



# Reasons for Determination

## Application for merger authorisation

lodged by

Brookfield LP and MidOcean

in respect of

the proposed acquisition of Origin Energy

Merger authorisation number: MA1000024

10 October 2023

Commissioners: Cass-Gottlieb, Keogh, Lowe, Brakey, Crone, Ridgeway

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Attachment A: Brookfield Undertaking

Attachment B: AusNet Undertaking

Attachment C: Brookfield Undertaking

## Executive summary

EOS Aggregator (Bermuda) LP (**Brookfield LP**) and MidOcean Reef BidCo Pty Ltd (**MidOcean**), collectively, the **Applicants** have applied for authorisation for:

- MidOcean to acquire 100% of the ordinary shares in Origin Energy Limited (**Origin**); and
- MidOcean to divide Origin into the Origin Integrated Gas business and the Origin Energy Markets business. MidOcean will retain the Origin Integrated Gas business (**Origin Integrated Gas**), while Brookfield LP will acquire the Origin Energy Markets business (**Origin Energy Markets**).

(together, the **Proposed Acquisition**).

The Australian Competition and Consumer Commission (**ACCC**) has decided, pursuant to section 88(1) of the Competition and Consumer Act 2010 (Cth) (**the Act**), to authorise the Proposed Acquisition on the conditions, pursuant to section 88(4) of the Act, that:

- Brookfield LP, Brookfield Asset Management ULC and Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489) and Brookfield Corporation (the **Brookfield Parties**) must give, and comply with, the section 87B undertaking in the form at Attachment A (the **Brookfield Undertaking**)
- AusNet Pty Ltd (ACN 603 317 559) and Australian Energy Holdings No 1 Pty Ltd (ACN 654 672 670) (the **AusNet Parties**) must give, and comply with, the section 87B undertaking in the form at Attachment B (the **AusNet Undertaking**), and
- MidOcean Energy Holdings Pty Ltd (ACN 662 741 415) and MidOcean Energy Parent Pty Ltd (ACN 666 688 786) (the **MidOcean Parties**) must give, and comply with, the section 87B undertaking in the form at Attachment C (the **MidOcean Undertaking**).

The ACCC is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition, primarily due to the competitive effects of vertical integration between electricity transmission and generation businesses, and other forms of vertical integration involving electricity distribution or smart meters.

However, the ACCC considers that the Proposed Acquisition will likely result in:

- an acceleration of renewable generation and storage development for Origin Energy Markets
- additional renewable generation and storage development for Origin Energy Markets, and
- a decrease in Origin Energy Markets' emission intensity.

The ACCC also considers that the Proposed Acquisition would result, or be likely to result, in an acceleration of renewable generation and storage build-out in Australia, and that this constitutes a public benefit.

The ACCC considers these benefits will result in a reduction of greenhouse gas emissions in Australia relative to the future without the Proposed Acquisition, which constitutes a material

public benefit, in the sense that it is important and of value to Australians. Taking into account the conditions specified in the authorisation, the ACCC is satisfied in all the circumstances that the Proposed Acquisition would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Acquisition.

## The test

Before the ACCC can grant authorisation, the ACCC must be satisfied, in all the circumstances, that the proposed conduct:

- would not have the effect, or be likely to have the effect, of substantially lessening competition (the **Competition Test**), or
- would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Acquisition (the **Public Benefit Test**).

The task before the ACCC in weighing the public benefits and public detriments in this matter is finely balanced. It involves weighing the anti-competitive effects the ACCC considers likely to result from the Proposed Acquisition, which may harm both consumers and the economic efficiency of energy markets, against likely environmental benefits to the public from increasing the speed and extent of Origin's transition to renewable energy sources, and Australia's accelerated decarbonisation.

## Competition assessment

In this Summary of Reasons for Determination, the term Brookfield refers to Brookfield Corporation, Brookfield Asset Management ULC and their affiliates.

Brookfield is a large asset manager with investments across five broad categories. The Proposed Acquisition will result in Brookfield LP owning Origin's retail electricity and gas business, and its electricity generation business. Brookfield LP is a limited partnership with the majority interests being controlled by Brookfield within Brookfield's Renewable Power & Transition business unit.

Brookfield, as part of its Infrastructure business unit, has a 45.4% interest in AusNet, which owns the vast majority of the electricity transmission network in Victoria, one of five electricity distribution networks in Victoria, and one of three gas distribution networks in Victoria. In addition, Brookfield's Infrastructure business unit (through related entities) holds a 50% interest in Intellihub, a smart metering company.

Brookfield actively manages AusNet and Brookfield's Intellihub stake. It also intends to actively manage the Origin Energy Markets business.

MidOcean Energy, LLC is a new liquified natural gas (**LNG**) company formed by EIG Partners, an institutional investor in the energy sector, to build an LNG portfolio. MidOcean will acquire Origin's upstream gas interests, including its interest in Australia Pacific LNG (**APLNG**).<sup>1</sup> MidOcean Energy Holdings Pty Ltd, in a separate transaction, is also due to acquire a small interest in Queensland Curtis LNG (**QCLNG**). MidOcean and MidOcean Energy Holdings Pty Ltd are wholly owned subsidiaries of MidOcean Energy, LLC.

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<sup>1</sup> APLNG is one of three LNG projects in Queensland that produce and sell LNG for export as well as supplying gas to the eastern states. QCLNG and Gladstone LNG (GLNG) are the other two LNG projects.

The Proposed Acquisition will therefore result in vertical links between Origin and AusNet, and between Origin and Intellihub. It will also result in horizontal overlap between upstream gas businesses through the MidOcean Energy LLC and its subsidiaries' (**MidOcean Group**) interests.

A key issue for the ACCC, given the vertical links the Proposed Acquisition creates, is whether Brookfield has the ability and incentive to use its position in monopoly infrastructure to anti-competitively foreclose rivals in another market.<sup>2</sup>

The ACCC is concerned that the vertical integration of the monopoly transmission network in Victoria with Origin's electricity generation business will lead to anti-competitive behaviour by AusNet in favour of Origin. The ACCC is primarily concerned that due to their common control, AusNet may discriminate in favour of Origin in connecting new generators to the Victorian transmission network or in the way that it operates the transmission network.

However, there are factors that may limit, but not eliminate, the anti-competitive impact of the vertical integration, such as:

- the roles of AEMO as the National Electricity Market (**NEM**) and system operator and as the Victorian transmission network planner
- economic regulation and enforcement of ring-fencing rules by the AER
- the role of minority investors in the relevant entities
- the degree of separation between the Brookfield funds making the investments; and
- the s87B undertakings which are a condition of authorisation.

The ACCC considers that, in combination, the mitigating factors will make it less likely that there will be discrimination in favour of Origin by AusNet of a kind that would be easy to detect. However, the ACCC considers there is a real prospect of subtle and difficult to detect discrimination. The regulatory frameworks (including the applicable ring-fencing guidelines and rules) do not in themselves sufficiently counter the risk of foreclosure of Origin's rivals. Having separate funds is not in itself likely to address the concern, given incentives within Brookfield teams to have regard to the overall portfolio. The role of minority investors will not likely act to constrain foreclosure strategies that have minimal impact on the profitability of AusNet or are difficult to detect. The undertakings accepted by the ACCC (discussed further below) are behavioural in nature, and although they assist, do not completely remove the potential for foreclosure.

The ACCC is concerned that even subtle discrimination such as applying connection criteria more stringently to a competing connection applicant has the potential to have a significant anti-competitive effect.

In summary, due to vertical integration between electricity transmission and generation, the ACCC is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the markets for the:

- wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
- supply of hedging instruments to electricity retailers operating in the Victorian region of the NEM

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<sup>2</sup> ACCC, [Merger Guidelines](#), November 2008 (amended November 2017), at p. 25.



- supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria.

The ACCC is also concerned about vertical integration between AusNet's electricity distribution business and Origin, which is likely to impact competition in retailing, and vertical integration between Intellihub and Origin, which is likely to impact competition in smart-meter and behind the meter services. However, while the ACCC is similarly not satisfied on these issues, the ACCC considers that the competition impacts are less significant compared to the issues arising in relation to vertical integration of electricity transmission and generation.

The ACCC is also concerned about horizontal competition effects due to MidOcean Group's ownership interests in both QCLNG and APLNG, which may impact competition in the wholesale gas market in the eastern states.

The s87B undertakings which are a condition of authorisation are relevant to the assessment of the above competition issues.

The ACCC is satisfied that the Proposed Acquisition would not have the likely effect of substantially lessening competition as a result of vertical integration between gas distribution and gas retailing, and the vertical integration between embedded generation and electricity distribution.

## Public detriment

In assessing the public detriments, the ACCC has had regard to all competitive harms likely to result from the Proposed Acquisition, notwithstanding its conclusions in respect of the Competition Test. The ACCC considers that the vertical integration discussed above, across regulated monopoly assets and contestable markets, would give rise to material competition harms, at a time when there is increased change in the nature of energy markets, and increasing pressure for the connection of new generation to the transmission network. This vertical integration therefore raises the possibility for long-term competitive harm.

As noted above, the ACCC has also considered the horizontal competition issues arising in overlapping interests in LNG facilities, and the associated effects on competition, as a public detriment likely to result from the Proposed Acquisition.

## Public benefits

The ACCC considers that the Proposed Acquisition would result, or be likely to result, in:

- an acceleration of renewable generation and storage development for Origin Energy Markets
- additional renewable generation and storage development for Origin Energy Markets; and
- a decrease in Origin Energy Markets' emissions intensity.

The ACCC considers that these constitute material public benefits, in the sense that they are important and of value, both to Origin's customers and to Australians more broadly. The ACCC also considers that the Proposed Acquisition would result, or be likely to result, in an acceleration of renewable generation and storage build-out in Australia more generally, and that this constitutes a public benefit. SoThe ACCC considers these benefits will result in an acceleration of the reduction of greenhouse gas emissions in Australia relative to the future without the Proposed Acquisition.

Reducing greenhouse gas emissions is critical to achieving the less extreme warming contemplated under projected climate change scenarios and to reducing the severity of the impacts of climate change on Australia and other countries. Origin is a significant emitter of greenhouse gases and its large retail base supports hedging with a large number of high-emission generators. The ACCC considers that the Proposed Acquisition will help Australia to mitigate its contribution to climate change and assist it in meeting or exceeding national emissions reduction targets, which will contribute to supporting a global transition to lower emissions.

The ACCC accepts that Brookfield will likely deliver a faster and more comprehensive transition of Origin to renewable energy sources, than would occur absent the Proposed Acquisition. The ACCC considers that the nature of the Brookfield Global Transition Fund and Brookfield's financial, reputational and commercial incentives, in combination with its global renewables expertise and procurement scale advantage, will enable it to increase the speed of the build-out, and favour a completed build-out. In particular:

- while Brookfield (and individuals responsible for managing the Brookfield Global Transition Fund) is primarily motivated by financial returns, there is an alignment of the achievement of financial returns and the completion of the build-out, as underpinned by its modelling
- an express purpose of the Brookfield Global Transition Fund is investment in renewable energy projects and decarbonisation, and investors have joined the fund on this basis
- internal governance arrangements require Brookfield to regularly measure and report against specific 'impact targets' for its renewables build-out and Paris-aligned emissions reduction targets
- a failure to complete the build-out may impact Brookfield's ability to attract investors and raise capital for future funds.

The ACCC considers that Brookfield's build-out plans will be supported by access to Origin's retail base and existing generation firming capacity. The ACCC accepts that as a publicly listed company, Origin faces challenges in leveraging these assets in its own renewable generation and storage development relative to Brookfield.

The access to a retail base can contribute to accelerating the build-out of renewable generation and storage assets, because it removes the need to negotiate offtake agreements which can take considerable time and increase project costs, particularly in relation to long-term financing.

The ACCC considers that Brookfield is well-placed to invest in renewables, due to its capital structure; that the Brookfield Global Transition Fund is not required to pay dividends throughout the fund's life; and that it has capital ready to deploy. Further, the ACCC considers Brookfield may be able to reduce its risks by pursuing multiple projects simultaneously, with the expectation that at least some will come to fruition. This is likely to increase the speed by which Brookfield can complete the build-out.

Brookfield's global renewables expertise and procurement scale advantage may enable it to increase the speed of the build-out. In particular, Brookfield will benefit from centralised procurement capabilities, including access to a wider range of supply chains, and group-level negotiations with suppliers. Brookfield will also benefit from its global renewables expertise, including its experience in developing grid-scale wind generation and storage assets.

The ACCC acknowledges the various factors that may act to delay Brookfield's renewables build-out. In particular, the ACCC considers that limits in the transmission system may make a rapid build-out difficult. However, these factors would also be likely to delay other renewables developers including Origin under its current ownership structure. The ACCC considers that regardless of these factors, the Proposed Acquisition is likely to result in an accelerated and additional renewables build-out by Origin compared to the case where the Proposed Acquisition does not go ahead.

In coming to this conclusion, the ACCC has taken into account that without the Proposed Acquisition, both Brookfield and Origin would likely still invest in renewable generation, and that it is only the 'extra' investment, arising as a result of the Proposed Acquisition, that the ACCC has placed weight on as a public benefit.

In relation to the overall impact on Australian renewable investment, the ACCC recognises that there may be a degree of 'crowding out' (that is, investment by Brookfield may displace some investment by others that would have occurred without the transaction) but still considers that the Proposed Acquisition will result an accelerated build-out overall of renewables in Australia.

The ACCC considers the Proposed Acquisition will lessen absolute emissions for Australia as a whole, by bringing forward renewable generation investment, which will displace fossil-fuel generation earlier. However, the ACCC recognises that in the much longer-term a similar amount of renewable and storage capacity may ultimately be built in the future with or without the Proposed Acquisition.

The ACCC has not reached a concluded view on whether or not Origin's own absolute emissions from generation will reduce with the Proposed Acquisition. In light of the energy security concerns being considered by the NSW government and the impacts this may have on the timing of the closure of Eraring, the ACCC has not concluded Eraring will likely close earlier due to the Proposed Acquisition. As Eraring represents Origin's main contribution to emissions, the timing of Eraring's closure is material to considering Origin's absolute emissions under the Proposed Acquisition.

However, the ACCC considers that Origin's generation portfolio's average emissions intensity will reduce earlier due to the Proposed Acquisition, as its generation portfolio will have a higher percentage of renewables than without the Proposed Acquisition. Further, the emissions associated with supplying Origin's significant retail load will be reduced, as there will be an earlier reduction in the emissions intensity of NEM generation overall due to the Proposed Acquisition likely bringing forward renewable generation development.

The ACCC does not consider that the other public benefits that the Applicants claimed would result, or would be likely to result from the Proposed Acquisition, including: decreased energy prices or volatility in prices; the earlier and cheaper development and delivery of new technologies in Australia; the development of the Australian renewables industry in the form of local supply chains and on-shore manufacturing; increased direct and indirect employment; and the acceleration of behind the meter solutions.

## Undertakings

The ACCC has granted authorisation on the conditions, pursuant to section 88(4), that:

- the Brookfield Parties must give, and comply with, the Brookfield Undertaking;
- the AusNet Parties must give, and comply with, the AusNet Undertaking; and
- the MidOcean Parties must give, and comply with, the MidOcean Undertaking.

The ACCC considers that the Brookfield Undertaking, the AusNet Undertaking and the MidOcean Undertaking will do one or more of reducing the likelihood of some public detriment, and increasing the likelihood of some public benefit, resulting from the Proposed Acquisition.

The Brookfield Undertaking and the AusNet Undertaking include a range of separation and ring-fencing measures within Brookfield and between Brookfield, AusNet and Origin. As part of this separation, there will be two groups of Brookfield personnel that will manage Brookfield's interest in one of AusNet or Origin and have no involvement in the other. A member of one group may not become a member of the other, and there are restrictions between the groups including in respect of communication and physical work areas. The Brookfield and AusNet Undertakings also provide for independent auditing, with public versions of reports, of Brookfield and AusNet's compliance with their respective undertakings. For AusNet, this includes auditing of compliance with the non-discrimination obligations of the AER's Transmission Ring-Fencing Guideline as relating to vertical integration with Origin, and extension of this audit to negotiated transmission services. Brookfield and AusNet must publish a range of material, including the aforementioned public audit reports and key details of any Origin applications to connect to the AusNet transmission network.

The Brookfield Undertaking also provides for other commitments that are intended to reduce the likelihood of detriments, including that Brookfield will be prevented from selling AusNet and Origin in the future in a way that a single corporate group or its related/connected entities or parties hold an economic interest greater than 10% in both, and to protect from Intellihub sharing confidential information of an electricity retailer or its other customers.

These commitments are intended to reduce the likelihood of Brookfield or AusNet engaging in certain conduct that would favour Origin or otherwise disfavour Origin's rivals.

The MidOcean Undertaking contains a commitment by MidOcean Energy Holdings Pty Ltd to waive its rights to receive certain sensitive information relating to QCLNG. It also requires MidOcean Energy Holdings Pty Ltd to delete or destroy any such information if it is received by MidOcean Energy Holdings Pty Ltd. The ACCC considers that this undertaking will reduce the ability of MidOcean Group to facilitate coordinated conduct between APLNG and QCLNG, thereby reducing the likelihood of some public detriments occurring if the Proposed Acquisition proceeds.

The Brookfield Undertaking also requires Brookfield to publish annual reports on the progress of Origin in meeting the objectives of the proposed renewables build-out, and records Brookfield's commitment to these objectives. The ACCC considers this will increase the likelihood of Brookfield completing a higher proportion of the full proposed build-out and progress towards delivering up to 14 GW of renewable generation and storage, thereby increasing the likelihood of some public benefits occurring if the Proposed Acquisition proceeds.

## Weighing of benefits and detriments

Acknowledging the inherent difficulty in weighing competitive harm against public benefits, the ACCC has made the evaluative judgment applied by the Tribunal and the Court in analogous cases.<sup>3</sup>

The ACCC considers that the Proposed Acquisition is likely to result in competitive detriments of varying scale and likelihood. The ACCC's concerns derive, in the main, from the vertical integration arising from Brookfield's interests in both AusNet and Origin. The principal competitive detriment arising is in connection to vertical integration of electricity generation and transmission, which detriment the ACCC considers to be material. Accordingly, the ACCC places considerable weight on this detriment.

The other detriments identified by the ACCC are less likely to occur, would be of lesser effect or both, such that the ACCC has placed less weight on them.

The ACCC considers that the likelihood of the identified detriments, including the principal detriment in electricity generation and transmission, is mitigated to some extent by the proffered undertakings.

Against this, the ACCC is required to weigh the public benefits likely to result from the Proposed Acquisition. The ACCC considers there are material public benefits likely to result from the Proposed Acquisition in the form of accelerated and additional renewables development for Origin, leading to a reduction in emissions intensity. The ACCC considers these public benefits to be highly valuable and important to Australians in the context of the need to reduce greenhouse gas emissions to assist in global efforts to avoid the most severe impacts of climate change. Accordingly, the ACCC has given significant weight to these public benefits.

The ACCC considers the Proposed Acquisition is likely to result in an acceleration of renewable generation and storage build-out for Australia as a whole, and this constitutes a public benefit.

The ACCC considers that the Brookfield Undertaking increases the likelihood of these benefits materialising.

## Conclusion

Accordingly, as outlined in the Reasons for Determination below, the ACCC is satisfied in all the circumstances that, on the conditions that:

- the Brookfield Parties must give, and comply with, the Brookfield Undertaking,
- the AusNet Parties must give, and comply with, the AusNet Undertaking, and
- the MidOcean Parties must give, and comply with, the MidOcean Undertaking,

the Proposed Acquisition would result, or be likely to result, in a benefit to the public, and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Acquisition.

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<sup>3</sup> *ACCC v Australian Competition Tribunal* (2017) 254 FCR 341, at [7]; *ACCC v Pacific National (No 2)* [2019] FCA 669, at [1276].

## 1. The application for merger authorisation

- 1.1. On 5 June 2023 EOS Aggregator (Bermuda) LP (**Brookfield LP**) and MidOcean Reef Bidco Pty Ltd (**MidOcean**), collectively, the **Applicants** lodged an application with the Australian Competition and Consumer Commission (**ACCC**) for merger authorisation (the **Application**).
- 1.1. The Applicants have sought authorisation to engage in the conduct described in application MA1000024, being the proposed acquisition of Origin Energy Limited (**Origin**), comprising 2 interdependent acquisitions:
  - a) **Scheme Acquisition:** It is proposed that MidOcean will acquire 100% of the ordinary shares in Origin pursuant to a scheme of arrangement under the *Corporations Act 2001* (Cth) (**Corporations Act**) (the **Scheme Acquisition**). To implement the Scheme Acquisition, a binding Scheme Implementation Deed was signed on 27 March 2023 by Origin, MidOcean and Brookfield Renewable Group Australia Pty Ltd. The Scheme Acquisition is subject to various conditions precedent, as set out in the Scheme Implementation Deed (see Annexure 5.1 of the Application), including Foreign Investment Review Board approval, ACCC authorisation, Origin shareholder approval and Court approval, and
  - b) **On-Sale Acquisition:** Conditional upon, and as soon as possible following implementation of the Scheme Acquisition, MidOcean will procure that Origin and its interests are divided into 2 separate businesses, being the Origin Energy Markets business and the Origin Integrated Gas business. Origin's Energy Markets business comprises Origin's energy retailing business, electricity generating assets, energy wholesale and trading business, development assets relating to energy production and storage, investment in Octopus Energy and its Liquefied Petroleum Gas (**LPG**) business and domestic gas trading business **Origin Energy Markets**. Origin's Integrated Gas business comprises Origin's upstream gas interests and shareholding in Australia Pacific LNG (**APLNG**), **Origin Integrated Gas**. The division of Origin will be implemented by MidOcean procuring the sale of the various Origin subsidiaries and assets comprising the Origin Energy Markets business to various entities wholly owned by Brookfield LP. MidOcean will retain 100% of the shares in Origin which, following completion of the sale of the Origin Energy Markets business, will own only the Origin Integrated Gas business. The terms of Brookfield LP's acquisition of the Origin Energy Markets business are set out in the Commitment Deed (see Annexure 5.3 of the Application) and the steps that MidOcean and Brookfield LP will take to prepare for the implementation of the Scheme Acquisition and the On-Sale Acquisition are set out in the Bid Conduct Deed (see Annexure 5.2 of the Application).
- 1.2. The Scheme Acquisition and the On-Sale Acquisition are together the **Proposed Acquisition**.
- 1.3. The Application is made pursuant to section 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). A merger authorisation provides protection from legal action under section 50 of the Act, which otherwise prohibits acquisitions of shares or assets that would or would be likely to have the effect of substantially lessening competition in any market.<sup>4</sup>

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<sup>4</sup> For detailed information about the authorisation process, see: ACCC, [Merger Authorisation Guidelines](#), October 2018.

- 1.4. The Applicants seek authorisation of the Proposed Acquisition on their own behalf, and on behalf of the following classes of person:
- any entity that is a related body corporate of Brookfield LP that acquires any part of Origin Energy Markets
  - any entity that is a related body corporate of MidOcean Energy, LLC that acquires any part of Origin Integrated Gas.
- 1.5. The Applicants request that the ACCC grants a single authorisation under section 88(5) of the Act for the 2 interdependent acquisitions which, taken together, form the Proposed Acquisition.
- 1.6. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to make submissions outlining whether they support the application or not, to help inform its decision.

## The parties

### *Brookfield*

- 1.7. Brookfield is a Canadian global asset manager with approximately USD 850 billion assets under management.<sup>5</sup> Brookfield invests in sectors such as real estate, infrastructure, renewable power, private equity and credit.<sup>6</sup> Brookfield Corporation and Brookfield Asset Management Limited are the 2 key corporate entities in Brookfield. Both have an interest in Brookfield Asset Management ULC (**BAM**), which is the holding company for the Brookfield asset management business.
- 1.8. For ease of reference, Brookfield Corporation, Brookfield Asset Management Limited and BAM will be referred to collectively as Brookfield in the Reasons for Determination. Brookfield Renewable Group Australia Pty Ltd is a subsidiary of Brookfield Corporation.<sup>7</sup>
- 1.9. Brookfield LP has been established for the purposes of the Proposed Acquisition and it has no activities or operations in Australia (or globally). At completion of the Proposed Acquisition, Brookfield LP will be controlled by Brookfield through Brookfield Global Transition Fund (**BGTF**), Brookfield Renewable Partners LP (**BEP**) and certain other Brookfield-managed co-investors, holding a combined interest of 67.6%. The balance of Brookfield LP will be owned by:
- a) Buckland Investment Pte. Ltd. (which is managed by GIC Special Investments Private Limited, which is in turn wholly owned by GIC Private Limited (**GIC**)) (**Buckland Investment**) (22.5%)
  - b) Davis Investments Pte. Ltd, wholly owned by Temasek Holdings (Private) Limited (**Temasek**) (9.9%).<sup>8</sup>

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<sup>5</sup> Brookfield, [Who We Are](#), accessed 30 August 2023.

<sup>6</sup> Brookfield and MidOcean application for merger authorisation for proposed acquisition of Origin Energy Limited ('**Application for merger authorisation**' hereafter) (MA1000024), 5 June 2023, at [444].

<sup>7</sup> ASIC Extract, Brookfield Renewable Group Australia Pty Ltd (ACN: 658081291), 7 August 2023.

<sup>8</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [10], [479] – [480]; Applicants' correspondence regarding update on the status of Brookfield's equity syndication process, 24 August 2023.



## Origin

- 1.10. Origin is a major integrated electricity generator and retailer of electricity and natural gas.
- 1.11. Origin also operates a gas exploration and production business and has a 27.5% stake in the APLNG export venture based in Gladstone, Queensland.<sup>9</sup> APLNG is a coal seam gas to liquified natural gas (**LNG**) project which supplies Australian customers with natural gas and international customers with LNG.<sup>10</sup>

## MidOcean Group

- 1.12. MidOcean has been established as a special purpose vehicle, which is ultimately wholly owned (via a series of intermediary holding vehicles) by MidOcean Energy LLC. MidOcean Energy LLC is an LNG company formed and managed by EIG Partners to build a diversified LNG portfolio.<sup>11</sup>
- 1.13. MidOcean Energy LLC and its subsidiaries are referred to in the Reasons for Determination collectively as **MidOcean Group**.<sup>12</sup>
- 1.14. EIG Partners is an institutional investor based in Washington D.C. with a focus on energy and energy-infrastructure investments. It has contributed USD 44.6 billion of institutional funding to almost 400 renewable energy projects globally.<sup>13</sup>

## The Proposed Acquisition

### The Scheme Acquisition

- 1.15. On 27 March 2023 Origin entered into a binding Scheme Implementation Deed with Brookfield Renewable Group Australia Pty Ltd and MidOcean.<sup>14</sup>
- 1.16. The scheme, if implemented, will result in MidOcean acquiring 100% of the shares in Origin for total consideration of AUD 5.78 per share and USD 2.19 per share to be paid to all shareholders (**Scheme Consideration**). Under the terms of the scheme, the Scheme Consideration will be paid in Australian dollars (with the US dollar component based on the prevailing exchange rate at the time of implementation of the scheme), unless the shareholder makes a valid election to have the US dollar component paid in US dollars.<sup>15</sup>
- 1.17. Based on an assumed AUD/USD exchange rate of 0.70, this implies a total Scheme Consideration of AUD 8.912 per share, which corresponds to an enterprise value of AUD 18.7 billion for Origin.<sup>16</sup>

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<sup>9</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [619].

<sup>10</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [619] – [620], fn 1.

<sup>11</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [258].

<sup>12</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [260(b)].

<sup>13</sup> EIG Partners, [About Us](#), accessed 15 September 2023.

<sup>14</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [4].

<sup>15</sup> Origin Energy, [Scheme Implementation Deed: Attachment 1 – Scheme of Arrangement](#), 27 March 2023, at pp. 4 – 5.

<sup>16</sup> Application for merger authorisation (MA1000024), 5 June 2023, at p. 3.



- 1.18. In addition, a 4.5 cents per month 'ticking fee', accruing on a daily basis, will be payable if implementation of the scheme is delayed beyond 30 November 2023.<sup>17</sup>
- 1.19. The scheme is subject to various customary conditions precedent as set out in the Scheme Implementation Deed, including Foreign Investment Review Board approval, Origin shareholder approval, Court approval and ACCC approval.<sup>18</sup>

### **On-Sale Acquisition**

- 1.20. Origin's Energy Markets business comprises Origin's energy retailing business, electricity generating assets, energy wholesale and trading business, development assets relating to energy production and storage, investment in Octopus Energy and LPG business and domestic gas trading business.
- 1.21. Origin's Integrated Gas business comprises Origin's upstream gas interests and 27.5% shareholding in APLNG (pursuant to a joint venture with Sinopec (25%) and ConocoPhillips Australia Pacific LNG Pty Ltd (**ConocoPhillips**) (47.5%)).<sup>19</sup>
- 1.22. Following the implementation of the Scheme Acquisition it is proposed that Origin will be divided, by MidOcean procuring the sale of the various Origin subsidiaries and assets comprising the Origin Energy Markets business to various entities wholly owned by Brookfield LP. The terms of Brookfield LP's acquisition of Origin Energy Markets are set out in a Commitment Deed dated 27 March 2023.<sup>20</sup>
- 1.23. The steps that MidOcean and Brookfield LP propose to take to prepare for the implementation of the Scheme Acquisition and the On-Sale Acquisition are set out in a Bid Conduct Deed dated 27 March 2023.<sup>21</sup>
- 1.24. It is proposed that following completion of the sale of Origin Energy Markets, EIG Management Company, LLC (through its related companies including MidOcean) will own Origin Integrated Gas.
- 1.25. Immediately following the implementation of the Proposed Acquisition, MidOcean intends to sell part of Origin's 27.5% interest in APLNG to ConocoPhillips, resulting in ConocoPhillips acquiring an additional 2.49% interest in APLNG.<sup>22</sup> **[Redacted – Confidential]**.<sup>23</sup> MidOcean will retain a 25.01% interest in APLNG. The conduct described in this paragraph does not form part of the Proposed Acquisition for which authorisation is sought.

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<sup>17</sup> Where the implementation date has not occurred by 30 November 2023, the Scheme of Arrangement provides for the payment of additional consideration of an amount equal to an additional AUD 0.001479 for each day that has elapsed from (and including) 1 December 2023 to (and including) the date on which implementation occurs. 'Additional Consideration' is defined at: Origin Energy, [Scheme Implementation Deed: Attachment 1 – Scheme of Arrangement \(Schedule 1\)](#), 27 March 2023, at p. 14.

<sup>18</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [251].

<sup>19</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [619].

<sup>20</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [255(b)].

<sup>21</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [255(a)].

<sup>22</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [270].

<sup>23</sup> **[Redacted – Confidential]**.

## Applicants' stated rationale for the Proposed Acquisition

### Brookfield

- 1.26. Brookfield submits that BGTF is focussed on creating value for investors through making investments that accelerate the global transition:<sup>24</sup>
- a) Brookfield considers the Proposed Acquisition is an ideal investment opportunity for BGTF as Origin is Australia's largest generator/retailer (**gentailer**) (by customer accounts) with low customer turnover and industry-leading cost to serve<sup>25</sup>
  - b) Origin is structurally short of electricity, creating an opportunity for BGTF to invest in significant additional renewable generation to meet Origin's customer demand<sup>26</sup>
  - c) Brookfield's access to capital and renewable development capabilities will enable it to invest the requisite capital during the next decade to build-out up to 14 gigawatts (**GW**) of additional renewable storage and generation resulting in a more cost effective and flexible portfolio to benefit Origin's retail customers<sup>27</sup>
  - d) the regulated price setting regime together with Origin's position as the largest and lowest cost to serve electricity retailer in Australia, provides earnings visibility and stable margins<sup>28</sup>
  - e) Origin is uniquely positioned to benefit from the economy's electrification, providing customers with greater choice of low-cost services and products.<sup>29</sup>

### MidOcean Group

- 1.27. The Applicants submit that the Proposed Acquisition aligns with MidOcean Group's plans to build a diversified, cost-competitive, and carbon competitive LNG portfolio.<sup>30</sup> The Applicants submit that APLNG's investment in quality gas reserves and downstream infrastructure will complement MidOcean Group's existing Australian LNG assets acquired from Tokyo Gas.<sup>31</sup>
- 1.28. The Applicants consider gas and LNG to be key transitional fuels and, accordingly, a critical component for meeting emissions reduction targets and building renewable integration in power grids.<sup>32</sup> The Applicants submit that the Proposed Acquisition will contribute to Australia's energy transition, ensure domestic gas supply, and provide reliable LNG to meeting growing demand in the Asia-Pacific region.<sup>33</sup>

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<sup>24</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [12].

<sup>25</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [281(a)].

<sup>26</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [280].

<sup>27</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [281(c)].

<sup>28</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [281(d)].

<sup>29</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [281(e)].

<sup>30</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [258].

<sup>31</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [285(a)].

<sup>32</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [285(b)].

<sup>33</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [285(d)] – [287].

## 2. Statutory framework

### The requirements for authorisation

- 2.1. One of the objects of the Act is to enhance the welfare of Australians through the promotion of competition.<sup>34</sup> As the Harper Committee said:

Competition is desirable not for its own sake but because, in most circumstances, it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end.<sup>35</sup>

- 2.2. The Act protects competition primarily through the prohibitions on anti-competitive conduct in Part IV, including the section 50 prohibition on acquisitions that would or would be likely to substantially lessen competition in any market. However, it has been recognised that conduct that would breach the competition rules may have offsetting public benefits such that the achievement of economic efficiency and the other benefits of competitive market conduct may come at the cost of other valued objectives.<sup>36</sup> Because of this, Australia's competition law has included since 1974 a legislative scheme that provides, in the words of the Australian Competition Tribunal (the **Tribunal**), 'an administrative process to remove the risk that proposed beneficial conduct may contravene competition laws.'<sup>37</sup>

- 2.3. Section 88(1) of the Act confers on the ACCC a discretionary power to authorise conduct:

Subject to this Part [Part VII], the Commission may, on an application by a person, grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Part IV specified in the authorisation would or might apply.

- 2.4. That discretion is enlivened when either of the necessary conditions or 'statutory preconditions'<sup>38</sup> in section 90(7) is met. Section 90(7) relevantly provides:

The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:

(a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or

(b) the Commission is satisfied in all the circumstances that:

(i) the conduct would result, or be likely to result, in a benefit to the public; and

(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct; or [...]

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<sup>34</sup> *Competition and Consumer Act 2010* (Cth), s 2.

<sup>35</sup> Ian Harper et al., [Competition Policy Review: Final Report](#), March 2015, at p. 397.

<sup>36</sup> Frederick G Hilmer et al., [National Competition Policy Report by the Independent Committee of Inquiry 1993](#), 25 August 1993, at pp. 29, 88.

<sup>37</sup> *Application by Medicines Australia Inc* [2007] ACompT 4, at [105].

<sup>38</sup> *Application by Flexigroup Limited (No 2)* [2020] ACompT 2, at [138]; *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [91], [99], [111] – [129].

- 2.5. For convenience, these Reasons for Determination refer to the preconditions in section 90(7)(a) as the **Competition Test** and section 90(7)(b) as the **Net Public Benefit Test** respectively.<sup>39</sup>
- 2.6. The satisfaction of those statutory preconditions does not require that the ACCC grants authorisation: the ACCC has a discretion to refuse authorisation even where it is satisfied of one or both of the preconditions in section 90(7)(a) or (b).<sup>40</sup> This follows from both the discretionary language of section 88(1) (the word ‘may’) and the framing of section 90(7) in terms that the ACCC must not make a determination granting an authorisation under section 88 unless it is satisfied either that no substantial lessening of competition is likely or that there would be a net public benefit.<sup>41</sup> These are negative limitations on the granting of authorisation rather than positive directions to authorise.
- 2.7. The Tribunal has said that the discretion is not in its terms limited other than by the subject matter, scope and purpose of the Act and the statutory context in which it appears; it is not narrowly confined.<sup>42</sup> The Tribunal has canvassed circumstances in which the ACCC might exercise the discretion and not grant authorisation notwithstanding the Net Public Benefit Test is met.<sup>43</sup> However, the Tribunal has said that if the ACCC or the Tribunal on review were to be satisfied that the conduct is likely to result in a net public benefit, ordinarily authorisation would be granted.<sup>44</sup>
- 2.8. As already noted, before the ACCC can grant a merger authorisation, the ACCC must be satisfied in all the circumstances that the proposed merger meets either the Competition Test or the Net Public Benefit Test.
- 2.9. The word ‘satisfied’ in the context of an administrative decision is not amenable to the application of a standard of proof such as the balance of probabilities. However, this does not mean there is an absence of a legal standard of satisfaction.<sup>45</sup> In respect of section 90(7), to be ‘satisfied’ requires the ACCC to reach ‘an affirmative belief’.<sup>46</sup>
- 2.10. Both preconditions in section 90(7) require the ACCC to be ‘satisfied in all the circumstances’: these depend on the ACCC’s state of mind. The reference to ‘all the circumstances’ underscores that the ACCC is to have regard to anything known to it that bears upon the making of its decision. But those circumstances must be related to the competition effects and public benefits and detriments of the conduct. That follows from the textual focus of section 90(7)(a) and (b) upon the ‘conduct’.<sup>47</sup>
- 2.11. In forming a state of satisfaction under section 90(7), the ACCC must act upon a correct understanding of the law. It must act reasonably. It must reason rationally and logically. And it must also have a basis for its findings. That basis can rest in

<sup>39</sup> It is important to note that section 90(7)(b) requires the ACCC to identify likely public benefits and likely public detriment, but that the ACCC must be satisfied that the former would outweigh the latter (e.g., it does not say ‘would be likely to outweigh’).

<sup>40</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [127].

<sup>41</sup> See, in respect of an earlier iteration of s 90(7): *Application by Medicines Australia Inc* [2007] ACompT 4, at [106].

<sup>42</sup> *Application by Medicines Australia Inc* [2007] ACompT 4, at [126].

<sup>43</sup> *Application by Medicines Australia Inc* [2007] ACompT 4, at [127] – [128].

<sup>44</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [127]; *Application by Flexigroup Limited (No 2)* [2020] ACompT 2, at [138]; *Application by Medicines Australia Inc* [2007] ACompT 4.

<sup>45</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [99].

<sup>46</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [99]; *BOY19 v Minister for Immigration and Border Protection* (2019) 165 ALD 39, at [55].

<sup>47</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [144] – [145], [159].

one or a combination of: evidence, common sense, a reasonable appreciation of human experience, personal experience or specialised knowledge of the ACCC and findings based on reasonable inferences from these sources.

- 2.12. Ultimately, it is a matter for the ACCC how to sift, evaluate and weigh the material before it, so long as it does so in a reasonable and rational fashion.
- 2.13. A feature of this application for merger authorisation is that the ACCC has received substantial submissions and evidence from the Applicants and relatively little material – whether supporting, contradictory or neutral – from other market participants. An administrative decision-maker such as the ACCC is not required to accept uncritically any and all claims made by the Applicants,<sup>48</sup> and need not have rebutting evidence before finding that a particular assertion is not made out.<sup>49</sup> Further, it has been said that:
- to establish a particular fact even in the absence of contradictory evidence, the mode of proof must be sufficient to persuade a reasonable person to that conclusion [...] in forming a view as to whether particular material demonstrates a particular factual matter, regard is had to the nature and form of the evidence received, the degree of its inherent veracity (or lack thereof), the other forms of persuasive material that might be available to be presented as to the same facts and any reason why that material is not presented.<sup>50</sup>
- 2.14. The ACCC has approached its assessment of the material before it with these principles in mind.
- 2.15. Both the Competition Test and the Net Public Benefit Test involve consideration of what is likely to occur. The meaning of 'likely' has been the subject of some debate but, in the section 50 test, 'likely to have the effect' can be accepted as meaning a 'real chance' that is a 'real commercial likelihood'.<sup>51</sup> The Court has cautioned against atomising this test and said that, rather, there is a single evaluative judgment in determining whether a substantial lessening of competition is likely.<sup>52</sup> The Tribunal has recently said that 'likely' in section 90(7) should have the same meaning as in the prohibitions in Part IV of the Act (which include section 50).<sup>53</sup>
- 2.16. In assessing the likely effect on competition or the likely benefits and detriments arising from a proposed acquisition, the ACCC considers an analytical tool that has been described as 'the future with and without'.<sup>54</sup> This is not a comparison of a future in which the acquisition is authorised against a future in which it is not. Rather, it involves a forward-looking comparison of a future in which the proposed acquisition occurs with a future in which it does not.<sup>55</sup>

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<sup>48</sup> See, e.g.: *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at p. 451.

<sup>49</sup> *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 at [7].

<sup>50</sup> *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121 at [187] – [188].

<sup>51</sup> *ACCC v Pacific National (No 2)* [2019] FCA 669, at [1274], [1275]; affirmed on appeal *ACCC v Pacific National* (2020) 277 FCR 49, at [246]. See also: *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [117].

<sup>52</sup> *ACCC v Pacific National (No 2)* [2019] FCA 669, at [1276].

<sup>53</sup> *Application by Port of Newcastle Operations Pty Limited (No 2)* [2022] ACompT 1 [53] – [60].

<sup>54</sup> *Application by Medicines Australia Inc* [2007] ACompT 4, at [117] – [119], citing *Re QIW Ltd* 132 ALR, 276 and *Qantas Airways Ltd* [2004] ACompT 9, at [151]. See and compare: *ACCC v Metcash Trading Limited* (2001) 198 FCR 297, at [228]; *Australian Building and Construction Commissioner v Pattinson* (2002) 399 ALR 599, at [45].

<sup>55</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [149].

- 2.17. In section 50 proceedings, the Court has said that a party who wishes to prove that a transaction will not have the likely effect of substantially lessening competition ‘must negative the existence of any real chance [...] of a commercially relevant or meaningful lessening of competition flowing from the acquisition’.<sup>56</sup> In the merger authorisation context, for the purposes of the Competition Test the ACCC forms a view as to whether it is satisfied, in all the circumstances, that no substantial lessening of competition is likely in any market.<sup>57</sup>
- 2.18. The Net Public Benefit Test refers to ‘benefit to the public’ and ‘detriment to the public’. These are not defined in the Act but the former encompasses ‘the widest possible conception of public benefit [...] anything of value to the community generally, any contribution to the aims pursued by the society, including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress’.<sup>58</sup> ‘Detriment to the public’ extends to ‘any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency’.<sup>59</sup>
- 2.19. The Net Public Benefit Test has been described as involving a ‘balance sheet’ approach.<sup>60</sup> However, in light of the breadth of potentially relevant benefits and detriments, many benefits and detriments will be incommensurable (such as comparing a likely competitive detriment against a likely environmental benefit) and possibly unmeasurable. Recognising this, the weighing of the likely benefits and detriments ‘may more usefully be assayed by means of a process of ‘instinctive synthesis’.<sup>61</sup>

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<sup>56</sup> See: *Australian Gas Light Company v Australian Competition & Consumer Commission [No 3]* (2003) 137 FCR 317, at [305]. See also: *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720, at [1031].

