

The Hon Malcolm Turnbull MP  
Prime Minister  
Parliament House  
CANBERRA ACT 2600

By email: [Malcolm.Turnbull.MP@aph.gov.au](mailto:Malcolm.Turnbull.MP@aph.gov.au)

24 April 2018

## Re: Binding rate of return guideline legislation

We write to you as a leading long-term Australian investor in electricity transmission and distribution networks.

Spark Infrastructure is listed on the Australian Stock Exchange and has been invested in the electricity networks sector since 2005, with network investments in South Australia, Victoria and NSW.

We have been working with a group of investors, who collectively provide more than \$13 billion in capital to Australian energy Network Service Providers (**NSPs**), to consider the investment implications of the COAG Energy Council Senior Committee of Officials proposed amendments to legislation to make the Australian Energy Regulator's (**AER**) Rate of Return Guideline (**RORG**) binding.

We have a number of significant concerns, which we outlined in our submission to this process (refer attached). However, I would like to emphasise the following points:

- The RORG and associated legislation are the most important pieces of regulatory related guidance and law to investors (who provide equity capital) and to debt financiers, both of whom underpin the efficient capital structures of most NSPs – wholly-owned Government businesses excluded. Inefficient capital structures will mean that consumers will pay more unnecessarily for their network services.
- Although industry expected changes to make the AER's RORG binding, the draft amendments go considerably further and will either deter private investment or drive up prices, or both.
- Last year, despite industry and the AER working in good faith to reform the limited merits review (LMR) framework under the direction of the COAG Energy Council (and as recommended in the Finkel Report), the Commonwealth took unilateral action to abolish LMR.
- Most importantly however, was that the abolition of LMR was only predicated on the fact that judicial review would remain. The draft legislation goes too far, and in practice will effectively remove the rights of investors and NSPs to judicial review, despite the retention of judicial review being considered a necessity when assessing the abolition of LMR.
- The removal of LMR, and now the proposed RORG legislation, is undermining the role of the COAG Energy Council and the Australian Energy Markets Commission (**AEMC**) in establishing energy policy and rules in an independent, transparent and robust manner. The Australian Energy Markets Agreement which is an agreement between the Commonwealth and States, is being circumvented by the Commonwealth.
- This proposed legislation will in effect elevate the role of the AER, with respect to the rate of return, to policy setter, rule maker and rule implementer, with no real or practical avenues of review for NSPs, investors or consumers. That is, the AER will not be beholden to the COAG Energy Council, and nor will it be accountable for its decisions, even if it doesn't follow its own stated processes or rules.

Private investment in electricity network assets has delivered savings for consumers. Privately-owned network businesses are consistently the top ranked performers in the annual benchmarking studies conducted by the AER. Continued efficiently-priced private investment in network businesses is at risk.

If these amendments are adopted, Australia will be a global outlier. No other country operates without some form of governance check or judicial review. Even the AER considers that its decisions should be subject to judicial review.

We urge the COAG Energy Council to modify the Legislative Package as follows:

- Limit amendments to only those required to make the RORG binding.
- Do not make amendments that alter or remove the current ROR rules.
- Do not make amendments that alter the powers of existing Australian institutions such as those that:
  - Increase the power of the AER by elevating the RORG into law.
  - Remove the power of the AEMC to make rules in relation to the ROR.
- Ensure that the changes to the RORG do not affect normal judicial review rights and ensure rights in relation to ROR decisions are consistent with other major administrative decisions.

We invite you to contact us to discuss this submission further or to seek further information. Please do not hesitate to call Sally McMahon, Economic Regulatory Advisor, on 0421 057 821 or myself.

Yours sincerely,



**Rick Francis**  
Managing Director & CEO  
Spark Infrastructure

Attachment:

- Response to consultation on binding rate of return (ROR) amendments, dated 13 April 2018