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Electricity Legislation Consultation  
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### **Electricity Price Monitoring and Response Legislative Framework Consultation Paper**

The Business Council is pleased to provide a submission in response to the 'Electricity Price Monitoring and Response Legislative Framework Consultation Paper' (Consultation Paper).

#### **Key points**

- The Business Council supports lower electricity prices but does not believe this will be achieved by ad hoc and extreme intervention in the electricity market which brings new risks, unintended consequences and has never worked before.
- While we understand the need to prioritise affordability, greater intervention and more regulation – including forced divestment which even the ACCC has rejected – is not the answer. By exacerbating sovereign risk and interfering in market outcomes, the proposals in the Consultation Paper will discourage investment and have serious adverse consequences for prices and reliability down the track.
- The anti-competitive behaviour the proposed legislative framework seeks to prohibit is already appropriately dealt with, and prohibited, under existing laws and rules that apply to electricity market.
- Further, inquiry after inquiry into retail prices, wholesale bidding and conduct and contract market liquidity has not found any evidence of fraudulent or dishonest behaviour, nor acts of bad faith with the purpose of distorting or manipulating prices. Consequently, the government's rationale behind developing this new intrusive legislative regime remains unclear and the policy case has not been made.
- The potential remedies outlined in the Consultation Paper are extreme – particularly that of the Treasurer-ordered remedies such as capping retail offers and forced divestiture – and go well beyond what was recommended by the ACCC in its recent report.
- The proposed introduction of these heavy-handed, intrusive Treasurer-ordered remedies in the energy sector sets a dangerous precedent for other sectors of the economy and threatens our economic attractiveness by sending a signal to the world that investing in Australia comes with considerable risks.

## Overview

The government has announced that it will task the ACCC with monitoring retail prices, wholesale bids and conduct and contract market liquidity in the National Electricity Market (NEM) between 2018 and 2025. The ACCC will prepare six-monthly reports to the Treasurer reporting on its findings, including any 'identified unacceptable outcomes.'<sup>1</sup>

A range of enforcement remedies and responses have been announced by the government that could be applied if the ACCC identifies 'prohibited conduct', including recommending a 'proportional and targeted' response for the Treasurer's determination.<sup>2</sup> Such responses include converting the default market offer into a binding cap price, contracting obligations and divestiture orders.

The proposed changes announced by the government are extensive and seek to significantly alter the operation of Australia's existing competition law framework and its application to the electricity market. Due to this and the detailed legal nature of the proposed changes, the Business Council stresses the need for the government to undertake a considered and thorough consultation process with all stakeholders.

## Prohibited conduct

The Consultation Paper defines 'prohibited conduct' as to broadly align with the three limbs of the ACCC's electricity price monitoring: retail prices, wholesale bids and conduct and contract market liquidity.

First, on retail prices, the government has recently asked the Australian Energy Regulator (AER) to develop by 30 April 2019:

- A maximum price for the default market offer to apply from 1 July 2019 for customers not subject to state-based price regulation.
- A mechanism for determining a reference bill amount for each network distribution region, from which headline discounts can be calculated.<sup>3</sup>

The AER has indicated that it will release a consultation paper in the coming weeks to commence the process of consultation with stakeholders. It would be inappropriate to define 'prohibited conduct' in relation to retail prices under this legislative framework before the AER develops and sets a default market offer and stakeholders have had an opportunity to provide input and respond. Indeed, the approach set out in the Consultation Paper does not appear to align with the request made of the AER and the Minister's stated intention to pursue a default market offer via COAG Energy Council.

Further, the Consultation Paper canvasses a range of potentially significant and heavy-handed remedies in response to breaching the proposed prohibitions. It is critical the cart is not put before the horse. That is, remedies exist to address anti-competitive conduct – not for their own sake – and this conduct is yet to be identified and appropriately defined.

Second, on wholesale bids and conduct, the ACCC recently completed an extensive and detailed inquiry into the retail electricity market and noted:

The tightening of supply and demand, brought about mainly by the exit of large coal-fired generators, has seen a general 'lift' in wholesale prices across the NEM in recent years. The ACCC has undertaken detailed work to examine whether this lift is as a result of market power concerns, including bidding behaviour by particular generators. *The ACCC has found that elevated prices have generally been driven by high and entrenched levels of concentration in the market, combined with fuel source cost factors, rather than identifiable user or abuses of market power (for example, conduct of particular*

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<sup>1</sup> Australian Government, *Electricity Price Monitoring and Response Legislative Framework Consultation Paper*, October 2018, p. 2.