<sup>57</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [118].

<sup>58</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [121]; *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 8 ALR 481, at [510].

<sup>59</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [121]; *Re 7-Eleven Stores Pty Ltd* (1994) 16 ATPR 41-357, at [42,683].

<sup>60</sup> *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 8 ALR 481, at [512].

<sup>61</sup> *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, at [7]. There, the Full Court of the Federal Court was concerned with s 95AZH(1), which provided that the Tribunal must not grant a merger authorisation unless ‘satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.’

### 3. Timing

- 3.1. The ACCC has a period of 90 days from the day it receives an application for merger authorisation in which to make its determination.<sup>62</sup> The Act allows for the period to be extended where, before the initial 90-day period ends, the applicants notify the ACCC in writing that they agree to a longer period.
- 3.2. The Applicants have notified the ACCC that they agree to the period being extended so that it concludes on 12 October 2023.

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<sup>62</sup> *Competition and Consumer Act 2010* (Cth), s 90(10B); ACCC, [Merger Authorisation Guidelines](#), October 2018, at pp. 5, 15 – 16.

## 4. Consultation

- 4.1. The ACCC tests the claims made by an applicant in support of an application for merger authorisation through an open and transparent public consultation process.
- 4.2. Before the ACCC releases a determination in relation to an application for merger authorisation, it generally provides feedback to the applicant and interested parties about the issues raised in submissions. This feedback also identifies any issues of concern to the ACCC at that time and invites responses on issues raised.
- 4.3. In this matter, the ACCC invited submissions and sought additional information at 3 stages – the initial consultation process shortly after the Application was lodged, after the ACCC provided its initial feedback in its [transparency letter](#) published on 20 July 2023 and after the ACCC provided supplementary feedback in its [second transparency letter](#) published on 29 August 2023. The ACCC also relied on its powers under section 90(6) of the Act to seek additional information relevant to the ACCC making its determination of the Application from the Applicants<sup>63</sup> and other persons at key stages throughout the public consultation process.<sup>64</sup>
- 4.4. The ACCC has taken into account submissions, information and evidence received from the Applicants and interested parties, including:
- the Applicants' application in support of the merger authorisation and related annexures (including 6 witness statements and an expert report)
  - 14 written and oral public submissions from interested parties in response to the ACCC's initial consultation process<sup>65</sup>
  - information from 4 parties and individuals obtained under the ACCC's consultation powers<sup>66</sup>
  - information from the Applicants under the ACCC's information gathering powers<sup>67</sup>
  - information from 2 parties requested under the ACCC's information gathering powers<sup>68</sup>
  - submissions from 4 interested parties in response to the ACCC's transparency letter
  - submissions from 2 interested parties in response to the reports prepared for the ACCC
  - submissions from the Applicants and Origin, including one additional witness statement and 2 additional expert reports, in response to submissions from interested parties and the ACCC's transparency letters and information requests.
- 4.5. Public submissions by the Applicants, Origin and interested parties are published on the ACCC's [public register](#). The ACCC also received some submissions and responses to information requests that were wholly or partly confidential. In the

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<sup>63</sup> *Competition and Consumer Act 2010* (Cth), s 90(6)(b).

<sup>64</sup> *Competition and Consumer Act 2010* (Cth), s 90(6)(c) – (d).

<sup>65</sup> *Competition and Consumer Act 2010* (Cth), s 90(6)(a).

<sup>66</sup> *Competition and Consumer Act 2010* (Cth), s 90(6)(d).

<sup>67</sup> *Competition and Consumer Act 2010* (Cth), s 90(6)(b).

<sup>68</sup> *Competition and Consumer Act 2010* (Cth), s 90(6)(c).



Reasons for Determination, certain information and submissions from some interested parties have therefore been de-identified.

- 4.6. The ACCC also received and had regard to information and documents obtained under the ACCC's compulsory information gathering powers,<sup>69</sup> including under oral examination. This material has not been placed on the public register.
- 4.7. An overview of the parties that provided submissions and information to the ACCC at various stages of the consultation process is provided below. The views of interested parties and the Applicants are outlined in further detail where relevant in the Reasons for Determination.

### **Initial consultation on the Application**

- 4.8. In response to the Application, the ACCC sought views from a range of interested parties. The ACCC received 14 public submissions during the ACCC's initial consultation process.
- 4.9. The ACCC received public submissions from:
- **gentailers and generator developers:** EnergyAustralia, AGL, Alinta Energy, ACEN Australia, Syncline Energy and Iberdrola
  - **financial institutions:** ANZ and Commonwealth Bank of Australia
  - **a petroleum company:** Ampol
  - **an industry body, a research institute and a customer:** Grattan Institute, Clean Energy Council and Roger Fyfe
  - **2 anonymous parties.**<sup>70</sup>
- 4.10. The Applicants provided 2 responses to public submissions on 28 July and 24 August 2023. The ACCC also received an oral submission from the Applicants on 4 August 2023.

### **Following the ACCC's publication of the first transparency letter**

- 4.11. The ACCC invited information in response to its transparency letter by 27 July 2023 and received responses from 4 interested parties: Shell Queensland Gas Company (**Shell QGC**), Telstra, **[Redacted – Confidential]** and Roger Fyfe. The Applicants and Origin also each provided a response to the transparency letter.

### **Further consultation under section 90(6) of the Act**

- 4.12. The ACCC requested and received additional information under section 90(6)(b) of the Act from the Applicants.
- 4.13. The ACCC requested and received information under section 90(6)(c) and (d) of the Act from Engie, Shell, the Australian Energy Regulator (**AER**), the Australian Energy Market Operator (**AEMO**), Origin, Temasek and the Applicants.

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<sup>69</sup> *Competition and Consumer Act 2010* (Cth), s 155.

<sup>70</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023; Anonymous submission **[Redacted – Confidential]**, 5 July 2023.

- 4.14. The ACCC consulted under section 90(6)(d) of the Act with Mr Harris of Frontier Economics and Mr Hyslop of ACIL Allen and with AEMO and the AER. Mr Harris and Mr Hyslop authored reports in response to questions the ACCC put to them in these consultations.
- 4.15. In response to Mr Harris' report, ANZ provided information to the ACCC. In response to Mr Hyslop's report, **[Redacted – Confidential]** provided information to the ACCC. In response to Mr Harris and Mr Hyslop's reports, the Applicants on 23 August 2023 provided 2 separate reports.<sup>71</sup>

## Overview of submissions

- 4.16. The views expressed in submissions to, and information required by, the ACCC were mixed. Some interested parties, including Syncline Energy, Shell QGC, Roger Fyfe, **[Redacted – Confidential]** and an anonymous party express concerns about the competitive impact of the Proposed Acquisition.<sup>72</sup> Other interested parties, such as Commonwealth Bank of Australia and ANZ, support the Proposed Acquisition, while the Grattan Institute, Ampol, Telstra and ACEN Australia have limited or no concerns with the Proposed Acquisition.<sup>73</sup>
- 4.17. Additional interested parties, including EnergyAustralia, Iberdrola, Clean Energy Council and Alinta, indicate that the Proposed Acquisition could give rise to competition concerns if the AER's Ring-Fencing Guidelines are not effective. That is, without effective ring-fencing guidelines, Brookfield, through its interest in AusNet Pty Ltd (**AusNet**), may have the ability and incentive to preference Origin's generators connecting to the Victorian transmission network.<sup>74</sup> Engie also submits that the absence of obligations for transmission network operators to offer the same terms, conditions or pricing could allow for favouritism.<sup>75</sup>
- 4.18. The ACCC also received information from interested parties in response to the Applicants' public benefits claims about the scale and pace of the renewables build-out.<sup>76</sup>
- 4.19. The ACCC has received mixed feedback from interested parties about the advantages Brookfield derives from its global and centralised procurement capabilities. ACEN Australia submits that Brookfield's global procurement capabilities might give it an advantage over other developers to overcome global supply chain issues, and acquire materials more cheaply.<sup>77</sup> Iberdrola submits that any advantage in terms of cheaper pricing will likely be minor, although a company like Brookfield will benefit from being able to procure inputs at scale and manage a portfolio of projects.<sup>78</sup>

<sup>71</sup> Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023; Expert report of David Dixon (Rystad Energy) for the Applicants, 25 August 2023.

<sup>72</sup> Syncline Energy submission, 25 June 2023; Shell QGC submission in response to ACCC Transparency Letter, 10 August 2023; Roger Fyfe submission, 4 July 2023; Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023; **[Redacted – Confidential]**.

<sup>73</sup> Commonwealth Bank of Australia submission, 27 June 2023; ANZ submission, 23 June 2023; Grattan Institute record of oral submission, 3 July 2023; Ampol submission, 22 June 2023; Telstra submission in response to ACCC Transparency Letter, 8 August 2023; ACEN Australia record of oral submission, 4 July 2023.

<sup>74</sup> EnergyAustralia record of oral submission, 4 July 2023; Iberdrola record of oral submission, 1 August 2023; Clean Energy Council record of oral submission, 25 July 2023; Alinta Energy record of oral submission, 30 June 2023.

<sup>75</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>76</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [782], [809] – [810], [948].

<sup>77</sup> ACEN Australia record of oral submission, 4 July 2023, at [13].

<sup>78</sup> Iberdrola record of oral submission, 1 August 2023, at [9] – [10].

- 4.20. Also, ACEN Australia, EnergyAustralia and an anonymous party, accept that if Brookfield was to achieve its renewables build-out, it would be significant within the context of transitioning the National Electricity Market (**NEM**) to renewable energy sources.<sup>79</sup>
- 4.21. Other interested parties submit that, irrespective of the Proposed Acquisition, network congestion and connection bottlenecks are the major barriers to building generation capacity in the NEM.<sup>80</sup>

## Proposed section 87B undertakings

### *Brookfield Undertaking*

- 4.22. The Applicants, on behalf of certain Brookfield entities, provided the First Proposed Brookfield Undertaking to the ACCC on 5 June 2023. The ACCC commenced consultation on the First Proposed Brookfield Undertaking on 6 June 2023.
- 4.23. The ACCC received 7 submissions during the consultation period.

### Interested party submissions

- 4.24. Ampol submits that the Applicants should give an enforceable undertaking which contains a firm commitment to build approximately 14 GW of new generation and storage assets by 2033.<sup>81</sup>
- 4.25. Mr Hyslop's report submits that the ring-fencing arrangements contained in the First Proposed Brookfield Undertaking may be sufficient to prevent the misuse of information between certain affiliated Brookfield business units.<sup>82</sup> Alinta did not object to the Proposed Acquisition if appropriate ring-fencing measures are used but did not refer to the First Proposed Brookfield Undertaking specifically.<sup>83</sup>
- 4.26. The Grattan Institute submits that the First Proposed Brookfield Undertaking could remedy some issues raised by the Proposed Acquisition, however, it is unclear whether it would prevent the risk of information sharing between Brookfield business units. The Grattan Institute suggests that the obvious solution would be for Brookfield to divest its interest in AusNet.<sup>84</sup>
- 4.27. Syncline Energy submits that it does not believe that the First Proposed Brookfield Undertaking, or any undertakings offered by the Applicants, will be sufficient to avoid a substantial lessening of competition and to prevent AusNet from discriminating against competing electricity generators.<sup>85</sup>

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<sup>79</sup> ACEN Australia record of oral submission, 4 July 2023, at [14]; EnergyAustralia record of oral submission, 25 July 2023, at [24]; Anonymous record of oral submission [**Redacted – Confidential**], 5 July 2023, at [10].

<sup>80</sup> Alinta Energy record of oral submission, 30 June 2023, at [10]; Anonymous record of oral submission [**Redacted – Confidential**], 5 July 2023, at [2] – [3]; ACEN Australia record of oral submission, 4 July 2023, at [16]; Grattan Institute record of oral submission, 3 July 2023, at [15], [17]; Iberdrola record of oral submission, 1 August 2023, at [17].

<sup>81</sup> Ampol submission, 22 June 2023, at pp. 1 – 2.

<sup>82</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [36].

<sup>83</sup> Alinta Energy record of oral submission, 30 June 2023, at [18].

<sup>84</sup> Grattan Institute record of oral submission, 3 July 2023, at [2] – [3].

<sup>85</sup> Syncline Energy submission, 25 June 2023, at p. 4.

- 4.28. Roger Fyfe submits that the ring-fencing commitments in the First Proposed Brookfield Undertaking between AusNet and Origin Energy Markets would be impossible to achieve following privatisation of the Origin business.<sup>86</sup>
- 4.29. In relation to gas markets, the Grattan Institute submits that the First Proposed Brookfield Undertaking might not necessarily solve the problem of customers being unable to access spare pipeline capacity.<sup>87</sup>

### **Applicants' response to submissions**

- 4.30. On 28 July 2023 and 24 August 2023, the Applicants provided a response to submissions received from interested parties.
- 4.31. The Applicants submit that Brookfield has financial and reputational interests to complete the renewables build-out of Origin, such that an undertaking of the kind proposed by Ampol is not necessary to ensure a high degree of confidence that the build-out will proceed. In that regard, the Applicants note that for example, the Origin Energy Markets business will be more valuable for later divestment if Brookfield successfully completes the proposed build-out.
- 4.32. In response to Alinta Energy's submission, which emphasises the importance of appropriate ring-fencing measures between the transmission/distribution and generation businesses owned by Brookfield, the Applicants refer to the ring-fencing measures set out in the First Proposed Brookfield Undertaking as an appropriate way to re-enforce the separation between AusNet and Origin Energy Markets.
- 4.33. In response to the Grattan Institute's submission about whether the First Proposed Brookfield Undertaking would prevent the risk of information sharing between AusNet and Brookfield entities, the Applicants emphasise that AusNet and Origin Energy Markets will remain separate companies with separate owners and management teams and that the proposed ring-fencing obligations will ensure that competitively sensitive information is not shared between affiliated businesses.
- 4.34. In relation to the Grattan Institute's submission about customer access to spare pipeline capacity, the Applicants note that there is uncontracted spare capacity on each of Jemena's pipelines that transport gas for use in retail markets. On this issue, the Applicants further note that AusNet does not own any gas transmission pipelines and that there are no vertical competition concerns related to Jemena's interests in transmission pipelines (for the reasons outlined in paragraph 6.152 of the Reasons for Determination).
- 4.35. In response to Syncline Energy's submission that questions the sufficiency of the First Proposed Brookfield Undertaking, the Applicants re-iterate the separate ownership and management of AusNet and Origin Energy Markets, re-enforced by the ring-fencing commitments pursuant to the First Proposed Brookfield Undertaking. The Applicants also submit that the current challenges related to network connections are unrelated to the Proposed Acquisition.
- 4.36. In its second response of 24 August 2023 to the information provided by Engie, the Applicants say that no confidential information is or will be shared by Intellihub Australia Pty Ltd (**Intellihub**) between energy retailers due to contractual reasons

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<sup>86</sup> Roger Fyfe submission, 4 July 2023, at p. 1.

<sup>87</sup> Grattan Institute record of oral submission, 3 July 2023, at [5].

and relevant legislation, and that only authorised Intellihub employees can access its database, which contains only limited information. The Applicants add that limits on sharing information obtained by Intellihub will be appropriately enforced.

- 4.37. On 29 August 2023, Brookfield submits that it would not be feasible for it to undertake to divest Brookfield's managed interest in AusNet. Fundamentally, it claims that the investment manager of the Brookfield business unit that invested in AusNet has a legal obligation to act in the interests of its clients who invested in AusNet. It considers that acting contrary to the interests of the AusNet investors (who seek exposure to long term infrastructure investments and only acquired AusNet in February 2022) to facilitate the acquisition of Origin Energy Markets for the benefit of a different group of investors would breach the investment manager's fiduciary duties and damage Brookfield's reputation.
- 4.38. The Applicants on behalf of certain Brookfield entities provided a revised, iterative, Second Proposed Brookfield Undertaking to the ACCC on 27 August 2023.
- 4.39. On 9 October 2023, the Applicants on behalf of Brookfield Investment Management Australia Pty Ltd, Brookfield Corporation, Brookfield Asset Management Limited and Brookfield LP (the **Brookfield Parties**) gave an undertaking, in the form of Attachment A, to the ACCC pursuant to section 87B of the Act (the **Brookfield Undertaking**).
- 4.40. The Brookfield Undertaking places obligations on the Brookfield Parties to:
- separate Brookfield's Infrastructure and Renewable Power & Transition business units
  - separate AusNet and Origin Energy Markets
  - ensure personnel will not be involved in Origin Energy Markets' applications to connect to AusNet's transmission network
  - record its commitment (and report annually) on the progress of Origin Energy Markets in meeting the objectives of the proposed renewables build-out
  - ensure that any future sale of Origin Energy Markets will not result in Origin Energy Markets being controlled by a single corporate group
  - ensure that Intellihub will not share confidential information of an electricity retailer (other than Origin Energy Markets), or other customer of Intellihub, with Origin Energy Markets
  - provide for independent auditing of the Brookfield Parties' compliance with the Brookfield Undertaking, with a public version of the report to be published
  - provide for periodic ACCC review of the Brookfield Undertaking to determine whether any changes to the terms of the Brookfield Undertaking are necessary.
- 4.41. The Brookfield Undertaking and its effect on the ACCC's assessment of the Proposed Acquisition is discussed further in sections 8 and 9 below.

### ***AusNet Undertaking***

- 4.42. On 9 October 2023, the Applicants on behalf of AusNet and Australian Energy Holdings No 1 Pty Ltd (the **AusNet Parties**) gave an undertaking, in the form of Attachment B, to the ACCC pursuant to section 87B of the Act (**AusNet Undertaking**).

- 4.43. The AusNet Undertaking places obligations on the AusNet Parties to:
- separate AusNet and Origin Energy Markets personnel in respect of AusNet senior management, directors and senior employees
  - ensure that personnel will not be involved in Origin Energy Markets' applications to connect to AusNet's transmission network, and that the AusNet Parties will notify relevant applicants of the existence of the AusNet Undertaking and details of the independent auditor
  - provide for independent auditing of the AusNet Parties' compliance with the AusNet Undertaking and with the non-discrimination obligations contained in the AER's Transmission Ring-Fencing Guideline (and to additionally report against this guideline for negotiated transmission services, until the guideline does apply to these services), with a public version of the audit report to be published.
- 4.44. The AusNet Undertaking and its effect on the ACCC's assessment of the Proposed Acquisition is discussed further in sections 8 and 9 below.

### **MidOcean Undertaking**

- 4.45. The Applicants on behalf of MidOcean Energy Holdings Pty Ltd (**MidOcean Energy**), a subsidiary of MidOcean Energy LLC, provided the First Proposed MidOcean Undertaking to the ACCC on 19 September 2023. In response to an information request pursuant to section 90(6)(c) of the Act, the ACCC received feedback on the First Proposed MidOcean Undertaking from Shell QGC.

### **Shell QGC's response to the First Proposed MidOcean Undertaking**

- 4.46. Shell QGC, the operator of Queensland Curtis LNG (**QCLNG**), submits that the First Proposed MidOcean Undertaking broadly addresses Shell QGC's concerns regarding pricing and volume information as Shell QGC's concerns relate to the east coast domestic gas market and equity gas that is contractually required to be sold by MidOcean Energy to Walloons Coal Seam Gas Pty Limited (**Walloons**).<sup>88</sup> Shell QGC's concerns about information sharing due to MidOcean Group's interests in both QCLNG and APLNG are summarised at paragraphs 6.366 to 6.368.
- 4.47. Shell QGC also says that the First Proposed MidOcean Undertaking does not address:
- the potential for the flow of sensitive pricing and volume information from MidOcean to MidOcean Energy
  - Shell QGC's concerns about potential impacts of the proposed APLNG acquisition on QCLNG upstream production, noting that such production supplies the domestic market and QCLNG LNG facilities.<sup>89</sup>
- 4.48. Shell QGC explains that concerns around QCLNG upstream production arise in circumstances where:
- wholly-owned subsidiaries of MidOcean Energy LLC (MidOcean and MidOcean Energy) will have full access to commercially sensitive information (including

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<sup>88</sup> Shell QGC s90(6)(c) Response to Notice issued 19 September 2023: **[Redacted – Confidential]**, at [4].

<sup>89</sup> Shell QGC s90(6)(c) Response to Notice issued 19 September 2023: **[Redacted – Confidential]**, at [4].

resources, reserves and work programme and budget positions) for both the APLNG and QCLNG projects

- these related MidOcean entities can influence commercial decisions relating to the pace and quantity of gas brought to market by those projects.<sup>90</sup>

4.49. Shell QGC suggests that appropriate measures including robust ring-fencing protocols be applied to ensure the continuous supply into the east coast gas market is not impeded by:

- common personnel within MidOcean Energy and MidOcean inadvertently leveraging competitively sensitive information from one project to inform decision-making in the other project
- production development or optimisation decisions and investment strategies of one project being influenced by commercial or other considerations relating to the other project.<sup>91</sup>

### **Applicants' response to Shell QGC**

4.50. On 29 September 2023, the Applicants provided a response to Shell QGC's feedback.

4.51. In response to Shell QGC's concerns that related MidOcean Group entities can influence commercial decisions, the Applicants reject that would be the likely outcome and noted that MidOcean Energy and MidOcean have no operational or marketing roles and are not in a position to coordinate production and supply decisions between projects. The Applicants also note that its involvement in committees or Board discussions would not allow for swift adjustments required to coordinate supply, and in any case, any attempt to do so would be visible to the ACCC through the east coast gas market inquiry and information published under the Gas Market Code.

4.52. In response to Shell QGC's concerns regarding MidOcean's access to commercially sensitive APLNG information, the Applicants note that without operatorship or marketing roles, MidOcean's information on APLNG is limited to matters coming before Board and committees it is represented on as a shareholder, and MidOcean has no incentive to pursue a one directional supply of such information from APLNG to QCLNG.

4.53. On 9 October 2023, the Applicants on behalf of MidOcean Energy and MidOcean Energy Parent Pty Ltd (the **MidOcean Parties**) gave an undertaking, in the form of Attachment C, to the ACCC pursuant to section 87B of the Act (**MidOcean Undertaking**).

4.54. The MidOcean Undertaking places obligations on the MidOcean Parties to provide a written waiver in favour of Shell QGC (currently a wholly owned subsidiary of Shell and the operator of QCLNG) and Walloons that, for the term of the MidOcean Undertaking, MidOcean Energy waives any rights it may have under contractual arrangements for the QCLNG project to obtain specific types of competitively sensitive information.

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<sup>90</sup> Shell QGC s90(6)(c) Response to Notice issued 19 September 2023: [Redacted – Confidential], at [5].

<sup>91</sup> Shell QGC s90(6)(c) Response to Notice issued 19 September 2023: [Redacted – Confidential], at [6].

4.55. The MidOcean Undertaking and its effect on the ACCC's assessment of the Proposed Acquisition is discussed further in sections 8 and 9 below.



## 5. Background

- 5.1. This section covers background information about the parties and related entities, the electricity, gas and smart meter industries in Australia, renewable energy in Australia and applicable regulations.

### Parties and related entities

#### *Brookfield*

- 5.2. Brookfield is a Canadian global asset manager with approximately USD 850 billion assets under management.<sup>92</sup> Brookfield invests in sectors such as real estate, infrastructure, renewable power, private equity and credit.<sup>93</sup>
- 5.3. Brookfield Corporation and Brookfield Asset Management Limited are the 2 key corporate entities in Brookfield.
- a) Brookfield Corporation is a publicly listed corporation on the New York Stock Exchange (NYSE: BN). Founded in 1899, Brookfield Corporation is an investment management company focusing on investments in real estate, renewable power, infrastructure, credit and private equity. Brookfield Corporation is an investor, as well as an investment and asset manager.
- b) Brookfield Asset Management Limited is an entity spun out of Brookfield Corporation. It is a publicly listed corporation on the New York Stock Exchange (NYSE: BAM).
- 5.4. BAM is the holding company for the Brookfield asset management business. BAM and its subsidiaries provide asset management services including to affiliates of Brookfield Corporation. Brookfield Corporation owns 75%, and Brookfield Asset Management Limited owns 25% of BAM.<sup>94</sup>
- 5.5. Brookfield Corporation focuses on investment of its proprietary capital and BAM focuses on management of investment vehicles through which Brookfield Corporation, its affiliates and third parties invest. In this sense, BAM services Brookfield Corporation as well as third-party investors.
- 5.6. For ease of reference, the Reasons for Determination will often refer to Brookfield Corporation, Brookfield Asset Management Limited and BAM collectively as 'Brookfield' where it is unnecessary to differentiate between them.

#### **Brookfield business units**

- 5.7. BAM is in the business of establishing and managing funds for the purpose of obtaining returns for itself and investors. BAM has 5 key business units: Real Estate, Infrastructure, Private Equity, Renewable Power & Transition and Credit & Insurance Solutions.<sup>95</sup> Each business unit manages various investment vehicles in which Brookfield has an interest. The Infrastructure and Renewable Power &

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<sup>92</sup> Brookfield, [Who We Are](#), accessed 30 August 2023.

<sup>93</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [444].

<sup>94</sup> Application for merger authorisation (MA1000024), 5 June 2023, at fn 99.

<sup>95</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [445] (Figure 20), [450].

Transition business units are the most relevant business units in the context of the Proposed Acquisition.

- 5.8. Each of BAM's business units has an Investment Committee. The primary role of the Investment Committees is to be the ultimate decision makers regarding investments in entities recommended by the relevant Brookfield managed funds.<sup>96</sup> The ACCC understands that the Investment Committees do not involve themselves in the management of any of these entities.<sup>97</sup>
- 5.9. There is typically some overlap in the individuals who sit on these Investment Committees.<sup>98</sup> For instance, there are 7 individuals who sit across the Investment Committees of Brookfield's Infrastructure and Renewable Power & Transition business units.<sup>99</sup>

### **Brookfield Infrastructure unit**

- 5.10. Brookfield's Infrastructure unit is responsible for sourcing and managing infrastructure (non-renewable power) investments. It owns and operates assets across transport, data, utilities and midstream sectors, with a focus on cash flow stability and resilience.<sup>100</sup>
- 5.11. The key entity in Brookfield's Infrastructure unit is Brookfield Infrastructure Partners L.P. (**BIP**). Brookfield owns approximately 30% of BIP.<sup>101</sup> Brookfield also directs 100% of BIP's voting rights through a general partner interest held by Brookfield Infrastructure Partners Limited, which is wholly owned by Brookfield.<sup>102</sup> BIP invests into other infrastructure related Brookfield entities, such as Brookfield Super-Core Infrastructure Partners (**BSIP**) and the Brookfield Infrastructure Fund (**BIF**) series.<sup>103</sup>
- 5.12. The remaining 73.9% equity interest of BIP is held by third-party investors (the public through retail investment avenues or institutional investors through limited partnerships).<sup>104</sup>
- 5.13. BIP and its associated Brookfield infrastructure entities (such as the BSIP and the BIF series of funds) source their funds from limited partners. These limited partners make commitments to contribute capital to the relevant partnership or fund. Ultimately, sources of funding come predominantly from institutional investors, retail investors through Brookfield's stock exchange listed entities and Brookfield itself through a separate fund or limited partnership managed by the Brookfield group.
- 5.14. Brookfield, through its Infrastructure business unit, holds interests in AusNet and Intellihub:

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<sup>96</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [457].

<sup>97</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [459].

<sup>98</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [457].

<sup>99</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [471], [484].

<sup>100</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [484].

<sup>101</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [483].

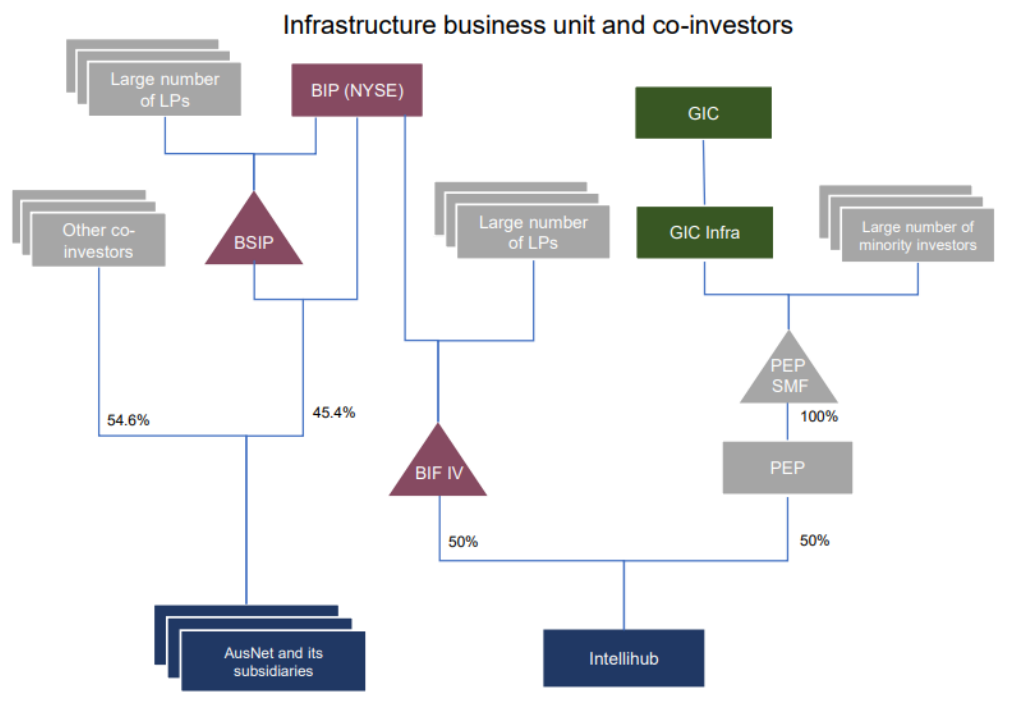
<sup>102</sup> Brookfield Infrastructure Partners L.P., [2022 Annual Report](#), accessed 30 August 2023, at pp. 103 – 104.

<sup>103</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [483] – [484].

<sup>104</sup> Brookfield Infrastructure Partners L.P., [2022 Annual Report](#), accessed 30 August 2023, at p. 104.

- a) Brookfield holds a 45.4% equity stake in AusNet through BIP and BSIP. By virtue of governance arrangements, [Redacted – Confidential].<sup>105</sup> More information regarding the control of AusNet is provided further below.
- b) Brookfield holds a 50% equity stake in Intellihub through BIP and BIF IV.<sup>106</sup> [Redacted – Confidential].

**Figure 1: Current corporate structure of Brookfield Infrastructure unit**



Source: Application for merger authorisation (MA1000024): Annexure 1.9 (Applicants) – Origin Energy Markets pre-acquisition structure chart (simplified), 5 June 2023.

**Brookfield Renewable Power & Transition unit**

- 5.15. Brookfield holds a 48% equity stake in BEP.<sup>107</sup> BEP is the key entity within Brookfield’s renewables business arm. BEP manages and invests into other renewables Brookfield entities, such as the BGTF,<sup>108</sup> BIF IV and BIF V.<sup>109</sup>
- 5.16. Brookfield also possesses a 100% voting right interest in BEP through the BEP’s managing General Partner, and Brookfield Renewable Partners Limited, which is managed and wholly owned by Brookfield.<sup>110</sup>
- 5.17. The remaining 52% equity share of BEP is held by third-party investors (institutional investors, other investment managers and retail investors).

<sup>105</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [Redacted – Confidential].

<sup>106</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [528].

<sup>107</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [465].

<sup>108</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [464].

<sup>109</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [471].

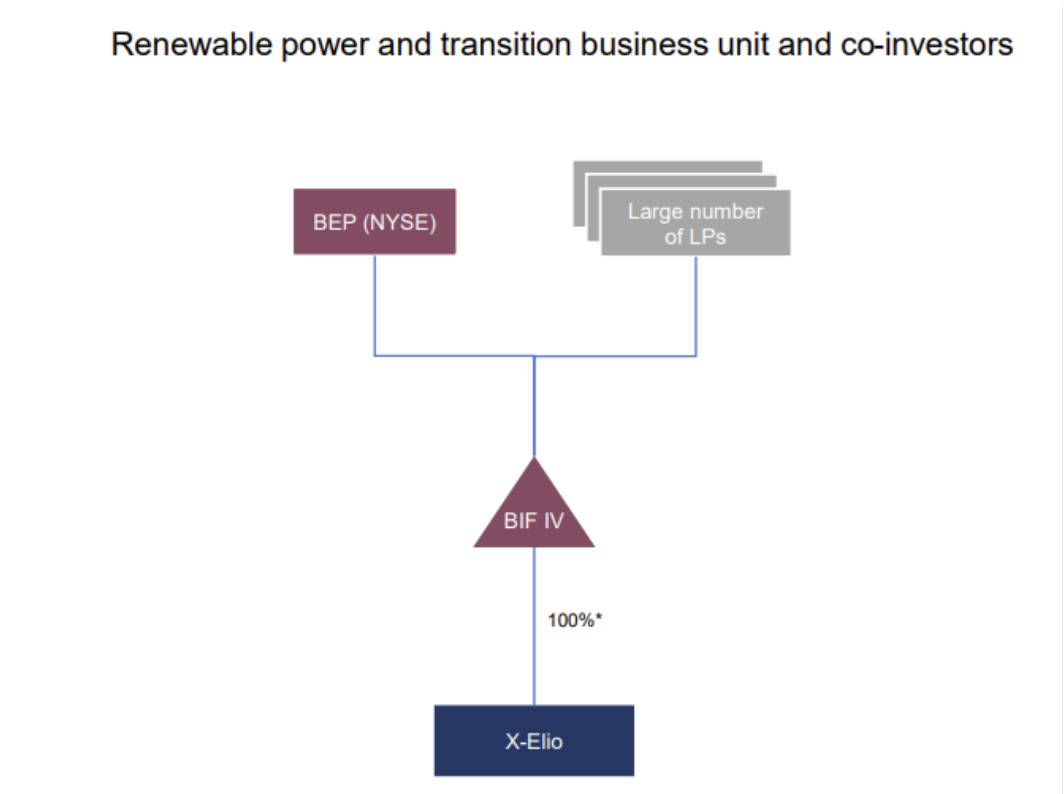
<sup>110</sup> United States Securities and Exchange Commission, [Form 20-F \(Brookfield Renewables Partners, L.P.\)](#), accessed 30 August 2023, at p. 82.

5.18. BEP (and its associated Brookfield renewables funds, such as BGTF) source its funds from its limited partners. These limited partners make commitments to contribute capital to the relevant partnership or fund. Ultimately, sources of funding come predominantly from institutional investors, retail investors through Brookfield’s stock exchange listed entities and Brookfield itself through a separate fund or limited partnership managed by the Brookfield group. By way of example, **[Redacted – Confidential]**:

- a) **[Redacted – Confidential]**
- b) **[Redacted – Confidential]**
- c) **[Redacted – Confidential]**
- d) **[Redacted – Confidential]**.<sup>111</sup>

5.19. Brookfield Renewable Power & Transition business unit has, through BIF IV, a 50% ownership interest in the Spanish company X-Elio. The remaining 50% is held by Kohlberg Kravis Roberts & Co. L.P., however, in March 2023 BIF IV agreed to acquire the remaining 50% and the transaction is expected to close during the second half of 2023.<sup>112</sup>

**Figure 2: Current corporate structure of Brookfield Renewable Power & Transition unit**



Source: Application for merger authorisation (MA1000024): Annexure 1.9 (Applicants) – Origin Energy Markets pre-acquisition structure chart (simplified), 5 June 2023.

<sup>111</sup> **[Redacted – Confidential]**.

<sup>112</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [543].

## MidOcean

- 5.20. MidOcean has been established as a special purpose vehicle, which is ultimately wholly owned (via a series of intermediary holding vehicles) by MidOcean Group.<sup>113</sup>
- 5.21. EIG Partners is an institutional investor based in Washington D.C. with a focus on energy and energy-infrastructure investments. It has contributed USD 44.6 billion of institutional funding to almost 400 renewable energy projects globally.<sup>114</sup> EIG Partners has committed, signed and raised USD 8.2 billion of capital in LNG projects over the last 20 years.<sup>115</sup>
- 5.22. MidOcean Group does not currently own any assets in Australia, but MidOcean Energy, a subsidiary of MidOcean Energy LLC, recently entered into a definitive agreement with Tokyo Gas to purchase small stakes in 4 Australian LNG projects.<sup>116</sup>
- 5.23. Under the Proposed Acquisition, MidOcean will acquire Origin's Integrated Gas business including its upstream gas interests and its 27.5% stake in APLNG.<sup>117</sup>
- 5.24. On 28 September 2023, MidOcean Group announced that Aramco has signed definitive agreements to acquire a minority interest in MidOcean Group.<sup>118</sup> The transaction is subject to regulatory approvals and the ACCC understands Aramco does not hold any gas or LNG production interests in Australia. The ACCC does not consider the announcement has a material impact on the authorisation decision before it given the nature of the minority stake and the lack of overlap, and FIRB consideration will have regard to national interest security issues should any be identified.

## Origin

- 5.25. Origin is an Australian Stock Exchange (**ASX**) listed major integrated gentailer of electricity and natural gas.
- 5.26. Origin owns the fifth largest share of generation output into the NEM and accounts for about 8.99% of the NEM's capacity through 11 generation sites across South Australia, New South Wales, Victoria and Queensland.<sup>119</sup> These include:
- the Uranquity (692 Megawatt (**MW**)), Eraring (2880 MW) and Shoalhaven (240 MW) power stations in New South Wales<sup>120</sup>
  - the Mortlake Power (566 MW) station in Victoria<sup>121</sup>
  - the Darling Downs (644 MW), Mt Stewart (423 MW) and Roma (80 MW) power stations in Queensland<sup>122</sup>

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<sup>113</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [260(b)].

<sup>114</sup> EIG Partners, [About Us](#), accessed 15 September 2023.

<sup>115</sup> MidOcean Energy, [About Us](#), accessed 22 September 2023.

<sup>116</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [595].

<sup>117</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [619].

<sup>118</sup> MidOcean Energy, [Aramco to enter global LNG business by acquiring stake in MidOcean Energy](#), 28 September 2023, accessed 6 October 2023.

<sup>119</sup> AER, [State of the Energy Market 2022](#), 29 September 2022, at p. 49 (Figure 2.22)

<sup>120</sup> Origin Energy, [Generation](#), accessed 31 August 2023.

<sup>121</sup> Origin Energy, [Generation](#), accessed 31 August 2023.

<sup>122</sup> Origin Energy, [Generation](#), accessed 31 August 2023.

- the Osborne (180 MW), Ladbroke Grove (80 MW) and Quarantine (224 MW) power stations in South Australia.<sup>123</sup>
- 5.27. Origin’s market share of retail electricity in the NEM is around 25-30% in each market sector (residential, small business and large business customers).<sup>124</sup> In Victoria, Origin’s share of retail electricity was approximately 17% by customer numbers in quarter 3 of 2022-23.<sup>125</sup>
- 5.28. Origin’s market share of retail gas is around 27% for residential customers and around 50-60% for small and large business customers.<sup>126</sup>
- 5.29. Origin also operates a gas exploration and production business and has a 27.5% stake in the APLNG export venture based in Gladstone, Queensland. APLNG is a coal seam gas to LNG project which supplies Australian customers with natural gas and international customers with LNG. Origin Energy’s Integrated Gas business owns a 27.5% stake in APLNG, in a joint venture with ConocoPhillips and Sinopec. Origin operates the venture’s gas fields, upstream exploration, production and pipeline system.<sup>127</sup>

### AusNet

- 5.30. As noted above, Brookfield has a 45.4% interest in AusNet through a holding company, Australian Energy Holdings No 1 Pty Ltd.<sup>128</sup> This stake is owned by affiliated funds of Brookfield Infrastructure, including BIP and BSIP.<sup>129</sup> The remaining equity is owned by Australian Retirement Trust (15%), Alberta Investment Management Corporation (9.9%), Investment Management Corporation of Ontario (9.9%), Healthcare of Ontario Pension Plan (9.9%) and Canada’s Public Sector Pension Investment Board (9.9%).<sup>130</sup>
- 5.31. AusNet owns and operates AUD 11 billion of electricity and gas network assets in Victoria,<sup>131</sup> including:
- Victoria’s monopoly electricity transmission network, which connects and supplies power to 6.6 million Victorians
  - one of the five monopoly electricity distribution networks in Victoria, which provides electricity to 802,000 customers in the state
  - one of the three monopoly gas distribution networks in Victoria, which distributes gas to 792,000 residential, industrial and commercial customers.<sup>132</sup>
- 5.32. AusNet also operates a ‘development and future networks’ business to support functions that fall outside its regulated business. Specifically, the ‘development and future networks’ business provides contracted infrastructure asset and energy, and a range of utility services, to support the management of electricity, gas and water

<sup>123</sup> Origin Energy, [Generation](#), accessed 31 August 2023.

<sup>124</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 246 (Figure 7.17).

<sup>125</sup> ESCV, [Energy Market Dashboard - 2022/23, Q3](#), accessed on 13 September 2023.

<sup>126</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 247 (Figure 7.18).

<sup>127</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [619] – [621].

<sup>128</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [126].

<sup>129</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [486].

<sup>130</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [498].

<sup>131</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [510].

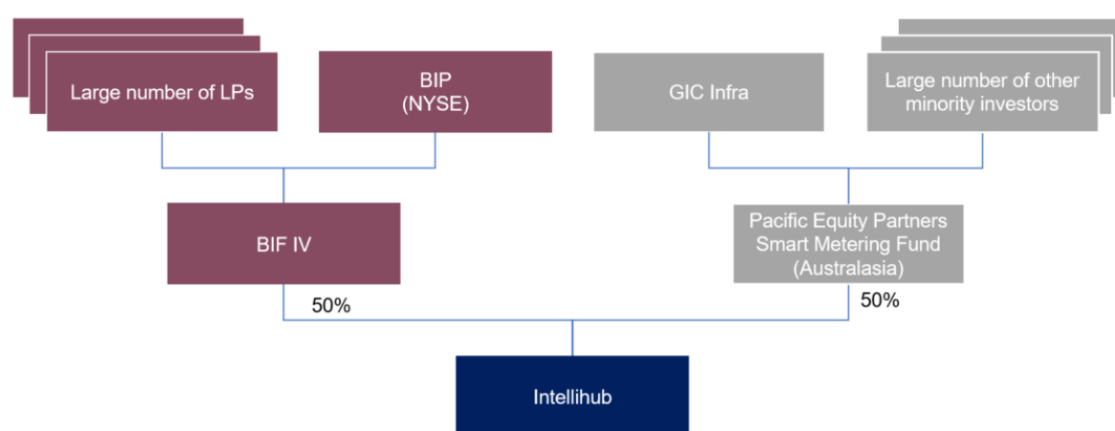
<sup>132</sup> AusNet, [What we do](#), accessed 30 August 2023.

networks that fall outside the regulated asset base.<sup>133</sup> This is partly overseen by Mondo, a party within AusNet, and partially undertaken by AusNet Transmission Group Pty Ltd (a subsidiary of AusNet). Mondo builds, operates and maintains infrastructure for the utility, transport and government sectors.<sup>134</sup>

## Intellihub

- 5.33. As noted above, Brookfield owns a 50% stake in Intellihub, through BIF IV, in which BIP invests.<sup>135</sup> The other shareholder is the Pacific Equity Partners' Smart Metering Fund.<sup>136</sup> The infrastructure arm of GIC Special Investments Private Limited (**GIC Infra**), a subsidiary of GIC, discussed below, has an interest in Pacific Equity Partners' Smart Metering Fund as detailed in Figure 3 below:

**Figure 3: Ownership structure of Intellihub**



Source: Application for merger authorisation (MA1000024), 5 June 2023, at [527] (Figure 30).

