16 September 2020

Critical Infrastructure Centre
Department of Home Affairs
3-5 National Circuit
Barton ACT 2600

Dear Sir/Madam,

Submission on Protecting Australia's Critical Infrastructure reforms

The Clean Energy Council is pleased to provide a submission in response to the Department of Home Affairs' proposed Protecting Critical Infrastructure and Systems of National Significance reforms. Our submission is focused on the proposed changes for the energy sector.

The Clean Energy Council (**CEC**) is the peak body for the clean energy industry in Australia. We represent and work with over 800 of the leading businesses operating in renewable energy and energy storage. We are committed to accelerating Australia's clean energy transformation.

Currently, renewable energy assets are generally unlikely to be considered 'critical infrastructure assets' under the *Security of Critical Infrastructure Act 2018* (Cth), with the exception perhaps of large-scale hydro. The CEC understands that it is the intention of the Department of Home Affairs (**the Department**) that renewable energy assets be regulated under any reforms made to the *Security of Critical Infrastructure Act 2018* (Cth) due to the proposed new definition of 'regulated critical infrastructure asset' for electricity.

The CEC recognises that cyber security is an important issue, particularly in relation to the provision of essential services such as electricity. We also understand that the security obligations proposed in the Consultation Paper have been developed in consultation with the Australian Energy Market Operator (**AEMO**).

However, the CEC has identified a number of issues with the proposed definition of 'regulated critical infrastructure asset' for electricity, which may have a disproportionately adverse effect on renewable energy assets and warrant review by the Department. This submission also provides recommendations around the proposed cyber security obligations. These are outlined below.

Definition of 'critical infrastructure asset' and 'regulated critical infrastructure asset'

1. The electricity generation capacity threshold should be increased or changed

At the industry workshop facilitated by the Department of Home Affairs on 27 August 2020, the following definition of 'regulated infrastructure asset- electricity' was proposed by the Department:

> *Electricity generation and storage*
> • *Any person who engages in the activity of owning, controlling, or operating a generating/storage system directly connected to an electricity network or electricity system*

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with a total nameplate rating of more than 30 MW in the NEM, 10 MW in the WEM, NWIS and NT

• Energy systems that provide system restart ancillary service.

The CEC regards the proposed capacity threshold of 30MW as being substantially lower than is necessary. The Consultation Paper states that it is the Department's intention to protect infrastructure that is *'most critical to Australia's economy, security and sovereignty'* and that, currently, critical infrastructure is defined as:

> *'those physical facilities… which if destroyed, degraded or rendered unavailable for an extended period, would significantly impact on the social or economic wellbeing of the nation, or affect Australia's ability to conduct national defence and ensure national security.'*

A 30MW generator is a very small utility-scale electricity system and we consider it too small to be included within the definition of a 'critical infrastructure asset'. The breach, outage or failure of such a system would not pose any material risk to the stability of the system or supply to consumers, nor is it likely to impact social or economic wellbeing, or national security.

The threshold should be set at a capacity that has at least a medium to high risk of affecting system stability, which we would expect would be significantly greater than 30MW. This capacity threshold should be developed in consultation with AEMO and the electricity sector.

The CEC understands that if the above proposal for increasing the threshold was adopted, there could be concerns multiple projects falling below the higher power thresholds could be aggregated in foreign ownership. The CEC suggests that aggregated assets come under cyber security obligations elsewhere in the *Security of Critical Infrastructure Act 2018*, for example having their own definition or category, rather than being considered 'critical infrastructure assets'. This would assist to ameliorate the Foreign Investment concerns outlined below, while still protecting Australia's cyber security.

2. The definition should only apply to projects that are operational

By the same logic outlined above, projects that are at development or construction phase should not be considered 'critical infrastructure assets' as they are not critical to the supply of electricity and would not affect system stability.

The proposed definition for 'critical infrastructure asset' should be qualified so that the asset is only included under the definition when it is at an operational stage. The CEC suggests that any expanded definition of 'critical infrastructure asset' should include an exemption, similar to the current exemption under the *Security of Critical Infrastructure Rules 2018,* so that any renewable energy asset should not be considered critical if it has not begun to operate since first being built. Once operating, the asset can then fall under the definition of 'critical infrastructure asset' (if it meets the required capacity threshold trigger).

3. The proposed definition may stifle investment

The proposed definition has the potential to stifle foreign investment, both capital and debt, in renewable energy assets, particularly those assets at the critical stage of development. This is because the definition of a 'critical infrastructure asset' is linked to the proposed Foreign Investment Review Board (**FIRB**) definition of 'national security business' which has new obligations for foreign buyers under the *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (**the Bill**).

