

10 October 2019

Energy Security Board

By email: info@esb.org.au

Re: Response to Post 2025 Market Design - Issues Paper September 2019

We welcome the opportunity to respond to the Issues Paper for the ESB's review of the Post 2025 Market Design.

Spark Infrastructure and its securityholders are the providers of long-term equity capital into energy infrastructure investments in the National Electricity Market (**NEM**). We have a keen interest in ensuring the NEM provides the right environment for investment that delivers the lowest cost, secure and reliable electricity system over the long term for the benefit of customers.

With investments in electricity transmission and distribution networks in NSW, South Australia and Victoria and the recent addition of the Bomen Solar Farm in NSW, we have direct experience in regard to the opportunities and challenges of delivering investment in new interconnection, connecting new generation and facilitating the efficient use of distribution networks to meet changing customer needs.

We consider that the assessment framework proposed in the Issues Paper for the post 2025 market design must include predictability, investability and the ability to withstand political interference.

We note with disappointment the exclusion of governance from the scope of the review, despite strong but agile governance being a key outcome identified in the COAG Energy Council's Strategic Energy Plan (**SEP**). Independence and strong governance must be incorporated in the post 2025 NEM market design and would be consistent with the COAG Energy Council's agreement to re-commit to the Australian Energy Market Agreement (**AEMA**) in response to the Finkel Review. The AEMA sets out roles, powers and responsibilities and its objectives are to promote the long-term interests of consumers and establish a framework for further reform.¹

Investors must have confidence that the market design will be resilient to change and political influence that is not supported by clear policy, robust processes and appropriate evidence. Without commitment and adherence to strong governance, even the best market design will remain subject to ad-hoc, incremental and, at times, unpredictable or politically driven change that stymies investment to the detriment of customers.

¹ Commonwealth and state governments of Australia, *Amendments to the Australian Energy Market Agreement*, 9 December 2013, p.9.

We believe that some critical features of the NEM have been eroded as a result of not adhering to the AEMA. For example:

- The Commonwealth acted unilaterally to abolish merits review (a critical control to increased discretion afforded to a regulator); and
- The COAG Energy Council removed the powers of the AEMC to make rules in relation to the rate of return and the value of imputation credits; and, in addition, increased the power and discretion of the AER in relation to these issues to effectively remove judicial review rights.

These outcomes and arrangements must be addressed and corrected in the post 2025 market design if investors and customers alike are to have confidence in decision makers, their decision making, and the resilience of the market design. This is not a new concept or unique to the energy sector. As outlined by The Hon. Justice Deirdre O'Connor²:

The availability of administrative review has led to increased awareness among decision makers about the exercise of decision making power within the terms of authorising legislation, promoted the consistent application of the law by decision makers and led to improvements in the quality of primary decision making.

We recommend that appropriate review rights are restored and accountability for the use of discretion and the separation of rule maker and rule enforcer be re-established. A successful regime is not where review of a regulator's decision is prevented but where review rights are available but seldom required.

We also note that this review is being undertaken when regulatory, political and sovereign risks are at unprecedented high levels and regulated returns on electricity networks are at unprecedented low levels. This will increase costs to customers and prevent improvements in services over the long term as a result of poor incentives to invest in interconnectors, connect renewable energy zones, innovate and to support networks as providers of platforms for two-way energy and data flows.

These investments are critical to deliver the \$4 billion+ in benefits to customers identified by AEMO in the Integrated System Plan. Difficulty in raising capital to undertake this investment will lead to delays, and the requirement for government support or higher cost capital which will erode savings to customers.

We support a market design that is more than theoretically sound but also capable of facilitating the efficient investment required to achieve policy objectives and deliver better outcomes and lower costs to customers.

Please contact me on 0421 057 821 for further discussion regarding this submission.

Yours sincerely,



Sally McMahon
Head of Economic Regulation
Spark Infrastructure

² The Hon. Justice Deirdre O'Connor, Lessons from the Past/Challenges for the Future: Merits Review in the New Millennium, Paper presented at the 2000 National Administrative Law Forum – Sunrise or Sunset? Administrative Law in the New Millennium, June 2000.