- 5.34. Intellihub is an Australian and New Zealand-based utility services company which provides smart metering services and data solutions for electricity, gas and water meters.<sup>137</sup> It primarily manages and operates more than 1.6 million electricity smart meters across Australia and New Zealand.<sup>138</sup> Intellihub services the retail and business customers of more than 30 electricity retailers.<sup>139</sup>
- 5.35. Intellihub purchased Origin's smart metering business called Acumen in 2018 for AUD 267 million.<sup>140</sup> Origin committed to a competitive long-term agreement with Acumen/Intellihub for the ongoing deployment of digital meters for Origin's

<sup>133</sup> AusNet, [What we do](#), accessed 30 August 2023.

<sup>134</sup> Mondo, [Infrastructure](#), accessed 30 August 2023.

<sup>135</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [526] – [527].

<sup>136</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [489], [526]; Pacific Equity Partners, [Pacific Equity Partners wins Australian Investment Council Large Cap Investment Award](#), 15 September 2022, accessed 22 September 2023.

<sup>137</sup> Intellihub, [Homepage](#), accessed 30 August 2023.

<sup>138</sup> Intellihub, [Intellihub acquires pool monitoring and management business](#), 12 December 2022, accessed 30 August 2023.

<sup>139</sup> Intellihub, [Welcome to Intellihub](#), accessed 30 August 2023.

<sup>140</sup> Origin Energy, [Origin to sell Acumen for \\$267 million](#), 24 May 2018, accessed 30 August 2023.



electricity customers.<sup>141</sup> Origin is able to contract with other parties for deployment and management of the uncontracted balance of smart metering requirements.<sup>142</sup>

## GIC

- 5.36. Buckland Investment, which is managed by GIC Infra, wholly owned subsidiary of GIC, is a co-investor in Brookfield LP. Buckland Investment has a 22.5% stake in Brookfield LP.<sup>143</sup>
- 5.37. GIC is a Singaporean-based global investment management company established to manage Singapore's foreign reserves. It invests across several asset classes including equities, fixed income, real estate and infrastructure.<sup>144</sup>
- 5.38. GIC Infra owns (through affiliates) an interest in several related entities, including:
- a 16.87% stake in ACEN Corporation, a renewables platform based in the Philippines with a presence in several countries in the Asia-Pacific region, including Australia.<sup>145</sup> ACEN Australia is a developer, owner and operator of renewables projects across the NEM, and currently has 1 GW of capacity under construction and 8 GW in the development pipeline<sup>146</sup>
  - a [Redacted – Confidential] [*public text: substantial minority*] stake in Intellihub, through its [Redacted – Confidential] [*public text: majority*] interest in the Pacific Equity Partners' Smart Metering Fund.<sup>147</sup>

## Temasek

- 5.39. Temasek is a co-investor to the transaction. Temasek will have a 9.9% stake in Brookfield LP.<sup>148</sup>
- 5.40. Temasek is a Singaporean investment company which manages a SGD 403 billion portfolio of investments across several industries including financial services, real estate, transport and industrials.<sup>149</sup>
- 5.41. Temasek owns an indirect 40% interest in SGSP Australia Assets Pty Ltd (**SGSPAA**), through its wholly owned affiliate SP Group. SGSPAA owns or has an interest in a portfolio of energy infrastructure assets and businesses, including Jemena.<sup>150</sup> Jemena owns and operates gas transmission and processing facilities, alongside gas and electricity distribution assets in eastern and northern Australia.<sup>151</sup>
- 5.42. Figure 4 sets out Temasek's interests in Jemena.

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<sup>141</sup> Origin Energy, [Origin to sell Acumen for \\$267 million](#), 24 May 2018, accessed 30 August 2023.

<sup>142</sup> Origin Energy, [Origin to sell Acumen for \\$267 million](#), 24 May 2018, accessed 30 August 2023.

<sup>143</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [480].

<sup>144</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [549].

<sup>145</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [551].

<sup>146</sup> ACEN Australia record of oral submission, 4 July 2023, at [1] – [2].

<sup>147</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [489].

<sup>148</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [480].

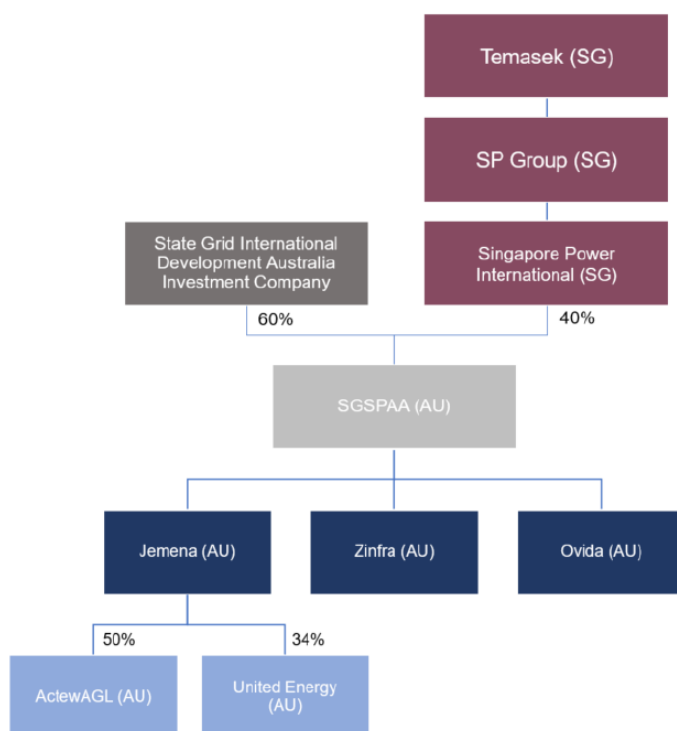
<sup>149</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [554].

<sup>150</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [557] – [558].

<sup>151</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [562], [572].



**Figure 4: Temasek's interests in Jemena**



Source: Application for merger authorisation (MA1000024), 5 June 2023, at [559] (Figure 37).

## Industry background

5.43. This section sets out background information on the electricity, gas and smart meter industries in Australia. This includes describing key characteristics and features that are relevant to competition and the ACCC's assessment of the Proposed Acquisition, and introduces key concepts and terminology. The end of this section includes more detailed information about regulations and guidelines that apply in the electricity transmission, electricity distribution and gas distribution sectors, as relevant to the ACCC's assessment of competition issues.

### *National Electricity Market (NEM)*

5.44. Electricity generated in eastern and southern Australia is traded through the NEM.<sup>152</sup> The NEM consists of a wholesale spot market for selling electricity and a transmission grid for transporting it to energy customers.<sup>153</sup> The NEM interconnects Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania. Energy is generated and used in each State-based 'region' and there is State-based spot pricing, where electricity flows between regions. Western Australia and the Northern Territory are not connected to the NEM, primarily due to the distance between the networks.<sup>154</sup>

<sup>152</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, p. 36.

<sup>153</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, p. 37.

<sup>154</sup> AEMO, [Energy Markets and Systems](#), accessed 22 September 2023.

- 5.45. Electricity in the NEM is transported principally via high voltage transmission lines from grid-connected generators to large industrial energy customers and low voltage distribution networks. Energy retailers complete the supply chain by purchasing electricity from the wholesale market and in effect packaging it with network services for sale to households and businesses.<sup>155</sup> The electricity supply chain in the NEM is discussed further below.
- 5.46. The NEM wholesale market operates around a common pool, or ‘spot market’, for wholesale trading in physical electricity. The AEMO is responsible for the settlement of all electricity bought and sold through the spot market.<sup>156</sup> All electricity in the spot market is bought and sold at the prevailing spot price.<sup>157</sup>
- 5.47. As electricity cannot be easily stored, the amount of electricity generated and transported to customers must match demand in real time. The spot market allows for electricity supply and demand to be matched simultaneously through a centrally coordinated dispatch process. Accordingly, spot prices fluctuate based on supply (i.e., the offers submitted by generators to supply electricity into the NEM at particular volumes and prices at set times) and demand (i.e., from consumers) at any point in time.<sup>158</sup>
- 5.48. At a high level, generators submit in advance the price and quantity of electricity that they are willing to generate for each 5-minute ‘trading interval’ on a given trading day to AEMO. AEMO’s central dispatch engine orders the generators’ offers, from least to most expensive, and determines which generators will be dispatched in each 5-minute interval and the corresponding spot price for that 5-minute interval. AEMO’s objective is to dispatch the lowest cost mix of generators to meet expected demand. A generator receives the spot price for all electricity generated in each 5-minute trading interval.<sup>159</sup> A separate spot price is determined for each of the 5 regions in the NEM.<sup>160</sup> Such ‘regional reference prices’ diverge from one another to the extent that electrical losses arise on power transported between regions and to the extent that power flows between regions are limited by transmission constraints.
- 5.49. Spot prices fluctuate across minutes, days, months and years. Due to the high level of price volatility in the electricity spot market, both retailers and generators generally seek to reduce their respective exposures to the spot price by hedging.
- 5.50. Hedging involves generators and retailers entering into arrangements (either directly with each other or through an intermediary, such as an exchange) where they agree on a set price for specific terms for the sale and purchase of electricity. To the extent these pricing arrangements are in place, the actual wholesale electricity purchase costs of a retailer and the wholesale revenues of a generator are determined by these hedging contracts rather than the spot price. This allows

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<sup>155</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 37.

<sup>156</sup> AEMO, [Energy Markets and Systems](#), accessed 22 September 2023.

<sup>157</sup> AEMC, [Spot and contract markets](#), accessed 22 September 2023.

<sup>158</sup> AEMO, [The National Electricity Market](#), December 2021, at p. 3.

<sup>159</sup> Five-minute dispatch and settlement was introduced in July 2021. Accordingly, the spot price is no longer an average of the 6 5-minute dispatch prices across a half-hour and the definition of a trading interval has changed from 30 minutes to 5 minutes. More information is available at: AEMC, [Five Minute Settlement](#).

<sup>160</sup> AEMC, [How power is dispatched across the system](#), accessed 22 September 2023; AEMC, [Spot and contract markets](#), accessed 22 September 2023.

retailers and generators to manage their spot market price exposure and provides cost and revenue certainty.<sup>161</sup>

- 5.51. The ACCC understands that the vast majority of hedging is taken against a regional reference price applicable to the region where the load/demand is located. Inter-regional hedging can occur through a process of coupling contracts or generation assets in an adjacent region with inter-regional settlement residue rights on the relevant interconnector. Inter-regional hedging comes with inherent risk as it relies on the physical flow of energy on the interconnector (which is subject to transmission constraints) matching its notional capacity. Participants are unlikely to rely solely on inter-regional hedging to manage their spot market exposure, but it can be one element of their overall strategy. Therefore, hedging by buyers of electricity in a region will generally be with a generator of electricity in the same region. This is relevant to market definition, discussed in Section 6.

## ***Electricity supply chain***

### **Electricity generation**

- 5.52. The NEM uses a mix of technologies to produce electricity. Traditionally, the majority of Australia's electricity was generated using coal, gas and hydro power stations but the sector is evolving to include a more diverse range of renewable sources such as wind and solar.<sup>162</sup>
- 5.53. Generation of electricity can result from:
- traditional high voltage large-scale generators, or
  - a wide variety of smaller distributed generation or embedded generation units, including smaller generation units that are located behind the meter, in particular rooftop photovoltaic (**PV**) solar panels.<sup>163</sup>
- 5.54. Most large generators in the NEM are vertically integrated, with portfolios in both generation and retail. Vertical integration provides generators and retailers with a 'natural hedge' against price risk in the wholesale market,<sup>164</sup> reducing their need to participate in financial hedge (contract) markets.<sup>165</sup>
- 5.55. Generation of energy in the NEM is coordinated by AEMO across various energy regions and flows to where it is needed. This central coordination is essential because generators are interconnected through transmission networks and the action of each generator affects the other generators in the network.<sup>166</sup>

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<sup>161</sup> ACCC, [Inquiry into the National Electricity Market](#), 23 November 2022, at pp. 30, 78.

<sup>162</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 54; AEMC, [Electricity Supply Chain](#), accessed 22 September 2023.

<sup>163</sup> AEMC, [Electricity Supply Chain](#), accessed 22 September 2023. 'Behind the meter' refers to power that is produced, stored or consumed on the energy user's side of the meter. Conversely, power that is produced or stored on the electricity grid side is considered 'front of the meter'.

<sup>164</sup> To the extent that the level of their generation output matches the level of their retail load over time.

<sup>165</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 45.

<sup>166</sup> AEMC, [Electricity Supply Chain](#), accessed 22 September 2023.

- 5.56. All generators in the NEM must sell their electricity via the spot market.<sup>167</sup> Generators must register with AEMO and submit bids via the AEMO bidding system.<sup>168</sup>

### ***Embedded generation***

- 5.57. Embedded generation refers to generating units that are connected to distribution, rather than transmission, networks. Embedded generating units vary widely in terms of their size (MW capacity) and configuration: they range from solar and wind farms of similar scale to transmission-connected facilities, through community virtual power plants (often combining solar generation and battery storage), and down to household rooftop solar units that may export to the distribution network.
- 5.58. As such, there is a patchwork of regulatory frameworks that apply to the connection of embedded generating units to the distribution networks under Chapters 5 and 5A of the National Electricity Rules and, to a lesser extent, under the Electricity Distribution Code of Practice. This is discussed in more detail below.

### **Grid-scale energy storage**

- 5.59. Grid-scale energy storage are technologies connected to the power grid that store electrical energy at a large-scale for later use. Storage technologies in the NEM include batteries and pumped hydroelectricity.<sup>169</sup>
- 5.60. Stored energy can be used to support system stability by being injected into the grid at times of high demand and providing stability services to the grid by balancing variability in renewable generation. The AER has forecasted that with less coal-fired generation and more wind and solar generation expected in the NEM, increased grid-scale storage will be essential to manage daily and seasonal variations in output.<sup>170</sup>

### **Electricity transmission**

- 5.61. Transmission networks provide the link between power generators and customers by transporting high-voltage electricity to major load centres. Electricity is injected from points along the transmission grid into the distribution networks that deliver electricity to households and businesses.<sup>171</sup>
- 5.62. Transmission network service providers (**transmission providers**) build, maintain, plan and operate the transmission networks in the NEM.<sup>172</sup> There are 5 state-based transmission providers servicing each of the states in the NEM, with cross-border interconnectors linking the grid at state borders to allow electricity to flow from one state to another.<sup>173</sup>

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<sup>167</sup> [National Electricity Rules](#) cl 2.2.4(c).

<sup>168</sup> [National Electricity Rules](#) cl 2.2.1(a).

<sup>169</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 62; AEMO, [Energy Explained: Big Batteries](#), 20 May 2023, accessed 22 September 2023.

<sup>170</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 62.

<sup>171</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 80.

<sup>172</sup> AEMC, [Network planning](#), accessed 22 September 2023.

<sup>173</sup> AEMC, [Transmission: who does what?](#), 11 April 2013, at p. 2.

- 5.63. In Victoria, AEMO is responsible for planning and directing augmentation of the electricity transmission network,<sup>174</sup> while AusNet owns and operates the electricity transmission network. AusNet provides and offers connection services to network users (e.g., connecting and disconnecting generating units, grid-scale batteries or loads from or to the network), whereas AEMO is responsible for shared transmission services.<sup>175</sup> More detail on these complex arrangements is provided further below.
- 5.64. This split oversight model for electricity transmission is unique to Victoria. It has resulted in a more complex framework for the economic, access and conduct regulation of electricity transmission in Victoria. Currently, that framework is largely imposed through modified application of the National Electricity Law and the National Electricity Rules.
- 5.65. At the end of this section is a high-level overview of the regulation of the Victorian electricity transmission network, with focuses on:
- the augmentation of, and access and connection to, the Victorian transmission network
  - the regulatory framework for transmission connection disputes
  - the AER's Transmission Ring-Fencing Guideline
  - foreshadowed changes to the regulatory framework.

## Electricity distribution

- 5.66. Distribution networks transport electricity from transmission networks to end-use customers. The high voltage electricity that is used for transmission from the generator is converted into lower voltages by substation transformers. It is then carried in wires over poles - or in densely populated areas, in wires buried underground - to businesses and homes.<sup>176</sup>
- 5.67. Distribution network service providers (**distribution providers**) build, maintain and operate the distribution networks.<sup>177</sup> Distribution providers transport and deliver electricity to customers, but they do not sell it. Instead, retailers purchase electricity from the wholesale market and package it with network services to sell to customers.<sup>178</sup>
- 5.68. The transmission grid in the NEM connects with 13 distribution networks. Customers in Queensland, New South Wales and Victoria are serviced by multiple distribution providers, each of which owns and operates its distribution network within a defined geographic region. South Australia, Tasmania and the Australian Capital Territory are serviced by single distribution networks operating within each jurisdiction.<sup>179</sup>

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<sup>174</sup> AEMO, [Victorian transmission connections](#), accessed 22 September 2023; AEMO, [Victorian Annual Planning Report](#), October 2022, at p. 4.

<sup>175</sup> AER, [Draft Decision, AusNet Services Transmission Determination 2022 to 2027](#), July 2021, at p. 5.

<sup>176</sup> AEMC, [Electricity Supply Chain](#), accessed 22 September 2023.

<sup>177</sup> AEMC, [Network planning](#), accessed 22 September 2023.

<sup>178</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 80.

<sup>179</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 81.

- 5.69. AusNet owns and operates one of five electricity distribution networks in Victoria.<sup>180</sup> Jemena Electricity Network, which is 100% owned by Jemena, is another electricity distribution provider in Victoria. Jemena also has:
- a) a 50% interest in Evoenergy, which owns and operates the electricity distribution network in the Australian Capital Territory
  - b) a 34% interest in United Energy which owns and operates an electricity distribution network in Victoria.<sup>181</sup>
- 5.70. The end of this section discusses the pricing of distribution services, customer connections to, and augmentation of, the distribution network, and the regulatory framework for distribution connection disputes.

### **Electricity retail**

- 5.71. The electricity retail market is the interface between electricity retailers and their customers, and through which energy retailers sell electricity and energy services to residential and business customers. Retailers contract with customers to supply energy for an agreed price. The agreed price is used by the retailer to pay for energy it has purchased from the wholesale market, as well as the cost of transporting the energy and other system costs.<sup>182</sup>
- 5.72. Retailers purchase electricity from the NEM. As discussed above, retailers are exposed to financial risk through spot price volatility in the wholesale electricity market. To manage this risk, most retailers purchase hedging contracts that limit part, or all of the wholesale price they pay. Hedging lets retailers offer stable annual prices to customers, so that customers have more predictable energy bills instead of bearing the financial risk of energy prices themselves.<sup>183</sup>
- 5.73. Retail competition in the electricity sector has been progressively introduced in Australia since the early to mid-2000s. Retail competition across New South Wales, South Australia, South-East Queensland and Victoria has been growing steadily.<sup>184</sup>
- 5.74. Figure 5 sets out the electricity retail market shares in the NEM (excluding Victoria) across residential, small business and large customers.

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<sup>180</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 82 (Figure 4.1).

<sup>181</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [563] (Figure 38).

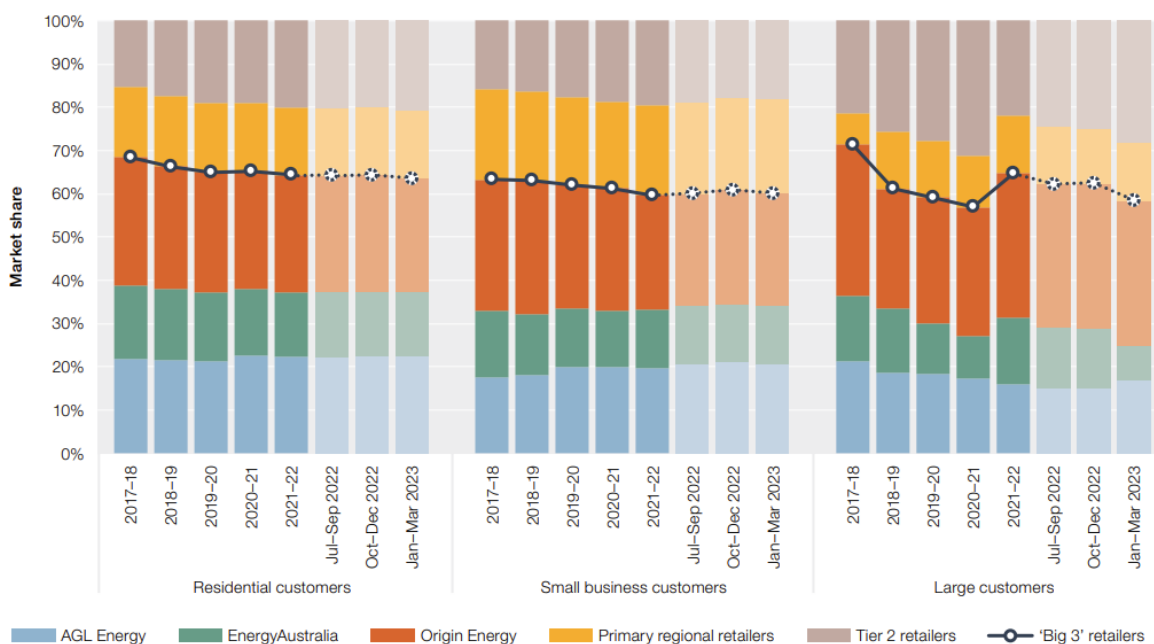
<sup>182</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 216.

<sup>183</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 216.

<sup>184</sup> ACCC, [Inquiry into the National Electricity Market](#), 23 November 2022, at p. 66.

**Figure 5: Energy retail market share in the NEM – electricity**

**Figure 7.17 Energy retail market share – electricity**



Note: All data as of 31 March 2023. Data includes customers in Queensland, NSW, South Australia, Tasmania and the ACT. Some differences may occur between annual and quarterly data to account for retailers revising their data when making their annual submission.  
 Source: AER, *Quarterly retail performance report, Q3 2022–23*, June 2023.

Source: AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 246 (Figure 7.17).

## Policy evolution and reform of electricity market structure

5.75. Until the 1990s, electricity in Australia was generally supplied by vertically integrated government-owned monopolies that were responsible for all segments of the supply chain.<sup>185</sup> In its original 1991 report on Energy Generation and Distribution, the (then) Industry Commission considered, *inter alia*, the problems arising from the integration of transmission and generation within a single organisation. It went on to suggest that:

A number of possibilities exist to overcome these problems: rely on the provisions of the TPA to promote fair trading; form separate accounting entities within the same enterprise to cover generation and transmission (i.e. ring fencing); allocate these functions to separate organisations (i.e. full separation); and apply the first response in conjunction with either of the others.<sup>186</sup>

5.76. In assessing the merits of ring-fencing, the Industry Commission observed:

It is inherently difficult to make an enterprise responsible for bulk generation and transmission behave as if it were 2 separate entities. Inevitably, the potential for conflict of interest in relation to open access to the transmission grid would remain, with associated incentives for the incumbent to manipulate terms of access, as well as the allocation of overhead costs and asset values used in determining transmission charges. To behave as 2 separated entities, the transmission division, occasionally – perhaps frequently – would need to act to the detriment of its associated generation

<sup>185</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [30].

<sup>186</sup> Industry Commission, [Energy Generation and Distribution, Volume II: Report, Report No. 11](#), 17 May 1991, at p. 113.



division and, ultimately, to the detriment of the corporation as a whole (e.g. allowing distributors to purchase electricity from independent generators).<sup>187</sup>

- 5.77. For these and other reasons, the Industry Commission ultimately recommended full structural separation of transmission from generation assets, with the standalone transmission business to be subject to an open access obligation governed by independent economic regulation.<sup>188</sup>
- 5.78. The 1993 National Competition Policy Review chaired by Professor Fred Hilmer (the **Hilmer Report**) highlighted the competition issues arising from vertical integration of the natural monopoly elements of the energy supply chain (such as electricity transmission) with potentially competitive activities (such as electricity generation).<sup>189</sup> It noted that:
- [...] effective competition in electricity generation requires access to electricity transmission grids. In this case, integration of the natural monopoly element (transmission grids) and a potentially competitive activity (electricity generation) raises concerns that control over access to the monopoly element may be misused to stifle or prevent competition in the potentially competitive sector. Even if access is not actually misused, the potential for such behaviour may deter new entry to, or limit vigorous competition in, markets dependent on access to the natural monopoly element.<sup>190</sup>
- 5.79. In 1995 the Council of Australian Governments adopted a national competition policy which would lead to the separation of the generation, transmission, distribution and retail segments of the supply chain.<sup>191</sup>
- 5.80. In 2011 the Ministerial Council on Energy, Standing Committee of Officials identified several risks that could arise in the event of any future co-ownership of transmission and generation in the NEM. It also rated the likelihood and significance of harms flowing from those risks on a scale of high, moderate and low:
- reduction in transmission of service quality and connection for competing generators: Likelihood – High; Significance – High
  - investment and maintenance decisions made in favour of the co-owned generator: Likelihood – Moderate; Significance – High
  - sharing information between the co-owned businesses to improve the generator’s bidding strategies: Likelihood – Moderate; Significance – High
  - strategic short-term ‘de-rating’ of the lines that competing generators use for the benefit of co-owned generators: Likelihood – Moderate; Significance – Moderate
  - transferring costs incurred by a co-owned generator into the transmission business’ regulated asset base: Likelihood – Low; Significance – Moderate
  - perceived loss of market integrity (or increase in investment risk) by market participants: Likelihood – Moderate; Significance – High.<sup>192</sup>

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<sup>187</sup> Industry Commission, [Energy Generation and Distribution, Volume II: Report, Report No. 11](#), 17 May 1991, at p. 114.

<sup>188</sup> Industry Commission, [Energy Generation and Distribution, Volume II: Report, Report No. 11](#), 17 May 1991, at p. 115.

<sup>189</sup> Frederick Hilmer et al., [National Competition Policy](#), 25 August 1993.

<sup>190</sup> Frederick Hilmer et al., [National Competition Policy](#), 25 August 1993, at p. 219.

<sup>191</sup> Energy Networks Australia, [Guide to Australia’s Energy Networks](#), 24 September 2019, at p. 2.

<sup>192</sup> Ministerial Council on Energy Standing Committee of Officials, [Consultation Regulation Impact Statement – Separation of generation and transmission](#), 11 August 2011, at p. vii.



5.81. For the segments of the supply chain that are ‘natural monopolies’ and therefore not amenable to competition – namely, transmission and distribution networks – the reforms of the 1990s have led to regulation.<sup>193</sup> The Energy Networks Association notes that electricity (and gas) networks:

[...] are natural monopolies because the scale and nature of the infrastructure precludes competitors from replicating it – it wouldn’t make sense for a business to duplicate transmission towers or gas pipes.<sup>194</sup>

5.82. The AER summarised the rationale for the regulation of electricity networks in its State of the Energy Market 2023 report as follows:

Because monopolies face no competitive pressure, they have opportunities and incentives to charge higher prices than they could charge in a competitive market. This environment poses risks to consumers, given network charges currently make up around 40% of a residential electricity bill [...] To counter these risks, the role of the AER as the economic regulator is to replicate the incentives that network service providers would face in a competitive market (that is, to control costs, invest efficiently and not overcharge consumers).<sup>195</sup>

5.83. The regulatory framework applied by the AER is set out in the National Electricity Law and the National Electricity Rules.<sup>196</sup> Although the AER undertakes several functions under this framework, a key role is to set the maximum revenue that transmission and distribution providers can earn from their customers for delivering electricity through their networks over a given period (typically 5 years).<sup>197</sup>

5.84. Another role of the AER under the framework is to promote and enforce compliance with ‘ring-fencing’ requirements:

Ring-fencing aims to prevent network service providers from using revenue from regulated services to cross-subsidise their unregulated products or services, and/or discriminate in favour of affiliated businesses.

The AER publishes separate ring-fencing guidelines for transmission and distribution networks. Under the guidelines, network service providers identify and separate the costs and business activities of delivering regulated network services from the delivery of other services in competitive markets..<sup>198</sup>

## Smart meters

5.85. Smart meters (also known as ‘Type 4’ meters) are two-way devices that digitally measure when and how much electricity is used at a premises.<sup>199</sup> Smart meters transmit this information back to retailers, enabling remote reading and servicing.<sup>200</sup>

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<sup>193</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [32].

<sup>194</sup> Energy Networks Australia, [Guide to Australia’s Energy Networks](#), 24 September 2019, at p. 3.

<sup>195</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 84.

<sup>196</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 84.

<sup>197</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at pp. 84 – 85.

<sup>198</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at pp. 94 – 95.

<sup>199</sup> Type 1-3 meters are installed at connection points with a load size above 750 MWh (generally large businesses), whereas Type 4 meters are installed at connection points with a load size up to 750 MWh (generally residential and small businesses). Type 5 are manually read interval meters and Type 6 are manually read accumulation meters: AEMC, [Rule Determination – National Electricity Amendment \(Expanding competition in metering and related services\) Rule 2015](#), 26 November 2015, at pp. 2 – 3.

<sup>200</sup> AER, [Smart meters](#), accessed 27 September 2023.

This contrasts with accumulation meters, which perform basic metering functions and require manual readings.<sup>201</sup>

- 5.86. Smart meters enable customers to access a range of potential benefits, including:
- greater accuracy and detail of real-time information regarding a customer's electricity usage, meaning no more manual meter readings or estimated bills
  - greater access to different flexible pricing options, meaning customers can choose different rates for electricity that suit them
  - the ability to monitor and control electricity consumption allowing customers to change their usage patterns by identifying cheaper times to use energy and as a result, cut the costs of their bill.<sup>202</sup>
- 5.87. There are several accredited metering providers in the NEM who provide, install and maintain each type of meter. For example, Intellihub, Vector Metering, Spotless, Yurika, Plus ES, Mondo, Metropolis, PowerMetric and others are accredited to provide metering services in relation to smart meters. Metering providers are often accredited to provide services for other types of meters.<sup>203</sup>

### Roll-out of smart meters in the NEM

- 5.88. Victoria has a near universal uptake of smart meters.<sup>204</sup> Outside of Victoria, the average smart meter uptake level in each jurisdiction is about 30% (as of November 2022), with the Australian Energy Market Commission (**AEMC**) expecting full deployment of smart meters by 2040 if the current rate of installation continued at the same pace.<sup>205</sup>
- 5.89. The AEMC has recently released its final report for its Review of the Regulatory Framework for Metering Services. The AEMC has recommended a target of universal take-up of smart meters by 2030 across the NEM (other than Victoria).<sup>206</sup>
- 5.90. The AEMC's primary recommendation for accelerating uptake is to require distribution providers to develop 'legacy meter retirement plans' that schedule clusters of manually read meters to be retired and replaced each year over a 5-year period, and to remove the option for customer opt-out. The customer's retailer will then be responsible for overseeing those replacements in accordance with the timelines under the plan.<sup>207</sup>
- 5.91. Smart meters must be installed for all new meter connections, upon a customer's request, or if a customer's existing meter is faulty, has reached the end of its life or needs replacing.<sup>208</sup> In addition, a retailer may undertake a retailer-led new meter deployment to its customers, under which new smart meters are rolled out on an 'opt-out' basis.<sup>209</sup>

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<sup>201</sup> AEMC, [Rule Determination – Estimated Meter Reads](#), 25 October 2018, at p. 5.

<sup>202</sup> AEMC, [Metering review for a smarter energy future](#), 3 November 2022, accessed 27 September 2023.

<sup>203</sup> AEMO, [National Electricity Market Accredited Metering Providers](#), August 2023.

<sup>204</sup> Victorian Auditor General Office, [Realising the benefits of smart meters](#), September 2015, at p. 4.

<sup>205</sup> AEMC, [Review of the regulatory framework for metering services – Draft report](#), 3 November 2022, at p. 6.

<sup>206</sup> AEMC, [Review of the regulatory framework for metering services – Final report](#), 30 August 2023, at pp. i, iii, 6.

<sup>207</sup> AEMC, [Review of the regulatory framework for metering services – Final report](#), 30 August 2023, at pp. iv – viii.

<sup>208</sup> [National Electricity Rules](#) cl 7.8.3(a).

<sup>209</sup> [National Energy Retail Rules](#) r 59A.

- 5.92. Competition in metering services applies to customers in New South Wales, Tasmania, the Australian Capital Territory, South Australia and most of Queensland, excluding customers in embedded networks.<sup>210</sup> Distribution providers now have only a residual role as the metering coordinators for existing manually read meters, until the meter is replaced and the customer's retailer appoints a new metering coordinator.<sup>211</sup>
- 5.93. Energy retailers are responsible for contracting a metering coordinator to maintain and install smart meters for most residential and small businesses customers.<sup>212</sup> The metering coordinator has overall responsibility for the metering installations for which it is appointed.<sup>213</sup> The metering coordinator in turn will engage a metering provider to install and maintain the metering installation for that connection point, and a metering data provider to collect and process metering data.<sup>214</sup>
- 5.94. Any person other than a distributor can perform one or more of these 3 metering roles provided they are registered and accredited by AEMO for the relevant roles.<sup>215</sup> In practice, the metering coordinator and metering provider functions are often performed by the same business.
- 5.95. There is no obligation on a metering coordinator to provide metering services and no regulation of the price of these services. The price of services is subject to commercial negotiations between the metering coordinator and the energy retailer.<sup>216</sup>

## Gas supply chain

### Gas production

- 5.96. Gas producers extract gas from gas basins and process the gas for transmission and sale in domestic and overseas markets.<sup>217</sup> The largest production basins in eastern Australia are the Surat–Bowen basins in Queensland. Other basins that are currently used to supply gas in eastern Australia are in South Australia, New South Wales, offshore Victoria and the Northern Territory.<sup>218</sup>
- 5.97. Most of the gas produced in eastern Australia is exported as LNG, via 3 export facilities in Queensland (the QCLNG, the Gladstone LNG project and the APLNG project).<sup>219</sup> These export facilities commenced operations in 2015 and have resulted

<sup>210</sup> AER, [Electricity Network Service Provider – Registration Exemption Guideline](#), March 2018.

<sup>211</sup> [National Electricity Rules](#) cl 11.86.7.

<sup>212</sup> [National Electricity Rules](#) cl 7.2.1(a)(1); AEMO, [What does the 'Power of Choice' mean for consumers?](#), 7 December 2017, accessed 27 September 2023.

<sup>213</sup> [National Electricity Rules](#) cl 7.3.1(a)(1).

<sup>214</sup> [National Electricity Rules](#) cls 7.3.2(a), (d).

<sup>215</sup> AEMC, [Rule Determination – National Electricity Amendment \(Expanding competition in metering and related services\) Rule 2015](#), 26 November 2015, at pp. v – vi; AEMC, [Rule Determination, National Electricity Amendment \(Meter Installation - Advanced Meter Communications\) Rule 2019](#), 21 March 2019, at p. 40.

<sup>216</sup> AEMC, [Rule Determination – National Electricity Amendment \(Expanding competition in metering and related services\) Rule 2015](#), 26 November 2015, at p. xi.

<sup>217</sup> AEMC, [Gas supply chain](#), accessed 17 August 2023.

<sup>218</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 146.

<sup>219</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at pp. 161 – 162.

Australia has 5 LNG projects in Western Australia (Prelude LNG, North West Shelf LNG, Gorgon LNG, Wheatstone LNG, Pluto LNG) and 2 in the Northern Territory (Darwin LNG, Ichthys LNG).

in gas prices in the domestic market becoming more exposed to international prices.<sup>220</sup>

- 5.98. In the domestic market, gas producers sell gas to gas-powered electricity generators, large commercial and industrial gas users and energy retailers who on-sell gas to smaller commercial and industrial, business and household consumers.<sup>221</sup> The majority of gas in Australia is traded through bilateral contracts, with around 10% to 20% of gas traded in spot markets.<sup>222</sup>
- 5.99. While there are a number of gas producers operating in eastern Australia, this segment of the supply chain is highly concentrated and dominated by the LNG producers. The 3 LNG producers and their associates, for example, are estimated to have influence over 90% of proved and probable (2P) reserves in eastern Australia through their direct interests, joint venture arrangements and exclusivity arrangements.<sup>223</sup> This highlights the LNG exporters' dominant position and effective control that they have over the supply and development of gas in the east coast gas market.<sup>224</sup>

## Gas storage

- 5.100. Gas can be stored in underground depleted gas fields, transmission pipelines or LNG storage facilities and used to manage seasonal or short-term peaks in demand.<sup>225</sup> Underground storage, for example, is typically used by retailers and other large gas users to manage winter peaks in demand, with gas injected during the summer months and then withdrawn in winter. LNG storage, on the other hand, is typically used to meet very short-term peaks in demand and for system security or emergency management purposes.
- 5.101. The importance of storage has increased in eastern Australia, particularly in the south, which is subject to greater variations between demand and supply over the winter period. The 2 key storage facilities that are currently in operation in south-eastern Australia are the Iona underground storage facility, owned by Lochard Energy,<sup>226</sup> and the Dandenong LNG storage facility, owned by APA.<sup>227</sup>

## Gas transmission

- 5.102. Gas produced for domestic consumption is transported by high pressure transmission pipelines from production facilities to entry points of distribution networks (the 'city gates'), or to large users that are connected to the transmission pipelines.<sup>228</sup>

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<sup>220</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at pp. 146, 156 – 158.

<sup>221</sup> AEMC, [Gas supply chain](#), accessed 17 August 2023.

<sup>222</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at pp. 149 – 150; AEMC, [Gas markets](#), accessed 17 August 2023.

Bilateral contracts refer to contracts between a buyer and gas supplier that set out the price, terms and conditions on which gas will be supplied for the term of the contract. Spot markets facilitate short-term trading of gas and have typically been used by market participants to manage imbalances in their contract positions. There are 3 types of spot markets in eastern Australia – Victoria's declared wholesale gas market, the short-term trading market hubs (at Brisbane, Sydney and Adelaide) and gas supply hubs (located in Wallumbilla, Queensland and Moomba, South Australia).

<sup>223</sup> ACCC, [Gas Inquiry July 2022 interim report](#), July 2022, at p. 103.

<sup>224</sup> ACCC, [Gas Inquiry July 2022 interim report](#), July 2022, at p. 103.

<sup>225</sup> See, e.g.: AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 168.

<sup>226</sup> Lochard Energy, [Iona Facility](#), accessed 14 September 2023.

<sup>227</sup> APA, [Dandenong LNG gas storage facility](#), accessed 14 September 2023.

<sup>228</sup> AEMC, [Gas supply chain](#), accessed 17 August 2023.

5.103. An interconnected transmission pipeline grid links gas basins and retail markets in all states and territories other than Western Australia.<sup>229</sup> The eastern gas market's transmission system has evolved from a series of point-to-point pipelines into an integrated network, with many gas pipelines becoming bi-directional and gas increasingly flowing across multiple pipelines to reach its destination.<sup>230</sup> The majority of these transmission pipelines are owned by APA<sup>231</sup> and Jemena.<sup>232</sup>

## Gas distribution

5.104. Gas distribution pipelines transport gas from transmission pipelines to end users. They typically consist of a backbone of high and medium pressure pipelines running between the 'city gate' (the point of connection to the transmission pipeline) and major demand centres. This backbone pipeline system feeds low-pressure pipelines, which deliver gas to businesses and homes.<sup>233</sup>

5.105. Gas is distributed to most Australian capital cities, major regional areas and towns. Queensland, Victoria and New South Wales each have multiple distribution networks, while South Australia, Tasmania and the Australian Capital Territory are each served by a network owned by a single operator.<sup>234</sup>

5.106. Australian Gas Infrastructure Group, owned by the CK Infrastructure Holdings led consortium, is the largest owner of gas distribution networks in eastern Australia, with ownership interests in networks located in Queensland, South Australia, New South Wales and 2 of the Victorian networks.<sup>235</sup> The other major owners of distribution networks in eastern Australia are:

- Jemena, who owns the New South Wales gas distribution network and has a 50% interest in EvoEnergy's gas distribution network in the Australian Capital Territory
- AusNet, who owns the third gas distribution network in Victoria.

5.107. The end of this section discusses the regulatory framework that applies to gas transmission pipelines and distribution networks, the regulatory framework for customer connections and the legislated ring-fencing requirements.

## Gas retail

5.108. To supply retail customers, gas retailers will typically enter into contracts with:

- gas producers or other retailers to procure the required amount of gas<sup>236</sup>

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<sup>229</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 190. The only exception to this is in northern Queensland (around Townsville), which is not connected to the rest of the eastern Australian gas market.

<sup>230</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 173.

<sup>231</sup> APA, for example, owns the Roma to Brisbane Pipeline, South West Queensland Pipeline, Carpentaria Gas Pipeline, Wallumbilla to Gladstone Pipeline, Moomba to Sydney Pipeline, Amadeus Gas Pipeline, SESA Pipeline and Victorian Transmission System. It also has interests in the Port Campbell to Adelaide Pipeline and a number of pipelines in the Northern Territory. See: [APA website](#), accessed September 2023.

<sup>232</sup> Jemena, for example, owns the Queensland Gas Pipeline, Darling Downs Pipeline, Roma North Pipeline, Eastern Gas Pipeline, Northern Gas Pipeline, Colongra Gas Pipeline. See: [Jemena website](#), accessed September 2023.

<sup>233</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 190; AEMC, [Gas supply chain](#), accessed 17 August 2023.

<sup>234</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 195.

<sup>235</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 195.

<sup>236</sup> Some retailers operating in Sydney, Adelaide, Brisbane or Victoria may also procure gas through the spot markets.

