner*

There is no evidence to suggest that 20 percent is the appropriate threshold, which again highlights the randomness associated with the proposal.

[4] ACCC 2018: Retail Electricity Pricing Inquiry Final Report, pg. 90

As the consultation paper notes, reliance on nameplate capacity is a blunt instrument which does not account for the factors discussed in section 4 of this submission. The Australian Energy Regulator's (AER) State of the Energy Market report[5] examines market share in two ways:

1. Market Shares in Generation Capacity – where it takes a point in time as a reference, in this case 2017–18 summer capacity. The AER examines firm dispatchable generation and accounts for wind and solar using AEMO's 'firm contribution' estimates in order to assess the generation likely to be operational during periods of maximum demand. Capacity is allocated to the business that controls the trading rights for each generator (e.g. PPA's). Import capacity via interconnectors and rooftop solar PV capacity are excluded.

2. Market Shares in Generation Output – where it makes a terawatt hour calculation of the total output in 2017–18. Ownership is attributed by trading rights at the time, e.g. PPAs and it excludes output from rooftop solar PV systems.

Origin considers that option 2 is more appropriate as the actual output of a unit over a period is better able to account for characteristics such as intermittency, outages and run profiles. Notwithstanding this, the obvious drawback is that the analysis is backward looking and not necessarily indicative of future dispatch, particularly in an ever-changing market.

The detail of agreements such as PPAs or generator tolling arrangements would also need to be examined. For example, a PPA can simply be an offtake agreement where the entirety of the contract is attributed to the purchasing party. In other arrangements, the owner of the asset can still control the generator's dispatch. The implications for market competitiveness are different under the two approaches.

[5] AER State of the Energy Market, December 2018, p.108-109.