It is the CEC's understanding that under the Bill, any entity in Australia that is a direct interest holder in relation to a 'critical infrastructure asset' will be considered a 'national security business'. New changes under the Bill include:

- Mandatory pre-investment notification to the Treasurer by any foreign person wanting to acquire 10 per cent or more of a 'national security business',
- A process by which any investment (pre- or post-acquisition) may be 'called in' for review by the Treasurer on national security grounds (**'call-in' power**),
- A new power for the Treasurer to impose conditions, vary conditions, or, as a last resort, order the divestment of any investment which had previously received FIRB approval, on the basis of (among other things) new national security risks (**'last resort' power**), and
- Removal of the exemption for foreign money lenders where obtaining an interest in a national security business, meaning that foreign persons (for example, banks) will need approval before entering into money lending agreements in connection with an asset.

The CEC is concerned that the relationship with these FIRB changes and the *Security of Critical Infrastructure Act 2018* (Cth) create time-consuming requirements and investment uncertainty which will dissuade investors, particularly for relatively small-value (and low megawatt capacity) investments. This poses a very real risk of having a chilling effect on investment for some renewable energy assets and will decrease the number of funding participants.

In circumstances where investors are not dissuaded, the proposed changes will at the very least create delay in the investment process and add complexity to an already challenging regulatory environment. In particular, the proposed 'call-in' and 'last resort' powers have the potential to create significant uncertainty and long-term transaction risk for both investors and developers. In that regard, clear guidelines as to when the 'call-in' power will be exercised would be necessary in providing a higher degree of investor confidence.

These outcomes are undesirable in a climate where significant amounts of new investment are required in Australia's essential energy infrastructure – much of which needs to be sourced from overseas. Additionally, the extensive implications arising from the changes listed above are considered excessive for projects which are not of a substantial size, given the low level of risk to national security, or social and economic wellbeing. The renewable energy sector has a potentially large role to play in assisting the economic recovery post-pandemic and favourable foreign investment conditions will be critical to that recovery.

4. The proposed definition may stifle access to international technology and innovation

In addition to providing finance, foreign input is also essential from a technology and innovation perspective. As mentioned above, the proposed 'call in' power and 'last resort' powers in the Bill and their relationship with *Security of Critical Infrastructure Act 2018* (Cth) create uncertainty and transaction risks, and therefore may be barriers to participation from overseas Original Equipment Manufacturers (**OEMs**) and discourage international partnering. Although some services required to develop and operate renewable assets exist within Australia, a significant proportion of specialist products relating to wind turbine generators, solar farm inverters and hydro turbine generators are typically developed, designed and manufactured abroad. Making the Australian market more difficult to enter for world-class technologies and international developers may have a detrimental impact on Australia's transition to a clean energy future.

Proposed cyber security obligations

1. More clarity around meaning of cyber security incident

The Department proposes that critical infrastructure assets have an obligation to report where affected by cyber security incidents. The CEC suggests there needs to be detail around the definition of cyber security incidents to ensure that trivial matters do not trigger an onerous reporting obligation.

2. Appropriate energy sector regulator

The Department has indicated that there will be an appointed Regulator to regulate compliance with Positive Security Obligations. The CEC suggests the Australian Energy Regulator (**AER**) and Western Australia's Economic Regulation Authority (**ERA)** are the appropriate bodies to oversee the energy industry's obligations under the critical infrastructure framework. The AER and the ERA are subsidiaries of the Australian Competition & Consumer Commission.

3. Standards should be proportionate and developed with the electricity sector

The CEC notes that as part of the Protecting Critical Infrastructure reform timeline, the Department intends to design sector-specific standards later this year, through to early 2021. The CEC recommends that these standards are developed in close consultation with the electricity sector to ensure that:

- An appropriate balance is struck between the protection of cyber security and creating standards that are not overly burdensome, and
- There is clarification around the responsibilities of owners versus operators.

Complying with these standards will necessarily increase a business' compliance costs, and any penalties associated with non-compliance may impact Directors' and Officers' insurance premiums.

Thank you for this opportunity to provide feedback on the proposed Protecting Critical Infrastructure and Systems of National Significance reforms and we look forward to working in co-operation with the Department to refine the proposals to ensure that they are proportionate, practical and do not stifle much needed investment in Australia's energy system.

Please do not hesitate to contact me on 0417 033 752 or at afreeman@cleanenergycouncil.org.au if you wish to discuss these matters further.

Yours sincerely,

Anna Freeman
Director Energy Generation