- pipeline operators to procure the required amount of pipeline capacity on the transmission and distribution pipelines required to transport gas from the source of supply to their customers<sup>237</sup>
  - storage providers to procure any storage capacity they may require.<sup>238</sup>
- 5.109. Depending on the location of their customers, they may also need to be registered with AEMO to operate in the relevant spot markets and retail markets.
- 5.110. Like electricity, gas retailers (who are often also electricity retailers) will typically sell gas to consumers at an agreed price that reflects the cost of procuring, transporting and storing the gas, and other retail costs.<sup>239</sup> Gas retailers may also use hedging contracts to manage the financial risk they face when procuring gas.<sup>240</sup>
- 5.111. Like in the electricity sector, retail competition in the gas sector has been progressively introduced since the early-to-mid 2000s in New South Wales, the Australian Capital Territory, South Australia, Queensland, Victoria and Tasmania. There are, however, some regional areas in these jurisdictions where a single retailer services the area, because they have procured all, or a significant portion of, the pipeline capacity used to service this area.<sup>241</sup>
- 5.112. Figure 6 sets out the market shares in eastern Australia (excluding Victoria) for gas retailers supplying residential, small business and large customers. As it shows, the retail market is dominated by Origin, AGL and EnergyAustralia, although Tier 2 retailers have grown their market shares over the last 2 years.

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<sup>237</sup> As outlined above, this does not apply in the Victorian Transmission System, where the Australian Energy Market Operator is responsible for allocating capacity through the operation of the Declared Wholesale Gas Market.

<sup>238</sup> AER, [State of the Energy Market 2022](#), 29 September 2022, at pp. 14 (Infographic 2); AEMC, [Gas supply chain](#), accessed 17 August 2023.

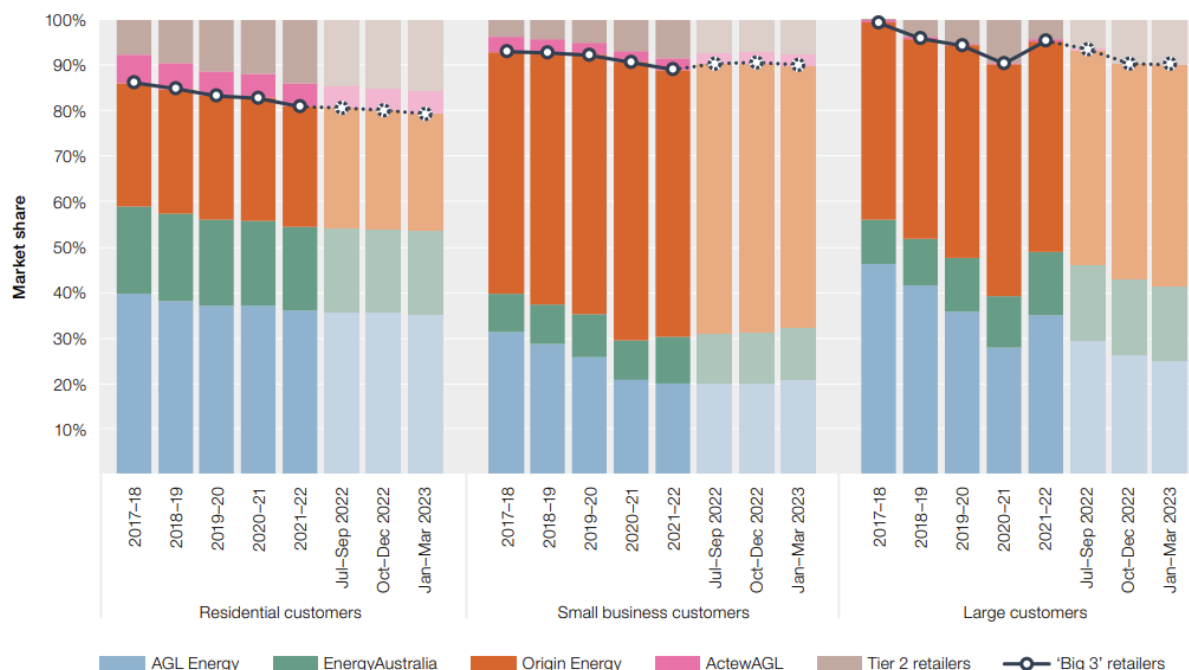
<sup>239</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, p. 216.

<sup>240</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, p. 216.

<sup>241</sup> ACCC, [Gas Inquiry January 2020 Interim Report](#), January 2020, at pp. 111 – 117.



**Figure 6: Energy retail market share in QLD, NSW, SA and ACT – gas**



Note: All data as of 31 March 2023. Data includes customers in Queensland, NSW, South Australia and the ACT.

Source: AER, *Quarterly retail performance report, Q3 2022–23*, June 2023.

Source: AER, [State of the Energy Market 2023](#), 5 October 2022, at p. 247 (Figure 7.18).

## Vertical integration in the eastern Australian gas market

5.113. In a similar manner to electricity, the eastern Australian gas market underwent several reforms in the 1990s in response to both the Hilmer Report and the Council of Australian Governments' national competition policy.<sup>242</sup> The objective of these reforms was to facilitate 'free and fair' trade of gas between and within states and territories, and intra- and inter-basin competition by:

- implementing a third-party access framework for gas pipelines
- removing legislative and regulatory barriers to the trade in gas
- commercialising the operations of publicly owned gas utilities
- facilitating the development of new pipeline links between basins and markets
- removing restrictions on the use of natural gas.<sup>243</sup>

5.114. The first of these measures, which was implemented in 1997 through the National Third Party Access Code for Natural Gas Pipeline Systems (the **Gas Pipeline Code**), recognised the importance of:

- separating potentially contestable elements of the gas supply chain (i.e., production and retailing) from the natural monopoly elements of the supply chain (i.e., transmission and distribution pipelines), and

<sup>242</sup> National Competition Council, [Compendium of National Competition Policy Agreements](#), June 1998, at pp. 67 – 97.

<sup>243</sup> National Competition Council, [Compendium of National Competition Policy Agreements](#), June 1998, at pp. 67 – 97.

- enabling third parties to access transmission and distribution pipelines on fair, reasonable and non-discriminatory terms.

5.115. This is reflected in the objectives of the Gas Pipeline Code, which were to:

‘[...] establish a framework for third party access to gas pipelines that:

- (a) facilitates the development and operation of a national market for natural gas; and
- (b) prevents abuse of monopoly power; and
- (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
- (d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users; and
- (e) provides for resolution of disputes.’<sup>244</sup>

5.116. At the time the Gas Pipeline Code was implemented, there were a number of vertically integrated pipeline operators, with some producers and retailers owning pipelines.<sup>245</sup> To try and mitigate the risks associated with these vertical arrangements, the Gas Pipeline Code required pipeline service providers to comply with:

- minimum ring-fencing obligations that required the service provider to:
  - be a separate legal entity that does not carry on a related business of producing, purchasing or selling natural gas
  - maintain separate accounts for the pipeline
  - ensure confidential information is not shared
  - not share marketing staff with an associate in a related business, and
- associate contract obligations that required the service provider to obtain the regulator’s consent before entering into contracts with an associate.<sup>246</sup>

5.117. The Gas Pipeline Code was replaced by the National Gas Law and National Gas Rules in July 2008. While a number of aspects of the access regime have changed in the intervening 15 years, the ring-fencing and associate contract provisions are largely unchanged.<sup>247</sup> Further information about the regulatory framework for gas pipelines is included at the end of this section.

## Renewable energy in Australia

5.118. Fossil fuels such as coal, oil and gas are the largest contributor to global climate change and account for over 75% of global greenhouse gas emissions.<sup>248</sup> The Intergovernmental Panel on Climate Change has emphasised the need for rapid,

<sup>244</sup> [National Third Party Access Code for Natural Gas Pipeline Systems](#), November 1997, at p. 1.

<sup>245</sup> For example, in 1997 AGL, a gas retailer, owned the Moomba to Sydney Pipeline, the Roma to Brisbane Pipeline, the New South Wales Gas Distribution network, while the South West Queensland Producers had an interest in the Carpentaria Gas Pipeline and ActewAGL, a gas retailer, also owned the ACT gas distribution network.

<sup>246</sup> [National Third Party Access Code for Natural Gas Pipeline Systems](#), November 1997, ss 4.1, 7.1.

<sup>247</sup> See: *National Gas (South Australia) Act 2008* (SA), sch 1 (‘National Gas Law’), ch 4 pt 2; [National Gas Rules](#) pts 5, 16.

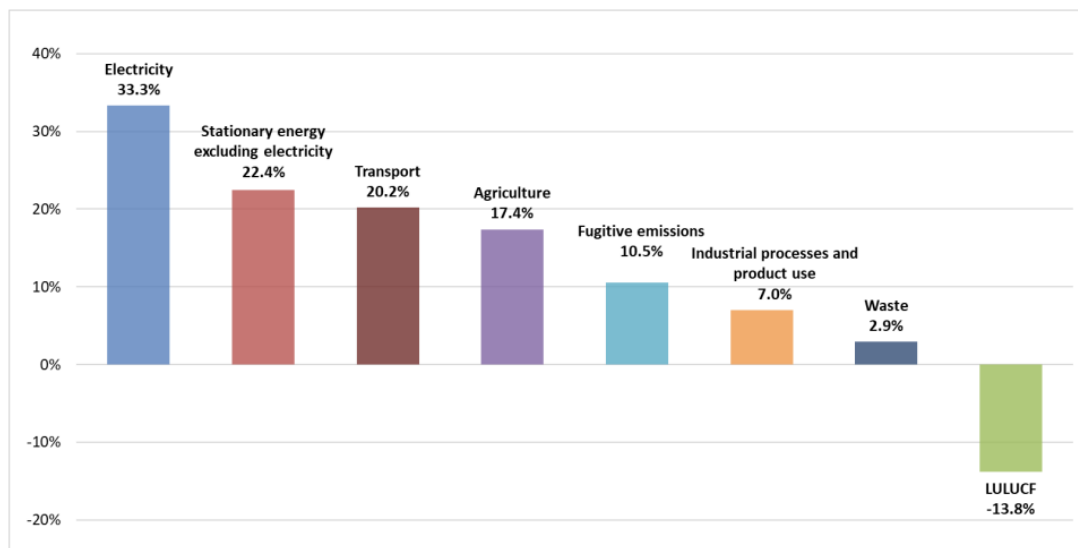
<sup>248</sup> United Nations, [Renewable Energy – Powering a Safe Future](#), accessed 21 August 2023.



deep cuts in greenhouse gas emissions globally.<sup>249</sup> Reducing emissions in high emitting sectors, with speed, is critical in addressing the impact of climate change, which has led to increases in the severity and frequency of weather and climate extremes.

5.119. Electricity generation from fossil fuels is Australia’s largest source of greenhouse gas emissions and accounts for approximately 33.3% of Australia’s emissions in 2022.<sup>250</sup>

**Figure 7: Share of total emissions by sector, for the year to December 2022**



Source: Department of Climate Change, Energy, the Environment and Water, [Quarterly Update of Australia’s National Greenhouse Gas Inventory](#), December 2022, at p. 9 (Figure 3).

5.120. Electricity generators are amongst Australia’s highest emitting corporations. Origin was the fourth highest emitting corporation in Australia in 2020-21, reporting 14.9 million tonnes of scope 1 greenhouse gas emissions (carbon dioxide equivalent).<sup>251</sup>

### ***The Paris Agreement and Australia’s emissions reduction targets***

5.121. There are a number of international agreements that seek to reduce greenhouse gas emissions and mitigate climate change risk. The Paris Agreement, which was adopted by 196 countries in 2015, is the most current international agreement and informs Australia’s domestic climate change policy.<sup>252</sup> The Paris Agreement, which Australia has signed, sets an ‘overarching goal’ of holding the increase in global average temperature to well below 2°C above pre-industrial levels, and to pursue efforts to limit global warming to 1.5°C above pre-industrial levels.<sup>253</sup> Signatories determine how they will achieve the overarching goal and must submit ‘Nationally Determined Contributions’, which set out their specific commitments and plans to

<sup>249</sup> Intergovernmental Panel on Climate Change, [Working Group II Report of IPCC’s Sixth Assessment Report Press Release](#), 28 February 2022, at p. 1.

<sup>250</sup> Department of Climate Change, Energy, the Environment and Water, [Quarterly Update of Australia’s National Greenhouse Gas Inventory](#), December 2022, at pp. 9 – 11.

<sup>251</sup> Clean Energy Regulator, [Australia’s 10 highest greenhouse gas emitters 2020-21](#), 28 February 2022, accessed 14 September 2023.

<sup>252</sup> United Nations Climate Change, [The Paris Agreement](#), accessed 18 August 2023.

<sup>253</sup> United Nations Framework Convention on Climate Change, [Paris Agreement](#), 12 December 2015, article 2.

reduce greenhouse gas emissions in line with the warming scenario contemplated in the overarching goal.<sup>254</sup>

- 5.122. Australia has committed to a target of reducing its emissions by 43% below 2005 levels by 2030, and to achieving net-zero emissions by 2050.<sup>255</sup> This target has been legislated under the *Climate Change Act 2022 (Cth)*.<sup>256</sup> State and Territory governments have also set their own separate emissions reduction targets, and some have mandated renewable energy targets.<sup>257</sup>
- 5.123. Australia's 2030 emissions reduction target is both a single year commitment to reduce emissions to 43% below 2005 levels by 2030, and a multi-year emissions budget covering cumulative emissions from 2021-2030.<sup>258</sup> The Australian Government has stated that, under a baseline scenario, Australia is currently projected to achieve a 32% reduction on 2005 levels in 2030, 5% above its 2021-2030 emissions budget.<sup>259</sup> Under a 'with additional measures' scenario, which incorporates some but not all measures that are now being implemented under the Australian Government's Powering Australia Plan,<sup>260</sup> the Australian Government has stated that Australia is projected to achieve a 40% reduction on 2005 levels in 2030. This is 1% above the 2021-2030 emissions budget.<sup>261</sup>
- 5.124. From 2020 to 2030, most of the decline in emissions is projected to come from the electricity sector due to the strong uptake of renewables. This decline is partially offset by increases in transport as activity returns to previous levels after COVID-19 restrictions, and agriculture due to projected restocking of the cattle herd. From 2030 to 2035, emissions from all sectors are projected to decline, with the electricity and land use, land use change and forestry sectors making the largest contributions.<sup>262</sup>

### ***Uptake of renewable energy***

- 5.125. Transitioning to renewable energy will assist Australia reduce its greenhouse gas emissions and contribute to meeting its domestic targets and international obligations. There are a number of Commonwealth and State government initiatives

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<sup>254</sup> United Nations Climate Change, [The Paris Agreement](#), accessed 18 August 2023.

<sup>255</sup> Australian Government Department of Industry, Science, Energy and Resources, [Australia's Nationally Determined Contribution Communication 2022](#), at p. 7.

<sup>256</sup> *Climate Change Act 2022 (Cth)*, s 10.

<sup>257</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [58] – [70]; Australian Office of Financial Management, [Australian Government Climate Change commitments, policies and programs](#), November 2022, at p. 1; Climateworks Centre, [State and territory climate action: leading policies and programs in Australia](#), December 2022, at pp. 10 – 11, 15 (Table 1).

<sup>258</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, [Australia's emissions projections 2022](#), December 2022, at p. 2.

<sup>259</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, [Australia's emissions projections 2022](#), December 2022, at p. 2.

The baseline scenario includes existing federal, state and territory policies and measures. It also includes some policies under the Powering Australian Plan, which have been implemented already or where the detailed design is well progressed.

<sup>260</sup> For more information about the Government's Powering Australia Plan, see: Australian Government Department of Climate Change, Energy, the Environment and Water, [Powering Australia](#).

<sup>261</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, [Australia's emissions projections 2022](#), December 2022, at p. 2.

The 'with additional measures' scenario includes additional policies and programs under the Powering Australia Plan that are currently subject to consultation and detailed design.

<sup>262</sup> Australian Government Department of Climate Change, Energy, the Environment and Water, [Australia's emissions projections 2022](#), December 2022, at p. 3.

designed to support investment in renewable energy generation and storage.<sup>263</sup> The ACCC also understands that there is a high level of support among the Australian public in relation to the transition to renewable energy.<sup>264</sup>

- 5.126. Modelling has been undertaken to predict how the transition to renewable energy in Australia is likely to unfold, including the impact this will have on Australia's ability to meet its emissions reduction targets. The Powering Australia Plan, which was introduced in 2022, sets a goal (based on modelled outcomes of the policy) that the proportion of renewable energy generation and storage in the NEM will reach 82% by 2030.<sup>265</sup>
- 5.127. The NEM delivers approximately 180 terrawatt-hours (TWh) of electricity to industry and homes per year. The NEM would need to nearly double that by 2050 to enable further electrification and replace gas, petrol and other fuels.<sup>266</sup>
- 5.128. AEMO's 2022 Integrated System Plan provides a roadmap, based on certain assumptions (including that Australia will meet its 2050 emissions reduction targets),<sup>267</sup> for the ongoing and efficient development of the NEM.<sup>268</sup> The Integrated System Plan is intended to support the transition to net-zero emissions, enable low-cost renewable energy and provide consumers with secure and affordable power.<sup>269</sup>
- 5.129. In developing the Integrated System Plan, AEMO considered 4 scenarios as to how the transformation of the NEM may occur.<sup>270</sup> Stakeholder feedback was that the step change scenario was the most likely scenario to occur.<sup>271</sup>
- 5.130. Under the step change scenario, renewable generation in the NEM would reach 83% in 2030-2031, 96% by 2040 and 98% by 2050.<sup>272</sup> In order to achieve the outcomes contemplated under the step change scenario, AEMO estimates that:
- an additional 54 GW of new distributed energy resources (such as rooftop PV systems, distributed battery storage and electric vehicles) is required by 2050, which is 5 times the current 15 GW capacity
  - an additional 125 GW of new utility-scale variable renewable energy is required by 2050, which is 9 times the current 16 GW capacity.<sup>273</sup>

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<sup>263</sup> See, e.g.: Clean Energy Regulator, [Large-scale Renewable Energy Target](#), 2 August 2022, accessed 21 August 2023; Clean Energy Regulator, [Small-scale Renewable Energy Scheme](#), 28 June 2023, accessed 21 August 2023; Australian Renewable Energy Agency, [About](#), accessed 21 August 2023; Clean Energy Finance Corporation, [Who We Are](#), accessed 21 August 2023; Department of Climate Change, Energy, the Environment and Water, [Capacity Investment Scheme](#), accessed 27 September 2023; Department of Climate Change, the Environment, Energy and Water, [National Energy Transformation Partnership](#), 12 August 2022, accessed 27 September 2023; Department of Climate Change, Energy, the Environment and Water, [Powering Australia](#), accessed 21 August 2023; Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [58] – [70].

<sup>264</sup> SECNewgate, [Mood of the Nation](#), June 2023, accessed 27 September 2023.

<sup>265</sup> 82% is not a legislated target (but rather a modelled outcome). See: Reputex, [The Economic Impact of the ALP's Powering Australia Plan: Summary of modelling results](#), December 2021, at p. 9; Department of Climate Change, Energy, Environment and Water, [Powering Australia](#), accessed 28 August 2022.

<sup>266</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 38.

<sup>267</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 32.

<sup>268</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022.

<sup>269</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 8.

<sup>270</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 30.

<sup>271</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 7.

<sup>272</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 45.

<sup>273</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at pp. 38 – 39.

- 5.131. Under the other scenarios modelled by AEMO, which include the slow change, progressive change and hydrogen export scenarios, emissions reductions within the NEM occur at different trajectories.<sup>274</sup>
- 5.132. There are conflicting views as to whether Australia will reach 82% renewable energy in the NEM by 2030. For example, Mr Harris considers that Australia is likely to be able to meet a goal of 82% renewable generation in the NEM by 2030, noting that he expects an acceleration in the number of projects coming online up to 2030.<sup>275</sup> The Applicants submit that Australia is not likely to achieve its NEM 82% renewable generation target for 2030 unless something changes.<sup>276</sup> In support of this argument, the Applicants provided a report from Mr Dixon of Rystad Energy, who considers the NEM will not reach this target until 2035.<sup>277</sup> The uncertainties in relation to how Australia's transition will unfold is considered further in Section 7.

### Relevant regulatory frameworks

- 5.133. The electricity and gas supply chains in the NEM are subject to several regulatory frameworks. The remainder of this section covers background information about the regulations and guidelines that apply in the electricity transmission, electricity distribution and gas distribution sectors, as relevant to the ACCC's assessment of competition issues in the Reasons for Determination.

### Electricity transmission

- 5.134. This section provides a high-level overview of the regulation of the Victorian electricity transmission network, with particular focus on:
- the regulatory framework for electricity transmission in Victoria
  - the operation and economic regulation of the Victorian transmission network
  - augmentation of, and access and connection to, the Victorian transmission network
  - the regulatory framework for transmission connection disputes in Victoria
  - the AER's Transmission Ring-Fencing Guideline
  - foreshadowed changes to the regulatory framework.

### Regulatory framework for electricity transmission in Victoria

- 5.135. Before the establishment of the NEM, electricity supply in Victoria was undertaken by a fully vertically integrated utility. Upon the privatisation of the electricity industry in the mid-1990s, the natural monopoly transmission and distribution network elements were structurally separated from the generation sector. Cross-ownership restrictions were legislated in Victoria that effectively prohibited common ownership of transmission and generation assets. However, the prohibition did not apply to cross-ownership resulting from an acquisition approved by the ACCC.<sup>278</sup> In 2013

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<sup>274</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 30.

<sup>275</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [16].

<sup>276</sup> Applicants' response to ACCC information request, 23 August 2023, at [6].

<sup>277</sup> Expert report of David Dixon (Rystad Energy) for the Applicants, 25 August 2023, at p. 6.

<sup>278</sup> *Electricity Industry Act 1993* (Vic), Part 13; as continued by the *Electricity Industry Act 2000* (Vic), Part 3 (Separation of generation, transmission and distribution sectors); in particular s 68.

the prohibition of cross-ownership was repealed, in favour of relying solely on the ACCC's merger powers under the Act.<sup>279</sup>

- 5.136. In 2004 the ACCC considered issues of vertical integration between the Victorian transmission business and retail/generation assets in the context of an informal merger review of SP Energy Pty Ltd's acquisition of TXU Australia Group. The ACCC received a confidential divestiture commitment from the acquirer to sell the TXU generation interests in Victoria and South Australia, and those assets were subsequently divested.<sup>280</sup>
- 5.137. Since privatisation, a further structural separation was established within the regulatory framework for the Victorian electricity transmission network. The functions that are vested wholly in transmission providers in other jurisdictions, are allocated in Victoria broadly as follows:
- a) transmission planning and investment decisions are vested in an independent entity (initially VENCORP and, since 2009, AEMO)
  - b) ownership and operation of the bulk of the shared transmission network are vested in a private operator (AusNet).<sup>281</sup>
- 5.138. Most network planning for the Victorian transmission network is carried out by AEMO.<sup>282</sup> However, AusNet and AEMO together carry out annual joint planning with the Victorian distribution providers,<sup>283</sup> and AusNet (rather than AEMO) is responsible for carrying out the Regulatory Investment Test cost-benefit evaluation process for transmission asset replacement and renewal projects.<sup>284</sup>

### Operation and economic regulation of the Victorian transmission network

- 5.139. Under the National Electricity Rules, transmission services are categorised according to how they are economically regulated:
- a) **prescribed transmission services**, for which the prices are regulated by 5-yearly transmission determinations made by the AER. These services include the transmission of electricity over the shared transmission network and interconnection with other transmission networks<sup>285</sup>
  - b) **negotiated transmission services**, for which the terms and prices are negotiated between a transmission provider and a transmission network user, under negotiating principles and criteria set out in the National Electricity

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<sup>279</sup> *Energy Legislation Amendment (Flexible Pricing and Other Matters) Act 2013* (Vic), s 10. See: [Second reading speech](#), Energy Legislation Amendment (Flexible Pricing and Other Matters) Bill 2012, Legislative Assembly, 12 December 2012, at p. 5493.

<sup>280</sup> The divestiture commitment is in a confidential annexure to the s87B undertaking accepted by the ACCC, but the ACCC has since obtained consent to this high-level summary disclosure of the divestiture commitment.

<sup>281</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [109] – [112].

<sup>282</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [17] – [23], [123] – [126].

<sup>283</sup> [National Electricity Rules](#) cl 5.14.1(b).

<sup>284</sup> [National Electricity Rules](#) cl 5.16.4(z6); AEMO, [Victorian Annual Planning Report](#), October 2022, at pp. 94 – 101; Statement of Thomas Hallam (AusNet), 5 June 2023, at [73].

<sup>285</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [26(a)].

Rules.<sup>286</sup> These are principally non-contestable works for the connection of new generating units, grid-scale batteries and loads<sup>287</sup>

- c) **non-regulated transmission services**, being transmission services that are neither prescribed nor negotiated transmission services. These principally comprise augmentations to the transmission network (including to connect new generating units, grid-scale batteries and loads) that are provided contestably. The prices and terms for those services are determined through competitive tender or by negotiation with the incumbent transmission provider and any other service providers approached by a connection applicant.<sup>288</sup>

- 5.140. AusNet recovers its costs of providing prescribed transmission services through regulated revenues that it receives from transmission-connected customers (directly) and from retail customers (through their respective retailers and distribution providers). Its aggregate revenue allowance for each year is determined by a transmission determination made by the AER, using a building block model, before the commencement of each 5-year regulatory period.<sup>289</sup>
- 5.141. The AER also applies a service target performance incentive scheme to regulated networks such as AusNet.<sup>290</sup> The service target performance incentive scheme offers incentives to networks to improve their service performance to levels valued by their customers. The transmission service target performance incentive scheme covers 3 service components:
- the frequency of supply interruptions, duration of outages and the number of unplanned faults on the network
  - rewards for operating practices that reduce network congestion
  - funding for one-off projects that improve a network's capability, availability or reliability at times when users most value reliability, or when wholesale electricity prices are likely to be affected.<sup>291</sup>
- 5.142. Financial bonuses of up to +4% of revenue, or penalties of up to -1% of revenue, are available for exceeding/failing to meet performance targets under the scheme.
- 5.143. AusNet's recovery of revenues from customers for prescribed transmission services is principally governed by the pricing methodology that AEMO submits to the AER, which provides how the prices payable by transmission network users will be set each year.<sup>292</sup>

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<sup>286</sup> *National Electricity Rules (Version 109)* cl 6A.9.1 in Victoria as provided for by *National Electricity Rules* cl 11.98.8; *National Electricity Rules* cl 5.2A.6, sch 5.11 in all other jurisdictions.

<sup>287</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [997] – [999]; Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [26(b)]; Statement of Thomas Hallam (AusNet), 5 June 2023, at [28] – [30].

<sup>288</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1008]; Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [26(c)].

<sup>289</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [27] – [28], [34] – [35].

<sup>290</sup> AER, *State of the Energy Market 2023*, 5 October 2023, at p. 142.

<sup>291</sup> AER, *State of the Energy Market 2023*, 5 October 2023, at p. 142.

<sup>292</sup> *National Electricity Rules* cl 6A.10.1 as modified by cl S6A.4.2(f); Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [136], [145].



- 5.144. In its operation and maintenance of the Victorian transmission network, AusNet is principally required to:
- a) operate the Victorian transmission network in accordance with instructions given by AEMO<sup>293</sup> and provide shared network capability services as required under its Network Services Agreement with AEMO<sup>294</sup>
  - b) manage, maintain and operate the network to enable continuous transfer of electricity to each connection point, to minimise the number of interruptions and to restore supply promptly<sup>295</sup>
  - c) disconnect and reconnect generating units, grid-scale batteries or loads from or to the transmission network, at AEMO's direction or on AusNet's own initiative<sup>296</sup>
  - d) comply with the bushfire mitigation and other safety obligations under the *Electricity Safety Act 1998 (Vic)*<sup>297</sup>
  - e) comply with the obligations imposed under its electricity transmission licence (issued by the Essential Services Commission of Victoria).<sup>298</sup>

### **Augmentation of, and access and connection to, the Victorian transmission network**

- 5.145. Ordinarily, AusNet may only augment the Victorian transmission network if it wins a competitive tender conducted by AEMO, or if it is otherwise authorised to do so by AEMO.<sup>299</sup> For example, AusNet was awarded the tender for the construction of the Western Renewable Link augmentation in 2019.<sup>300</sup>
- 5.146. Under the National Electricity Rules, an augmentation of the Victorian transmission network is:
- a) **contestable**, insofar as the augmentation works are separable from the existing shared transmission system and their capital cost will exceed AUD 10 million<sup>301</sup>
  - a) **non-contestable**, if the works are not separable, if their capital cost will be less than AUD 10 million, or if AEMO considers that it is not economical or practicable, or that it would unduly prejudice power system security, to treat the augmentation as contestable.<sup>302</sup>
- 5.147. These contestability criteria are also applied in determining the extent to which electrical work for the connection of new generators, grid-scale batteries and loads

<sup>293</sup> [National Electricity Rules](#) cls 5.1A.1(g)(1), 5.2.3(e).

<sup>294</sup> *National Electricity (South Australia) Act 1996* (SA), sch 1 ('National Electricity Law') s 50D; Statement of Thomas Hallam (AusNet), 5 June 2023, at [47]; Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [145].

<sup>295</sup> [National Electricity Rules](#) cls 5.1A.1(g)(1), 5.2.3(e1)(1), (3) – (4).

<sup>296</sup> [National Electricity Rules](#) cls 5.1A.1(g)(3) – (5), 5.9.3, 5.9.4, 5.9.6.

<sup>297</sup> Statement of Thomas Hallam (AusNet), 5 June 2023, at [57] – [58]; Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [102] – [106].

<sup>298</sup> Statement of Thomas Hallam (AusNet), 5 June 2023, at [60].

<sup>299</sup> *National Electricity (South Australia) Act 1996* (SA), sch 1 ('National Electricity Law') s 50F; Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [127] – [130].

<sup>300</sup> The Western Renewable Link augmentation is a major buildout of 200 km of new transmission lines, which will provide enhanced connection of large-scale wind and solar generation hubs in western Victoria into the transmission grid: BIP, [Brookfield Infrastructure Partners L.P. 2022 Annual Report](#), at p. 100.

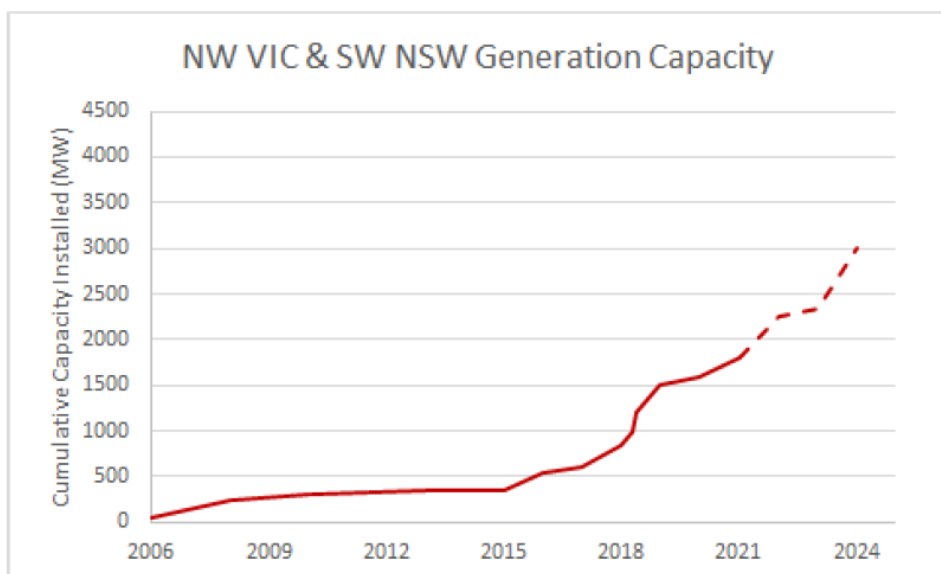
<sup>301</sup> [National Electricity Rules](#) cl 8.11.6(a); Statement of Thomas Hallam (AusNet), 5 June 2023, at [30].

<sup>302</sup> [National Electricity Rules](#) cl 8.11.6.

to the Victorian transmission network must be done non-contestably by AusNet or may be done contestably, either by AusNet or by another provider.<sup>303</sup>

- 5.148. Whenever AusNet constructs an augmentation under the direction of AEMO or pursuant to an agreement with a connection applicant, it is entitled to require the AER to revoke and remake its transmission determination to enable it to recover its additional capital and operating expenditure requirements for prescribed transmission services resulting from the augmentation.<sup>304</sup> There has recently been a significant increase in the number of new connections to the Victorian transmission network, including in parts of Victoria that are endowed with favourable wind and solar resources, but which previously hosted very little electricity generation.<sup>305</sup> For example, in 2021, AEMO published the following historical and forecast data regarding connection of new generation capacity in northwest Victoria and southwest New South Wales:<sup>306</sup>

**Figure 8: Actual and forecast cumulative installed generation capacity in northwest Victoria and southwest New South Wales, 2006 to 2024**



Source: AEMO, [Q&A: Connections to the Western Victoria transmission network](#), September 2021, at p. 4.

- 5.149. As of July 2023, there were **[Redacted – Confidential]** pending applications to connect to the Victorian transmission network, predominantly being **[Redacted – Confidential]**.<sup>307</sup>
- 5.150. Indeed, AEMO has emphasised the importance of augmentation to provide increased transmission capacity in Victoria (and between Victoria and New South Wales), to facilitate the efficient development of renewable generation in areas with high quality renewable resources.<sup>308</sup> The ACCC therefore expects that the number

<sup>303</sup> Statement of Thomas Hallam (AusNet), 5 June 2023, at [30].

<sup>304</sup> [National Electricity Rules](#) cl 6A.7.1 as modified by cl S6A.4.2(d). See and compare: Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [133].

<sup>305</sup> See also: Application for merger authorisation (MA1000024), 5 June 2023, at [644] – [645] (Figures 54, 55).

<sup>306</sup> AEMO, [Q&A: Connections to the Western Victoria transmission network](#), September 2021, at p. 4.

<sup>307</sup> **[Redacted – Confidential]**.

<sup>308</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 74.



of applications to connect to the Victorian transmission network will remain elevated, if not continue to increase, over the coming decade.

- 5.151. The NEM has been designed, since its inception, to operate on the principle of open access to transmission networks.<sup>309</sup> The current regulatory framework for the Victorian transmission network does not depart from that principle.<sup>310</sup>
- 5.152. In Victoria, the functions of the transmission provider in relation to new connections are divided between AEMO and AusNet, so that:
- a) AEMO is responsible for assessing and negotiating the technical and system strength requirements for the applicant's proposed connection
  - b) AusNet is responsible for negotiating (at least the non-contestable) physical connection and augmentation works for the connection and then (except to the extent that the connection works are carried out contestably by a third-party provider) for constructing or upgrading the connection assets and operating and maintaining those assets.<sup>311</sup>
- 5.153. As noted above, connection services may be provided contestably, to the extent that the works will have a capital cost of more than AUD 10 million and are separable from the shared transmission network. In practice, every connection application will involve a non-contestable component, as electrical 'cut in' works<sup>312</sup> to the shared network are always necessary, **[Redacted – Confidential]**.<sup>313</sup>
- 5.154. AEMO or the generator that seeks to connect to the transmission system may conduct the competitive tender to select the party who will construct the relevant connection assets.<sup>314</sup>
- 5.155. **[Redacted – Confidential]**.<sup>315</sup>
- 5.156. The terms of any offer by AusNet to carry out contestable or non-contestable connection works are provided to a connection applicant confidentially, **[Redacted – Confidential]**.<sup>316</sup>
- 5.157. The information provided by a connection applicant to AusNet typically includes **[Redacted – Confidential]**.<sup>317</sup>

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<sup>309</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [49] – [54].

<sup>310</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [657], [1013].

However, the regulatory framework for New South Wales REZs has recently broken with the open access principle, in favour of access schemes based on the allocation of access rights to connect to the transmission network within a REZ, up to the maximum capacity of the local transmission network.

<sup>311</sup> Statement of Thomas Hallam (AusNet), 5 June 2023, at [44]; [National Electricity Rules](#) r 5.3B(a); Applicants' response to ACCC Transparency Letter, 27 July 2023, at [4.3].

<sup>312</sup> Referred to as 'turn in work' in: Statement of Thomas Hallam (AusNet), 5 June 2023, at [49].

<sup>313</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T108 LL.9 – 10].

<sup>314</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1008].

<sup>315</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T111 LL.5 – 7]. See and compare: Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [43(d)], [140(b)].

<sup>316</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T114 L.12], [T114 LL.20 – 25], [T114 L.27] – [T115 L.2]. See also: [National Electricity Rules](#) cl 5.3.8.

<sup>317</sup> **[Redacted – Confidential]**.

## Regulatory framework for transmission connection disputes in Victoria

- 5.158. As a connection applicant is compelled to negotiate with a monopoly transmission provider to obtain access to the transmission network, the National Electricity Rules include provisions for the resolution of disputes between a connection applicant and AusNet if the parties are unable to agree on price and other terms of non-contestable connection services.
- 5.159. In Victoria, a dispute between a connection applicant and AusNet as to terms and conditions of access for the provision of negotiated transmission services:
- a) may be notified to the AER, which then appoints a commercial arbitrator to determine the dispute, applying the negotiated transmission service criteria determined under AusNet's transmission determination,<sup>318</sup> or
  - b) may be notified for resolution through consultations between the parties or, failing resolution within 60 business days, may be referred to the Wholesale Energy Market Dispute Resolution Adviser to establish a dispute resolution panel to determine the dispute.<sup>319</sup>
- 5.160. On the evidence provided to the ACCC, neither mechanism has been invoked in relation to any dispute or disagreement with any connection applicant about the terms of connection offered by AusNet for connection to the Victorian transmission network.<sup>320</sup>
- 5.161. However, it is conceivable that one party to a dispute might trigger one mechanism and another party to the dispute the other mechanism.<sup>321</sup> Neither mechanism allows for the involvement of an independent engineer, as can occur in other jurisdictions.<sup>322</sup> As such, if a connection applicant were to invoke the transmission connection dispute resolution mechanisms that apply in Victoria, it is uncertain whether those provisions would be fit for purpose.
- 5.162. Lastly, the dispute resolution procedures are also limited in their scope: they apply only to the proposed terms and conditions for the provision of negotiated connection services that must be provided by AusNet non-contestably. They do not extend to disputes:
- a) as to the terms and conditions of contestable connection services, leaving any dissatisfaction with the terms that AusNet proposes for contestable connection services to be addressed by the connection applicant by obtaining competing proposals from alternative suppliers<sup>323</sup>

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<sup>318</sup> In Victoria: *National Electricity Rules (Version 109)* cl 6A.30.4(b), (c), as provided for by *National Electricity Rules* cl 11.98.8. These rules provide that the commercial arbitrator must determine the dispute within 30 business days, or such longer period as the parties agree in writing (cl 6A.30.5(a),(c)). The commercial arbitration provisions now in force in other jurisdictions are to the same effect: *National Electricity Rules* cls 5.5.6(a) – (c).

<sup>319</sup> *National Electricity Rules* cls 8.2.4 – 8.2.11; Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [45] – [46], fn 12; Application for merger authorisation (MA1000024), 5 June 2023, at [1005], fn 521.

<sup>320</sup> Statement of Thomas Hallam (AusNet), 5 June 2023, at [36]; Transcript of Examination under section 155(1)(c), [Redacted – Confidential], 7 August 2023, at [T140 L.17].

<sup>321</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [3.19].

<sup>322</sup> In 2017, the *National Electricity Rules* provisions regarding resolution for transmission connection disputes were enhanced, by providing a single commercial arbitration process, and a mechanism for the appointment of an independent engineer to resolve technical questions. However, in Victoria the pre-2017 transmission connection dispute provisions have been grandfathered and so remain in place.

<sup>323</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [46].

- b) about AusNet's performance of negotiated connection services after a connection agreement has been entered into.<sup>324</sup> After a connection agreement has been entered into, any dispute as to the performance of connection services (whether contestable or non-contestable) must be resolved under the contractually-designated dispute resolution procedure or in court.

## AER Transmission Ring-Fencing Guideline

- 5.163. Ring-fencing has long been recognised as a regulatory tool that may be capable of addressing risk of anti-competitive behaviour where a business operates in both regulated monopoly and unregulated competitive activities.<sup>325</sup> In its consideration of structural reform of the electricity supply industry in the early 1990s, the Industry Commission identified ring-fencing as one of three major approaches (along with relying on provisions of the *Trade Practices Act 1974* and full separation of ownership between generation and transmission) that might improve access to transmission facilities. It firmly recommended that there should be full separation of ownership between transmission and generation, but that ring-fencing should be used as an interim mechanism to achieve notional or accounting separation initially.<sup>326</sup>
- 5.164. Since 2016, the development and regulatory oversight of the ring-fencing framework for electricity focussed initially on the Distribution Ring-Fencing Guideline (discussed further below). While the Transmission Ring-Fencing Guideline has been updated in March 2023, not all of the provisions of the Distribution Ring-Fencing Guideline have been included in the Transmission Ring-Fencing Guideline. Partly, this reflects an assessment of the cost-benefit of imposing restrictions on transmission providers in relation to co-location of staff, branding and cross-promotion.<sup>327</sup> Moreover, the obligation to comply with the Transmission Ring-Fencing Guideline has only recently been made a civil penalty obligation, since July 2023.<sup>328</sup>
- 5.165. Since its publication of the updated version 4 of the Transmission Ring-Fencing Guideline, in recognition of the increased regulatory burden that the new guideline imposes, the AER has only required transmission providers to comply with version 4 of the Transmission Ring-Fencing Guideline as soon as practicable, but no later than March 2024.<sup>329</sup> This includes the transmission providers' obligation to submit their first annual compliance report for the 2023 calendar year by April 2024.<sup>330</sup> The current Transmission Ring-Fencing Guideline has therefore not yet fully entered into force, and in circumstances where the AER has not yet publicly reported on

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<sup>324</sup> In Victoria, *National Electricity Rules (Version 109)* cl 6A.30 applies to disputes as to 'terms and conditions of access as referred to in cl 6A.1.2, [...] for the provision of negotiated transmission services' as provided for by *National Electricity Rules* cl 11.98.8; *National Electricity Rules* r 8.2.1(a)(4) applies to disputes about 'proposed access arrangements or connection agreements [...] for connection and access to a [...] declared transmission system'.

<sup>325</sup> See, e.g.: AER, [Electricity Transmission Ring-Fencing Guideline: Explanatory Statement - Version 4](#), March 2023, at p. 4.

<sup>326</sup> Industry Commission, [Energy Generation and Distribution Inquiry Report No. 11 - Volume 1: Summary and Recommendations](#), at pp. 16 – 19. See also: Industry Commission, [Energy Generation and Distribution Report No. 11 - Volume 2: Report](#), at pp. 113 – 114.

