

The Senate

Economics
References Committee

Foreign investment review framework

Supplementary report

April 2016

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Senate Economics References Committee

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Competition Tribunal
AER	Australian Energy Regulator
ASPI	Australian Strategic Policy Institute
CPC	Communist Party of China
EOI	Expression of Interest
GSP	Gross State Product
IPART	Independent Pricing and Regulatory Tribunal
NEM	National Electricity Market
NSW	New South Wales
SOE	State-owned Enterprise

Chapter 1

Introduction

Referral of the inquiry

1.1 On 25 November 2015, the Senate referred the following matter to the Senate Economics References Committee (committee) for inquiry and report by 4 February 2016:

An examination of the foreign investment review framework, including the powers and processes of the Foreign Investment Review Board, in relation to Australian assets of strategic or national significance being subject to lease or purchase by foreign owned interests, and whether there ought to be any legislative or regulatory changes to that framework to ensure Australia's national interest is being adequately considered, with particular reference to:

- (a) the decision by the Northern Territory Government to grant a 99-year-lease over the Port of Darwin to Landbridge Group;
- (b) the planned lease by the New South Wales Government of TransGrid;
- (c) the decision by the Treasurer to block the sale of S Kidman and Co on national interest grounds; and
- (d) any other related matters.¹

1.2 On 4 February 2016, the committee tabled an interim report. On 8 April 2016, the committee tabled its report. In that report, the committee recommended an extension of the inquiry reporting date to 28 April 2016, in order to enable the committee to examine issues raised by the New South Wales (NSW) Government's decision to lease of 50.4 per cent of Ausgrid, one of the state's largest electricity distribution networks.

1.3 Public submissions to the inquiry are at Appendix 1.

1.4 This report should be read in conjunction with the committee's interim report, which was tabled in the Senate on 4 February 2016, and its substantive report, which was tabled on 8 April 2016.

Purpose of the report

1.5 This supplementary report focusses on the NSW Government's decision to lease 50.4 per cent of Ausgrid, one of the state's major electricity distributors. It will examine this decision in relation to the issues raised by the committee's inquiry into the capacity of the foreign investment review framework to secure Australia's national interest. In particular, this supplementary report examines key aspects of the Ausgrid lease process in light of the committee's view, made clear in its substantive report, that

1 *Journals of the Senate*, No. 129, 25 November 2015, p. 3482.

the current foreign investment review process lacks sufficient transparency and consistency.

Structure of the report

1.6 Chapter 2 provides an overview of the Ausgrid lease process in respect of the NSW Government's *Rebuilding NSW* strategy. It also considers the potential implications of a recent decision by the Australian Energy Regulator (AER) to lower the distribution charges that electricity distributors are entitled to charge consumers.

1.7 Chapter 3 examines the evidence for and against the lease of 50.4 per cent of Ausgrid. In addition to providing an overview of the NSW Government's case for the Ausgrid lease, Chapter 3 considers evidence presented to the committee that critical infrastructure assets are potentially more vulnerable to cyber-attack and disruption if they are sold or leased to foreign owned entities, especially State-owned Enterprises (SOEs). Chapter 3 also relates the conclusions contained in the committee's substantive report, especially that the foreign investment review framework lacks consistency and transparency, to the lease of Ausgrid and the sale of S. Kidman and Co.

Chapter 2

The lease of Ausgrid and *Rebuilding NSW*

The Ausgrid lease

2.1 As part of a wider set of fiscal measures laid out in June 2014, the Premier of NSW, the Hon. Mike Baird MP, announced that the NSW Government would seek to lease 49 per cent of the state's electricity network for a period of 99 years.¹ The NSW Government also announced that leasing the three largest providers in the state-owned electricity distribution network – Transgrid, Ausgrid and Endeavour Energy – would allow it to fund 'once-in-a-generation' investments in significant areas of state infrastructure.²

