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Electricity Legislation Consultation
Structural Reform Group
The Treasury
Langton Crescent
Parkes ACT 2600

By Email: Electricity.Legislation@treasury.gov.au

Dear Sir/Madam

Electricity Price monitoring and responsive legislative framework – Consultation Paper

The Australian Industry Group (Ai Group) welcomes the opportunity to make this short submission on the Commonwealth's proposals to implement legislation regarding a price monitoring and response regime for the electricity sector.

Ai Group's members comprise businesses of all sizes across Australia. While some of our member are involved in energy supply, the vast majority are energy users. They have a strong interest in ensuring the supply of affordable, reliable and clean energy. Eastern Australia is currently experiencing very high prices for electricity and gas. Ai Group has a strong preference for efficient market clearing mechanisms and predictable energy policy settings to avoid discouraging the investment that can help lower electricity prices. Excessive and unpredictable intervention in the electricity market risks deterring effective investment and adversely affecting the long-term interests of energy consumers.

While we have concerns about the timeframe for this public inquiry and the lack of detail regarding a number of substantive and procedural issues in the consultation paper, we acknowledge that given the specific and unique characteristics of the electricity sector there may be a need to introduce some additional provisions in the *Competition and Consumer Act 2010 (Cth)* (CCA), to target specific conduct in the sector.

We do not support the amendments to the CCA or standalone legislation which would create a power to require a corporate entity to divest some or all of its assets. Such a measure would undermine the National Electricity Objective as stated in the *National Electricity Law*, which is to '*promote efficient investment in and efficient operation and use of electricity services for the long-term interests of consumers of electricity*'. As we said when divestment powers were flagged in August, whilst threats of intervention, such as the Australian Domestic Gas Security Mechanism, can be appropriate and effective in a supply crisis, they do carry serious risks that need to be weighed against the benefits. The threat of divestiture or involuntary restructuring presents further deep uncertainty for an electricity sector that needs to invest and is already struggling with an opaque and chaotic policy landscape. We further stated that the Commonwealth needs to exercise considerable caution in developing any measures for the forcible breakup of electricity businesses.

There is currently a strong wave of investment in renewable energy, initially inspired by the national Renewable Energy Target (RET) but now also supported by a tight generation market and the emerging corporate power purchase agreement (CPPA) market. However, ongoing uncertainty over national energy and climate policy has greatly exacerbated the underlying uncertainty of investment in a market undergoing fundamental changes to technology and business models. This uncertainty has deepened following the abandonment of the National Energy Guarantee (NEG) Emissions Obligation. There are greater threats to reliability over time and we are falling short of our economy-wide emissions reduction goals. In other words, we are failing on all elements of the 'energy trilemma' identified by the

Finkel Review, despite the considerable progress underway on energy market and policy reforms in recent years. Investment beyond the RET is thus likely to be lower and slower than it should be if there is no improvement in this policy uncertainty.

Ai Group strongly believes that given the existing level of uncertainty in the energy sector, further measures to force business entities to restructure or divest some or all of their assets, risks having a materially detrimental impact on their existing commercial operations and investment strategies. These risks apply to all private participants in the generation sector, not just large incumbents. More generally, ministerial discretion to break up power businesses would set a poor precedent for disproportionate government intervention in the wider economy. It will raise deep reservations among domestic and international institutional investors regarding investment in Australia, including in the wider infrastructure sector.

Ai Group notes that the Australian Competition & Consumer Commission's (ACCC) recent retail electricity pricing inquiry final report referred to the divestiture of privately owned assets as an 'extreme' measure. They instead recommended a soft 20% cap on market share in the generation sector, a recommendation which is now being developed through other processes. The ACCC took a cautious approach with this cap, since they do not generally regard capping share as not the most effective means of generating market entry and competition. Their recommendation was very much the exception rather than the rule, motivated by the limitations of the existing section 50 of the CCA which could lead to further market consolidation and entrench the market power of incumbents in the face of 'major market transition'.¹

Section 50 of the CCA can only prevent mergers or acquisitions which have the effect of 'substantially lessening competition'. Any merger or acquisition which lessens competition, but not substantially, would hence not be caught by the existing provision. The imposition of a 20% market share limitation is intended to limit the market power of incumbents and enable commercially viable market entry, thereby ensuring effective long-term competition.² However, the ACCC limit the scope of their recommendation to prohibit growth beyond the cap through further acquisitions. Their report states that entities which currently have more than 20 per cent market share should not be required to divest or restructure their operations, nor prevented from building their own new assets.³ The ACCC recognizes that short periods of high prices in the NEM provide an important signal for further investment. However, if efficient market entry is being deterred during periods of high prices than this merits further investigation regarding market structure and power.⁴ It is apparent that the ACCC does not want to hamper investment sentiment by both existing and future market participants. We note that the ACCC report points out that the lack of an effective and durable climate policy has been a major cause of investment uncertainty.⁵

The Consultation Paper acknowledges that a temporary increase in prices can provides a vital signal for market entry. However, apart from the limited hypothetical examples the paper provides very little by way of detail to explain its understanding of the exercise of 'market power' or a 'substantial lessening of competition'. Given the vast amount of legal precedent for the relevant provisions of the CCA regarding 'market power' and the 'substantial lessening of competition' and the numerous guidelines issued by the ACCC and other regulatory bodies, it would be useful to have further details on the Commonwealth's thinking.

The Consultation Paper is vague or altogether silent on a number of important substantive and procedural issues. It offers no initial guidance on the key determining factors for use of the three Treasurer-ordered remedies, nor how the additional remedies would function together with the comprehensive existing provisions for anti-competitive conduct and associated remedies in the CCA.

¹ Australian Competition & Consumer Commission, *Restoring electricity affordability and Australia's competitive advantage, Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. 90

² Ibid

³ Ibid, p. 91

⁴ Ibid, p. 98

⁵ Ibid, p. 100-102



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No guidance or references are provided in relation to how the 'public benefit' and 'public detriment' tests would be applied. It is unclear how the ACCC or Treasurer would determine that divestiture of one or more specific assets is an appropriate or effective solution to problematic activity.

We note that previous legislative amendments to the CCA have followed a comprehensive and rigorous consultative process, notably in relation to the relatively recent 'Harper Review'. The ACCC, AER and AEMC all follow a lengthy consultative process in relation to their determinations. Given the magnitude and far reaching implications of the proposed legislative amendments, we are deeply concerned about the limited time frame for public consultation and stakeholder engagement.

Should you wish to discuss the matters raised in this letter, please contact our adviser Tennant Reed on 03 9867 0145 or tennant.reed@aigroup.com.au.

Sincerely yours,

Innes Willox
Chief Executive