<sup>327</sup> AER, [Ring-fencing Guideline Electricity Distribution](#), November 2021, cls 4.2.1, 4.2.3.

<sup>328</sup> Pursuant to the *National Electricity (South Australia) (Civil Penalties) Amendment Regulations 2023* (SA), reg 3(30).

<sup>329</sup> AER, [Ring-Fencing Guideline Electricity Transmission](#), March 2023, cl 7(a); AER, [Electricity Transmission Ring-Fencing Guideline \(Version 4\): Explanatory Statement](#), March 2023, at p. 53.

<sup>330</sup> AER, [Ring-fencing Guideline Electricity Transmission](#), March 2023, cls 6.2, 7.

compliance with previous versions of the guideline, any assertions about the efficacy of the Transmission Ring-Fencing Guideline are necessarily speculative.<sup>331</sup>

- 5.166. Key elements of the ring-fencing framework under version 4 of the Transmission Ring-Fencing Guideline include:
- a) preventing cross-subsidies, through requiring legal and accounting separation of transmission services from other electricity and non-electricity services<sup>332</sup>
  - b) an obligation not to discriminate (directly or indirectly) between related and rival, or potential rival, electricity service providers<sup>333</sup>
  - c) information ring-fencing, limiting sharing of ring-fenced information with related service providers, and disclosure of such shared information to unrelated parties on an equal basis<sup>334</sup>
  - d) separating marketing staff for certain transmission services from marketing staff for contestable electricity services.<sup>335</sup>
- 5.167. In preparing version 4 of the guideline, the AER noted that the evolution of a more diverse range of electricity services through the energy transition has both increased the scope for transmission providers to operate outside traditional transmission network services, and to promote contestability in other services that have traditionally been provided by monopoly transmission providers. For example, the development of technologies that can provide both transmission services and contestable services, such as grid-scale batteries, has made it harder to monitor and control the potential for cross-subsidisation.
- 5.168. Consequently, the amendments to the Transmission Ring-Fencing Guideline strengthened transmission providers' legal separation obligations, including by removing the previous 5% revenue cap exception (but enabling transmissions providers to apply for ad hoc waivers), and by prohibiting transmission providers from leasing excess capacity from batteries (again subject to ad hoc waiver).<sup>336</sup>
- 5.169. Shortly after publication of version 4 of the guideline, in May 2023, the AER began consulting on options to address gaps in the Transmission Ring-Fencing Guideline. During the AER's earlier review of the guideline, stakeholders had raised concerns about the guideline's inability to prevent transmission providers from discriminating against competitors in providing contestable services due to their monopoly role in providing the non-contestable elements of a connection.<sup>337</sup> Other stakeholders also raised specific concerns about AusNet's ability, under the regulatory and operating framework in Victoria, to share with its unregulated affiliates information regarding network connections that is unavailable to independent third parties.<sup>338</sup>
- 5.170. The AER was unable to address these issues in version 4 of the guideline because the National Electricity Rules only authorises the AER to make transmission ring-

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<sup>331</sup> See and compare: Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [183] – [191].

<sup>332</sup> AER, [Ring-fencing Guideline Electricity Transmission](#), March 2023, cls 3.1 – 3.2.

<sup>333</sup> AER, [Ring-fencing Guideline Electricity Transmission](#), March 2023, cl 4.1.

<sup>334</sup> AER, [Ring-fencing Guideline Electricity Transmission](#), March 2023, cl 4.2.

<sup>335</sup> AER, [Ring-fencing Guideline Electricity Transmission](#), March 2023, cl 4.3.

<sup>336</sup> AER, [Electricity Transmission Ring-fencing Guideline \(version 4\), explanatory statement](#), March 2023, at pp. v – vii.

<sup>337</sup> AER, [Options to Address Gaps in Transmission Ring-Fencing Framework: Consultation paper](#), May 2023, at p. 6.

<sup>338</sup> AER, [Options to Address Gaps in Transmission Ring-Fencing Framework: Consultation paper](#), May 2023, at p. 18, referring to submissions made by Iberdrola, CitiPower, Powercor and United Energy.

fencing guidelines for the accounting and functional separation of *prescribed transmission services* from other services provided by a transmission provider and its affiliates.<sup>339</sup> As noted above, the non-contestable component of connection of new generators, grid-scale batteries and loads to the transmission network is classified as *negotiated transmission services*.<sup>340</sup> The National Electricity Rules does not authorise the AER to make a guideline that prohibits a transmission provider from discriminating against competitors or sharing with its affiliates information that it obtains in the provision of *negotiated connection services*.<sup>341</sup>

- 5.171. Following consultation, on 17 July 2023, the AER lodged a rule change request with the AEMC, requesting that the National Electricity Rules be amended to authorise the Transmission Ring-Fencing Guideline to ring-fence the provision of both prescribed and negotiated transmission services, from the other services that a transmission provider or its affiliates may offer contestably.<sup>342</sup> As at 9 October, the AEMC had received but not yet initiated its consideration of that rule change request.<sup>343</sup>
- 5.172. If made, that rule change will confer a power on the AER to revise the Transmission Ring-Fencing Guideline to provide for the ring-fencing of negotiated, as well as prescribed, transmission services. Whether the AER does so, and what regulatory constraints it imposes, will then be a matter for the AER to determine.

### **Foreshadowed changes to the regulatory framework under the Victorian Transmission Investment Framework**

- 5.173. The Victorian government has proposed a new regulatory framework for the planning and development of transmission infrastructure in Victoria to achieve net-zero emissions targets.<sup>344</sup> The new framework may substantially alter the framework for augmentation of, and connection to, the Victorian transmission network, and a reallocation of the responsibilities presently vested in AEMO and AusNet. At the time of finalising this Determination, it remains unclear whether, or how, AusNet's role in negotiating and constructing contestable and non-contestable connection works may be modified. Legislative amendments are expected to be introduced into Parliament in early 2024, and the details of the final procurement framework and access scheme are expected to be published in mid-2025.<sup>345</sup>

### **Electricity distribution**

- 5.174. This section provides a high-level overview of the:
- regulatory framework for pricing of distribution services in Victoria
  - regulatory framework for customer connections to, and augmentation of, distribution networks in Victoria

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<sup>339</sup> [National Electricity Rules](#) cl 6A.21.2(a).

<sup>340</sup> See paragraph 5.139 above.

<sup>341</sup> For example, the definition of 'ring-fenced information' is limited to information acquired or generated by a transmission provider 'in connection with its provision of prescribed transmission services': AER, [Ring-fencing Guideline Electricity Transmission](#), March 2023, cl 1.4.

<sup>342</sup> AER, [Rule change request: Expanding the transmission ring-fencing framework to include negotiated transmission services](#), 18 July 2023.

<sup>343</sup> See: AEMC, [Expanding the transmission ring-fencing framework](#), accessed 5 October 2023.

<sup>344</sup> The new framework is known as the Victorian Transmission Investment Framework.

<sup>345</sup> Department of Energy, Environment and Climate Action, [Victorian Transmission Investment Framework, Final design paper](#), June 2023, at pp. 46 – 49.



- AER’s Distribution Ring-Fencing Guideline
- regulatory framework for embedded generator connections in Victoria.

### Pricing of distribution services

5.175. Chapter 6 of the National Electricity Rules regulates the pricing of the distribution services provided by distribution providers. The way their various distribution services are regulated depends on whether the AER classifies them as ‘direct control services’, ‘negotiated distribution services’ or ‘negotiated distribution services’ in the distribution determination for each distribution provider.

- **direct control services:** comprise of ‘standard control services’ (i.e., basic charges for use of the distribution system) and ‘alternative control services’ (i.e., services only used or requested by certain customers, such as a customer requested electricity pole relocation). Alternative control services include basic connection services<sup>346</sup>

Direct control services are subject to regulatory oversight of revenues and prices by the AER through its 5 yearly distribution determinations<sup>347</sup>

- **negotiated distribution services:** for which prices are negotiated between the distribution provider and the customer. The AER makes a negotiated distribution service classification where it considers that all relevant parties have at least a reasonable degree of countervailing market power to effectively negotiate the provision of those services<sup>348</sup>
- **non-regulated distribution services:** distribution services that are offered in well-established competitive markets.<sup>349</sup>

5.176. When making a distribution determination, the AER also approves a tariff structure statement for each distribution provider. This statement identifies the tariff classes into which retail customers are allocated, and the structures and charging parameters for, and the approach that the distribution provider will take in setting, each tariff.<sup>350</sup>

5.177. Before the start of each regulatory year, the distribution provider must also submit for AER approval an annual pricing proposal, which quantifies the tariff to be charged for each tariff class in the coming year.<sup>351</sup> The annual pricing proposal must be consistent with the distribution provider’s distribution determination and its tariff structure statement, and must also comply with the pricing principles set out in the National Electricity Rules.<sup>352</sup>

### Customer connections to, and augmentation of, the distribution network

5.178. Distribution connection services encompass services required to connect premises to a distribution network, including the design, construction and energisation of connection assets. In some circumstances, the new connection may require an

<sup>346</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1145].

<sup>347</sup> AER, [Service Classification Guideline](#), 28 September 2018, at pp. 4, 9, 12.

<sup>348</sup> AER, [Service Classification Guideline](#), 28 September 2018, at pp. 9, 12.

<sup>349</sup> AER, [Service Classification Guideline](#), 28 September 2018, at p. 9.

<sup>350</sup> [National Electricity Rules](#) cl 6.18.1A(a).

<sup>351</sup> [National Electricity Rules](#) cls 6.18.2(a)(1), 6.18.2(a), (b).

<sup>352</sup> [National Electricity Rules](#) cls 6.18.2(b)(7), 6.18.5, 6.18.8(a).

augmentation of the shared distribution network to ensure there is sufficient capacity to service the connection.<sup>353</sup>

- 5.179. Chapter 5A of the National Electricity Rules applies to customer connections for retail customers. In Victoria, a slightly modified version of Chapter 5A is applied through Schedule 2 to the *National Electricity (Victoria) Act 2005* (Vic).
- 5.180. Under the regulatory framework, connection services are categorised as follows:
- a) **basic connection services** are connections commonly sought by retail customers which involve no (or only minimal) augmentation of the distribution network, and for which the distribution provider has an AER-approved model standing offer. For pricing purposes, basic connection services are categorised as alternative control services
  - b) **standard connection services** are other connection services for a class of retail customers, and for which the distribution provider has an AER-approved model standing offer. For pricing purposes, standard connection services offered by AusNet and Jemena are currently categorised as direct control services
  - c) **negotiated connection services** are more involved connection services, typically requiring some augmentation of the distribution network, and the terms and specifications of which are negotiated between the connection applicant and the distribution provider. For pricing purposes, negotiated connection services offered by AusNet and Jemena are currently categorised as direct control services.<sup>354</sup>
- 5.181. Each distribution provider is required to have a connection policy (approved by the AER), which sets out the basis for charging and determining the amount of connection charges.<sup>355</sup> Distribution providers are also required to have a model standing offer to provide basic and standard connection services on specified terms and conditions.<sup>356</sup>

### ***Pricing and negotiation of basic and standard connection services***

- 5.182. AusNet and Jemena's annual pricing proposals set out the fees chargeable for their basic connection services.<sup>357</sup>
- 5.183. Standard connection services may attract a pre-calculated capital contribution, in addition to the fees chargeable for the associated basic connection services.<sup>358</sup>
- 5.184. Once a customer or its retailer applies for a basic or standard connection service, the distribution provider must provide a connection offer (consistent with its model standing offer for those services) to the applicant within 10 business days.<sup>359</sup>

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<sup>353</sup> See, e.g.: AusNet, [Distribution Connection Policy](#), July 2021, at [2.1].

<sup>354</sup> See: Application for merger authorisation (MA1000024), 5 June 2023, at [1172] (Figure 112).

<sup>355</sup> [National Electricity Rules](#) cls 6.7A.1(b), 6.12.1(21).

<sup>356</sup> [National Electricity Rules](#) cls 5A.B.1, 5A.B.4.

<sup>357</sup> See, e.g.: [AusNet Services: Annual pricing proposal 2023-24](#), 31 March 2023, at pp. 58 – 59.

<sup>358</sup> [National Electricity Rules](#) cls 5A.E.1(b), (c)(3); AER, [Connection charge guidelines for electricity customers](#), April 2023, at pp. 10, 16.

<sup>359</sup> [National Electricity Rules](#) cl 5A.F.1; Essential Services Commission, [Electricity Distribution Code of Practice](#), cl 3.2.



### **Pricing and negotiation of negotiated connection services**

- 5.185. Negotiated connection services are bespoke connections to the distribution network, which typically require some augmentation. They may be requested by large commercial or industrial customers, real estate developers or by residential or small business customers whose requirements do not fall within the scope of basis and standard connection services for which the distribution provider has a model standing offer.<sup>360</sup> A negotiated connection may be initiated by direct request from the customer, or through the customer's retailer.<sup>361</sup>
- 5.186. Although negotiated connection services are classified as direct control services under the current distribution determinations for AusNet and Jemena, the fees and charges payable for negotiated connection services are negotiated between the distribution provider and the connection applicant.<sup>362</sup> The distribution provider is required to negotiate in accordance with the negotiating framework under clause 5A.C.3 of the National Electricity Rules and to comply with its connection policy.<sup>363</sup>
- 5.187. A distribution provider is required to use its best endeavours to provide a connection offer for negotiated connection services within 65 business days after receiving the application for connection.<sup>364</sup> Once made, a connection offer is open for acceptance for 20 business days, unless extended by the distribution provider.<sup>365</sup>
- 5.188. Under clause 5.2 of the Electricity Distribution Code of Practice, a distribution provider must call for tenders for any augmentation works in relation to connection services requested by a connection applicant.<sup>366</sup> However, that obligation does not apply insofar as the augmentation involves services that cannot be safely or lawfully carried out by a third party or involves design services, or if the connection applicant chooses a contractor directly or otherwise agrees that no tenders should be called for.<sup>367</sup>
- 5.189. In practice, AusNet typically does not permit tenders for work inside existing station assets or that involve augmenting existing shared network assets to be tendered. For that work, AusNet has appointed (by tender) a master service provider that undertakes nearly all augmentation construction work on its distribution network.<sup>368</sup>

### **Regulatory framework for distribution connection disputes**

- 5.190. The AER is responsible for resolving retail customer connection disputes under Part 10 of the National Electricity Law. Connection disputes relate to disputes between a distribution provider and a connection applicant regarding:
- the costs of connection

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<sup>360</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1193].

<sup>361</sup> However, AusNet's Distribution Connection Policy provides that it only accepts connection applications for new property developments from property developers directly: AusNet, [Distribution Connection Policy](#), 1 July 2021, at p. 37.

<sup>362</sup> See: AusNet, [Distribution Connection Policy](#), 1 July 2021, at p. 35.

<sup>363</sup> [National Electricity Rules](#) cl 5A.C.3(a)(7).

<sup>364</sup> [National Electricity Rules](#) cl 5A.F.4(a).

<sup>365</sup> [National Electricity Rules](#) cl 5A.F.4(e).

<sup>366</sup> The Electricity Distribution Code of Practice applies to distribution providers in Victoria under the *Essential Services Commission Act 2001* (Vic) and the *Electricity Industry Act 2000* (Vic).

<sup>367</sup> Essential Services Commission, [Electricity Distribution Code of Practice](#), cls 5.2.1(a), 5.2.4.

<sup>368</sup> Application for merger authorisation (MA1000024): Annexure A (Applicants) – Overview of the regulatory regimes, 5 June 2023, at [254], [257] – [258].

- the non-price terms and conditions of the capital contribution policy of the distribution provider.<sup>369</sup>

5.191. In Victoria, under the *National Electricity (Victoria) Act 2005* (Vic), the AER can:

- resolve disputes regarding economic regulation under that Act and the *Electricity Industry Act 2000*
- resolve disputes on whether the distribution provider's terms and conditions for connection are fair and reasonable.<sup>370</sup>

### **AER Distribution Ring-Fencing Guideline**

5.192. Distribution providers are required to comply with the AER's electricity Distribution Ring-Fencing Guideline,<sup>371</sup> which is a civil penalty obligation under the National Electricity Rules.<sup>372</sup>

5.193. The Distribution Ring-Fencing Guideline imposes obligations on distribution providers targeted at, among other things:

- promoting the development of competitive markets in energy services by separating regulated distribution provider services from contestable services
- cross-subsidisation, with provisions that aim to prevent a distribution provider from providing other services that could be cross-subsidised by its distribution services
- discrimination, with provisions that aim to:
  - prevent a distribution provider from conferring a competitive advantage on itself or its related affiliates that provide contestable services
  - ensure a distribution provider handles ring-fenced information appropriately.<sup>373</sup>

5.194. The Applicants submit evidence that a future reclassification of distribution services, in a future distribution decision, known as a service classification determination, could result in contestable connection services sitting outside these prohibitions in the Distribution Ring-Fencing Guideline, as currently drafted.<sup>374</sup> However, before making such a decision the AER would be expected to consider similar issues to those addressed by the ring-fencing framework including any potential impacts on competition in providing those services.<sup>375</sup>

### **Embedded generator connections**

5.195. In Victoria, the Electricity Distribution Code of Practice generally requires a distribution provider to comply with its obligations under the National Electricity

<sup>369</sup> AER, [Customer Information – Dispute resolution process Customer connection to electricity networks](#), February 2016, at [2.1].

<sup>370</sup> *National Electricity (Victoria) Act 2005* (Vic), sch 2, cl 5A.G.2; AER, [Customer Information – Dispute resolution process Customer connection to electricity networks](#), February 2016, at [2.2].

<sup>371</sup> AER, [Ring-fencing Guideline Electricity Distribution](#), November 2021.

<sup>372</sup> *National Electricity Rules* cl 6.17.1.

<sup>373</sup> AER, [Ring-fencing Guideline Electricity Distribution](#), November 2021, cl 1.1.1.

<sup>374</sup> [Expert report of Greg Houston \(HoustonKemp Economists\) for the Applicants](#), 8 June 2023, at [372].

<sup>375</sup> Namely, the form of regulation factors set out in section 2F of the *National Electricity (South Australia) Act 1996* (SA), sch 1 ('National Electricity Law').

Rules in responding to a connection application from an embedded generator and imposes certain technical requirements on embedded generators.<sup>376</sup>

- 5.196. Under the National Electricity Rules, there are 2 connection regimes for 3 different categories of embedded generating units,<sup>377</sup> namely:
- a) **registered embedded generators**, which are capable of exporting more than 5 MW, or whose output is sold directly into the NEM wholesale market, and whose operators are therefore required to be registered as market participants in the NEM
  - b) **non-registered embedded generators**, which export less than 5 MW and do not sell directly into the wholesale market, and whose units do not comply with AS 4777 (Grid connection of energy systems via inverters)
  - c) **micro-embedded generators**, which export less than 5 MW, and do not sell directly into the wholesale market, and whose units comply with AS 4777.
- 5.197. The connection of registered embedded generators is regulated under Chapter 5 of the National Electricity Rules. Registered embedded generators can apply to AusNet or Jemena to connect to their respective distribution networks.<sup>378</sup> AEMO has a lesser role than it does in relation to connections to the Victorian transmission network (confined only to assessment of certain technical requirements).<sup>379</sup> The embedded generator ultimately enters into a connection agreement with the distribution provider alone.
- 5.198. The National Electricity Rules imposes time limits of 15 and 30 business days respectively for a distribution provider to respond to a preliminary enquiry and a connection enquiry (but does not impose any deadline for a distribution provider to respond to a full connection application).<sup>380</sup> There is no mechanism for a connection applicant to enforce compliance with those time limits at the earlier stages of the connection application process.
- 5.199. Through that process:
- a) the distribution provider must use reasonable endeavours to provide the access arrangements being sought by the connection applicant, provided that those arrangements are consistent with good electricity industry practice, having regard to the connection assets and any augmentations or extensions that are required for the connection<sup>381</sup>
  - b) the distribution provider and the connection applicant must negotiate in good faith to reach agreement on the connection service charge, use of system services charges and any compensation to be provided by the distribution provider if the embedded generator is subject to network constraints.<sup>382</sup>

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<sup>376</sup> Essential Services Commission, [Electricity Distribution Code of Practice](#), cls 3.5, 21.

<sup>377</sup> See and compare: Application for merger authorisation (MA1000024), 5 June 2023, at [1361] (Figure 114). The first category, 'registered embedded generators', encompasses categories 1 and 2 in Figure 114.

<sup>378</sup> Applications are made under [National Electricity Rules](#) rr 5.3A and 5.3AA.

<sup>379</sup> Being the AEMO advisory matters referred to in [National Electricity Rules](#) cl 5.3.4A(a).

<sup>380</sup> [National Electricity Rules](#) cls 5.3A.7(a)(1), 5.3A.8(c).

<sup>381</sup> [National Electricity Rules](#) r 5.3AA(e).

<sup>382</sup> [National Electricity Rules](#) rr 5.3AA(f)(1), (3) – (4).

- 5.200. The connection and use of system charges to be paid by a connection applicant to a distribution provider must be negotiated in good faith in accordance with rule 5.3AA. If the embedded generator and the distribution provider are unable to reach agreement as to the proposed terms and conditions of access, a dispute may be referred for resolution to the AER under rule 6.22, or for resolution under the two-stage process under rule 8.2.<sup>383</sup>
- 5.201. Like retail customer connections (discussed above), the connection of non-registered embedded generators and micro-embedded generators are regulated under Chapter 5A of the National Electricity Rules. In Victoria, a slightly modified version of Chapter 5A is applied.<sup>384</sup> Under Chapter 5A:
- a) a distribution provider must have an AER-approved model standing offer to connect micro-embedded generators as a basic connection service, and micro-embedded generators may be connected either as a basic connection service or as a negotiated connection service
  - b) a distribution provider may have an AER-approved model standing offer to connect non-registered embedded generators as a standard connection service, and non-registered embedded generators may be connected either as a standard connection service (if offered by the distribution provider) or as a negotiated connection service.<sup>385</sup> Typically, non-registered embedded generators are connected as a negotiated connection service.<sup>386</sup>
- 5.202. Under Chapter 5A, any dispute about connection charges or proposed terms and conditions of connection may be referred for determination by the AER.<sup>387</sup>

## Gas pipelines

- 5.203. This section covers the relevant parts of the regulatory framework for gas pipelines.

### Regulatory framework for gas pipelines

- 5.204. Gas transmission and distribution pipelines are subject to the regulatory framework set out in the National Gas Law and National Gas Rules. All pipelines must provide third-party access to pipeline services if requested to do so (subject to some transitional exemptions). They are also subject to information disclosure requirements, a common access negotiation framework, a dispute resolution mechanism, several prohibitions and other provisions that are intended to constrain the exercise of market power by pipeline service providers.<sup>388</sup>
- 5.205. Under the regulatory framework, a pipeline may be classified as either a scheme or a non-scheme pipeline. The main differences between these classifications are that:

<sup>383</sup> [National Electricity Rules](#) cls 5.1.2(e)(2), 5.3A.11, 8.2.1(a)(4). The Rules suggest (but do not require) that disputes as to connection charges and commercial terms of access should be determined by the AER under r 6.22, and that technical disputes should be resolved under r 8.2. The two-stage process under National Electricity Rules r 8.2 is summarised in paragraph 5.159(b) above.

<sup>384</sup> As further modified by *National Electricity (Victoria) Act 2005* (Vic) s 16A(a) – (d) and by any subsequent amendments made through the ordinary rule change processes to provisions of Chapter 5A of the National Electricity Rules that are applied in Victoria via the *National Electricity (Victoria) Act 2005* (Vic).

<sup>385</sup> Or the non-registered embedded generator may elect to be connected under the Chapter 5 framework: [National Electricity Rules](#) cl 5A.A.2(c).

<sup>386</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1361] (Figure 114).

<sup>387</sup> [National Electricity Rules](#) cls 5A.G.1, 5A.G.2.

<sup>388</sup> Australian Government Solicitor, [Legal briefing – Gas pipeline reforms](#), 17 March 2023, at pp. 1 – 2.

- **scheme pipelines** are subject to ‘full regulation’, which means they must submit an access arrangement to the regulator for approval, and are subject to a regulatory-oriented access dispute resolution process
- **non-scheme pipelines** are subject to a lighter handed commercially-oriented form of regulation and are not therefore required to obtain regulatory approval. They are, however, required to publish their standing terms and a range of other information to facilitate third-party access and are also required to comply with the negotiation framework, with a commercially-oriented access dispute resolution process available if negotiations fail.<sup>389</sup>

5.206. There are about 127 gas transmission pipelines in Australia.<sup>390</sup> Only 3 transmission pipelines are scheme pipelines and subject to full regulation, namely the Roma to Brisbane Pipeline, the Victorian Transmission System and the Amadeus Gas Pipeline.<sup>391</sup> The remainder of the transmission pipelines are non-scheme pipelines.

5.207. At the distribution level, the major gas networks located in Victoria, New South Wales, the Australian Capital Territory and South Australia are scheme pipelines and subject to full regulation, while those located in Queensland and Tasmania are non-scheme pipelines.<sup>392</sup>

### Regulation of gas distribution pricing for reference and non-reference services

5.208. AusNet and Jemena Gas Network are scheme pipeline service providers. The reference services provided by AusNet are primarily the gas transportation services that are provided to all customers under different tariffs.<sup>393</sup> Similarly, the reference services provided by Jemena Gas Network are primarily gas transportation services.<sup>394</sup>

5.209. The pricing of AusNet and Jemena Gas Network’s reference services is regulated under Part 9 of the National Gas Rules, and determined under access arrangements approved each 5 years by the AER.

5.210. As the Applicants note, it is potentially open for AusNet or Jemena Gas Network to charge a retailer more or less than the reference tariff by agreement.

5.211. The prices for non-reference services are not regulated, but rather are agreed by negotiation between a gas distributor and its customer. AusNet’s non-reference services include connection services to large customers.<sup>395</sup> If the parties are unable to reach agreement as to the price or terms of non-reference services, they may be determined by an access dispute notified to the AER under Chapter 5 of the National Gas Law and Part 12 of the National Gas Rules.

<sup>389</sup> Australian Government Solicitor, [Legal briefing – Gas pipeline reforms](#), 17 March 2023, at pp. 2 – 3.

<sup>390</sup> AEMC, [Gas pipeline register](#), accessed 14 September 2023.

<sup>391</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 192 (Figure 6.1).

<sup>392</sup> AER, [State of the Energy Market 2022](#), 29 September 2022, at p. 159 (Table 5.1).

<sup>393</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1315(d)]; AusNet, [Gas Access Arrangement Revision: FY 2024-28, Part A](#), 8 June 2023, at p. 7.

<sup>394</sup> Jemena Gas Networks, [Access Arrangement: JGN’s NSW gas distribution network 2020-2025](#), June 2020, at cl 2.2(b).

<sup>395</sup> Tariff D and Tariff M Connection services: AusNet, [Gas Access Arrangement Revision: FY 2024-28, Part A](#), 8 June 2023, at p 7. For Jemena Gas Network, non-reference services include the interconnection service and other services provided in response to a prospective user’s specific needs: Jemena Gas Networks, [Access Arrangement: JGN’s NSW gas distribution network 2020-2025](#), June 2020, at cls 2.4 – 2.6.

## Regulatory framework for customer connections

- 5.212. Customer connections in Victoria are governed by clause 3 of the Gas Distribution System Code of Practice. Under that code, a distributor must use its best endeavours to connect a new supply address within 20 business days of a request, and must provide a customer with information as to its requirements for any new gas installation within 10 business days of such a request.<sup>396</sup>
- 5.213. The Gas Distribution System Code of Practice requires that a distributor's terms and conditions of connection must be fair and reasonable and consistent with the guidelines set out in Schedule 2 to the Gas Distribution System Code of Practice.<sup>397</sup> If the distributor seeks to recover the costs of any augmentation, then it must solicit tenders from at least 2 contractors, unless the customer or the Essential Services Commission of Victoria agrees that it need not do so.<sup>398</sup>
- 5.214. The recently announced (but not yet legislated) prohibition on new connections to the gas network in Victoria will apply to all residential planning permit applications for new dwellings and apartments submitted from 1 January 2024.<sup>399</sup> This will significantly reduce the relevance of these connection obligations to new residential homes and developments in Victoria.
- 5.215. In other participating jurisdictions of the National Gas Law outside Victoria, the connection of retail customers to the gas distribution network is governed by Part 12A of the National Gas Rules.<sup>400</sup>
- 5.216. Disputes as to proposed connection charges or the terms of a proposed connection may be determined by an access dispute notified to the AER under Chapter 5 of the National Gas Law. The AER is responsible for resolving retail customer connection disputes under Part 12A of the National Gas Rules. The AER can resolve access disputes regarding the costs of connection and the non-price terms and conditions of a distributor's connection offer.<sup>401</sup>

## Ring-fencing obligations

- 5.217. For gas pipelines, ring-fencing obligations are imposed under the National Gas Law and the National Gas Rules directly, rather than through AER-published guidelines.<sup>402</sup> The key obligations imposed are that a pipeline service provider:
- must not itself carry on a related business<sup>403</sup>

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<sup>396</sup> Gas Distribution System Code of Practice, cl 3.1(b), (d).

<sup>397</sup> Gas Distribution System Code of Practice, cl 3.1(c), (f)(ii).

<sup>398</sup> Gas Distribution System Code of Practice, cl 3.2.

<sup>399</sup> Department of Energy, Environment and Climate Action, [Victoria's Gas Substitution Roadmap](#), accessed 28 September 2023.

<sup>400</sup> [National Gas Rules](#) pt 12A was inserted into the National Gas Rules by the *National Gas (National Energy Retail Law) Amendment Rule 2012*. That rule was made by the South Australian Minister, under s 294C of the National Gas Law. S 294C of the National Gas Law was inserted by the *Statutes Amendment (National Energy Retail Law) Act 2011 (SA)*. However, the amendments to the National Gas Law by that Amending Act do not enter into force in Victoria until Victoria becomes a participating jurisdiction in the *National Energy Retail Law*. See: *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') sch 3 cl 88. As Victoria has not acceded to the *National Energy Retail Law*, the result is that pt 12A of the National Gas Rules has never become part of the National Gas Rules as they apply in Victoria.

<sup>401</sup> [National Gas Rules](#) rr 119Y, 119Z.

<sup>402</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') ch 4 pt 2; [National Gas Rules](#) pt 5.

<sup>403</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') s 139.



- must not share marketing staff with any associated entity that takes part in a related business<sup>404</sup>
  - must keep separate accounts for each of its pipelines, and a consolidated set of accounts for the whole of its business<sup>405</sup>
  - must not enter certain contracts for pipeline services with its associates, unless approved by the AER.<sup>406</sup>
- 5.218. A pipeline service provider must not enter or give effect to a contract with its associate which:
- has the purpose or the likely effect of substantially lessening competition in a market for natural gas services
  - is for pipeline services that are not provided on arm's length terms (as if the associate were a separate unrelated entity).<sup>407</sup>
- 5.219. Each of these obligations is a tier 1 civil penalty obligation.<sup>408</sup>
- 5.220. The AER can impose a bespoke additional ring-fencing requirement in relation to a particular service provider, to ensure that the provider is providing pipeline services to itself or an associated entity on arm's length terms, and to provide users with sufficient information to understand whether the service provider is complying with that obligation.<sup>409</sup> This mechanism offers the possibility of ensuring more effective ring-fencing regulation if the Proposed Acquisition were to give rise to any concern that AusNet or Jemena Gas Network might engage in discrimination in the supply of gas distribution services.

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<sup>404</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') s 140.

<sup>405</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') s 141.

<sup>406</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') ss 147 – 148; [National Gas Rules](#) r 32.

<sup>407</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') s 148(2) (the 'competitive parity rule').

<sup>408</sup> *National Gas (South Australia) Regulations (SA)* reg 6, sch 3 pt 1.

<sup>409</sup> *National Gas (South Australia) Act 2008 (SA)*, sch 1 ('National Gas Law') ss 143 – 145.



## 6. Competitive effects of the Proposed Acquisition

- 6.1. This section outlines the ACCC's analysis of the Proposed Acquisition's effects and likely effects on competition. This section is structured as follows:
- an overview of the legal framework for the ACCC's assessment of competitive effects
  - an overview of the competitive concerns arising from the Proposed Acquisition
  - an overview of how the ACCC has approached its assessment of these competitive concerns
  - consideration of first, corporate structure, and then secondly, the competitive effects of the Proposed Acquisition arising from the various vertical and horizontal links brought about by the Proposed Acquisition, and
  - the ACCC's conclusion on whether it is satisfied that the Competition Test is met.
- 6.2. Competitive effects of the Proposed Acquisition are also relevant to the Net Public Benefit Test. Section 7 outlines the ACCC's analysis of competitive effects in the context of the Net Public Benefit Test.

### Framework for assessment of competitive effects

- 6.3. The Competition Test requires the ACCC to be satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition.<sup>410</sup> In *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, [99], the Tribunal said (emphasis added):

In respect of s 90(7), satisfaction requires that the ACCC reach an **affirmative belief** that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition.<sup>411</sup>

- 6.4. The Tribunal has said that the Competition Test:

requires the Tribunal to assess the likely effects of the proposed conduct on competition in all relevant markets. The conduct under consideration may have a range of potential effects on competition, both positive and negative, with such effects having different degrees of likelihood (from mere possibilities to near certainties). The Tribunal must not grant authorisation under the competition test in s 90(7)(a), however, unless it is satisfied that the likely effect of the proposed conduct, considered in totality, is not to substantially lessen competition in any market.<sup>412</sup>

- 6.5. The ACCC notes that a lessening of competition, even if not substantial, will be relevant to the ACCC's task of identifying and weighing the public benefits and detriments likely to result from the Proposed Acquisition.
- 6.6. The Tribunal has previously noted that the established legal principles concerning the meaning of the words 'likely effect of substantially lessening competition' in

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<sup>410</sup> *Competition and Consumer Act 2010* (Cth), s 90(7)(a).

<sup>411</sup> The 'satisfaction standard' in the context of the *Migration Act 1958* has also been held to require an affirmative belief on the part of the decision maker. See, e.g.: *BOY19 v Minister for Immigration and Border Protection* (2019) 165 ALD 39, at [55].

<sup>412</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [118].

section 50 of the Act are directly applicable to the Competition Test.<sup>413</sup> These principles include:

- the identification of markets must be the ‘essential first step’ in the ACCC’s assessment of present competition and likely competitive effects resulting from the conduct.<sup>414</sup> The identification of markets may involve a fact-intensive exercise, and the boundaries of markets may be blurred and overlap with other markets<sup>415</sup>
- the term ‘substantially’ means an effect that is ‘real or of substance’ and thereby, ‘meaningful and relevant to the competitive process’<sup>416</sup>
- an effect is ‘likely’ if it has a ‘real chance’ or a ‘real commercial likelihood’ of occurring.<sup>417</sup> This requires an assessment of what could reasonably be expected to be the consequences of the proposed conduct; it encompasses real commercial likelihoods but not mere possibilities.<sup>418</sup>

6.7. The meaning of the term ‘competition’ in the Act is also well established. The following statement of the Tribunal in *Re Queensland Cooperative Milling Association Ltd* (1976) 8 ALR 481 often cited:<sup>419</sup>

Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society’s resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.

This does not mean that we view competition as a series of passive, mechanical responses to ‘impersonal market forces’. There is, of course, a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.<sup>420</sup>

## Overview of competitive concerns arising from the Proposed Acquisition

6.8. In its assessment of the competitive effects of the Proposed Acquisition, the ACCC has considered 2 sources of competition concerns in respect of the Proposed

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<sup>413</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [111].

<sup>414</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [113] citing *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (1976) 8 ALR 481, at [513].

<sup>415</sup> *ACCC v Pacific National Pty Limited* [2020] FCAFC 77; 277 FCR 49, at [104], [219].

<sup>416</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [116] citing *ACCC v Pacific National* (2020) 277 FCR 49, at [104], [219].

<sup>417</sup> *ACCC v Pacific National (No 2)* [2019] FCA 669 at [1274] – [1275]; 277 FCR 49, at [246]. See also: *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [117].

<sup>418</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [117].

<sup>419</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [117].

<sup>420</sup> *Re Queensland Cooperative Milling Association Ltd* (1976) 8 ALR 481, at [511] – [512].

Acquisition: vertical integration concerns in electricity and gas markets and horizontal overlap concerns in gas markets. These are discussed in more detail below.

### ***Brookfield LP ownership of Origin Energy Markets***

- 6.9. Following completion of the Proposed Acquisition, Brookfield LP will own the Origin Energy Markets business comprised of Origin's electricity and gas retailing, generation, energy wholesale and trading, energy production and storage development, Octopus energy, LPG and gas trading businesses.<sup>421</sup>
- 6.10. Brookfield will control Brookfield LP through BGTF, BEP and other Brookfield managed co-investors. The Brookfield-managed portion of Brookfield LP will be 67.6%.<sup>422</sup>
- 6.11. The Proposed Acquisition will establish vertical links between Origin Energy Markets and other entities that participate in the electricity and gas supply chains.
- 6.12. The first set of vertical links is between AusNet and Origin. Brookfield Infrastructure has a 45.4% interest in AusNet through Brookfield funds including BIP and BSIP.<sup>423</sup> AusNet owns various electricity and gas network assets in Victoria to which electricity and gas retailers and electricity retailers connect to serve customers.
- 6.13. AusNet owns the Victorian electricity transmission network and Origin owns a gas-fired power station in Victoria at Mortlake, which connects to that AusNet-owned transmission network.<sup>424</sup> As Origin builds renewable generation and storage assets in Victoria, it will need to connect these to AusNet's transmission network.
- 6.14. AusNet owns one of five Victorian electricity distribution networks. Origin is one of the electricity retailers whose customers are connected to that AusNet-owned distribution network.<sup>425</sup> Origin is also a generator of electricity whose assets compete against embedded generation that connects to that AusNet-owned distribution network.<sup>426</sup>
- 6.15. AusNet owns one of three gas distribution networks in Victoria and Origin is a gas retailer in Victoria whose customers are connected to that AusNet-owned distribution network.<sup>427</sup>
- 6.16. The second set of vertical links established by the Proposed Acquisition will be between Intellihub and Origin. BIF IV owns 50% of the holding company of Intellihub.<sup>428</sup>
- 6.17. Intellihub is a smart meter provider that delivers metering and data solutions principally to electricity retailers.<sup>429</sup> It supplies smart meters (and related data

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<sup>421</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [4].

<sup>422</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [10], [479] – [480]; Applicants' correspondence regarding update on the status of Brookfield's equity syndication process, 24 August 2023.

<sup>423</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [486], [498].

<sup>424</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [17(a)], [69].

<sup>425</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [17(b)], [137].

<sup>426</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [203].

<sup>427</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [179].

<sup>428</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [489], [526].

<sup>429</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [17(c)].

services) to Origin and other retailers for use in their downstream electricity retail businesses.<sup>430</sup> It also supplies an application programming interface to retailers, including Origin, for use in virtual power plants.<sup>431</sup>

- 6.18. The third set of vertical links established by the Proposed Acquisition will be between Jemena and Origin. Under the Proposed Acquisition, Temasek will own 9.9% of Brookfield LP,<sup>432</sup> which will own 100% of the Origin Energy Markets business.<sup>433</sup> Separately, Temasek has committed capital to BGTF as a founding investment partner.<sup>434</sup> **[Redacted – Confidential]**.<sup>435</sup>
- 6.19. Temasek has a 100% interest in Singapore Power Limited, which has a 40% interest in Jemena.<sup>436</sup> Jemena owns or otherwise has interests in 2 Victorian electricity distribution networks, the New South Wales gas distribution network and the Australian Capital Territory electricity and gas distribution networks.<sup>437</sup> Origin is one of the electricity retailers whose customers are connected to those distribution networks.<sup>438</sup> Jemena also owns a number of gas transmission pipelines on the east coast of Australia.<sup>439</sup>

### **MidOcean ownership of Origin Gas Markets**

- 6.20. MidOcean Group currently owns no assets in Australia, but pursuant to the Proposed Acquisition, it will acquire 27.5% of APLNG.<sup>440</sup> Immediately following the Proposed Acquisition, it will sell 2.49% of this interest to ConocoPhillips, leaving it holding a 25.01% interest in APLNG.<sup>441</sup> The Proposed Acquisition is expected to complete by early in the 2024 calendar year.<sup>442</sup>
- 6.21. In October 2022, MidOcean Energy entered an agreement to acquire small interests in 4 Australian LNG projects from Tokyo Gas. These assets include minority interests in the Gorgon, Ichthys, Pluto and QCLNG LNG projects.<sup>443</sup> This transaction is expected to complete in **[Redacted – Confidential]**.<sup>444</sup>
- 6.22. Consequently, following the Proposed Acquisition and the finalisation of the acquisition of Tokyo Gas interests, MidOcean Group will have interests in APLNG and QCLNG, 2 of the largest east coast gas producers. Both APLNG and QCLNG produce natural gas which they sell to the east coast domestic market as well as overseas.<sup>445</sup> This gives rise to a horizontal link between APLNG and QCLNG.

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<sup>430</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [17(c)], [227].

<sup>431</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [17(c)].

<sup>432</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [10], [479] – [480]; Applicants' correspondence regarding update on the status of Brookfield's equity syndication process, 24 August 2023.

<sup>433</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [4(b)].

<sup>434</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [10], fn 4.

<sup>435</sup> **[Redacted – Confidential]**.

<sup>436</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [19], [557] – [558].

<sup>437</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [563], [565].

<sup>438</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [20(a)].

<sup>439</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [574].

<sup>440</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [595], [1526].

<sup>441</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [259], [270].

<sup>442</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [272].

<sup>443</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [595].

<sup>444</sup> **[Redacted – Confidential]**.

<sup>445</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1521] – [1522].



Purchase Power Agreements.<sup>449</sup> This is discussed in further detail in the Public Benefits and Detriments section

- MidOcean Group would continue to seek out potential opportunities to acquire interests in the global LNG industry.<sup>450</sup> Currently, MidOcean Group does not own any assets in Australia.<sup>451</sup> If it completes its acquisition of Tokyo Gas' Australian gas assets (which is intended to occur irrespective of whether the Proposed Acquisition proceeds), it will have small interests in 4 Australian LNG projects, including QCLNG.<sup>452</sup> MidOcean Group has no plans to acquire any other LNG interests in Australia as at the date of the Application.<sup>453</sup>

6.24. The submissions the ACCC has received from market participants about what Brookfield and Origin are likely to do absent the Proposed Acquisition are discussed in the Public Benefits and Detriments section. The ACCC did not receive relevant submissions in respect of the other merger parties absent the Proposed Acquisition.