2.2 According to the NSW Government, leasing 49 per cent of the state's electricity distributions network will provide the capital funding necessary to implement the investment plans outlined in *Rebuilding NSW*, one of the Government's major strategic policy documents.³ In particular, the strategy outlined in *Rebuilding NSW* calls for a total government investment in the NSW economy of approximately \$20 billion, including a significant proportion on a range of state infrastructure projects, such as \$4.1 billion on improving regional transport and \$1 billion for enhancements to water security, among other major investment measures.⁴

2.3 In June 2014, the NSW Government announced that the overall cost of its infrastructure strategy would be met through a differentiated approach to leasing 49 per cent of the state's electricity network. The entirety of Transgrid would be offered for a lease period of 99 years, while only 50.4 per cent of Ausgrid and Endeavour Energy would be offered to potential investors.⁵ Essential Energy, which provides services to many parts of rural NSW, is not included in the NSW Government's leasing plans and will remain wholly state-owned.⁶

2.4 After securing the passage of the *Electricity Network Assets (Authorised Transactions) Act 2015*, the legislation that enabled the lease process, the NSW

1 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 15 April 2016).

2 The NSW Treasury, *Electricity Network Transactions*.

3 The NSW Government, *Rebuilding NSW*, <https://www.nsw.gov.au/rebuilding> (accessed 15 April 2016).

4 The NSW Government, *Rebuilding NSW*.

5 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 15 April 2016).

6 The NSW Treasury, *Electricity Network Transactions* .

Government formally launched the process of soliciting bids for the 99-year lease of Transgrid.⁷

2.5 On 25 November 2015, the NSW Government announced that a newly-formed consortium, NSW Electricity Networks, had been successful in its bid for Transgrid. The consortium is reported to have paid the NSW Government \$10.285 billion for the right to lease and operate Transgrid for a period of 99 years.⁸ While NSW Electricity Networks is majority owned by foreign interests, including state-owned investment vehicles from Kuwait and Abu Dhabi, the consortium also includes two major Australian companies, Spark Infrastructure and Hastings, which together have a 35.03 per cent stake in the 99 year lease of Transgrid.⁹

2.6 According to the NSW Government, the gross proceeds from the lease transaction will be used to fund parts of the infrastructure strategy outlined in *Rebuilding NSW*.¹⁰ The NSW Government also announced that, as a direct consequence of the lease, it would be eligible for a payment of \$1 billion from the Commonwealth Government, on the basis of provisions contained in the National Partnership Agreement on Asset Recycling.¹¹

2.7 On 24 November 2015, the day before the announcement that NSW Electricity Networks had won the right to lease Transgrid for 99 years, the NSW Government opened the Expression of Interest (EOI) process for the lease of 50.4 per cent of Ausgrid on the basis of a Trade Sale.¹²

2.8 One of the largest electricity providers in Australia, Ausgrid's network encompasses almost 50,000 kilometres of above and below ground cables, servicing a total of approximately 1.7 million customers in Sydney, the Hunter Valley and the Central Coast.¹³ According to media reports, Ausgrid's regulated asset base was approximately \$15.5 billion as of June 2015, which could make a 50.4 per cent lease

7 *Electricity Network Assets (Authorised Transactions) Act 2015*, http://www.austlii.edu.au/au/legis/nsw/consol_act/enata2015566/ (accessed 15 April 2016).

8 The Hon. Mike Baird MP, Premier of NSW, and the Hon. Gladys Berejiklian MP, Treasurer of NSW, 'NSW Achieves Outstanding Result in \$10.258 billion Transgrid lease', *Media Release*, 25 November 2015, http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0013/127030/25-11-15_NSW_achieves_outstanding_result_in_TransGrid_lease.pdf (accessed 29 February 2016).

9 The Hon. Mike Baird MP, Premier of NSW, and the Hon. Gladys Berejiklian MP, Treasurer of NSW, 'NSW Achieves Outstanding Result in \$10.258 billion Transgrid lease', *Media Release*, 25 November 2015, http://www.treasury.nsw.gov.au/data/assets/pdf_file/0013/127030/25-11-15_NSW_achieves_outstanding_result_in_TransGrid_lease.pdf (accessed 29 February 2016).