<sup>2</sup> *ibid.*

<sup>3</sup> AER, *Retail electricity prices – Determination of a default market offer price*, 23 October 2018, available: <https://www.aer.gov.au/communication/retail-electricity-prices-determination-of-a-default-market-offer-price>

*generators to spike the price*). [emphasis added] In that context, the market power mitigation measures that are in use in other parts of the world would not address these specific issues.<sup>4</sup>

The ACCC inquiry follows two inquiries by the AER and Australian Energy Market Commission (AEMC), both of which did not find any evidence of fraudulent or dishonest behaviour, nor acts of bad faith with the purpose of distorting or manipulating prices.

The AER found that ‘while competitive pressure on wholesale prices has fallen, there is no evidence to suggest that prices are being driven by rebidding close to dispatch or physical or economic withholding - behaviours more usually associated with the exercise of market power.’<sup>5</sup> The AER instead pointed to rising fuel costs and supply issues in NSW, the role of interconnection with other jurisdictions and structural change across the NEM for the sustained period of high prices in NSW.<sup>6</sup>

The AEMC, in collaboration with the AER, also investigated claims that generators are gaming the wholesale electricity market. It found that gaming is not a problem in the NEM and, in line with the ACCC’s findings, that ‘acceptable rebidding can promote efficient outcomes for consumers by enabling electricity supply to adjust to changed market conditions.’<sup>7</sup>

Importantly, anti-competitive behaviour in relation to wholesale bidding and conduct – and contract liquidity – are appropriately dealt with under existing laws.

The AER has a range of market monitoring functions under the National Electricity Law (NEL) and Rules (the Rules). For example the AER is:

required to monitor the wholesale market on a regular and systematic basis and report on its performance. In particular, [it is] required to identify and analyse whether:

- there is ‘effective competition’ within the wholesale market or there are features of the market that may be detrimental to effective competition
- there are features of the market that may compromise the efficient functioning of the market.<sup>8</sup>

Further, in 2015, the AEMC made a rule change to strengthen the guidance around bidding behaviour by replacing the requirement that offers be made in good faith with a prohibition against making false or misleading offers. This rule change provided the AER with greater powers to monitor compliance and take enforcement action if a breach occurs.

These rules, together with existing provisions of the NEL, the *Competition and Consumer Act 2010* (the CCA) (discussed below), already provide regulators with the authority to monitor, take action, and enforce penalties for anti-competitive behaviour. Further, the CCA was recently amended to strengthen the misuse of market power provisions and introduce a new concerted practices prohibition. Despite the fact these powers already exist, inquiry after inquiry has failed to find any evidence of anti-competitive behaviour. Therefore, the government’s rationale behind developing this new intrusive legislative regime under the CCA remains unclear and the policy case has not been made.

Finally, it is importantly to highlight that the ACCC points to government policies associated with reducing emissions in the electricity sector as a significant reason behind the increase in wholesale prices. Indeed, the ACCC states that ‘various policy failures ... have hurt consumers’ due to a lack of enduring climate change policy that has ultimately undermined investment certainty in the market. The ACCC pointed to the National Energy Guarantee as a policy that could encourage new investment and the ‘assist in delivering electricity affordability.’ The Business Council and its members – the

<sup>4</sup> ACCC, *Retail Electricity Pricing Inquiry—Final Report*, June 2018, p. vii.

<sup>5</sup> AER, *AER electricity wholesale performance monitoring - NSW electricity market advice*, December 2017, available: <https://www.aer.gov.au/wholesale-markets/market-performance/aer-electricity-wholesale-performance-monitoring-nsw-electricity-market-advice-december-2017>

<sup>6</sup> *ibid.*

<sup>7</sup> AEMC, *AEMC assessment of rebidding in the national electricity market*, October 2018, available: <https://www.aemc.gov.au/news-centre/media-releases/aemc-assessment-rebidding-national-electricity-market>; AEMC, *Gaming in rebidding assessment (Grattan Response) – Final Report*, September 2018, p. 35.