6.25. In respect of these submissions by the Applicants, the ACCC considers:

- Brookfield will likely build some renewable generation and storage capacity in Australia in the medium term, up to its target of 5 GW. **[Redacted – Confidential]**.<sup>454</sup> It is therefore realistic that Victoria would remain an area of focus for Brookfield in pursuing further renewable opportunities. The ACCC's consideration of what Brookfield will likely do in the future without the Proposed Acquisition is set out in more detail in the Public Benefits and Detriments section at paragraphs 7.54 and 7.55. Brookfield would also continue to hold its interests in AusNet and Intellihub (see Section 5)<sup>455</sup>
- based on the evidence available, MidOcean Group will not have horizontal links between gas projects in Australia that materially affect the ACCC's assessment of the Proposed Acquisition<sup>456</sup>
- Origin would remain a publicly listed gentailer and pursue generation, retail, smart metering, and gas opportunities and deals in its own best interests. The ACCC's consideration of what Origin will likely do in the future without the Proposed Acquisition is set out in more detail in the Public Benefits and Detriments section at paragraphs 7.47 to 7.48.

6.26. In its assessment of potential competitive effects of the Proposed Acquisition, the ACCC therefore considers that, relevantly:

- vertical links between Brookfield's interests in first, electricity generation and transmission and secondly, embedded electricity generation and distribution would occur in Victoria in the future without the Proposed Acquisition to some extent, and

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<sup>449</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [379].

<sup>450</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [395].

<sup>451</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [595].

<sup>452</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [595].

<sup>453</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [396].

<sup>454</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [303] – [308]; Statement of Luke Edwards (Brookfield): Annexure LE-9, 5 June 2023.

<sup>455</sup> Applicants' letter re the feasibility of divesting Brookfield's interest in AusNet, 29 August 2023.

<sup>456</sup> An acquisition by MidOcean creating a horizontal link between gas projects in Australia may be considered by the ACCC under section 50 of the Act.

- AusNet’s business would continue to comprise both its ownership and operation of electricity transmission and distribution networks in Victoria as well as its development and future networks business (outside its regulated business) including Mondo.

### **Approach to assessment of competitive concerns**

- 6.27. When considering vertical mergers, the ACCC assesses whether the merged entity has the ability and incentive to fully or partially foreclose rivals and the associated effects that foreclosure may have on the relevant market(s).
- 6.28. In general, in the context of a firm providing an intermediate service to downstream or upstream competitors, exclusionary conduct typically can take 2 forms:
- complete foreclosure: the merged firm refuses to serve its downstream or upstream rival(s)
  - partial foreclosure: the merged firm raises the price, lowers the quality, or otherwise adversely supplies the service to a down- or upstream competitor, thereby raising its rivals’ costs.
- 6.29. A merged entity will only be able to engage in complete or partial foreclosure if:
- downstream or upstream rivals do not have competitively effective alternatives for the service provided by the merged entity
  - the merged entity’s corporate structure and/or governance means that the entities or business units at different levels of the supply chain do not act independently of each other, and
  - the merged entity is not effectively prevented from engaging in such conduct by other factors such as regulation.
- 6.30. In the present context, the ACCC considers that there are no competitively effective substitutes for most of the transmission and distribution services supplied by AusNet. Rather, AusNet has a position of very strong market power in respect of most of the transmission and distribution services it provides, given these are monopoly businesses supplying essential infrastructure services. Further, the ACCC considers that behavioural regulation of entities with market power is unlikely to effectively mitigate the ability to discriminate against rivals in upstream or downstream markets.
- 6.31. A firm that has an *ability* to engage in the foreclosure of rivals may not have the incentive to do so unless it can do so profitably. Whether it is profitable to pursue foreclosure strategies depends on the nature of competition in each of the relevant markets and the available means of foreclosure. To understand whether a firm with some ability to foreclose rivals has an incentive to engage in foreclosure strategies, the ACCC considers whether the benefit to the firm from doing so outweighs potential lost sales and weighs the foreclosure costs against likely gains and the relative size and importance to the merged firm of each market.<sup>457</sup>
- 6.32. With respect to incentive, the ACCC considers whether:
- the merged entity’s business units at different levels of the supply chain act independently of each other (having regard to corporate structure and/or

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<sup>457</sup> ACCC, [ACCC Merger Guidelines](#), November 2008 (amended November 2017), at [5.33] – [5.34].



governance) without a view to maximising the overall profits of vertically integrated levels, and

- any foreclosure would be profit-maximising for the merged entity. Of relevance in that consideration is the extent to which the merged entity's upstream or downstream arm (in this case, Origin generation or Origin retailing) would likely gain market share, and the profitability of that arm relative to any decreased profits at other levels of the merged entity (in this case, AusNet transmission or distribution profits).
- 6.33. The third and final aspect of the ACCC's consideration is the effect of the exclusionary conduct. In this case, and for example, the effects of foreclosure might take the form of adverse impacts on investment in generation assets and/or the level of wholesale electricity prices.
- 6.34. As noted above, the Proposed Acquisition gives rise to a number of vertical links in the electricity and gas supply chains, which are considered further below.
- 6.35. In order to properly assess the competitive effects of these vertical links, the ACCC has:
- first, considered in detail Brookfield's corporate structure and the degree of separation between the relevant business units and portfolio companies, as well as the degree of control Brookfield has, or will have, over AusNet, Intellihub and Origin Energy Markets. Temasek's corporate structure and ownership stakes in Australia's electricity and gas markets have also been considered. This analysis relates to various potential competitive effects
  - second, considered the competitive effects arising from the suite of vertical links arising from the Proposed Acquisition, including the incentive to foreclose rivals.
- 6.36. In respect of competitive effects arising from the horizontal link between QCLNG and APLNG, the ACCC's analysis has focused on information sharing and the potential for coordinated effects.

## **Corporate structure considerations**

### ***Brookfield's corporate structure***

- 6.37. The Proposed Acquisition will result in Brookfield having interests in the following entities:
- AusNet
  - Origin Energy Markets
  - Intellihub.
- 6.38. Brookfield is organised by business units with BAM ULC managing each business unit's investments.<sup>458</sup>
- 6.39. The Applicants submit that Brookfield's different business units operate independently on a day-to-day basis.<sup>459</sup>

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<sup>458</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [453].

<sup>459</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [451].

6.40. The Applicants submit that, if the Proposed Acquisition went ahead, separation and different ownership of AusNet, Origin Energy Markets and Intellihub would effectively limit the scope for vertical co-operation between the businesses.<sup>460</sup> Specifically:

- Brookfield's Infrastructure business unit (which has interests in AusNet and Intellihub, amongst other businesses) is separate to Brookfield's Renewable Power & Transition business unit (which will have interests in Origin Energy Markets business) with different management, investors, funds and general partners<sup>461</sup>
- portfolio companies of Brookfield funds (such as AusNet, Origin Energy Markets and Intellihub) are operated day-to-day by the relevant portfolio company by its own Chief Executive Officer (**CEO**) and Board of directors<sup>462</sup>
- in the case of AusNet, more than 50% of the equity is held by independent non-Brookfield co-investors.<sup>463</sup>

6.41. Co-ownership or having interests in entities along different levels of the supply chain can give rise to the ability and incentive for one entity to favour another related entity within the broader Brookfield business. The ACCC, in its consideration of the Proposed Acquisition, has sought to test:

- the financial and other motivations that may exist for BAM ULC to manage Brookfield business units' investments in a way that preferences related entities
- the independence of Brookfield's business units (specifically the degree to which Brookfield Infrastructure and Brookfield Renewable Power & Transition share information), and
- the degree of Brookfield's control over portfolio companies,

to determine whether there is a realistic ability and incentive to preference.

## Impact of BAM ULC's management

### *Financial incentives*

#### *Applicants' submissions*

6.42. The Applicants submit that BAM ULC earns a management and 'carry' fee for funds it manages, creating an incentive to maximise the returns for each portfolio business within a particular fund.<sup>464</sup>

6.43. The leadership team of Brookfield, including Stewart Upson, Connor Teskey (President, BAM; CEO Renewable Power & Transition) and Bruce Flatt (CEO of Brookfield) also receive **[Redacted – Confidential]**, which reflects all assets under BAM ULC management.<sup>465</sup> The Applicants submit the Origin Energy Markets and

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<sup>460</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1119].

<sup>461</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.2]; Application for merger authorisation (MA1000024), 5 June 2023, at [1125] – [1126].

<sup>462</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [458], [1120] – [1122].

<sup>463</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1123].

<sup>464</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [453].

<sup>465</sup> Applicants' record of oral submission, 4 August 2023, at [9] – **[Redacted – Confidential]**.

AusNet combined interests represent approximately 2% of the assets Brookfield manages globally.<sup>466</sup>

- 6.44. In terms of the incentives for executives in Brookfield business units, each is financially incentivised to maximise the value of assets in that business unit.<sup>467</sup> For instance, **[Redacted – Confidential]**.<sup>468</sup> Specifically, their financial incentive includes a proportion of the outperformance of the fund relevant to their role (comprising **[Redacted – Confidential]** of long-term incentive compensation) and BAM ULC options (**[Redacted – Confidential]** of their long-term incentive compensation).<sup>469</sup>

#### *ACCC view*

- 6.45. While the majority of direct financial incentives provided to executives in Brookfield business units are to maximise the value of assets in that business unit, a not insignificant proportion of executives' direct financial incentives (comprising the BAM options) could encourage conduct that benefits businesses held within other business units.
- 6.46. As noted below (see paragraphs 6.227 to 6.243) for regulated businesses such as AusNet's transmission and distribution networks, any conduct to foreclose is unlikely to result in significant loss in AusNet's profitability, while the benefits to Origin Energy Markets may be significant, which impacts on the nature of the incentives for BAM ULC and relevant Brookfield executives.
- 6.47. Further, the ACCC considers that executives within a large asset manager, such as Brookfield, may be motivated by more than just direct and immediate financial incentives, particularly where broader motivations are driven by a view to enhancing career prospects. Such broader motivations and incentives are difficult to quantify but could include establishing a reputation for contributing to the entire portfolio, building strong internal networks by (for example) demonstrating a willingness to engage in reciprocal and cooperative conduct between business units.
- 6.48. The ACCC considers that a detailed knowledge of Origin Energy Markets' business would not be required in order to understand what is beneficial to that business. For example, slowing the entry of a rival generator in a similar area to where Origin Energy Markets has publicly stated it will build a generator, will be an obvious means of assisting another Brookfield business unit and the relevant fund, without having to have a detailed understanding of the relevant business operations.
- 6.49. The ACCC considers that the potential remains for executives to be incentivised to engage in behaviour that would benefit other Brookfield business units or Brookfield overall (not necessarily just their business unit).

### ***Overlap of management and support staff across Brookfield business units***

#### *Applicants' submissions*

- 6.50. The Applicants submit that BAM ULC has a global executive team who sit across all business units and are responsible for managing BAM, overseeing the execution of

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<sup>466</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [349(a)(iv)].

<sup>467</sup> Applicants' record of oral submission, 4 August 2023, at [9].

<sup>468</sup> **[Redacted – Confidential]**.

<sup>469</sup> **[Redacted – Confidential]**.

its broader strategic plan.<sup>470</sup> In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>471</sup>

- 6.51. Additionally, there are specialist support personnel employed by BAM ULC that provide support functions across Brookfield funds.<sup>472</sup> Brookfield submits these individuals are not directly involved in the management or strategy around Brookfield's business units or funds.<sup>473</sup>

#### *ACCC view*

- 6.52. The ACCC considers that the global executive team and (to a lesser extent) support personnel can provide a potential avenue for sharing of information and/or implementation of foreclosure strategies.
- 6.53. Even if these executives and support staff do not generally involve themselves in the management of Brookfield's portfolio entities, because they work across multiple portfolios, they could be a source of information flows (whether advertent or inadvertent), and also a way of facilitating a foreclosure strategy. For example, executives may receive information from Origin Energy Markets and AusNet that allows them to identify where discrimination by AusNet in favour of Origin Energy Markets is profit maximising overall for Brookfield.

### ***Brookfield's reputation***

#### *Applicants' submissions*

- 6.54. The Applicants submit that Brookfield's reputation is the most important factor for its global franchise.<sup>474</sup> Brookfield manages approximately USD 850 billion in assets across its 5 business units<sup>475</sup> and notes in Brookfield Corporation's 2022 Annual Report the following:

Our business relationships and reputation could be negatively impacted by a number of factors including poor performance; actual, potential or perceived conflicts of interest that are not adequately addressed; misconduct or alleged misconduct by employees; rumors or innuendos; or failed or ineffective implementation of new investments or strategies. If we are unable to continue to raise and retain capital from third-party investors, either privately, publicly or both, or otherwise are unable to pursue our investment opportunities, this could materially reduce our revenue and cash flows and adversely affect our financial condition.<sup>476</sup>

- 6.55. The Applicants submit that it would be a conflict, and create material detriment to the Brookfield franchise, for Brookfield to use one pool of capital belonging to one set of investors, to benefit another pool of capital belonging to an entirely different

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<sup>470</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.6].

<sup>471</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T18 LL.7 – 9].

<sup>472</sup> These support services include compliance, tax, treasury, finance, insurance, IT, HR, and technical. See: Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.13].

<sup>473</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.13].

<sup>474</sup> Applicants' record of oral submission, 4 August 2023, at [2(2)].

<sup>475</sup> Brookfield, [Brookfield Asset Management Announces Strong Second Quarter Results](#), 9 August 2023, accessed 29 August 2023.

<sup>476</sup> Application for merger authorisation (MA1000024): Annexure 1.16 (Applicants) – Brookfield Corporation 2022 Annual Report (9 February 2023), 5 June 2023, at p. 104.

set of investors, and this would be catastrophic to Brookfield's global reputation and would affect its ability to raise funds across all of its businesses.<sup>477</sup>

#### *ACCC view*

- 6.56. The ACCC acknowledges that Brookfield values its strong global reputation and its ability to obtain investment for future funds would be put at risk by seeking to benefit one Brookfield business unit's investors over another.
- 6.57. The ACCC also acknowledges that Brookfield's reputation could be harmed if it were discovered that Brookfield were utilising one fund to benefit another, and this could materially impact its ability to raise equity for future funds.
- 6.58. The ACCC considers this is likely to act as a disincentive for Brookfield staff to favour one portfolio to the detriment of another portfolio company in an obvious way that would be clearly detected by investors. However, the ACCC does not consider all potential forms of preferencing would be readily detected.
- 6.59. To the extent preferencing gives rise to a conflict or causes financial loss, the impacts on profits of the monopoly business – particularly an economically-regulated business such as AusNet transmission and distribution – may be insufficiently noticeable to create a reputational risk. As a result, the ACCC does not consider that reputation alone is sufficient to remove potential incentives to preference related entities.
- 6.60. The ACCC also considers that not all forms of preferencing would cause a material conflict between the interests of the 2 portfolio companies. For example, preferencing Origin Energy Markets' renewable generation connections over others may not have any material impact on AusNet's profitability.

### ***Brookfield Infrastructure and Renewable Power & Transition business units***

#### *Applicants' submissions*

- 6.61. The Applicants submit that, if the Proposed Acquisition goes ahead, the management teams of AusNet and Origin Energy Markets will sit within different business units of BAM (AusNet sits within the Brookfield Infrastructure team, and Origin Energy Markets would sit within the Renewable Power & Transition team), with practical separation between the business units.<sup>478</sup>
- 6.62. While the Applicants acknowledge that there is typically some overlap in the individuals who sit on Investment Committees<sup>479</sup> (i.e. one individual may sit on more than one business unit's Investment Committee), the Applicants submit the role of the Investment Committee is to

review and make the ultimate decision regarding investments (or divestments) recommended to the relevant Brookfield managed funds – this includes new and follow-on investments in portfolio companies, and divestments of portfolio companies, including partial divestments.<sup>480</sup>

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<sup>477</sup> Applicants' record of oral submission, 4 August 2023, at [3].

<sup>478</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [128].

<sup>479</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [457].

<sup>480</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.8].

As such, the Investment Committees are not involved in the day-to-day management of portfolio companies.<sup>481</sup>

- 6.63. The Applicants note that there are physical separations between the Brookfield Infrastructure and Renewable Power & Transition business units and policies aimed at addressing conflicts between business units. Specifically,
- by and large there are separate funds that underpin the investments made by Brookfield Infrastructure and Brookfield Renewable Power & Transition business units comprised of different investors.<sup>482</sup> An exception is the BIF IV fund in which BEP and BIP are both investors depending on if the asset BIF IV is acquiring is renewable or a non-renewable asset<sup>483</sup> – Brookfield submits the Renewable Power & Transition and Infrastructure investments in BIF IV are managed separately.<sup>484</sup> Further, the investment manager entities for the funds within Brookfield Infrastructure and Brookfield Renewable Power & Transition business units are separate affiliates of BAM ULC<sup>485</sup>
  - the Brookfield Renewable Power & Transition and Infrastructure business units sit on different floors in **[Redacted – Confidential]** Sydney,<sup>486</sup> and have separate electronic drives.<sup>487</sup>
- 6.64. Further, the Applicants submit there are policies and processes that go to how Brookfield business units manage conflicts that may arise between them.<sup>488</sup> Specifically, **[Redacted – Confidential]**<sup>489</sup> **[Redacted – Confidential]**.<sup>490</sup>
- 6.65. **[Redacted – Confidential]**:
- **[Redacted – Confidential]**<sup>491</sup>
  - **[Redacted – Confidential]**,<sup>492</sup> and
  - **[Redacted – Confidential]**.<sup>493</sup>
- 6.66. **[Redacted – Confidential]**,<sup>494</sup> and all conflicts identified are considered by the Brookfield Conflicts Committee.<sup>495</sup>
- 6.67. **[Redacted – Confidential]**.<sup>496</sup>

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<sup>481</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.8].

<sup>482</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T65 LL.21 – 27].

<sup>483</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [454], fn 102.

<sup>484</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [484], fn 108.

<sup>485</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [1.7].

<sup>486</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T59 LL.13 – 15], [T65 LL.19 – 25]; Application for merger authorisation (MA1000024), 5 June 2023, at [128], [1126].

<sup>487</sup> **[Redacted – Confidential]**; Application for merger authorisation (MA1000024), 5 June 2023, at [128], [1126].

<sup>488</sup> Applicants' record of oral submission, 4 August 2023, at [4]; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>489</sup> **[Redacted – Confidential]**.

<sup>490</sup> **[Redacted – Confidential]**.

<sup>491</sup> **[Redacted – Confidential]**.

<sup>492</sup> **[Redacted – Confidential]**.

<sup>493</sup> **[Redacted – Confidential]**.

<sup>494</sup> **[Redacted – Confidential]**.

<sup>495</sup> Applicants' further submissions following ACCC meeting on 4 August 2023, 17 August 2023, at [13].

<sup>496</sup> **[Redacted – Confidential]**.

6.68. **[Redacted – Confidential]**.<sup>497</sup> The Conflicts Committee considers a number of matters per year.<sup>498</sup>

6.69. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>499</sup> **[Redacted – Confidential]**.<sup>500</sup>

#### *ACCC view*

6.70. The ACCC accepts that there are some physical separations between Brookfield Infrastructure and Brookfield Renewable Power & Transition business units and policies aimed at dealing appropriately with conflicts of interest.

6.71. However, information before the ACCC indicates that, while there are some separations, the 2 Brookfield business units have more overlap and communications in practice. As such these Brookfield business units are not as separate as the Applicants originally submit. This is discussed below.

#### *Informal meetings*

6.72. While the Brookfield Infrastructure and Brookfield Renewable Power & Transition staff sit on different floors within Brookfield's office, there is evidence of interactions between the different teams, not all of which is purely social in nature. For example, in sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>501</sup>

6.73. As to social interactions, the ACCC considers that they can present additional opportunities for information to flow from one area to another.

#### *Overlap in Investment Committees and staff movements between business units*

6.74. There is significant overlap in the Investment Committees between Brookfield Infrastructure and Brookfield Renewable Power & Transition business units and Brookfield has conceded that **[Redacted – Confidential]** what is described as **[Redacted – Confidential]** restriction.<sup>502</sup>

6.75. Further, the ACCC understands the Head of Brookfield's Renewable Power & Transition business unit (the business unit in which Origin Energy Markets will be managed) was previously a Senior Vice President and Vice President in Brookfield's Infrastructure business unit (the business unit in which AusNet and Intellihub sit).<sup>503</sup> In their role in the Infrastructure business unit, this Brookfield staff member was involved in managing the AusNet and Intellihub businesses, and received information about projects seeking to connect to AusNet's transmission network.<sup>504</sup>

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<sup>497</sup> **[Redacted – Confidential]**.

<sup>498</sup> Applicants' further submissions following ACCC meeting on 4 August 2023, 17 August 2023, at [12].

<sup>499</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T29 LL.12 – 28].

<sup>500</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T29 LL.12 – 28].

<sup>501</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T30 LL.10 – 12].

<sup>502</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T30 LL.2 – 7]; **[Redacted – Confidential]**.

<sup>503</sup> Statement of Luke Edwards (Brookfield), 5 June 2023, at [13].

<sup>504</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 5; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**.



*Communications and staff movements between AusNet and Brookfield Renewable Power & Transition*

- 6.76. From time to time, AusNet staff, including those working in the Mondo branch of the Development of Future Networks business, interact with Brookfield staff outside of Brookfield Infrastructure.<sup>505</sup> **[Redacted – Confidential]**,<sup>506</sup> and **[Redacted – Confidential]**.<sup>507</sup>
- 6.77. Documents obtained under the ACCC’s information gathering powers identified communication between AusNet and Brookfield Renewable Power & Transition staff. For example, AusNet has shared high-level recommendations of renewable development projects in Victoria that Brookfield Renewables could target.<sup>508</sup> Brookfield Renewables and AusNet have also discussed what capabilities AusNet has to support Brookfield Renewables to progress renewable development projects in the NEM.<sup>509</sup> Brookfield submits this engagement was consulting services provided by AusNet’s contestable arm, Mondo, at arm’s length, and reflects consulting services Mondo provides to other companies seeking its advice regarding connections across the NEM.<sup>510</sup>
- 6.78. The ACCC acknowledges that Mondo provides services to third parties, including regarding transmission generation connections.<sup>511</sup> **[Redacted – Confidential]**,<sup>512</sup> **[Redacted – Confidential]**,<sup>513</sup> **[Redacted – Confidential]**.<sup>514</sup>
- 6.79. Further, on its website, Mondo does not refer to providing the form of consultation services referred to above and in the Application, the Applicants state that Mondo’s activities involve:
- smart energy monitoring and management
  - providing solar solutions, and
  - contestable metering services for commercial and industrial customers and energy retailers.<sup>515</sup>
- 6.80. While Mondo may have been providing advice subject to an arms-length contract, the ACCC has not seen evidence to support the notion that this is a degree of information that is typically provided to market participants under consultancy arrangements.
- 6.81. Furthermore, and importantly, even if such advice is typical and is provided to any party on arms-length commercial terms, this type of communication and commercial arrangement provides an avenue for information flows that facilitate potential anti-competitive discrimination.

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<sup>505</sup> As to Mondo, see: Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T59 LL.10 – 11].

<sup>506</sup> See: **[Redacted – Confidential]**.

<sup>507</sup> See: **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>508</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 5; **[Redacted – Confidential]**.

<sup>509</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 5; **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>510</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure A, 1 September 2023, at [13].

<sup>511</sup> Mondo, [Infrastructure Electricity](#), accessed 11 September 2023.

<sup>512</sup> **[Redacted – Confidential]**.

<sup>513</sup> **[Redacted – Confidential]**.

<sup>514</sup> **[Redacted – Confidential]**.

<sup>515</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [519].

- 6.82. The ACCC considers the information provided by AusNet or Mondo to Brookfield supports the proposition that Brookfield business units (and their portfolio entities) do not operate completely separately.
- 6.83. Brookfield acknowledges it does not currently have formal ring-fencing in place between Brookfield Infrastructure and Brookfield Renewable Power & Transition business units or restrictions on the movement of staff between business units.<sup>516</sup> It submits there has been no reason prior to the Proposed Acquisition for such arrangements to be put in place.<sup>517</sup>

## Degree of Brookfield's control over portfolio companies

### *Brookfield's control of AusNet*

- 6.84. As noted in Section 5, Brookfield managed investors comprise 45.5% of the shareholding of AusNet (indirectly through AusNet Energy Holdings No. 1 and other subsidiaries).<sup>518</sup> Brookfield has appointed half of the directors on the Board of AusNet Holdings,<sup>519</sup> and as the largest shareholder of AusNet Holdings Brookfield holds the **[Redacted – Confidential]**.<sup>520</sup> **[Redacted – Confidential]** under the AusNet Shareholder Governance Agreement, which states:

**[Redacted – Confidential]**.<sup>521</sup>

### *Applicants' submissions*

- 6.85. The Applicants submit in the Application that AusNet is managed day-to-day at the portfolio company level by the Board of AusNet and the AusNet management team.<sup>522</sup>
- 6.86. The Applicants submit that the Board of AusNet has delegated authority to AusNet's CEO, to make decisions on AusNet's key business activities up to certain thresholds.<sup>523</sup> The Applicants submit that, as a result of this delegation of authority, it is rare that approval of the Board of AusNet is sought for day-to-day business decisions, and AusNet's CEO has the authority to make or approve decisions about most connections.<sup>524</sup>
- 6.87. However, in a 4 August 2023 meeting with the ACCC, Brookfield submits orally that Brookfield Infrastructure has 'influence' over AusNet and is an 'active fund manager'<sup>525</sup> and in a 27 August 2023 letter to the ACCC, Brookfield states that Brookfield Infrastructure 'actively manages' its interest in AusNet.<sup>526</sup>
- 6.88. In response to the Second ACCC Transparency Letter, Brookfield acknowledges that Brookfield Infrastructure has been, and is, actively involved in managing

<sup>516</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [10].

<sup>517</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [9].

<sup>518</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [504].

<sup>519</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [505].

<sup>520</sup> **[Redacted – Confidential]**.

<sup>521</sup> **[Redacted – Confidential]**.

<sup>522</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [121], [501].

<sup>523</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [502]; **[Redacted – Confidential]**.

<sup>524</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1121].

<sup>525</sup> Applicants' record of oral submission, 4 August 2023, at [1].

<sup>526</sup> Applicants' correspondence accompanying revised proposed undertaking, 27 August 2023, at p. 1.

AusNet including on connection matters falling within the AusNet CEO's delegated authority. Brookfield submits that this is because the economics of new connections are an important component of the AusNet business case.<sup>527</sup>

*ACCC view*

- 6.89. The evidence before the ACCC indicates that Brookfield Infrastructure is involved in the day-to-day business activities of AusNet and actively manages AusNet through endorsement of all contestable work.<sup>528</sup>
- 6.90. Despite the Applicants' earlier submissions in the Application,<sup>529</sup> the evidence before the ACCC shows that AusNet does seek approval and endorsement for day-to-day business activities from Brookfield Infrastructure, and Brookfield Infrastructure is involved in decision making beyond approving the annual budget and business plan and making decisions relating to large capital investments. In sworn evidence provided by an AusNet senior executive, **[Redacted – Confidential]**.<sup>530</sup> **[Redacted – Confidential]**.<sup>531</sup>
- 6.91. In sworn evidence provided by an AusNet senior executive, **[Redacted – Confidential]**.<sup>532</sup> This was corroborated by sworn evidence given by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>533</sup>
- 6.92. The ACCC also understands that Brookfield Infrastructure exercises its active management in decisions even where the connection is within the AusNet CEO's delegated authority.<sup>534</sup>
- 6.93. The ACCC has received information that indicates Brookfield receives the details of many (and possibly all) proposed connections to AusNet's transmission network, including for contracts or projects with expenditure within the thresholds<sup>535</sup> set out in the Application.<sup>536</sup> Specifically, in sworn evidence given by a Brookfield senior executive, **[Redacted – Confidential]**<sup>537</sup> **[Redacted – Confidential]**.<sup>538</sup> The evidence also indicates that, before a connection decision is signed off by AusNet, endorsement on the contract or project is sought from Brookfield Infrastructure staff.<sup>539</sup> The Brookfield staff being sent the relevant details of the contract or project, which includes detailed financial information, are not just the Brookfield appointed Directors to AusNet Holdings; they include a staff member in the Infrastructure

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<sup>527</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [6].

<sup>528</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T22 LL.16 – 23].

<sup>529</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [500], [1121].

<sup>530</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T25 L.20] – [T27 L.19].

<sup>531</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T27 L.26] – [T28 L.1].

<sup>532</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T10 LL.2 – 3].

<sup>533</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T26 LL.1 – 10].

<sup>534</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T22 L.16] – [T24 L.5]; Application for merger authorisation (MA1000024), 5 June 2023, at [502].

<sup>535</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 4; Application for merger authorisation (MA1000024), 5 June 2023, at [502].

<sup>536</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 4; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T22 LL.24 – 27].

<sup>537</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T22 L30] – [T23 L29].

<sup>538</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T22 LL.15 – 29].

<sup>539</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 4; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 7 August 2023, at [T22 LL.16-27].

business unit.<sup>540</sup> The ACCC understands that the information is only sent to Brookfield, and other shareholders in AusNet are not involved in the approval process.

- 6.94. Based on a review of internal **[Redacted – Confidential]**.<sup>541</sup>
- 6.95. Brookfield acknowledges that Brookfield Infrastructure receives information from AusNet management about connections (including financials) and provides guidance.<sup>542</sup> Brookfield submits that Brookfield Infrastructure’s involvement in connection applications reflects the importance of contestable connections to AusNet’s business<sup>543</sup> and it is necessary for Brookfield to receive financial information about connection related capital investment to effectively manage its interest in AusNet.<sup>544</sup>
- 6.96. Further, the ACCC understands from its review of internal emails and the sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**, that Brookfield seconded a Vice President in its Infrastructure business unit to AusNet’s Commercial Investment team.<sup>545</sup> Brookfield submits that the purpose of the secondment was to:
- assist AusNet in the transition from a listed company to a private business and to educate the AusNet team about Brookfield's approach to underwriting new investments.<sup>546</sup>
- 6.97. The staff member has since returned to the Brookfield Infrastructure business unit and continues to be involved in Brookfield Infrastructure’s management of AusNet. **[Redacted – Confidential]**.<sup>547</sup>
- 6.98. The ACCC also notes that AusNet’s website states clearly that it is owned by a company ‘controlled by Brookfield Asset Management.’<sup>548</sup>
- 6.99. In summary, the ACCC considers that Brookfield closely manages AusNet, in particular in relation to any decision making or processes that involve investment decisions (noting where investments involve related party transactions occur there are some limitations to Brookfield’s control, discussed below). The ACCC considers Brookfield is unlikely to involve itself in minor decision-making, although there does not appear to be an impediment to it doing so if it were dissatisfied with the AusNet CEO's management of these issues.

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<sup>540</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 4; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>541</sup> See, e.g.: **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>542</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure A, 1 September 2023, at [8(a)].

<sup>543</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure A, 1 September 2023, at [8(a)].

<sup>544</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure A, 1 September 2023, at [24].

<sup>545</sup> ACCC Transparency Letter: Annexure A, 29 August 2023, at p. 5; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T46 L.28] – [T47 L.3]; **[Redacted – Confidential]**.

<sup>546</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure A, 1 September 2023, at [8(b)].

<sup>547</sup> **[Redacted – Confidential]**.

<sup>548</sup> AusNet, [Investors](#), accessed 14 September 2023.

## **Brookfield's control of Origin Energy Markets**

### *Applicants' submissions*

6.100. The Applicants submit that, if the Proposed Acquisition goes ahead, the Origin Energy Markets business will be managed day-to-day at the portfolio company level with the relevant Board expected to comprise management and the CEO with a delegated authority to manage the business.<sup>549</sup> The Applicants have confirmed that Brookfield Renewables will be the business unit responsible for managing the interest in Origin Energy Markets that will be held by certain Brookfield Renewables controlled funds and Brookfield Renewables will actively manage this interest in Origin Energy Markets.<sup>550</sup>

### *ACCC view*

6.101. The ACCC considers that Brookfield will have an ability to exercise control over Origin Energy Markets following the Proposed Acquisition, which means there is the potential for Brookfield to influence Origin Energy Markets to act in a manner that may favour a Brookfield related entity (for example, Intellihub). This is because:

- under the Proposed Acquisition, Brookfield will control and manage Brookfield LP, which will own Origin Energy Markets.<sup>551</sup> While the Board of the operating company is expected to comprise management of the Origin Energy Markets business and the CEO will have delegated authority to manage the business in accordance with the budget and business plan approved by Brookfield LP,<sup>552</sup> as long as Brookfield holds more than 40% of the equity, it shall have the majority of votes on simple majority matters<sup>553</sup>
- **[Redacted – Confidential]**<sup>554</sup> **[Redacted – Confidential]**.<sup>555</sup> **[Redacted – Confidential]**,<sup>556</sup> **[Redacted – Confidential]**<sup>557</sup>
- while **[Redacted – Confidential]**<sup>558</sup>
- **[Redacted – Confidential]**.<sup>559</sup> The Applicants have confirmed that **[Redacted – Confidential]**, meaning Directors appointed by Brookfield to the Origin Energy Markets' Board will be able to take into account the interests of Brookfield when performing their duties.<sup>560</sup>

## **Brookfield's control of Intellihub**

6.102. As noted in Section 5, Brookfield's interest in Intellihub is through BIF IV. BIF IV owns 50% of Intellihub, however the remaining 50% is held by Pacific Equity Partners.

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<sup>549</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [268].

<sup>550</sup> Applicants' correspondence accompanying revised proposed undertaking, 27 August 2023, at p. 1.

<sup>551</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [10], fn 5.

<sup>552</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [268].

<sup>553</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [265].

<sup>554</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T15 LL.23 – 28].

<sup>555</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T16 L.23] – [T17 L.4].

<sup>556</sup> **[Redacted – Confidential]**.

<sup>557</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T17 L.17] – [T18 L.1].

<sup>558</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T30 LL.19 – 25].

<sup>559</sup> **[Redacted – Confidential]**.

<sup>560</sup> **[Redacted – Confidential]**.

### *Applicants' submissions*

6.103. The Applicants submit that as BIF IV and Pacific Equity Partners are entitled to appoint an equal number of Directors to the Intellihub Board and **[Redacted – Confidential]**.<sup>561</sup>

### *ACCC view*

6.104. As BIF IV is not the majority or single largest shareholder, in contrast to Brookfield's proposed interest in Origin Energy Markets and also in AusNet where it is the largest shareholder, the ACCC accepts neither BIF IV nor Pacific Equity Partners effectively control Intellihub on its own, but both have significant influence over Intellihub.

6.105. The ACCC notes that the lack of effective control does not preclude information sharing. In particular, the ACCC's investigation has also found evidence that **[Redacted – Confidential]**.<sup>562</sup> The Applicants submit the purpose of Intellihub sharing information about its contracts with major electricity retailers was for the relevant person in Brookfield Insurance solutions to assess whether a particular financing structure might be available.<sup>563</sup> Even if this is accepted, it is nonetheless another example of information being shared.

### ***Impact of co-investors on foreclosure risks***

#### *Applicants' submissions*

6.106. The Applicants submit the independent co-investors in AusNet and Brookfield LP will further limit the ability for AusNet to preference Origin Energy Markets over its competitors as these co-investors will have a strong incentive to monitor any transaction between AusNet and Origin Energy Markets<sup>564</sup> and the relevant Governance Agreements include a 'related party regime' that requires related party transactions to be approved by non-interested investors.<sup>565</sup>

### *ACCC view*

6.107. The ACCC considers that the co-investors may play an important role in constraining obvious behaviour that is designed to favour Origin Energy Markets and foreclose rivals. However, their degree of involvement appears limited in the case of AusNet and is not sufficient to fully protect against such anti-competitive conduct.

6.108. The Application notes that 2 of the co-investors in AusNet have irrevocably waived their right to appoint a Director and have appointed observers to the Board instead,<sup>566</sup> meaning that Brookfield has appointed 4 of the 8 Directors.<sup>567</sup>

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<sup>561</sup> **[Redacted – Confidential]**.

<sup>562</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>563</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [16].

<sup>564</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [125].

<sup>565</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [126], [528]; **[Redacted – Confidential]**.

<sup>566</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T17 LL.5 - 7].

<sup>567</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [505].

- 6.109. In sworn evidence given by a Brookfield senior executive, **[Redacted – Confidential]**,<sup>568</sup> **[Redacted – Confidential]**,  
**[Redacted – Confidential]**.<sup>569</sup>
- 6.110. Based on the information before the ACCC, it is unclear how active any co-investors will be in relation to managing dealings with Origin Energy Markets. In addition, as noted above, Brookfield can be heavily involved in managing its portfolio companies, and management is not limited to Board-level oversight. Instead, there is frequent communication between Brookfield executives and the entities being managed, where there is no direct oversight by the co-investors. For example, co-investors might never know that a rival to Origin Energy Markets is trying to connect to AusNet and AusNet has prioritised Origin Energy Markets ahead of a third party. In addition, some foreclosure behaviour may have no significant impact or no impact on the profitability of the entity the co-investor holds a stake in, for instance where AusNet has prioritised Origin Energy Markets there may be no material impact on AusNet profits which may make it difficult to detect or, even if detected, it may not warrant the co-investor's time and resources to pursue.
- 6.111. Finally, even if detected and worth pursuing in isolation, anti-competitive behaviour may not be complained about by a co-investor, particularly where the co-investor wishes to maintain a positive relationship with Brookfield or are otherwise satisfied with Brookfield's management overall.

### ***Related party transactions***

- 6.112. Limits on related party transactions are intended to avoid an entity (Entity A) providing a financial benefit to a related or affiliated entity (Entity B) that could endanger the interests of members or investors in Entity A which are unrelated to Entity B. Similar protections exist in the Corporations Act under Chapter 2E with the purpose being to:

protect the interests of a public company's members as a whole, by requiring member approval for giving financial benefits to related parties that could endanger those interests.<sup>570</sup>

### ***Applicants' submissions***

- 6.113. The Applicants confirm that other Brookfield-managed investment vehicles and their portfolio companies, including AusNet and Intellihub, would be considered affiliates of BEP and BGTF, under the term sheet for Brookfield LP.<sup>571</sup>
- 6.114. As a result, the Applicants submit concerns relating to the relationship between AusNet and Origin Energy Markets may be allayed as **[Redacted – Confidential]** for AusNet (or Origin Energy Markets, as relevant) would need to approve any transaction between the Origin Energy Markets business and an investor or its affiliates,<sup>572</sup> removing the ability for AusNet to favour Origin Energy Markets (or any other affiliated business within the Brookfield portfolio).

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<sup>568</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T20 LL.20 – 30].

<sup>569</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 8 August 2023, at [T26 L.31] – [T27 L.8].

<sup>570</sup> *Corporations Act 2001* (Cth), s 207.

<sup>571</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [267].

<sup>572</sup> **[Redacted – Confidential]**.



*Restrictions on related party transactions*

*Brookfield LP term sheet*

6.115. Accompanying the Application, the Applicants provided **[Redacted – Confidential]**.<sup>573</sup>

6.116. The term sheet contains a related party transaction clause, which states:

**[Redacted – Confidential]**.<sup>574</sup>

6.117. **[Redacted – Confidential]**.<sup>575</sup>

*AusNet governance agreement*

6.118. **[Redacted – Confidential]**.<sup>576</sup>

6.119. **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.<sup>577</sup>

6.120. **[Redacted – Confidential]**<sup>578</sup> **[Redacted – Confidential]**.<sup>579</sup>

6.121. **[Redacted – Confidential]**.<sup>580</sup> **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.<sup>581</sup>

6.122. **[Redacted – Confidential]**.

6.123. **[Redacted – Confidential]**.

*Intellihub governance agreement*

6.124. **[Redacted – Confidential]**.<sup>582</sup>

6.125. **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.<sup>583</sup>

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<sup>573</sup> **[Redacted – Confidential]**.

<sup>574</sup> **[Redacted – Confidential]**.

<sup>575</sup> **[Redacted – Confidential]**.

<sup>576</sup> **[Redacted – Confidential]**.

<sup>577</sup> **[Redacted – Confidential]**.

<sup>578</sup> **[Redacted – Confidential]**.

<sup>579</sup> **[Redacted – Confidential]**.

<sup>580</sup> **[Redacted – Confidential]**.

<sup>581</sup> **[Redacted – Confidential]**.

<sup>582</sup> **[Redacted – Confidential]**.

<sup>583</sup> **[Redacted – Confidential]**.

6.126. [Redacted – Confidential].<sup>584</sup>

6.127. [Redacted – Confidential]:

- [Redacted – Confidential]<sup>585</sup> [Redacted – Confidential]
- [Redacted – Confidential]
- [Redacted – Confidential].<sup>586</sup>

6.128. [Redacted – Confidential]:

- [Redacted – Confidential]
- [Redacted – Confidential]
- [Redacted – Confidential].<sup>587</sup>

6.129. [Redacted – Confidential].<sup>588</sup>

6.130. [Redacted – Confidential].<sup>589</sup>

*ACCC view on impact of related party transactions*

6.131. [Redacted – Confidential].

- [Redacted – Confidential]
- [Redacted – Confidential].

6.132. While the ACCC has had close regard to the related party transaction restrictions, and they do assist to a degree in dealing with foreclosure risks, they do not adequately address the concern.

6.133. In part this is because the treatment of any arrangement involving a competitor to Origin Energy Markets is just as likely or even more likely to raise possible foreclosure risks as the treatment of arrangements with Origin Energy Markets. For example, if one of Origin Energy Markets' rivals is seeking to connect a generator to AusNet's transmission network, the related parties clauses do not prevent Brookfield from participating in considering by AusNet.

6.134. These clauses only operate formally at the Board level, and do not restrict other involvement by Brookfield in the relevant entities. The ACCC notes the presence of the conflict of interest policies discussed above which have some impact on conduct at the non-Board level but does not consider these policies fully protect against the potential for foreclosure.

### ***Temasek's corporate structure***

6.135. The Proposed Acquisition will result in Temasek having interests in:

- Origin Energy Markets, and

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<sup>584</sup> [Redacted – Confidential].

<sup>585</sup> [Redacted – Confidential].

<sup>586</sup> [Redacted – Confidential].

<sup>587</sup> [Redacted – Confidential].

<sup>588</sup> [Redacted – Confidential].

<sup>589</sup> [Redacted – Confidential].