10 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 15 April 2016).

11 The NSW Treasury, *Electricity Network Transactions*.

12 The NSW Treasury, *Electricity Network Transactions*.

13 The NSW Treasury, *About Ausgrid*, http://www.treasury.nsw.gov.au/electricity_network_transactions/about_ausgrid (accessed 15 April 2016).

of the company worth approximately \$9.4 billion to \$10.4 billion, including the company's debt liability.¹⁴

2.9 At the time of writing, the NSW Government has not announced the outcome of the Ausgrid lease, nor has it provided any public updates on the current status of the process. According to information made available by the government, the EOI process for the lease of 50.4 per cent of Endeavour Energy, the final stage of the NSW Government's leasing arrangements, will begin in the course of 2016.¹⁵

The Ausgrid lease and *Rebuilding NSW*

2.10 In the lead up to the March 2015 state election, the NSW Government committed itself to a large-scale investment plan, aimed at upgrading major parts of the state's infrastructure and providing an investment-driven boost to the NSW economy.¹⁶ According to a report by Deloitte Access Economics, published in November 2014, the NSW Government's plans are likely to see an overall injection into the state's economy of \$300 billion over approximately 20 years. Job creation is forecast to be approximately 100,000 new jobs by 2035–36.¹⁷

2.11 According to the NSW Government, its plan to invest \$20 billion in major state infrastructure is dependent on releasing the capital that is 'locked up' in major state assets, including the state-owned companies, such as Ausgrid, that operate large parts of the state's electricity distribution network.¹⁸ Additionally, the NSW Government's investment plans, as outlined in *Rebuilding NSW*, are required to remain in conformity with the state's *Fiscal Responsibility Act 2012*.¹⁹ This requires that the Government acts to protect the state's AAA credit rating. Significant debt financing is thereby largely ruled out.²⁰

2.12 In addition to the projected release of approximately \$20 billion in capital currently embedded in the state's electricity distribution network, the NSW Government has announced that, once the full lease process has been completed, it

14 Angela MacDonald-Smith, 'Ausgrid lines up as 'plan b' for losing Transgrid bidders', *Sydney Morning Herald*, 23 November 2015, <http://www.smh.com.au/business/energy/ausgrid-lines-up-as-plan-b-for-losing-transgrid-bidders-20151122-gl5881.html> (accessed 15 April 2016).

15 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 15 April 2016).

16 The NSW Government, *Rebuilding NSW*, <https://www.nsw.gov.au/rebuilding> (accessed 15 April 2016).

17 Deloitte Access Economics, *Economic Impact of State Infrastructure Strategy – Rebuilding NSW*, <https://www.nsw.gov.au/sites/default/files/miscellaneous/economic-impact-of-state-infrastructure-strategy.pdf> (accessed 15 April 2016), p.5 and p.11.

18 The NSW Government, *Rebuilding NSW*, <https://www.nsw.gov.au/rebuilding> (accessed 15 April 2016).

19 *Fiscal Responsibility Act 2012*, http://www.austlii.edu.au/au/legis/nsw/consol_act/fra2012243/ (accessed 15 April 2016).

20 The NSW Government, *Rebuilding NSW*, <https://www.nsw.gov.au/rebuilding> (accessed 15 April 2016).

will be eligible for a \$2 billion contribution from the Commonwealth Government, pursuant to the National Partnership Agreement on Asset Recycling.²¹ The capital generated by the full lease process, including Commonwealth Government contributions, will fund a number of major state infrastructure investments, including:

- An additional \$1.1 billion to invest in the northern and southern extensions to WestConnex, along with the Western Harbour Tunnel.
- An extra \$7 billion for Sydney Metro, to fully fund a second harbour rail crossing.
- \$2 billion in additional education and health funding.
- \$4.1 billion for regional transport.
- \$1 billion for regional water security.
- \$300 million for regional tourism and the environment.
- More funds to Sports and Cultural infrastructure, up from \$500 million to \$1.2 billion.²²