<sup>8</sup> AER, *AER electricity wholesale performance monitoring - NSW electricity market advice*, December 2017, p. 4.

retailers, the generators and the large users – strongly supported the implementation of the Guarantee as a market-based mechanism that would drive investment and put long-term downward pressure on electricity prices.

## Remedies

As noted, the anti-competitive behaviour for which this new legislative regime seeks to address is already covered under existing laws. This is also the case for remedies. Contraventions of the CCA currently attract a range of penalties, as does breaches of the NEL and Rules, with the AER empowered with a range of possible enforcement options. Indeed, the additional remedies proposed in the Consultation Paper will add complexity and introduce the potential for inconsistencies with existing arrangements under the CCA to arise.

The potential remedies outlined in the Consultation Paper are extreme – particularly that of Treasurer-ordered remedies such as capping retail offers and forced divestiture – and go well beyond what was recommended by the ACCC in its recent report. In fact, in complete contrast, the ACCC found that ‘requiring the divestiture of privately owned assets is an extreme measure to take in any market, including the electricity market... other recommendations made in this report will, if implemented, be a better means to restore competition to a level which serves consumers well.’<sup>9</sup>

The Business Council notes that the ACCC already has an ability to seek divestiture orders under the existing provisions of the CCA. Section 50 of the Act prohibits acquisitions that would result in a substantial lessening of competition. This provision guards against further market concentration, including in the energy market. Where a merger or acquisition contravenes the Act, the ACCC (or any other person) can apply to the court for a divestiture order (s 80).

Of course, it will be preferable to prevent anti-competitive transactions before they proceed. In this regard the ACCC is empowered to receive court-enforceable undertakings that it can use as a tool in the merger review process. A court-ordered divestiture is also available where the merger or acquisition was granted authorisation on false or misleading information (s 81A). The Harper Competition Review considered the issue of extending the divestiture power to other anti-competitive conduct such as the misuse of market power. Ultimately, the panel concluded that the existing range of remedies were sufficient.<sup>10</sup> A similar conclusion was made by a 2014 Senate Economics Legislation Committee Inquiry, which found that the ‘evidence has not demonstrated that the potential advantages of such a [court-ordered divestments] power would outweigh the likely disadvantages.’<sup>11</sup>

These reviews found that there were insufficient grounds to extend court-ordered powers. A Treasurer-ordered power is even more extreme measure and risks sending a signal to the world that investing in Australia comes with considerable risks. If these powers are to be legislated then the power to make such an order must only be invested with the courts so that any decision is evidence-based and underpinned by the rule of law.

A further concern about the Treasurer-ordered remedies proposed in the Consultation Paper is that there is no detail about the decision-making framework that would apply. The Consultation Paper simply states that the Treasurer’s determinations will be ‘proportional and targeted’ to address ‘unacceptable outcomes’. A greater level of clarity is required to stipulate how these proposed powers would be exercised.

Further, the availability of merits and judicial review are vital mechanisms to ensure integrity and due process.

Australia desperately needs policies in the energy sector that support new investment and deliver lower prices. We should be cautious that new interventions into the market do not increase sovereign risk and discourage the new investment the sector urgently needs. The proposed introduction of these heavy-handed, intrusive Treasurer-ordered remedies in the energy sector sets a dangerous precedent for other sectors of the economy and threatens our economic attractiveness.

<sup>9</sup> ACCC, *Retail Electricity Pricing Inquiry—Final Report*, June 2018, p. 89.

<sup>10</sup> Professor Ian Harper, *Competition Policy Review – Final Report*, March 2015, p. 347.

<sup>11</sup> Senate Economics Legislation Committee, *Inquiry into Competition and Consumer Amendment (Misuse of Market Power) Bill 2014*, 2.43.

The Business Council would welcome the opportunity to discuss our submission further. Please contact us on 03 8664 2664 if you have any questions. Thank you for the opportunity to provide feedback.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jennifer Westacott', with a stylized flourish at the end.

**Jennifer A. Westacott AO**  
Chief Executive