- Jemena, which has interests in ActewAGL and United Energy.
- 6.136. As a result of the Proposed Acquisition, Temasek would become vertically integrated across the following areas:
- electricity distribution and retailing
  - electricity distribution and embedded generation
  - gas distribution and retailing
  - gas transmission and retailing.
- 6.137. The Applicants submit that, if the Proposed Acquisition went ahead the separation and different ownership of Jemena would effectively limit the scope for vertical co-operation between the Jemena and Origin Energy Markets businesses.<sup>590</sup>
- 6.138. Further, the Applicants submit that there will be no overlapping directors between SP Group<sup>591</sup> and Brookfield LP that would facilitate information sharing.<sup>592</sup> Further, it is expected that there will be no direct contact between Temasek management personnel and the respective management teams of the Origin Energy Markets business and SP Group business, with such interaction being subject to confidentiality protocols.<sup>593</sup>
- 6.139. The ACCC, in its consideration of the Proposed Acquisition, has sought to test:
- the degree of Temasek’s control over Jemena (and Jemena’s interests in United Energy and ActewAGL), and
  - the degree of Temasek’s proposed control over Origin Energy Markets as a result of the Proposed Acquisition,
- in order to determine whether there is a realistic ability and incentive to preference.

## Degree of Temasek’s control over Jemena and access to confidential information

### *Applicants’ submissions*

- 6.140. The Applicants submit that Temasek’s interest in Jemena is an indirect minority interest through a subsidiary which operates separately from Temasek<sup>594</sup> and, as a result, Temasek is limited in its ability to direct Jemena to preference Origin Energy Markets.<sup>595</sup>
- 6.141. Temasek’s interest in Jemena is indirect. Temasek has a 100% interest in SP Group, which, through SPI, has 40% interest in SGSPAA.<sup>596</sup> As detailed in Figure 4 SGSPAA owns Jemena, which has partial interests in ActewAGL and United

<sup>590</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1388].

<sup>591</sup> SP Group is the wholly owned subsidiary of Temasek which, in turn wholly owns SPI. For further detail, see **Error! Reference source not found.** which details the ownership structure of SP Group and its electricity and gas interests.

<sup>592</sup> Applicants’ response to ACCC Transparency Letter, 27 July 2023, at [2.10]; Temasek has the right to appoint one director to the Board of Brookfield LP, **[Redacted – Confidential]**.

<sup>593</sup> Applicants’ response to ACCC Transparency Letter, 27 July 2023, at [2.12].

<sup>594</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1388].

<sup>595</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1394].

<sup>596</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [559].

Energy.<sup>597</sup> The remaining 60% interest in SGSPAA is held by State Grid International Development Australia Investment Company Limited (**State Grid**).

- 6.142. Temasek does not have any representation on the Board of Jemena,<sup>598</sup> and there are no reporting lines between Temasek and Jemena.<sup>599</sup> As a shareholder of SP Group, Temasek receives shareholder updates from SP Group for the purpose of tracking the performance of its investment.<sup>600</sup> Where information is required from SP Group by Temasek for compliance with legal obligations this is sought from SP Group on an ad-hoc basis.<sup>601</sup>
- 6.143. As SGSPAA is jointly controlled by State Grid and SPI reserved matters require the approval of both State Grid and SPI. SPI as 40% shareholder in Jemena has the ability to appoint **[Redacted – Confidential]** SGSPAA Board Directors.<sup>602</sup> In the event of a deadlock on reserved matters, this is resolved by shareholders or the status quo is preserved.<sup>603</sup> This limits SPI's (and therefore Temasek's) ability to proactively influence or direct SGSPAA's decision making in a manner that would be inconsistent with the interests of the majority shareholder, State Grid (which has no commercial incentive to favour interests held by Temasek or Brookfield in other entities).<sup>604</sup>

#### **ACCC view**

- 6.144. The ACCC considers Temasek will have a limited ability to influence Jemena (or Actew AGL or United Energy) to favour Origin Energy Markets over its retail rivals or otherwise direct Jemena's commercial strategy, as it is the minority shareholder and the majority shareholder, State Grid, would be unlikely to approve such activity.
- 6.145. Further, the ACCC considers given Temasek's limited involvement in the day-to-day activities of Jemena and reporting, Temasek will not have the ability to provide any competitively sensitive information from Jemena to Origin Energy Markets.

#### **Degree of Temasek's control over Origin Energy Markets**

##### **Applicants' submissions**

- 6.146. The Applicant's submit Temasek's 9.9% minority interest in Brookfield LP, in the event the Proposed Acquisition proceeds, would limit its incentives or ability to share information or otherwise favour Origin Energy Markets.<sup>605</sup>

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<sup>597</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [558].

<sup>598</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [2.5].

<sup>599</sup> Temasek response to ACCC information request, 30 June 2023, at [2.15].

<sup>600</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [2.6] – [2.7].

<sup>601</sup> Temasek response to ACCC information request, 30 June 2023, at [2.15].

<sup>602</sup> **[Redacted – Confidential]**.

<sup>603</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [560].

<sup>604</sup> Temasek response to ACCC information request, 30 June 2023, at [2.18].

<sup>605</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1388].

### **ACCC view**

- 6.147. Temasek's interests in Origin Energy Markets will arise via its limited partnership interest in Brookfield LP (through its 100% ownership of Davis Investments) and its founding investment partner status of BGTF.<sup>606</sup>
- 6.148. As noted at 6.101 above, the ACCC considers that the structure of the Proposed Acquisition is set up in a way that provides for Brookfield to control and manage Origin Energy Markets. One of the reasons for this is that Brookfield Global Transition Fund GP Limited (**BGTF GP**), a Brookfield-controlled entity, will be the general partner of Brookfield LP and be responsible for making the business decisions of Origin Energy Markets on a day-to-day basis.<sup>607</sup>
- 6.149. Nonetheless, Temasek will obtain certain governance rights relevant to Origin Energy Markets. Specifically, Temasek (through Davis Investments) will obtain the right **[Redacted – Confidential]**.<sup>608</sup> However, as per the Governance Terms Sheet of BGTF, other than certain reserved or fundamental matters, decisions of the Board will be taken by a simple majority vote.<sup>609</sup> Practically, as long as Brookfield's interest in Brookfield LP is at least 40%, Brookfield's representative directors will have majority voting rights.<sup>610</sup>
- 6.150. Therefore, the ACCC considers that Temasek's governance rights are likely insufficient to create the ability for Temasek to influence Brookfield LP's activities, and subsequently, Origin Energy Markets.
- 6.151. The ACCC also notes that following the Proposed Acquisition, the Board of Origin Energy Markets is expected to comprise management of the Origin Energy Markets business and the CEO will have delegated authority to manage the business in accordance with the budget and business plan approved by Brookfield LP. This operating structure means that even though Temasek will appoint one director to the Board of Brookfield LP, its involvement is expected to be limited to the setting of a yearly budget and business plan approvals and otherwise, the monitoring of its investment.<sup>611</sup>

### **Conclusion on Temasek's control over Jemena and Origin Energy Markets**

- 6.152. The ACCC considers that Temasek will not have the ability or incentive to influence the conduct of Jemena or Origin Energy Markets due to its minority and non-controlling and non-management interests in these entities.
- 6.153. Accordingly, in its consideration of the Application, the ACCC has not sought to further analyse the competitive effects arising from the vertical integration between Temasek's interests in Jemena and Origin Energy Markets.

### **Consideration of Competitive Effects**

- 6.154. This section sets out the ACCC's analysis of the competitive effects of the Proposed Acquisition, taking as given the conclusions above on the implications of

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<sup>606</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [10], fn 4.

<sup>607</sup> Temasek response to ACCC information request, 30 June 2023, at [2.4].

<sup>608</sup> **[Redacted – Confidential]**.

<sup>609</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [265].

<sup>610</sup> Temasek response to ACCC information request, 30 June 2023, at [2.6].

<sup>611</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [2.13].

the corporate structures of the relevant entities for their ability and incentive to engage in conduct that lessens competition. This section begins by outlining the ACCC's approach to identifying markets relevant to its assessment. The section then proceeds to examine each of the vertical and horizontal 'links' or relationships brought about or affected by the Proposed Acquisition which have the potential to lessen competition. In each case the ACCC focusses on how the Proposed Acquisition affects the ability and incentive of the relevant entities to engage in anti-competitive conduct, and the extent to which such conduct could lessen competition in one or more of the markets previously identified. The vertical links and horizontal areas of overlap considered below are, in order:

- electricity generation and the transmission network (vertical)
- electricity generation (embedded generation) and distribution network (vertical)
- electricity distribution network and electricity retailing (vertical)
- electricity retailing and smart metering and behind the meter services (vertical)
- gas distribution network and gas retailing (vertical), and
- wholesale gas overlap (horizontal).

6.155. For each of the vertical links and horizontal areas of overlap considered below, the section sets out:

- a) a brief outline of the potential conduct of competitive concern
- b) a summary of the Applicants' submissions on the link or area of overlap
- c) interested party submissions (if any were made) and other information received on the link or area of overlap, including through consultation. In the case of the link between electricity generation and the transmission network, the submissions are relatively detailed and have been divided into the steps employed in competition analysis – assessing the merged entity's 'ability', incentive' and likely 'effect' to and from engaging in anti-competitive conduct
- d) the ACCC's views, including (where relevant) separate discussions of each of:
  - i) ability to engage in anti-competitive conduct
  - ii) incentive to engage in anti-competitive conduct
  - iii) likely effects of engaging in anti-competitive conduct in the relevant market(s) of concern
- e) the ACCC's conclusion.

### ***Market definition***

6.156. The ACCC has taken a purposive approach to market definition. Given the nature and extent of the vertical co-ownership links brought about by the Proposed Acquisition, the ACCC has approached the identification of relevant markets by considering the delineations that best assist the assessment of the potential anti-competitive effects of the Proposed Acquisition.

6.157. The relevant markets derived from this approach are as follows:

- in relation to the vertical co-ownership links between Brookfield’s electricity transmission and generation interests:
  - **a market or markets for the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly:** As discussed in Section 5, the NEM consists of a centrally-dispatched and settled spot market for the wholesale supply of electricity to consumers across Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania. However, transmission network constraints can limit the flow of electricity between state-based regions, forcing regional reference prices to diverge. This means that, particularly at times of high demand and/or reduced supply, the NEM effectively separates into state-based regional markets. These occasions are sufficiently frequent and significant in magnitude that their influence on average regional prices can remain substantial even over periods of weeks and quarters, and sometimes years (see Figure 10 below). Because buyers and sellers within a region are settled for their electricity purchase and sale transactions at their local region’s (loss-adjusted) reference price, they are not able to ‘substitute’ to or otherwise access another region’s prices at these times. As noted in section 5, inter-regional settlement residue rights offer a highly imperfect means of hedging inter-regional price differences. Therefore, the ACCC has largely proceeded on the basis of assessing competitive effects in a Victorian geographic market for the wholesale physical supply of electricity with limited-capacity interconnections to other states, but has also had regard to effects across a broader NEM-wide market
  - **a market for the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM:** As noted in section 5, electricity retailers tend to hedge the bulk of their expected wholesale electricity purchases with derivative instruments such as swap and cap futures contracts settled at their local regional reference price. The willingness of retailers to substitute to hedges settled at different regional reference prices (including with counterparties located in different states) is heavily constrained by the unreliable hedging services provided by inter-regional settlement residue rights. Therefore, the ACCC has proceeded on the basis of a state-based market for the supply of wholesale hedging instruments to Victorian retailers. As the wholesale supply of hedging is derivative of the wholesale physical supply of electricity, it may be appropriate to consider these markets together or as if they are a single market for many purposes. The ACCC therefore has not always separated out impacts in the hedge market as distinct from impacts in the wholesale supply market as the issues will often be the same
  - **a market for the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria:** As noted in Section 5, there are a number of Commonwealth and state government initiatives to support investment in renewable energy generation and storage. In Victoria, these include 2 rounds (to date) of Victorian Renewable Energy Target contracts-for-difference awarded to a range of project proponents.<sup>612</sup> In the opinion of Mr Harris, more rounds of Victorian Renewable Energy Target will occur.<sup>613</sup>

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<sup>612</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [64] – [66]. See also: Victorian Department of Energy, Environment and Climate Action, [Victorian Renewable Energy Target auction \(VRET2\)](#), accessed 4 October 2023.

<sup>613</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [80].



Further, the report by Mr Harris notes that, 'In addition to government interventions, there is also a growing market for corporate power purchase agreements to fulfil voluntary corporate renewable targets.' In Victoria, corporate power purchase agreements with renewable generators have been entered into in recent years by a variety of firms including IKEA and Amazon.<sup>614</sup> Together, the ACCC considers that there is a Victorian market for the supply of new renewable electricity generation and storage in response to government policy initiatives and to private (including corporate) counterparties. Over time, this market may widen to include, or be complemented by a market for, the supply of new firming generation

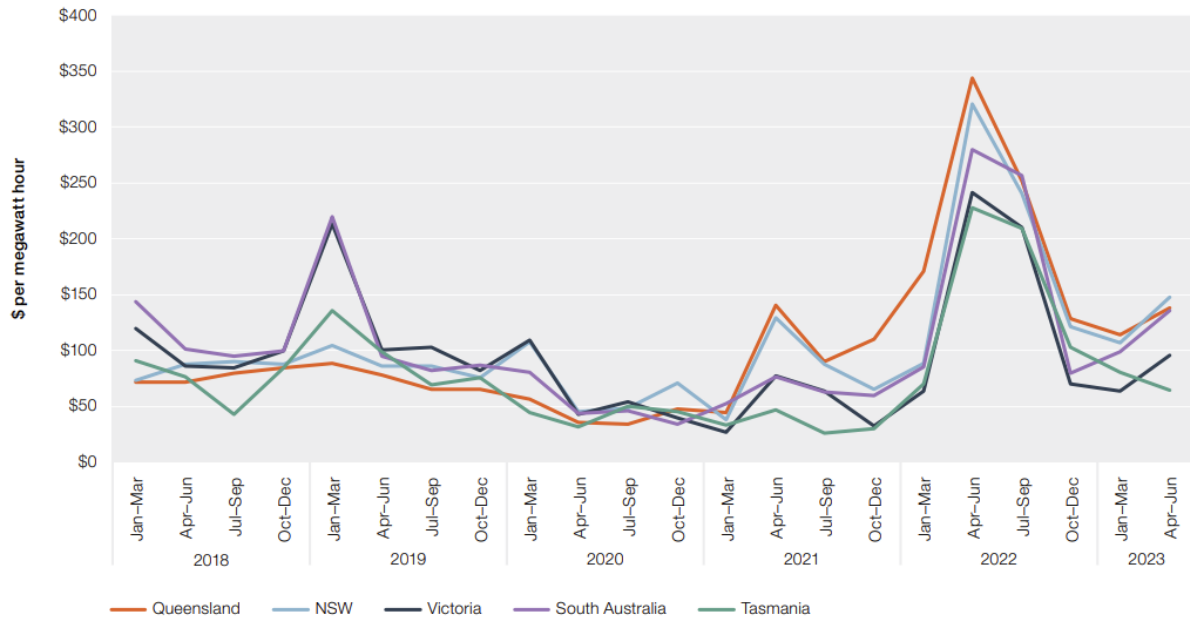
- in relation to the vertical co-ownership link between Brookfield's electricity distribution and embedded generation interests, the same wholesale markets as applicable to the assessment of the vertical co-ownership link between Brookfield's electricity transmission and generation interests are relevant. This is because embedded generators typically supply power that travels through the interconnected transmission network and that can influence wholesale prices within a region or across the NEM more broadly. Unless exempted, embedded generators are settled for any power they supply to the NEM at their local regional reference price, just like conventional transmission-connected generators. In addition, embedded generation connected to a given distribution network can provide network support services that help avoid the need for the relevant distribution provider (or the transmission provider to which the distribution provider is connected) to undertake regulated network investment payments made by the relevant distribution provider to the embedded generator; for network support services can then be passed-on to the distribution provider's customers under the economic regulatory regime, such that the distribution provider does not itself bear the cost of payments that are inflated by any foreclosing conduct by the distribution provider in favour of its affiliated embedded generators. Therefore, another potentially relevant market is for the supply of embedded generation network support services to Victorian or NEM distribution and transmission networks
- in relation to the vertical co-ownership links between Brookfield's electricity distribution and retail interests, a relevant market is for the retail supply of electricity to Victorian household and business customers connected to AusNet's distribution network or in Victoria more broadly. If Brookfield has the ability and incentive to use AusNet's position to raise the cost of Origin Energy Markets' rivals in competing for retail customers in its area, competitive harm is likely to be experienced at least by retail customers reliant on AusNet's distribution network, if not across Victoria as a whole
- in relation to the vertical co-ownership links between Brookfield's electricity retail and smart meters and behind the meter interests, a relevant market is for the retail supply of electricity to household and business customers in each of the NEM states separately or the NEM more broadly. In addition, Brookfield's interest in Intellihub suggests a relevant market is for the supply of smart meters and behind the meter services to electricity retailers in the each of NEM states separately or the NEM more broadly
- in relation to the vertical co-ownership links between Brookfield's gas distribution and retail interests, a relevant market is for the retail supply of gas to

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<sup>614</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [90] (Figure 12).

household and business customers connected to AusNet’s distribution network (in Victoria) or across Victoria more broadly.

**Figure 10: Quarterly wholesale electricity prices**



Note: Volume weighted average quarterly prices.

Source: AER; AEMO (data).

Source: AER, [State of the Energy Market 2023](#), 5 October 2022, at p. 29 (Figure 2.1).

6.158. Finally, the ACCC considers that the combination of MidOcean Group's impending interests in QCLNG and APLNG raises horizontal issues that are most appropriately assessed in a market that accounts for the extent of horizontal overlap in their activities. The relevant market for such an assessment is for the wholesale supply of gas to customers (including retailers) in eastern Australia (specifically, the eastern states of Queensland, New South Wales, Victoria and South Australia, as well as in the Australian Capital Territory).

### Vertical integration effects

#### Electricity generation and transmission

- 6.159. As the owner and operator of Victoria’s transmission network, AusNet performs a range of functions that enable the dispatch of existing generators and the connection of new generators in Victoria.
- 6.160. The key potential competition concern arising from Brookfield’s co-ownership of the Victorian transmission network and Origin Energy Markets’ generation interests is whether AusNet, post-merger, would have the ability and incentive to raise the price or lower the quality of access to Victorian transmission services to Origin Energy Markets’ existing or prospective rival generators, or provide Origin Energy Markets’ generation business with access to competitively advantageous information. To the extent this conduct occurs, it could render Origin Energy Markets’ rival generators less competitive in wholesale dispatch and/or contracting, as well as hindering a rival’s ability to obtain a timely connection to AusNet’s transmission network.

6.161. In particular, Brookfield may have the incentive to cause AusNet to operate its transmission network to benefit Origin Energy Markets' generation business in ways that include, but are not limited to:<sup>615</sup>

- delaying new connections for competing generators in favour of streamlined connections for Origin Energy Markets' generators. Such conduct could speed the development of Origin Energy Markets' new generators, while raising the costs of other proponents of new generation. In particular, this conduct could lessen competition and lead to higher prices in the supply of new generation and storage in response to government policy incentives and private demand
- making or influencing investment and maintenance decisions in favour of Origin Energy Markets' generators and at the expense of other generators. Such conduct could increase the profitability of Origin Energy Markets' generators while lowering the actual and expected profitability of other investors' generators. This could, in turn, deter or delay investment by other parties in Victoria
- strategic outages of lines that competing generators use at short notice and reducing transmission service quality for competing generators more generally. Such conduct could, like delaying competing new connections, increase the profitability of Origin Energy Markets' generators while lowering the actual and expected profitability of other investors' generators. This could, in turn, deter or delay investment by other parties in generation in Victoria, lessening competition in both the energy market and the hedging contract market. In addition, AusNet may be able to influence the flows of electricity across interconnectors through its operation of connecting transmission infrastructure. Both forms of conduct could lead to higher wholesale spot and contract prices in Victoria, and potentially in other states given the interconnected nature of the NEM. Given the very high ceiling on spot prices, and the sensitivity of the spot market to supply constraints, even small degradations in transmission services for other generators could have significant price effects, and
- sharing information (for example, about third-party generator outages) between the co-owned businesses to increase the profitability of Origin Energy Markets' generation bidding strategies. This could lead to higher wholesale spot and contract prices in Victoria, and potentially in other states given the interconnected nature of the NEM.

6.162. Accordingly, the ACCC is concerned that such conduct would harm competition in any or all of:

- the market(s) for the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
- the market for the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
- the market for the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria.

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<sup>615</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [32].

## **Applicants' submissions**

- 6.163. The Applicants submit that AusNet does not have the ability to foreclose Origin Energy Markets' generation rivals in relation to pricing (prescribed transmission services, negotiated transmission services, and/or contestable transmission services), connection and access, planning the transmission network (augmentation), renewal and maintenance outages, dispatch and curtailment, cross-subsidisation, and information and discrimination.<sup>616</sup>
- 6.164. Specifically, the Applicants submit that there is no ability for AusNet to discriminate against Origin Energy Markets' generation rivals, through:
- **the price charged for the use of or connection to its transmission network**, as connection charges are either regulated by the AER, negotiated in accordance with a regulated negotiation framework (including a pathway for AER dispute resolution), or set through a contestable market process<sup>617</sup>
  - **refusing to connect or unreasonably delaying connection to the transmission network**, as AEMO is responsible for system planning, augmentation and the provision of shared transmission services in Victoria,<sup>618</sup> and in that role engages and enters into use of system agreements with generators seeking connection directly.<sup>619</sup> The Applicants submit AEMO conducts competitive tenders for augmentation work unless the generator elects to,<sup>620</sup> and 'drives' the connection process.<sup>621</sup> Further, AusNet is unable to delay or refuse connections as it is under obligations to co-operate with AEMO, negotiate in good faith and is subject to a dispute resolution regime under the National Electricity Rules<sup>622</sup>
  - **investing in augmentations in a discriminatory manner**, as AusNet is prohibited under the National Electricity Law from augmenting the transmission network in Victoria unless directed or authorised by AEMO, it has won a competitive tender conducted by AEMO or authorised by the National Electricity Rules.<sup>623</sup> AusNet is subject to obligations under the National Electricity Rules to facilitate planning, construction or operation of an augmentation and to assist AEMO.<sup>624</sup> Separately, the Victorian Government has a power to (after consultation with AEMO) direct AusNet to undertake urgent augmentation.<sup>625</sup> In light of AEMO and the Victorian Government's powers, AusNet cannot augment or refuse to augment the network in a way that would foreclose Origin Energy Markets' competitors
  - **selectively maintaining and renewing parts of the network or taking unnecessary or prolonged maintenance outages in a manner that advantages Origin Energy Markets**, as any attempt to fail to maintain and renew transmission lines that service non-Origin Energy Markets generators

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<sup>616</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [985] (Figure 105).

<sup>617</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [986].

<sup>618</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1014].

<sup>619</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1015]; Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [20], [27].

<sup>620</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1015].

<sup>621</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1020].

<sup>622</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1021] – [1024].

<sup>623</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1026].

<sup>624</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1038].

<sup>625</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1040].

would place AusNet in breach of electricity safety laws; its license issued by the Essential Services Commission; requirements under the National Electricity Rules and AusNet's agreements with generators,<sup>626</sup> and high degree of transparency and regulatory oversight of AER and AEMO<sup>627</sup>

- **reducing third-party generators' ability to sell into the NEM through AusNet's transmission system**, as AEMO manages the dispatch and curtailment of generators in the NEM.<sup>628</sup> As such, AusNet has no role or ability to prioritise the dispatch of certain generators over others<sup>629</sup>
- **using AusNet's regulated transmission revenue to cross-subsidise Origin Energy Markets' contestable generation business**, as the Transmission Ring-Fencing Guideline requires legal separation.<sup>630</sup> Preparation of appropriate internal accounting to ensure a Transmission System Network Provider can demonstrate the extent and nature of transactions between it and affiliated entities.<sup>631</sup> A Transmission System Network Provider must also allocate or attribute costs to transmission services in a manner consistent with cost allocation principles and allocation methodology approved by the AER<sup>632</sup>
- **misusing confidential information or otherwise discriminating**, as the National Electricity Rules and Transmission Ring-Fencing Guideline contain provisions that ensure a transmission business cannot misuse commercially sensitive information obtained from third-party generators to benefit an affiliated generator<sup>633</sup> or provide information about its own network (for instance planned outages)<sup>634</sup> or otherwise discriminate between a related energy service provider and a competitor.<sup>635</sup> These obligations are monitored and enforced by the AER.<sup>636</sup>

6.165. Mr Houston's report provided by the Applicants presents analysis of AusNet's ability to foreclose generation rivals through:

- raising prices for prescribed transmission services or negotiated transmission services
- reducing quality for prescribed transmission services or negotiated transmission services, and
- provision of information to affiliates.

6.166. Mr Houston's report also assesses the potential effect of any such conduct, where relevant.

6.167. Mr Houston was not asked by the Applicants to provide an opinion on whether there would be an incentive for the relevant parties to engage in any vertical foreclosure

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<sup>626</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1043].

<sup>627</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1065].

<sup>628</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1075].

<sup>629</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1078].

<sup>630</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1087].

<sup>631</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1088].

<sup>632</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1089].

<sup>633</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1092].

<sup>634</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1093].

<sup>635</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1096] – [1098].

<sup>636</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1100] – [1101].

strategy.<sup>637</sup> However, in a further report by Mr Houston, he accepts that electricity networks would have an incentive to favour their affiliates (see paragraph 6.233 below).<sup>638</sup>

6.168. With respect to the prices of prescribed transmission services, Mr Houston's view is that AusNet does not have the ability to raise prices because of the 'prescriptive means' by which regulation of pricing is applied and AusNet's obligation not to discriminate under ring-fencing guidelines.<sup>639</sup>

6.169. With respect to prices of negotiated transmission services, Mr Houston's view is that:

i. AusNet's ability to raise prices is constrained by the principles governing access to negotiated transmission services contained in the National Electricity Rules, AusNet's negotiating framework approved by the AER, the negotiated transmission service criteria determined by the AER and the dispute resolution procedures; and

ii. any effect on competition from an increase in price would not be substantial because generators are large, sophisticated counterparties and I therefore assume they would draw on the dispute resolution procedures in circumstances where they consider that the price for negotiated transmission services would affect their ability to compete.<sup>640</sup>

6.170. With respect to the quality of prescribed transmission services, Mr Houston's view is that:

i. AusNet has no ability unilaterally to augment the shared network because of the institutional arrangements in Victoria whereby AEMO is responsible for planning and procuring augmentations;

ii. AusNet has some ability to prioritise replacement and renewal expenditure on system assets, but features of the regulatory framework, other obligations, and large and sophisticated counterparties act as constraints on this ability;

iii. AusNet does not have the ability to prioritise system delivery because network outages are subject to AEMO oversight, generators are likely well-informed regarding the nature and need for network outages and the transmission ringfencing guidelines prohibit discrimination in favour of an affiliate; and

iv. any strategy to foreclose generation rivals through reducing quality would not have a substantial effect on competition in the relevant market for wholesale electricity generation in Victoria because the constraints that I describe above prevent AusNet from conferring a material advantage on its affiliate;<sup>641</sup>

6.171. With respect to the quality of negotiated transmission services, Mr Houston's view is that:

i. AusNet's ability to reduce quality is constrained by the principles relating to access to negotiated transmission services contained in the National Electricity Rules,

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<sup>637</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [11].

<sup>638</sup> Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023, at [107].

<sup>639</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [172].

<sup>640</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [172]. For additional evidence, see: Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023, at [94] – [105].

<sup>641</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [213].

AusNet's negotiating framework approved by the AER, the negotiated transmission service criteria determined by the AER and dispute resolution procedures; and

ii. any strategy to foreclose generation rivals through reducing quality would not have a substantial effect on competition in the relevant market for wholesale electricity generation in Victoria because the constraints that I describe above prevent AusNet from conferring a material advantage on its affiliate.<sup>642</sup>

6.172. With respect to the provision of information to affiliates, Mr Houston's view is that AusNet does not have the ability to misuse information because of the requirements of ring-fencing guidelines, which are complemented by broader restrictions in the National Electricity Rules around the use of confidential information.<sup>643</sup>

6.173. In response to the Second ACCC Transparency Letter, Brookfield submits that AusNet would have no incentive to discriminate in relation to contestable connections to the transmission network because these services are provided in a competitive market. If AusNet were to discriminate in relation to pricing or timing of their offer, it is likely to lose that opportunity to a rival provider of those services.<sup>644</sup>

### ***Interested parties' submissions and consultation***

6.174. The ACCC received a number of submissions from interested parties (Alinta Energy, an anonymous interested party, EnergyAustralia, Iberdrola, Clean Energy Council, Grattan Institute, ACEN Australia and **[Redacted – Confidential]**), and issued written notices to industry participants (including the AER, Engie) seeking information to assist the ACCC to assess whether the Proposed Acquisition would give rise to the potential ability and incentive for AusNet to discriminate in favour of itself or its affiliates. A majority of interested parties provided views on the ability of AusNet to discriminate in favour of an affiliate and/or the efficacy of existing regulations to constrain such discrimination.

6.175. In considering the submissions and information responses provided by interested parties, the ACCC has had regard to the fact that industry participants may be disinclined to complain about AusNet, where AusNet is the monopoly provider of transmission services in Victoria and a party they unavoidably need to deal with if they are a generator or expect to be a generator in future. The ACCC has accepted confidentiality over some submissions given these circumstances.

6.176. Some broad issues raised by interested parties concerned the ability for discrimination to be detected. Alinta submits that the vertically integrated business may find ways to discriminate which cannot be picked up by a regulator.<sup>645</sup> **[Redacted – Confidential]**.<sup>646</sup> **[Redacted – Confidential]**.<sup>647</sup> The Clean Energy Council also raises that practically it may be challenging to assess the ability and incentive AusNet may have to discriminate against a generator because generators who have faced discrimination may be hesitant to openly share their experiences.<sup>648</sup>

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<sup>642</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [213].

<sup>643</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [268].

<sup>644</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [19].

<sup>645</sup> Alinta Energy record of oral submission, 30 June 2023, at [7].

<sup>646</sup> **[Redacted – Confidential]**.

<sup>647</sup> **[Redacted – Confidential]**.

<sup>648</sup> Clean Energy Council record of oral submission, 25 July 2023, at [16].



- 6.177. Engie’s views are that the concerns over co-ownership of generation and transmission broadly cover raising prices of electricity transmission, lowering the quality and quantity of localised electricity transmission, reducing the timeliness of transmission to competitors while making strong provision for affiliate generators, timing and pricing of connection services and outage planning.<sup>649</sup> By contrast, the Grattan Institute said that it is unclear whether a market structure could emerge in Victoria whereby AusNet could discriminate against non-Origin Energy Markets generators.<sup>650</sup>
- 6.178. In relation to potential discriminatory behaviour during the connection process between transmission providers and connecting generators, the Clean Energy Council emphasised the role of impartial third parties (such as AEMO) in mediating negotiations between generators and transmission providers.<sup>651</sup>

*Ability of AusNet to discriminate in favour of itself or its affiliates*

- 6.179. The ACCC has received submissions from interested parties raising concerns about AusNet’s ability to discriminate in favour of itself or its affiliates in light of the integration of transmission and generation.<sup>652</sup> The submissions identified issues regarding delay for new generation or storage assets, scheduling network outages, other forms of discrimination and the impact of regulation on the ability of AusNet to engage in such discrimination. Similar issues were raised by the AER and Engie when consulting with the ACCC.

*Delays to connections*

- 6.180. Advice from the AER noted that there is a risk of discrimination generally in relation to the connection of new generation or battery assets to the transmission network, where a transmission provider may seek to favour a related affiliate in negotiating a connection or in the delivery of competitive connection services.<sup>653</sup> It suggests that these discriminatory behaviours may be difficult to detect owing to the need for the connecting parties to maintain commercial relationships with the relevant transmission provider and, therefore, connecting parties may not challenge discriminatory behaviour for fear of adverse consequences.<sup>654</sup> The AER also states that the perceived discrimination risk may impact on investment decisions by potential competing generators.<sup>655</sup>
- 6.181. Engie considers that the generation development arm in a vertically integrated business could get privileged information from the transmission arm or even receive priority access to connections and grid augmentations, thereby distorting fair competition in a highly congested market and undermining competitors’ project viability.<sup>656</sup> Engie states that the absence of obligations for transmission network businesses to offer the same terms and conditions, or same pricing to generators could allow for soft favouritism.<sup>657</sup> As the viability of a development project is greatly

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<sup>649</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>650</sup> Grattan Institute record of oral submission, 3 July 2023, at [6].

<sup>651</sup> Clean Energy Council record of oral submission, 25 July 2023, at [19].

<sup>652</sup> See: Alinta Energy record of oral submission, 30 June 2023, Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, **[Redacted – Confidential]**; AER s90(6)(d) Response to Notice: **[Redacted – Confidential]**.

<sup>653</sup> AER s90(6)(d) Response to Notice issued 25 July 2023: **[Redacted – Confidential]**, at p. 4.

<sup>654</sup> AER s90(6)(d) Response to Notice issued 25 July 2023: **[Redacted – Confidential]**, at p. 4.

<sup>655</sup> AER s90(6)(d) Response to Notice issued 25 July 2023: **[Redacted – Confidential]**, at p. 5.

<sup>656</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>657</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

affected by timing and costs associated with a transmission connection agreement, difficult negotiations with a network compared to a competitor could delay the connection of a project.<sup>658</sup>

- 6.182. Alinta expresses concern about the ability and incentive for AusNet's transmission provider assets to discriminate against Origin Energy Markets' competitors when negotiating connections to the NEM.<sup>659</sup> It states that delayed network connections by a transmission provider (to favour its own related parties) can affect the viability of competitors' projects, and reduce new projects coming online.<sup>660</sup> Alinta sees itself as vulnerable to discrimination from a vertically integrated transmission provider when it comes to connecting its future generation assets.<sup>661</sup>
- 6.183. **[Redacted – Confidential].**<sup>662</sup>
- 6.184. An anonymous party submits that it would be possible for AusNet to discriminate against a particular generator, for example in relation to connection applications because of the opaque nature of the process and AusNet's position of power.<sup>663</sup> The party said that AusNet favouring Origin Energy Markets would be difficult to detect in the short term,<sup>664</sup> but that such behaviour would be noticeable in the long term trends in connection reporting data and as application timings emerge.<sup>665</sup>

#### *Scheduling network outages*

- 6.185. Engie perceives a risk that the network business could schedule transmission outages that could benefit its affiliated generation business.<sup>666</sup> Engie explains that transmission outages can have a significant impact on trading outcomes and that these outages could be planned to correspond with plant outages to better manage risk exposures or to constrain other generators.<sup>667</sup> It is unclear to Engie whether the AER could readily identify and manage these issues following the Proposed Acquisition.<sup>668</sup>
- 6.186. Alinta also expresses concern about discrimination by the transmission provider assets in network operation decisions such as maintenance and load-shedding.<sup>669</sup>
- 6.187. **[Redacted – Confidential].**<sup>670</sup>

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<sup>658</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>659</sup> Alinta Energy record of oral submission, 30 June 2023, at [3].

<sup>660</sup> Alinta Energy record of oral submission, 30 June 2023, at [3].

<sup>661</sup> Alinta Energy record of oral submission, 30 June 2023, at [2].

<sup>662</sup> **[Redacted – Confidential]**.

<sup>663</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [18].

<sup>664</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [20].

<sup>665</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [20].

<sup>666</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>667</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>668</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 2.

<sup>669</sup> Alinta Energy record of oral submission, 30 June 2023, at [4].

<sup>670</sup> **[Redacted – Confidential]**.

### *Other forms of discrimination*

- 6.188. Alinta considers that information asymmetry could allow a transmission provider to facilitate or delay connections and/or favour its own related parties. Examples include:<sup>671</sup>
- information sharing
  - details of technological requirements
  - more internal insight into the requirements and connections process
  - generally faster response times.
- 6.189. In another submission, **[Redacted – Confidential]**.<sup>672</sup>
- 6.190. EnergyAustralia notes that AusNet could discriminate in subtle ways, for instance through providing preferential access to better locations in the network for connection for generation projects.<sup>673</sup>

### *Impact of regulations on constraining ability to discriminate*

- 6.191. A number of interested parties also made submissions specifically about the regulatory regimes that apply to transmission networks, especially the Transmission Ring-Fencing Guideline.
- 6.192. Some parties consider appropriate ring-fencing could be sufficient to address key competition concerns regarding AusNet's ability to favour affiliates. Alinta indicates that it does not object to the Proposed Acquisition on the basis that appropriate ring-fencing measures are used between the transmission and generation businesses owned by the future Brookfield entity/ies and considers that this can be achieved effectively through existing measures available to the ACCC.<sup>674</sup>
- 6.193. Iberdrola states that it would not have concerns about discrimination if the Transmission Ring-Fencing Guideline is effective and enforced, however did not comment on the efficacy of the current ring-fencing guidelines.<sup>675</sup> EnergyAustralia share similar sentiments, and its main concern is how well ring-fenced the businesses are and ensuring the ring-fencing is working and monitored to manage the risks from the Proposed Acquisition.<sup>676</sup> EnergyAustralia states that while it is not 'significantly worried' about receiving the same terms and fair connection from AusNet as Origin Energy Markets' pipeline of generation, it emphasised the need for sufficient ring-fencing to ensure there are no incentives to favour some projects over others.<sup>677</sup>
- 6.194. However, some interested parties considered transmission ring-fencing – at least in its current state – may be insufficient to constrain AusNet's ability to discriminate. The Clean Energy Council notes that AusNet's ability to discriminate against an electricity generator in Victoria depends on the effectiveness of the Transmission

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<sup>671</sup> Alinta Energy record of oral submission, 30 June 2023, at [3].

<sup>672</sup> **[Redacted – Confidential]**.

<sup>673</sup> EnergyAustralia record of oral submission, 25 July 2023, at [16].

<sup>674</sup> Alinta Energy record of oral submission, 30 June 2023, at [18].

<sup>675</sup> Iberdrola record of oral submission, 1 August 2023, at [26].

<sup>676</sup> EnergyAustralia record of oral submission, 25 July 2023, at [5].

<sup>677</sup> EnergyAustralia record of oral submission, 25 July 2023, at [12].

Ring-Fencing Guideline in its current and future form.<sup>678</sup> Noting there is potential for discriminatory behaviour between transmission providers and their ring-fenced contestable network service providers and discriminatory behaviour between transmission providers and connecting generators.<sup>679</sup>

- 6.195. An anonymous interested party submits that transmission ring-fencing may not be working as anticipated in terms of ring-fencing between contestable and non-contestable transmission services, but also ring-fencing transmission companies from generation affiliates.<sup>680</sup> It also considers that it is very challenging to reform the ring-fencing measures to make them effective.<sup>681</sup> Finally, it states that the proximity of staff and the natural movement of people between affiliated entities results in preferential treatment.<sup>682</sup> Engie also considers ‘there is already broad concern that networks are not sufficiently orientated to the needs of generation development and operation’ and that competitive and non-competitive arms of network businesses are not sufficiently ring-fenced.<sup>683</sup>
- 6.196. Syncline suggests the regulatory framework will be easily circumvented.<sup>684</sup> **[Redacted – Confidential].**<sup>685</sup> **[Redacted – Confidential].**<sup>686</sup>
- 6.197. An anonymous interested party states that the current ring-fencing measures do not have a high efficacy, however it would be practically very challenging to reform ring-fencing measures to make them effective.<sup>687</sup> It argues the suggestion of increased reporting would not address issues as many of the issues arise due to proximity of staff and the natural movement of people between affiliated entities.

### **ACCC view**

- 6.198. In this section the ACCC presents its views on whether it is satisfied that the Proposed Acquisition is not likely to result in a substantial lessening of competition from Brookfield having the ability and incentive to use AusNet’s position as the monopoly transmission network operator in Victoria to discriminate in favour of Origin Energy Markets, or otherwise foreclose Origin Energy Markets’ rivals.
- 6.199. To reach this view ACCC has considered the extent to which Brookfield will have:
- the ability to engage in conduct which would discriminate in favour of Origin Energy Markets and foreclose its rivals, and
  - the incentive to engage in such conduct.
- 6.200. Finally, the ACCC considers the likely effect that such conduct would have on competition in relevant markets.

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<sup>678</sup> Clean Energy Council record of oral submission, 25 July 2023, at [14].

<sup>679</sup> Clean Energy Council record of oral submission, 25 July 2023, at [19].

<sup>680</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [17].

<sup>681</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [19].

<sup>682</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [19].

<sup>683</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 1.

<sup>684</sup> **[Redacted – Confidential]**.

<sup>685</sup> **[Redacted – Confidential]**.

<sup>686</sup> **[Redacted – Confidential]**.

<sup>687</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [17], [19].

6.201. The ACCC has considered all the material available to it in forming its view, including (but not limited to) the submissions of the Applicants and from others which are summarised above.

*Ability to discriminate or otherwise foreclose Origin Energy Markets' rivals*

6.202. In the ACCC's view, the key issues in assessing the ability of Brookfield to influence AusNet to discriminate in favour of Origin Energy Markets, and/or partly, or fully foreclose Origin Energy Markets' rivals, are:

- Brookfield's active management of AusNet
- the role of the co-investors in AusNet and the governance arrangements for AusNet
- the Brookfield separate fund structure
- the role and efficacy of regulation.

6.203. As set out in detail in the Corporate Structure Considerations section above, the ACCC considers that Brookfield controls AusNet and receives detailed information from AusNet about generators seeking to connect to AusNet's transmission network. In particular, the ACCC notes:

- the Applicants' submissions that Brookfield Infrastructure has been, and is, actively involved in managing AusNet including on connection matters falling within the AusNet CEO's delegated authority<sup>688</sup>
- Brookfield receives the details of many (and possibly all) proposed connections to AusNet's transmission network (see paragraphs 6.93 to 6.95).

6.204. In relation to the co-investors in AusNet, as set out in paragraphs 6.108 to 6.111 above, the ACCC considers that, while co-investors may provide some constraint, in the case of AusNet their degree of involvement appears limited. As noted above, their ability to detect discrimination in favour of Origin Energy Markets may be limited, particularly where the profit impact on AusNet is not material.

6.205. The ACCC considers that 'related party transactions' clauses in the AusNet governance agreement may also provide potential mitigation against foreclosure concerns. However, as discussed in paragraphs 6.132 to 6.134 above, while the ACCC considers that related party transaction causes may limit Brookfield's ability to use AusNet to benefit Origin Energy Markets directly, the clauses provide limited constraint overall; because, the treatment of any arrangement involving a competitor to Origin Energy Markets is just as likely to raise possible foreclosure risks as the treatment of arrangements with Origin Energy Markets, and the related parties clauses do not prevent Brookfield from participating in such arrangements.

6.206. In relation to the Brookfield separate fund structure, the ACCC considers that Brookfield's interest in AusNet being held in Brookfield Infrastructure, and its interest in Origin Energy Markets being held in Brookfield Renewables, provides greater mitigation against foreclosure than an ownership structure in which the same Brookfield entity had ownership stakes in AusNet and Origin Energy Markets. However, it does not provide strong mitigation against the ability for Brookfield to use AusNet to advantage Origin Energy Markets because the staff involved in each fund are still familiar with each other, co-located in the same office building, are

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<sup>688</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [6].

colleagues of the same broader organisation and are likely to have incentives, beyond direct financial incentives, to be cooperative with and assist other teams. As set out in paragraphs 6.72 to 6.83, the ACCC has seen evidence of regular communication, staff movement, and collaboration across the 2 Brookfield business units.