2.13 According to the NSW Government, leasing 49 per cent of the state's electricity distribution infrastructure will have a dual benefit. Firstly, leasing 49 per cent of the state's electricity distribution network will produce the primary benefit of freeing up scarce state resources for infrastructure investments that would otherwise be beyond the Government's fiscal capacity. Secondly, as a consequence of private sector involvement, there is likely to be an increase the efficiency of, and the rate of capital investment in, the leased entities.²³

The Ausgrid Lease and the Australian Energy Regulator

2.14 Recent media reports have suggested that the NSW Government's plan to lease 50.4 per cent of both Ausgrid might be affected, to the detriment of the final lease price, by a recent decision of the Australian Energy Regulator (AER). The AER's determination covers the regulatory period from 1 July 2014 to 30 June 2019, and could therefore affect the overall attractiveness of Ausgrid to potential private sector investors.²⁴

2.15 After reviewing the distribution charges that electricity networks are entitled to charge consumers, AER ruled that the three state-owned electricity distributors – Ausgrid, Endeavour Energy and Essential Energy – must reduce the charges that they

21 The NSW Government, *Rebuilding NSW*.

22 The NSW Government, *Rebuilding NSW*.

23 The NSW Government, *Rebuilding NSW*.

24 Australian Energy Regulator, *Ausgrid - Determination 2014-19*, <https://www.aer.gov.au/networks-pipelines/determinations-access-arrangements/ausgrid-determination-2014-19> (accessed 15 April 2016).

levy on consumers.²⁵ According to the Australian Financial Review, AER's decision could have the effect of reducing the operating revenue of Networks NSW – the state-owned company that currently owns Ausgrid, Endeavour Energy and Essential Energy – by up to \$566 million.²⁶

2.16 According to Networks NSW, the AER's determination in relation to distribution charges is likely to have a damaging effect on the lease process, since a potential investor could be forced to commit new and significant funds to a company that could, well into the foreseeable future, generate low or even negative equity returns.²⁷ While the investment strategies of private sector companies and consortiums are difficult to predict, Networks NSW maintained that a continued high level of regulatory uncertainty, especially over the longer term, will have the effect of lowering the value of Ausgrid for potential investors, both domestic and foreign.²⁸

2.17 In February 2016, however, the Australian Competition Tribunal (ACT) ruled that AER committed a number of errors in arriving at its determination. On the basis of that ruling, the tribunal set aside AER's revised network charges.²⁹ As a consequence of the ACT's decision – which has led AER, in turn, to seek a judicial review in the Federal Court – the overall regulatory environment in respect of network distribution charges remains comparatively unclear.

2.18 It remains possible that this degree of regulatory uncertainty, which might not be resolved in the near term, could negatively affect the price that potential bidders are willing to offer for Ausgrid. In turn, this could have an equally negative effect on the \$20 billion that the NSW Government, as outlined in its *Rebuilding NSW* policy, expects to raise from leasing 49 per cent of the state's electricity distribution network.

25 Sarah Gerathy, 'Energy companies thrown lifeline in battle against NSW regulator', *ABC News*, 26 February 2016, <http://www.abc.net.au/news/2016-02-26/energy-companies-thrown-lifeline-in-battle-with-nsw-regulator/7202724> (accessed 15 April 2016).

26 Geoff Winestock, 'NSW power sale: prices to rise after court win', *Australian Financial Review*, 26 February 2016, <http://www.afr.com/news/politics/nsw-power-sale-prices-to-rise-after-court-win-20160225-gn45h6> (Accessed 15 April 2016).

27 Geoff Winestock, 'NSW power sale 'not viable' if AER decision stands', *Australian Financial Review*, 21 September 2015.

28 Geoff Winestock, 'NSW power sale 'not viable' if AER decision stands', *Australian Financial Review*, 21 September 2015.

29 Sarah Gerathy, 'Energy companies thrown lifeline in battle against NSW regulator', *ABC News*, 26 February 2016, <http://www.abc.net.au/news/2016-02-26/energy-companies-thrown-lifeline-in-battle-with-nsw-regulator/7202724> (accessed 15 April 2016).

Chapter 3

The Ausgrid lease and critical infrastructure

The NSW Government's case for leasing Ausgrid

3.1 In addition to using the capital currently 'locked up' in both Ausgrid and Endeavour Energy to finance significant state infrastructure projects, the NSW Government maintained that the strategy contained in *Rebuilding NSW*, which is largely dependent on the finalisation of the lease process, will produce additional economic and social benefits. In particular, the NSW Government argued that the proceeds from the lease process, which are projected to reach \$20 billion, will place it in a stronger position to address the challenge of continued population growth and the consequent need for an increase in economic activity to support a larger population base. The NSW Government further observed:

The investment in infrastructure made possible by the *Rebuilding NSW* Plan will allow NSW to better manage the increase in population and economic activity that will occur over the coming decades. Rebuilding NSW will increase NSW's Gross State Product (GSP) by \$30.9 billion by 2035-36 (measured in 2013 prices); this is a real increase of 3.6 per cent above the level of GSP that would occur without the *Rebuilding NSW* plan. The increase in GSP comes from both a more efficient electricity network and also from the reinvestment of funds from the partial lease of electricity network assets into productive infrastructure.¹

3.2 In addition to a network price guarantee, which will commit the successful bidder to ensuring that total network charges will be lower in the financial year 2018-2019 than they were at 30 June 2014, the NSW Government also announced that the current requirements in relation to safety and reliability, which are mandated by state legislation, will continue to apply once the lease process is finalised.²

3.3 Apart from the wider benefits of 'unlocking' the capital contained in NSW's electricity distribution network – while simultaneously maintaining state ownership of critical state infrastructure at 51 per cent – the NSW Government argued that current consumer protections will be maintained or even enhanced. In particular, for example, a number of major protective mechanisms will be either newly enacted or increased in scope:

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- 1 Legislative Council of New South Wales Select Committee on the Leasing of Electricity Infrastructure, *NSW Government Submission to the Electricity Networks Leasing Inquiry*, 12 May 2015, p.6
https://www.nsw.gov.au/sites/default/files/miscellaneous/nsw_government_submission_to_the_electricity_networks_leasing_inquiry_12_may_15.pdf (accessed 15 April 2016)
 - 2 Legislative Council of New South Wales Select Committee on the Leasing of Electricity Infrastructure, *NSW Government Submission to the Electricity Networks Leasing Inquiry*, 12 May 2015, p.6

- **Electricity Price Commissioner:** The NSW Government appointed Professor Allan Fels, a former Chairman of the Australian Competition and Consumer Commission (ACCC), to the position of Electricity Price Commissioner. In that new role, Professor Fels will report to the Government on each transaction to confirm that these will not put upward pressure on network charges in the short, medium and long term. He will also be responsible for reviewing annual price guarantee statements, and will have the authority to refer any concerns or inconsistencies to either the AER or ACCC.
- **Continued Price Regulation:** AER, as the national regulator, will continue to determine network charges for all of NSW's electricity network businesses, and will continue to have the authority to enforce compliance with its determinations.
- **Reliability Standards:** The leased network businesses will continue to have a range of legislated obligations in respect of the safety and reliability of their distribution networks. These legislated obligations will remain in place irrespective of ownership.
- **Terms of the lease:** As an additional safeguard, the lease can be terminated for a number of substantive reasons, including the following: failing to operate or maintain the network in accordance with the regulatory regime and good operating practice; the network ceases to be used as an electricity network; the insolvency of the lessee; the revocation of a major authorisation, such as National Electricity Market (NEM) registration or the NSW operating licence. The NSW Government's consent is also required in the event that there is a change in the control of the lessee.
- **Independent Safety and Reliability Regulator:** An Independent Pricing and Regulatory Tribunal (IPART) will be appointed to ensure the operator's compliance with licence conditions, along with the continued maintenance of the mandated safety and reliability standards. IPART will receive regular reports in relation to reliability and customer service standards. In addition, it will require annual independent audits of reliability and customer service standards, and IPART will have the authority to appoint inspectors to assess electrical installations and equipment. IPART's inspectors will also possess the authority to investigate serious electricity accidents.
- **Step in Rights:** The NSW Government, through the Energy Minister, will have the authority to trigger new 'step in rights' if a breach of licence or regulatory obligation threaten the safety, security or reliability of the state's electricity supply. Under this power, IPART will take on the role of network administrator and will appoint a 'step in operator' until the Minister determines that these interim measures can be dispensed with.³

3 Legislative Council of New South Wales Select Committee on the Leasing of Electricity Infrastructure, *NSW Government Submission to the Electricity Networks Leasing Inquiry*, 12 May 2015, p.5.

3.4 On the basis of these regulatory safeguards, some of which go beyond the current safety, reliability and consumer protection requirements, the NSW Government maintained that the lease of 49 per cent of the state's electricity network will achieve dual aims: maintaining an efficient, safe and reliable electricity distribution network while also ensuring that government services, both now and into the future, can meet the various needs of the state's growing population.

The Ausgrid lease and critical infrastructure protection

3.5 Since the NSW Government announced the formal commencement of the Ausgrid lease process in November 2015, some media reports, so far unconfirmed by the NSW Government, have suggested that a number of foreign energy and investment companies have expressed their interest in acquiring 50.4 per cent of the electricity distributor. In particular, some recent reports have suggested that, along with other major foreign companies and consortiums, two of the frontrunners in the lease process are State Grid, a Chinese state-owned energy supplier, and Cheung Kong Infrastructure, a Hong Kong-based investment vehicle and infrastructure operator.⁴

3.6 It has been reported that State Grid submitted one of the unsuccessful bids for the 99 year lease of Transgrid, with some commentators suggesting that its ultimate failure to secure the transaction was the direct result of significant national security concerns. The majority of these concerns reportedly relate to the importance of Transgrid as an element of Australia's critical infrastructure and the fact that State Grid is a Chinese State-owned Enterprise (SOE).⁵

3.7 In the course of its inquiry, the committee heard evidence, including from the Australian Strategic Policy Institute (ASPI), that Australia's critical infrastructure assets, including major electricity distributors like Transgrid and Ausgrid, are particularly vulnerable to a variety of forms of interference and sabotage, including through foreign cyber intrusion. ASPI expressed its concern that any sale or lease of these assets, especially to foreign SOEs like State Grid, could lead to potentially significant national security risks, many of which are not adequately addressed through the current foreign investment review process.⁶

3.8 In addition to the general risks associated with allowing foreign-owned companies or consortiums to own and operate critical infrastructure, ASPI highlighted the fact that the majority of Chinese SOEs, including State Grid, maintain very close links with the ruling Communist Party of China (CPC). This could have the effect of

4 Angela MacDonald-Smith, 'Ausgrid lines up as 'plan b' for losing Transgrid bidders', *The Sydney Morning Herald*, 23 November 2015, <http://www.smh.com.au/business/energy/ausgrid-lines-up-as-plan-b-for-losing-transgrid-bidders-20151122-gl5881.html> (accessed 18 April 2016).

5 Sean Nicholls, 'Transgrid lease reaps more than \$10 billion for NSW Government', *Sydney Morning Herald*, 25 November 2015, <http://www.smh.com.au/nsw/transgrid-lease-reaps-more-than-10-billion-for-nsw-government-20151124-gl77pc.html> (accessed 18 April 2016).

6 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 4.

turning these entities from purely corporate actors into little more than strategic instruments of the CPC, even though they continue to operate in the global free market.⁷ ASPI suggested that the close and ambiguous relationship between the CPC and SOEs does not appear to be sufficiently or effectively captured in the Australian Government's foreign investment review and assessment processes.⁸

3.9 ASPI also observed that, while all online systems are vulnerable to cyber-attack and intrusion, which can be launched from almost any part of the world, physical access to critical systems is likely to provide a malicious actor with a number of significant advantages, especially if the aim is to destroy or degrade a piece of critical infrastructure. Mr Peter Jennings, Executive Director of ASPI, pointed out that direct access can be an important facilitator of cyber intrusion and terrorism:

Complex networked systems by definition are linked and present a variety of interfaces that can potentially be accessed by aggressors seeking to damage those systems. Even systems that are completely air gapped -- that is, are physically isolated from the Internet -- still require some form of interface from which to be programmed and/or controlled. These systems can still potentially be attacked by malicious cyber actors, for example via thumb drives or direct programming through access to a control interface... As a developed country and a close defence and intelligence ally of the United States Australian critical infrastructure is also likely to be of high interest to potential cyber aggressors. All of this points to the importance of sales or leasing of critical infrastructure to be carefully assessed from the perspective of the vulnerability of the infrastructure in question to cyber - attack.⁹

3.10 In addition, ASPI also gave evidence to the committee that the NSW electricity distribution network, of which Ausgrid is a major part, constitutes a major component of national critical infrastructure, and is therefore not merely a matter of state government concern.¹⁰ In particular, ASPI suggested that:

The Committee should note that the NSW 'poles and wires' network is as vulnerable to cyber-attack as the US electricity distribution network or the networks of other countries. Moreover there is increasing interest on the part of malicious cyber actors to explore how to damage the critical infrastructure of potential opponents. Australia cannot isolate itself from these international developments...NSW's electrical transmission and distribution system is an element of critical infrastructure on which significant parts of the Federal Government, Defence and Intelligence

7 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 1.

8 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 1.

9 Mr Peter Jennings PSM, answer to question on notice, 10 March 2016 (received 1 April 2016), p. 1-2.

10 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 2 .

community relies. We cannot afford to be casual about the security of this critical infrastructure.¹¹

3.11 While the committee recognises that the NSW Government has put in place a range of protections, both in relation to network reliability and consumer protection, in order to ensure that the lease process does not produce adverse effects, the question of the risks posed by foreign control of critical infrastructure does not appear to have been directly or adequately addressed.

3.12 The flaws in the foreign investment review process that the committee identified in its substantive report, especially in relation to the transparency and consistency of the assessment process itself, mean that it is unclear whether the full implications of leasing 49 per cent of the state's electricity distribution network, possibly to foreign domiciled and controlled companies, has received sufficient critical assessment.

Committee view

3.13 The committee recognises that foreign investment proposals are often complex and sensitive, especially if the proposed investment is in a major national asset, such as Ausgrid or S. Kidman and Co. Nonetheless, much of the evidence provided to the committee during its inquiry suggests that the foreign investment review framework suffers from a lack of clearly defined processes. In particular, the national interest test is seemingly ad hoc and inconsistently applied.

3.14 The committee takes the view that the lease of Ausgrid and the sale of S. Kidman and Co. together serve as a case in point. In both cases, the assessment process appears to have been conducted in a seemingly arbitrary manner and without a clear presentation of a national interest argument.

3.15 The committee recognises that both the lease of Ausgrid and the sale of S. Kidman and Co. might be in the national interest. However, the lack of procedural clarity in relation to assessment criteria and the national interest test, which the committee noted in its substantive report, again strongly suggests that the Australian public cannot have full confidence that these investment proposals have been subjected to a rigorous, transparent and consistent assessment process. As the committee made clear in its substantive report, these inconsistencies weaken the overall effectiveness of Australia's foreign investment review framework, not only in the eyes of the Australian people, but also for potential foreign investors.

Senator Chris Ketter
Chair

11 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, pp. 3-4.

Appendix 1

Submissions received

Submission Number	Submitter
26	Mr Greg Herbert
27	Mr Jeff Leddin

Appendix 2

Answers to questions on notice

15. Answers to written questions on notice received from Northern Territory Government on 12 April 2016.