### *The role of regulation*

- 6.207. The ACCC considers that there is limited scope for AusNet to discriminate in favour of Origin Energy Markets with regards to pricing of prescribed transmission services such as the transmission of electricity over the shared network. The AER determines revenue caps and approves pricing schedules for transmission networks on rolling 5 yearly cycles. There is little ability for AusNet to charge different users a different per unit price for transmission.
- 6.208. The ACCC also considers that there is limited ability for AusNet to influence the planning of the network in Victoria to favour Origin Energy Markets or to foreclose Origin Energy Markets' rivals. As discussed in Section 5, transmission network planning in Victoria is the responsibility of AEMO. In respect of outages, the ACCC notes, as stated on AEMO's website:
- AEMO is only able to withhold permission to proceed for outages of transmission network equipment where it would be necessary to issue a Direction or an Instruction under clause 4.8.9 of the National Electricity Rules to maintain the power system in a secure operating state, a reliable operating state or for reasons of public safety.<sup>689</sup>
- 6.209. As such, AEMO is not empowered to prevent AusNet taking either planned or unplanned outages, unless the outage in question would jeopardise system security or reliability, or public safety.
- 6.210. The ACCC notes that Mr Houston's views on this topic differ to those expressed by Mr Hyslop in consultation with the ACCC. Mr Hyslop acknowledges Mr Houston's view that the role of AEMO in the Victorian transmission network constrains AusNet's ability to discriminate. However, Mr Hyslop's view is that AusNet, as the owner of the assets, may be able to influence AEMO's decision-making.<sup>690</sup> The ACCC considers AusNet may have some ability to influence AEMO in its planning decisions, but that this influence is limited.
- 6.211. The ACCC considers the key areas of concern regarding potential AusNet discrimination in favour of Origin Energy Markets relate to delays to new connections, the operation and maintenance of the transmission network (particularly through the scheduling and taking of outages with those related to reliability and security overseen by AEMO) and the sharing of information relevant to both of these activities.
- 6.212. In these areas, the ACCC considers that the key pieces of regulation relating to concerns arising between a transmission network owner and a generation business are the electricity Transmission Ring-Fencing Guideline and the National Electricity Rules transmission connection dispute resolution procedures.

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<sup>689</sup> AEMO, [Network Outages](#), accessed 3 October 2023.

<sup>690</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [34]. Mr Hyslop's views do not change those of Mr Houston on this issue: Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023, at [80] – [86].

- 6.213. As discussed in Section 5, the AER has submitted a rule change request to the AEMC that, if enacted, would allow the AER to apply the existing Transmission Ring-Fencing Guideline prohibitions to negotiated transmission services as well as to prescribed transmission services. However, today the Transmission Ring-Fencing Guideline only applies to prescribed transmission services. The ACCC considers that the limited coverage of the existing guideline significantly limits their efficacy as a constraint on AusNet when dealing with rivals to Origin Energy Markets. However, the ACCC considers that even if the existing prohibitions were applied to negotiated transmission services, a number of concerns would remain. These are discussed below.
- 6.214. The 4 strands of the non-discrimination obligation imposed by clause 4.1 of the current guideline are:
- a) to deal or offer to deal with a related electricity service provider as if it were not a related provider
  - b) in like circumstances, to deal or offer to deal with a related electricity service provider and its competitors or potential competitors on substantially the same terms and conditions
  - c) in like circumstances, to provide substantially the same quality, reliability and timeliness of service to a related electricity service provider and to its competitors or potential competitors, and
  - d) not to disclose to a related electricity service provider information that the transmission provider has obtained through dealing with a competitor or potential competitor of the related provider, where to disclose that information would be likely to provide an advantage to the related provider.<sup>691</sup>
- 6.215. The ACCC considers that complex and bespoke engineering aspects of connections to the transmission network are such that the need to make trade-offs and exercise a degree of judgement will always be required in processing applications. Therefore, even with a high degree of informational transparency, proving a breach of the obligations, in *like circumstances* to offer *substantially the same* terms and conditions and to provide *substantially the same* quality of service to affiliated and unaffiliated connection applicants, would be very difficult.<sup>692</sup>
- 6.216. The difficulty of enforcing that obligation is further heightened by the opaque nature of the connection process, and the information asymmetry that a transmission provider enjoys.<sup>693</sup> The ACCC considers that the confidential nature of the connection application process makes it difficult for a connection applicant to allege that it is being afforded substantially worse treatment than an affiliated connection applicant in relevantly ‘like’ circumstances.
- 6.217. More generally, the opacity and complexity of the connection process increases the difficulty of detecting such discriminatory conduct.<sup>694</sup> As one anonymous interested party submits, it would be difficult in the short term for industry participants to detect

<sup>691</sup> AER, [Ring-fencing Guideline Electricity Transmission](#), version 4, March 2023, cl 4.1(c).

<sup>692</sup> See, e.g.: AER, [Rule change request: Expanding the transmission ring-fencing framework to include negotiated transmission services](#), 18 July 2023, at p. 12.

<sup>693</sup> See, e.g.: Alinta Energy record of oral submission, 30 June 2023, at [3].

<sup>694</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [18]; [Redacted – Confidential]; AER, [Options to Address Gaps in Transmission Ring-Fencing Framework, Consultation paper](#), May 2023, at pp. 16 – 17; Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [88].



if AusNet was giving favourable treatment to Origin Energy Markets; however, such favourable treatment may become discernible over the longer term, if a trend or pattern were to emerge from the reported connection times of various projects.<sup>695</sup>

- 6.218. The anonymous submission suggests current transmission ring-fencing may not be working as anticipated.<sup>696</sup> This submission suggests it is possible for AusNet or any transmission provider/distribution provider to discriminate against a particular generator.<sup>697</sup> One of the reasons is the process for approving a connection application is opaque, particularly since transmission providers have significant power in the relationship with generators and it is difficult, especially for smaller players, to push back on delays and projects which have been frustrated.<sup>698</sup> The party making this submission advises that the current regulation and AEMO's neutral presence are not sufficient to address grey areas surrounding delays, subjective judgements and information asymmetries.<sup>699</sup>
- 6.219. At a general level, the ACCC also notes that the Transmission Ring-Fencing Guideline has not been previously applied to a vertically integrated private transmission provider with substantial interests in existing and proposed generation and battery assets. Accordingly, the extent to which the guideline – either in their present state or even subsequent to any amendments in line with the AER's proposed changes – may prevent or limit anti-competitive behaviour in an area where until now AusNet's incentives to engage in such behaviour is untested. This introduces further uncertainty about the ability of the guideline to effectively mitigate potentially anti-competitive conduct arising from the Proposed Acquisition.
- 6.220. However, the ACCC notes that the Transmission Ring-Fencing Guideline has recently been made a civil penalty obligation, which enhances the guideline's deterrence effect.<sup>700</sup>
- 6.221. Regarding dispute resolution mechanisms, the ACCC notes that the Applicants emphasise the existence of a 'robust and effective' dispute resolution framework under the National Electricity Rules as an important mechanism that mitigates against the risk of anti-competitive conduct in the provision of transmission connection services.<sup>701</sup> However, no interested party has made a submission identifying this as a material regulatory safeguard.
- 6.222. Both the ACCC and the AER have received submissions from generators and renewable energy developers raising complaints about anti-competitive conduct by transmission providers in relation to transmission networks (including by AusNet in Victoria). As such, the fact that there has been no recourse to either of the available AER dispute resolution mechanisms<sup>702</sup> to resolve a transmission connection dispute with AusNet suggests that connection applicants do not consider it to be an effective practical avenue for responding to unsatisfactory connection proposals by AusNet.

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<sup>695</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [20].

<sup>696</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [17].

<sup>697</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [18].

<sup>698</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [18].

<sup>699</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [18].

<sup>700</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [189].

<sup>701</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1001] – [1006], [1023] – [1024]; Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [172], [195], [197], [205] – [207], [211] – [213], [255] – [256], [266].

<sup>702</sup> See paragraph 5.159 above.

- 6.223. The AER confirmed to the ACCC that connection applications are typically time-sensitive, and that delays resulting from dispute resolution processes may cause significant costs through foregone revenue, and may impact timing commitments for financing arrangements and so may potentially jeopardise the connection project.<sup>703</sup> As a practical example of this, **[Redacted – Confidential]**.<sup>704</sup>
- 6.224. Even leaving aside the potential for disputes to give rise to critical delay, a number of interested parties have observed that it is (or is perceived to be) counterproductive for connection applicants to complain about anti-competitive conduct by transmission providers including AusNet. **[Redacted – Confidential]**.<sup>705</sup> This is consistent with conclusions drawn by the AER through its consultations regarding the Transmission Ring-Fencing Guideline,<sup>706</sup> and with other interested party submissions to the ACCC,<sup>707</sup> that connection applicants are reluctant to complain about or to formally dispute a transmission provider’s conduct, in circumstances where they depend on the transmission provider in order to gain timely access to the transmission network for their current, and potentially also for future, projects.
- 6.225. As such, the ACCC considers that the Transmission Ring-Fencing Guideline and the National Electricity Rules dispute resolution mechanism provide only some limited mitigation against the prospect that the Proposed Acquisition provides AusNet with the ability to discriminate in favour of affiliated connection applicants.
- 6.226. The regulations may restrict obvious and blatant discrimination, but more subtle and difficult to detect discrimination is a commercially realistic possibility despite these regulations. Even such subtle discrimination (such as finding seemingly legitimate reasons to delay a connection application) could have a major impact on competition (as discussed below) in respect of competitive effects.

*Incentive to discriminate or otherwise foreclose Origin Energy Markets’ rivals*

- 6.227. In the above section, the ACCC set out its views on whether Brookfield has the ability to implement a strategy of having AusNet discriminate in favour of Origin Energy Markets. This section focusses on whether it will have the incentive to do so.
- 6.228. Some of the issues are intertwined. For example, the threat of regulatory action if Brookfield is found to be discriminating against Origin Energy Markets’ rivals in breach of non-discrimination rules is relevant to the consideration of both an ‘ability’ and ‘incentive’ consideration to discriminate. That is because regulatory action could be seen as impacting Brookfield’s ability to discriminate and also creating a disincentive to discriminate.
- 6.229. In analysing incentives in this section, the ACCC is focused on the economic trade-offs that arise, assuming Brookfield can implement a discriminatory strategy and is not impeded or deterred by the threat of regulatory action or co-investor responses

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<sup>703</sup> AER s90(6)(d) Response to Notice issued 25 July 2023: **[Redacted – Confidential]**, at p. 6.

<sup>704</sup> **[Redacted – Confidential]**.

<sup>705</sup> **[Redacted – Confidential]**.

<sup>706</sup> AER, [Options to Address Gaps in Transmission Ring-Fencing Framework, Consultation paper](#), May 2023, at p. 26; AER, [Rule change request: Expanding the transmission ring-fencing framework to include negotiated transmission services](#), 18 July 2023, at p. 12; AER s90(6)(d) Response to Notice issued 25 July 2023: **[Redacted – Confidential]**, at pp. 4, 6.

<sup>707</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [18]; EnergyAustralia record of oral submission, 4 July 2023, at [17].

from doing so. As noted above, due to the limits of regulatory action and co-investor responses, this means such a strategy and related behaviour would likely not be overt or obvious and clearly detectable, but would instead likely be subtle and difficult-to-detect.

- 6.230. A strategy to discriminate in favour of Origin Energy Markets could take AusNet away from the profit-maximising strategy AusNet would adopt without the Proposed Acquisition. For example, a strategy to discriminate in favour of Origin Energy Markets could lead to AusNet forgoing or deferring revenue from deterred or delayed connections or AusNet operating its network in a way that attracts penalties under the AER's service target performance incentive scheme. In these cases, a strategy to discriminate in favour of Origin Energy Markets may impact AusNet's profitability negatively. On the other hand, a strategy to discriminate in favour of Origin Energy Markets likely benefits Origin Energy Markets and likely increases the profitability of Origin Energy Markets.
- 6.231. The question being considered in this section is those trade-offs; the potential loss of profits to AusNet compared to the gains to Origin Energy Markets from engaging in such behaviour. If the losses to AusNet are not outweighed by the benefits to Origin Energy Markets, Brookfield will not be likely to have an incentive to engage in the behaviour.
- 6.232. The issue of trade-offs is recognised by both Mr Hyslop in his report for the ACCC and Mr Houston in his further report which is relied on by the Applicants. Mr Hyslop's view is that:

86. [...] if incentives to not comply [with relevant National Electricity Rules provisions and AER ring-fencing guidelines] exist, and the benefits of not complying outweigh the risk of being caught, the legislation and regulations may not be sufficient.

87. If the proposed transaction occurs, it is reasonable to assume incentives to favour affiliate generators and retail entities will exist because of the financial benefits that would flow to the integrated entities shareholders where favouritism is possible.<sup>708</sup>

- 6.233. And Mr Houston states:

107. I was not asked to consider incentive as part of my first report. However, I accept that, setting aside the countervailing considerations imposed by the prospect of revenue reductions under incentive schemes and regulatory sanctions, this incentive would be present – firms seek to maximise profits and, in circumstances where favouring affiliates is profitable, there will be an incentive to do so. Indeed, the existence of the transmission and distribution ring-fencing guidelines is indicative of an apprehension that, absent ring-fencing, electricity networks would have an incentive to favour their affiliates.

108. I explain in my first report that incentive turns on whether the foreclosure strategy is profitable for the integrated firm as a whole. In other words, it requires an assessment of the balance between the financial benefit of the conduct to one part of the integrated firm and the financial cost of the conduct to the other.<sup>709</sup>

- 6.234. It is difficult to do a precise analysis of the incentive question because there are many variables at play and different ways a foreclosure strategy could be implemented.

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<sup>708</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [86] – [87].

<sup>709</sup> Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023, at [107] – [108].

- 6.235. However, the ACCC considers that potential gains from AusNet stymieing Origin Energy Markets' rivals or otherwise favouring Origin Energy Markets could flow from:
- Origin Energy Markets being provided with investment opportunities it might otherwise have not had (e.g. preferencing by AusNet resulting in an Origin Energy Markets generation project displacing a rival project proposal)
  - lower overall dispatchable generation in Victoria, leading to higher wholesale prices (and higher profits from generation for Origin Energy Markets) when interconnectors are constrained
  - increased likelihood of Origin Energy Markets-owned generation being dispatched (at high prices), and making Origin Energy Markets a more in-demand hedging contract counterparty
  - following from the above, an increased likelihood of Origin Energy Markets-owned new renewable generation benefitting from policy mechanisms and private demand designed to encourage (underwrite or subsidise) the development of such generation, thereby enabling Origin Energy Markets to raise the auction or power purchase agreement price of output from such new generation and storage (see paragraphs 6.254 to 6.256).
- 6.236. Further, the ACCC considers that the loss of profitability from AusNet engaging in such behaviour is often likely to be insignificant compared to these gains.
- 6.237. For example, the lost profitability to AusNet from delaying a connection is likely to be minimal, compared to the significant upside that Origin Energy Markets could gain if entry of a rival wind farm is delayed, or its own wind farm is given priority access to the transmission network. The benefits could include earlier commissioning of Origin Energy Markets' own wind farm and the associated ability for Origin Energy Markets' plant to earn revenues from the wholesale market (including under contracts-for-difference and power purchase agreements) as well as from any policy incentives. Similarly, conducting maintenance on a transmission line that impacts an Origin Energy Markets rival at a time of peak demand, instead of at a non-peak time, may have only a modest impact on AusNet's profitability (although the ACCC has noted the service target performance incentive scheme discussed above at paragraph 5.141, but could lead to substantially higher wholesale spot prices (see also the discussion of 'effects' below). In this case, the benefits to Origin Energy Markets would include its generator being dispatched at a time when – due to the timing of the outage – wholesale spot prices have spiked to potentially many multiples of typical prices (and many multiples of Origin Energy Markets' marginal costs of generation, thereby increasing Origin Energy Markets' generation business's operating profits). Meanwhile, the rival generator that was subjected to the line outage would not be dispatched. Apart from missing out on the wholesale spot price benefits due to the outage, the rival generator would need to make difference payments on any derivative contracts it had entered that it may not be able to fund from its wholesale spot market revenues. Further, in anticipation of such conduct by AusNet, a rival generator may be deterred from entering hedging contracts in the first instance, with the result that wholesale hedging premiums and prices in Victoria are higher than they would be otherwise.
- 6.238. In this context, the ACCC also notes the AER's view that '[...] the value of the incentives from Service Target Performance Incentive Scheme in some cases may be insufficient to either deter the harmful conduct or to reassure potential investors

in new, competing generation'<sup>710</sup> and Mr Hyslop's view that '[...] the complexity of the processes and information asymmetry in favour of the networks result in some means of favouring affiliates not being easily discoverable'.<sup>711</sup>

- 6.239. The Applicants submit that because Origin is structurally 'long' in retail (i.e. it retails a larger volume of electricity than it generates) and since higher wholesale prices tend to flow through to retail prices with a lag, Brookfield will not have an incentive to engage in conduct which leads to an increase in wholesale electricity prices.<sup>712</sup> The ACCC agrees that the net position of Origin Energy Markets does impact its incentives, but notes several points that indicate that an incentive can still exist even if Origin currently has a larger structural physical position in electricity retailing than it does in generation.
- 6.240. First, Origin Energy Markets will have hedging arrangements in place that remove or at least reduces its effective 'long' position while those hedges continue. Origin Energy Markets' ownership of flexible generation (e.g. gas peaking plants, such as Mortlake) also helps manage the retail-side risk of higher wholesale prices.<sup>713</sup>
- 6.241. Second, the retail supply of electricity is a margin business and competition in retailing means that retail prices typically move over time to reflect changes in wholesale prices. Before AusNet embarks on any foreclosure conduct, Origin Energy Markets could enter contracts to protect itself from higher wholesale spot prices for up one to two years into the future until pass-through occurs.
- 6.242. Third, Brookfield intends for Origin Energy Markets to expand its generation footprint significantly and has a strong incentive to do so due to the nature of the BGTF fund (see discussion at paragraphs 7.90 to 7.115).
- 6.243. In conclusion, while there are many complicated factors at play, the ACCC considers that there is likely to be a strong *incentive* for Brookfield to influence AusNet to engage in a foreclosure strategy through ownership of the transmission network, when assessed from the perspective of the direct profit impacts on AusNet compared to Origin Energy Markets.

#### *Effects of foreclosure of Origin Energy Markets' rivals*

- 6.244. To the extent that the Proposed Acquisition led to Brookfield having the ability and incentive to engage in foreclosure-type conduct in relation to existing or prospective rival generators, it could lessen competition in one or more of the following markets:
- the market for the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
  - the market for the supply of wholesale hedging instruments to electricity retailers operating in Victoria, and/or
  - the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria.
- 6.245. The effects of the Proposed Acquisition on the first 2 of these markets are discussed first together, followed by a discussion of the effects on the third market.

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<sup>710</sup> AER s90(6)(d) Response to Notice issued 25 July 2023: **[Redacted – Confidential]**, at p. 5.

<sup>711</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [88].

<sup>712</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1105] – [1109].

<sup>713</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 247.

### *Effects on markets for wholesale physical supply and wholesale hedging instruments*

- 6.246. In relation to both the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly and the supply of wholesale hedging instruments to retailers in Victoria, there are several means by which the Proposed Acquisition could harm competition.
- 6.247. First, a degradation of transmission services by AusNet to existing rival generators – such as by AusNet taking unplanned outages of lines that competing generators use that are either unnecessary or for longer than necessary, as well as reducing transmission service quality for competing generators more generally – would reduce the ability of AEMO to dispatch the output of the rival generator(s) to meet prevailing demand. Given the highly inelastic nature of real-time electricity demand and the need for electricity supply to match demand at all times to maintain system security and reliability, even small degradations in transmission capacity to generators may have very substantial effects on average wholesale spot and contract prices.
- 6.248. By way of example, as noted by the AER when discussing several high-price wholesale market events in the first quarter of 2023:
- Price spikes, while short in duration, can have a material impact on average quarterly prices. The high price events covered in this report contributed between \$7 megawatt hour (**MWh**) to \$12/MWh to the quarterly average prices in Queensland, New South Wales and South Australia.<sup>714</sup>
- 6.249. In each of the 8 instances discussed by the AER in its report, it noted that transmission constraints limiting power imports from low-priced regions to high-priced regions were a contributing factor to the price spikes.<sup>715</sup> The ACCC notes that \$7-\$12/MWh represents approximately 10% of the average quarterly wholesale spot price in these states for Q1 2023,<sup>716</sup> indicating that the impact of high-price market events on average wholesale prices in this period was substantial.
- 6.250. Second, by sharing information between AusNet and Origin Energy Markets, Origin Energy Markets could alter its generator bidding strategies in ways that facilitated the opportunistic withholding of output by Origin Energy Markets and/or the raising of its generation and storage units' offer prices. To the extent Origin Energy Markets succeeded in implementing such strategies, it could increase wholesale spot prices at least in Victoria immediately, and in the medium to longer term raise contract premiums and prices payable by retailers and large business customers in Victoria, and potentially in other states.
- 6.251. Further, conduct by AusNet that reduces the dispatch of rival generators in Victoria at high-priced times would reduce their ability to offer wholesale hedging instruments. This is because such generators would not earn sufficient spot market revenues to meet their obligations to make difference payments to counterparties under such contracts. A reduction in the reliable supply of hedging instruments in Victoria would tend to result in higher contract premiums, thereby raising wholesale contract prices in Victoria. This would then tend to flow through to higher retail electricity prices in Victoria.

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<sup>714</sup> AER, [Electricity prices above \\$5,000/MWh, January to March 2023](#), June 2023, at p. 2.

<sup>715</sup> AER, [Electricity prices above \\$5,000/MWh, January to March 2023](#), June 2023.

<sup>716</sup> AER, [Wholesale markets quarterly Q1 2023, January – March](#), 20 April 2023, at p. 4 (Figure 1).

6.252. Finally, by AusNet degrading transmission service quality for competing generators, non-Brookfield investors may find it less appealing to develop new plants in Victoria, particularly firming generation and storage. Over time, such discrimination could increase Origin Energy Markets' share of Victorian dispatchable generation and storage capacity and output. While it is unclear how much generation and storage capacity Brookfield would develop in Victoria with the Proposed Acquisition, Origin Energy Markets' share of dispatchable output in Victoria is almost certain to increase from current levels to some degree. This could increase its ability and incentives to withhold supply, thereby exacerbating the above-mentioned competitive harms to the relevant wholesale spot and contract markets in Victoria and potentially the NEM, and likewise lead to higher wholesale and retail electricity prices.

#### *Effects on the supply of new generation and storage*

6.253. The ACCC considers that in an environment of substantial new connection applications for new renewable (and potentially firming) generation and storage, even greater competitive harm to the market for new generation and storage may flow from Brookfield's ability and incentives to discriminate in favour of its own new generator and storage plant connection applications over competing firms' applications.

6.254. By hindering or delaying transmission connection services to competing investors in new generation and storage services, Brookfield's conduct could raise rivals' costs or cause outright delays for rival investors. This may mean that Origin Energy Markets' rivals are effectively precluded from meeting the eligibility requirements of government policy mechanisms and/or private power purchase agreements. This could allow Origin Energy Markets to raise the price of its own new renewable and firming generation and storage services offered in response to government policy mechanisms and to private counterparties in Victoria.<sup>717</sup> If Origin Energy Markets offered higher prices into these mechanisms and those higher prices were nevertheless accepted due to AusNet's conduct, the result could be that taxpayers and/or private (including corporate) purchasers or underwriters of new generation and storage services would face significantly higher prices for the relevant energy output or services than they would otherwise. The ultimate outcome could be higher levels of taxpayer risk or debt and higher private counterparty costs.

6.255. Given that further rounds of Victorian Renewable Energy Target auctions or similar mechanisms are considered likely by Mr Harris,<sup>718</sup> and given the quantum and value of output that would likely need to be procured through such processes for Victoria to meet the State Government's renewable energy targets,<sup>719</sup> even a modest increase in the price of renewable or firming energy output and storage services

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<sup>717</sup> This includes power purchase agreements offered to corporate, energy retailer and other purchasers: Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [90] – [91]. It also includes contracts procured through future rounds of the Victorian Government's Victorian Renewable Energy Target auctions. Under Victorian Renewable Energy Target contracts, the strike prices under contracts-for-difference around which the Victorian Government and the successful project proponent are obliged to make difference payments are those bid by the successful proponent. See: Herbert Smith Freehills, [VRET 2: further auction to assist Victoria to meet its renewable energy target](#), 15 September 2021, accessed 27 September 2023.

<sup>718</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [80].

<sup>719</sup> For example, the modelling undertaken in support of Victoria's renewable energy targets forecasts renewable generation output rising from 11.2 TWh in 2022 to 19.8 TWh in 2030: Department of Environment, Land, Water and Planning, [Victorian electricity sector renewable energy transition, Energy Market Modelling Report](#), 18 October 2022, at p. 11 (Table 3). Further, total generation and storage capacity in Victoria could increase from ~20 GW today to ~32 GW (or from ~15 GW today to ~19 GW excluding distributed storage and solar PV): AEMO, [2022 Integrated System Plan \(ISP\)](#), 30 June 2022.



offered in response to government policy incentives and to private counterparties may result in substantial competitive harm.

- 6.256. For example, even if AusNet's conduct led to an increase in the cost of new wind and solar output developed in Victoria from 2025 onwards of just \$1/MWh (equivalent to an increase of approximately 2-2.5% for wind and 4% for solar), based on Victorian Government modelling, the cost to Victorian counterparties would rise by approximately \$4.1 million per annum by 2030 and \$26.6 million per annum by 2035.<sup>720</sup>

### **ACCC conclusion**

- 6.257. In respect of the vertical link between Brookfield's electricity transmission and generation interests, having considered the available evidence, the ACCC is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the markets for:
- the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
  - the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
  - the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria.

### **Electricity generation and distribution (embedded generators)**

- 6.258. As electricity networks change with the transition to renewables, it is expected that there will be greater use of embedded generation (including embedded battery storage), both for managing local demand peaks as well as for the general provision of energy. Therefore, competition in the provision of embedded generation will likely be more important going forward than it has been in the past.
- 6.259. The key potential competition concern arising from Brookfield's co-ownership of Victorian distribution networks and Origin Energy Markets' generation interests is whether AusNet would have the ability and incentive to foreclose Origin Energy Markets' rivals' embedded generators in AusNet's distribution area.
- 6.260. Foreclosure could manifest through AusNet raising the price or lowering the quality of access to AusNet's distribution services to Origin Energy Markets' future or prospective embedded generation rivals. In Victoria, distribution providers are subject to quality of service, outage notification and technical requirements under Schedule 5.1 of the National Electricity Rules<sup>721</sup> and the Electricity Distribution Code of Practice. Nevertheless, to the extent that this type of conduct occurs, it could have the effect of making Origin Energy Markets' embedded generation rivals less competitive in supplying power to the wholesale market (as embedded generators'

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<sup>720</sup> See: Department of Environment, Land, Water and Planning, [Victorian electricity sector renewable energy transition, Energy Market Modelling Report](#), 18 October 2022, at p. 11 (Table 3). Table 3 shows Victorian renewable generation output rising from 15.7 TWh per annum in 2025 to 19.8 TWh per annum in 2030 (an increase of 4.1 TWh per annum) and to 42.3 TWh per annum in 2035 (an increase of 26.6 TWh per annum)). Note that one million MWh is one TWh, so a \$1/MWh increase in the cost of renewable generation is equivalent to an increase of \$1 million/TWh.

<sup>721</sup> [National Electricity Rules](#) cl 5.2.3(b).



output is settled at their local regional spot price) and/or in obtaining connection to AusNet's distribution network.

- 6.261. The key means by which Brookfield may find it worthwhile for AusNet to operate its distribution network to benefit Origin Energy Markets' generation business are similar to those noted above in relation to AusNet's transmission network, namely:
- delaying new connections for Origin Energy Markets' embedded generator rivals in favour of streamlined connections for Origin Energy Markets' embedded generators. Such conduct could speed the development of Origin Energy Markets' new generators, while raising the costs of other proponents of new renewable generation and storage plants
  - making or influencing investment and maintenance decisions in favour of Origin Energy Markets' embedded generators and at the expense of other embedded generators. Such conduct could increase the profitability of Origin Energy Markets' generators and storage facilities while lowering the actual and expected profitability of other investors' generators and storage facilities. This could, in turn, deter or delay investment by other parties in renewable embedded generation and storage facilities in Victoria
  - strategic outages, at short notice, of lines that Origin Energy Markets' embedded generator rivals use, and the reduction of distribution service quality for competing embedded generators more generally. Such conduct, like delaying competing new connections, could increase the profitability of Origin Energy Markets' generators and storage facilities, while lowering the actual and expected profitability of other investors' generators and storage facilities. This could, in turn, deter or delay investment by other parties in renewable embedded generation and storage facilities in Victoria.
- 6.262. The ACCC considers that this type of conduct could potentially harm competition in any or all of:
- the market(s) for the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
  - the market for the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
  - the market for the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria, and/or
  - the supply of embedded generation network support services to Victorian or NEM distribution and transmission networks.

### ***Applicants' submissions***

- 6.263. The Applicants submit that AusNet does not have the ability or incentive to use its position as the owner of a Victorian electricity distribution network to foreclose Origin Energy Markets' embedded generation rivals, as:
- electricity distribution systems are regulated to ensure that owners cannot misuse any market power they may otherwise have without regulation
  - the electricity regulatory regime includes the AER's Distribution Ring-Fencing Guideline, which has the purpose of ensuring that where there is vertical integration between a distribution business and a contestable business, the

distribution business is operated in a way that does not adversely affect competition in the contestable market, and

- there is a high level of transparency over relevant aspects of AusNet’s operation of its distribution networks, and there is no possibility of subtle forms of discrimination not being detected.<sup>722</sup>

- 6.264. The Applicants further submit that there is regulation concerning pricing,<sup>723</sup> and connection and access.<sup>724</sup>
- 6.265. The Applicants note that augmentation and investment planning in relation to Victorian distribution networks undergoes a publicly transparent process, conducted jointly with other distribution networks and with AEMO and AER oversight.<sup>725</sup> This regulatory process applies to embedded generators connecting to AusNet’s distribution network.<sup>726</sup> With regard to maintenance and renewal work, the Applicants submit that AusNet must comply with performance and quality supply standards set out in the National Electricity Rules,<sup>727</sup> and that the maintenance of AusNet’s electricity distribution network is closely tied to the safety of the network, with any reduction in maintenance or quality of services potentially having significant safety repercussions.<sup>728</sup> Additionally, there is considerable transparency around planned and unplanned outages to AusNet’s distribution network, including through the reporting of planned outages to AEMO.<sup>729</sup> The Distribution Annual Planning Review reporting requires a distribution provider to analyse the expected future operation of its network over a period of a minimum of 5 years, including identifying limitations on its network, identifying whether any corrective action is required and developing a strategy for engaging with non-network providers.<sup>730</sup>
- 6.266. The Applicants further submit that the Distribution Ring-Fencing Guideline contains provisions that are designed to ensure there is no cross-subsidisation between a distribution business and a contestable business (such as embedded generation), and there is no misuse of confidential information or other discrimination, against a competing contestable business.<sup>731</sup>
- 6.267. Mr Houston’s report which is relied on by the Applicants provided supporting analysis to the Applicants’ submissions that AusNet does not have the ability to raise prices or reduce the quality of connection assets.<sup>732</sup>
- 6.268. Mr Houston disagrees that AusNet could use the connection process to frustrate or block the connection of a competing generator, noting that rule 5.3A of the National Electricity Rules sets out prescriptive regulation of the embedded generator connection process including explicit timeframes.<sup>733</sup> Mr Houston also submits that,

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<sup>722</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1363].

<sup>723</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1364] – [1372].

<sup>724</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1373] – [1376].

<sup>725</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1211].

<sup>726</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1377].

<sup>727</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1378].

<sup>728</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1379].

<sup>729</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1380].

<sup>730</sup> [National Electricity Rules](#) r 5.13.

<sup>731</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1381].

<sup>732</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [289], [309].

<sup>733</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [311]; Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023, at [76] – [93].

even assuming such conduct is possible (i.e. it is not discoverable or discernible), it would not confer a material advantage on an affiliate.<sup>734</sup>

- 6.269. With respect to quality of broader direct controls' services, Mr Houston's view is that:
- i. AusNet has some ability to prioritise expenditure on system assets because of the nature of the ex-ante regulatory framework and the discretion it provides to network businesses to prioritise network expenditure, but features of the regulatory framework act as constraints on this ability; and
  - ii. any strategy to foreclose generation rivals through reducing quality would not have a substantial effect on competition in the relevant market for wholesale electricity generation in Victoria because the constraints that I describe above prevent AusNet from conferring a material advantage on its affiliate.<sup>735</sup>
- 6.270. With respect to the provision of information to affiliates, Mr Houston's view is that AusNet does not have the ability to misuse information because of the requirements of ring-fencing guidelines, which are complemented by broader restrictions in the National Electricity Rules around the use of confidential information.<sup>736</sup>

### ***Interested parties' submissions and consultation***

- 6.271. The ACCC received limited in-depth engagement from interested parties with regard to embedded generation.
- 6.272. Alinta expresses concerns about the ability and incentive for distribution provider assets to discriminate against Origin Energy Markets' competitors when negotiating connections to the NEM.<sup>737</sup> Delayed network connections by a distribution provider (to favour its own related parties) can affect the viability of competitors' projects.<sup>738</sup>
- 6.273. Alinta also states concerns about discrimination by distribution provider assets in network operation decisions, such as maintenance and load-shedding.<sup>739</sup> Alinta submits that a vertically integrated business may find ways to discriminate that cannot be picked up by a regulator.<sup>740</sup>
- 6.274. Nevertheless, Alinta indicates that it does not object to the Proposed Acquisition on the basis that appropriate ring-fencing measures are used between the distribution and generation businesses owned by the future Brookfield entity/ies, and is of the view that this can be achieved effectively through existing measures available to the ACCC.<sup>741</sup>
- 6.275. The Clean Energy Council submits that some stakeholders raised concerns about perceptions of weakened guidelines and requirements in the existing framework for

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<sup>734</sup> Further expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 25 August 2023, at [76] – [93].

<sup>735</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [309].

<sup>736</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [343].

<sup>737</sup> Alinta Energy record of oral submission, 30 June 2023, at [3].

<sup>738</sup> Alinta Energy record of oral submission, 30 June 2023, at [3].

<sup>739</sup> Alinta Energy record of oral submission, 30 June 2023, at [4].

<sup>740</sup> Alinta Energy record of oral submission, 30 June 2023, at [7].

<sup>741</sup> Alinta Energy record of oral submission, 30 June 2023, at [18].

distribution networks.<sup>742</sup> Some stakeholders believe the current rules favour distribution businesses over competitive market participants.<sup>743</sup>

- 6.276. EnergyAustralia notes the importance of ensuring that ring-fencing between generation and distribution is effective.<sup>744</sup>
- 6.277. ACEN is not concerned and considers that any risk associated with embedded generation is no more substantial than the risk arising from the vertical integration of the electricity transmission and distribution networks.<sup>745</sup>
- 6.278. Engie submits that the extent of the efficacy of a vertically integrated distribution network business being required to comply with ring-fencing obligations is dependent on:
- whether the business has sufficient controls to maintain compliance with its ring-fencing obligations, and
  - the AER's ability to identify and act in response to non-compliance.<sup>746</sup>
- 6.279. The Grattan Institute states its main concern is information sharing between the existing AusNet business and Origin Energy Markets' retail business as the boundaries between regulated and unregulated businesses are becoming less clear.<sup>747</sup> The Grattan Institute provides the example of battery storage, as it can be used by both a distribution network and a generation asset. If a business owns a distribution network, generation asset and is a retailer, it could use knowledge from the businesses to understand where to best place batteries, and use this knowledge against one of its competitors. The Grattan Institute submits ring-fencing arrangements may be able to address this risk in a limited way.<sup>748</sup>
- 6.280. An anonymous interested party said that it would be possible for AusNet or any distribution provider to discriminate against a particular generator.<sup>749</sup>

### **ACCC view**

- 6.281. The ACCC considers that for similar reasons to those set out above in the ACCC's views on increased vertical integration between electricity generation and transmission, AusNet would have the ability to foreclose Origin Energy Markets' rival embedded generators in its distribution area. While reporting to AEMO, the National Electricity Rules and the Distribution Ring-Fencing Guideline provide some protection against discriminatory conduct, the ACCC considers that AusNet may find ways to discriminate that cannot be easily discovered or discerned.
- 6.282. This is supported by Mr Hyslop's view that, similar to transmission, it may be feasible for a gentailer integrated with distribution to misuse information in a way that is adverse to rival generators.<sup>750</sup>

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<sup>742</sup> Clean Energy Council record of oral submission, 25 July 2023, at [17].

<sup>743</sup> Clean Energy Council record of oral submission, 25 July 2023, at [17].

<sup>744</sup> EnergyAustralia record of oral submission, 4 July 2023, at [5].

<sup>745</sup> ACEN Australia record of oral submission, 4 July 2023, at [23].

<sup>746</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 3.

<sup>747</sup> Grattan Institute record of oral submission, 3 July 2023, at [2].

<sup>748</sup> Grattan Institute record of oral submission, 3 July 2023, at [2].

<sup>749</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [18].

<sup>750</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [51].

- 6.283. The ACCC notes that while the above conduct may reduce competition by raising the costs of rivals and deterring entry,
- the relatively small scale of dispatchable embedded generation in comparison to the overall level of generation in Victoria and across the NEM, and
  - the fact that AusNet owns and operates only one of five electricity distributors in Victoria (with a customer base of ~802,000 customers, out of approximately 3 million<sup>751</sup> NEM distribution customers in Victoria),<sup>752</sup>

means there is significantly less scope for AusNet's distribution business to harm competition compared to the conduct AusNet may engage in at the transmission network level. First, the 2 considerations noted above mean that AusNet's conduct at the distribution level may have a smaller influence on wholesale spot and contract (and indirectly, retail) electricity prices across the state or the NEM more broadly than it could at the transmission level. Similarly, the effect of any foreclosing conduct by AusNet on the supply of new renewable or firming generation and storage in Victoria in response to government policy incentives or private demand is likely to be less at the distribution level than it is at the transmission level. Finally, embedded generation providers wishing to offer network support services to distribution networks may be able to supply such services to the remaining 4 Victorian distribution networks and to distribution networks in other states.

- 6.284. The ACCC also notes that AusNet's commercial energy business, Mondo, is already a developer of embedded generation assets<sup>753</sup> and therefore the potential for competitive harm arising from AusNet's distribution network preferencing an affiliated developer and operator of embedded generation already arises, at least to some extent, even in the future without the Proposed Acquisition.
- 6.285. Therefore, although the ACCC considers that AusNet will have some ability to foreclose competing embedded generation developers, the factors above would tend to lessen AusNet's incentive to do so compared to the more pronounced incentive its transmission business faces to engage in similar conduct at the transmission level. Further, the ACCC considers that the likely effects of such conduct by AusNet distribution on competition – while not insignificant in isolation – would also tend to be much less than similar conduct engaged in at the transmission level. In particular, any effects of AusNet's distribution-level conduct on competition in a NEM-wide wholesale market (either for physical supply or hedging instruments) would be very modest.

### **ACCC conclusion**

- 6.286. In respect of the vertical link between Brookfield's electricity distribution and embedded generation interests, having considered the information and available evidence, the ACCC is **satisfied** in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the markets for:
- the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly

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<sup>751</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 83 (Figure 4.3).

<sup>752</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [514].

<sup>753</sup> See: Mondo, [Electricity projects](#), accessed 31 August 2023.

- the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
- the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria
- the supply of embedded generation network support services to Victorian or NEM distribution and transmission networks.

## **Electricity distribution and retail**

- 6.287. As noted above, AusNet owns one of the five licensed electricity distribution networks in Victoria. AusNet's retail customer footprint is about 25% of all customers connected to a Victorian distribution network.<sup>754</sup>
- 6.288. Retailers who supply, or win contracts to supply, their electricity customers in AusNet's distribution network area must acquire services from AusNet. The key potential competition concern is whether Brookfield's co-ownership of AusNet's electricity distribution business and Origin Energy Markets' electricity retail business will give AusNet the ability and incentive to raise the cost of these services, or otherwise adversely impact distribution services, to Origin Energy Markets' electricity retail rivals in Victoria.
- 6.289. To the extent that AusNet successfully engages in such conduct, Origin Energy Markets' rivals would be hampered in their ability to compete effectively in markets for the supply of electricity to retail customers. This is due to, for example, their inferior service quality and/or the pass-through to customers of increased costs to serve which may result in less competitive retail electricity rates. This would reflect a loss of competition in the retail supply of electricity to Victorian household and business customers connected to AusNet's distribution network or in Victoria more broadly.

## **Applicants' submissions**

### *The Application*

- 6.290. The Applicants submit that AusNet does not have the ability or incentive to use its position as an owner of one of Victoria's electricity distribution networks to foreclose Origin Energy Markets' retail rivals for reasons including that:
- a significant regulatory regime applies to AusNet's electricity distribution system to ensure that it cannot misuse any market power
  - AusNet is subject to the AER's electricity Distribution Ring-Fencing Guideline and its purpose of ensuring that the distribution business is operated in a way that does not adversely affect competition in the contestable retail market
  - the geographic dispersion of retail customers across a distribution network makes many foreclosure strategies impossible
  - there is a high level of transparency over AusNet's operation of its distribution network.<sup>755</sup>

<sup>754</sup> AER, [State of the Energy Market 2023](#), 5 October 2023, at p. 83 (Figure 4.3).

<sup>755</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1143].

- 6.291. Additionally, the Applicants observe that AusNet’s distribution area consists of several retailers’ customers interspersed across the network, with EnergyAustralia having the most customers. AusNet could not therefore benefit only Origin Energy Markets’ retail customers by selectively augmenting or investing in electricity distribution capabilities in a particular part of its distribution network.<sup>756</sup>
- 6.292. In more detail, the Applicants further submit that AusNet does not have the ability or incentive to discriminate against Origin Energy Markets’ retail rivals in relation to:
- **pricing for direct control services**, as principal services provided by AusNet in Victoria are direct control services and therefore subject to regulation by the AER through 5 yearly price determinations, and annual pricing proposals are additionally reviewed by the AER<sup>757</sup>
  - **pricing for negotiated distribution services**, as AusNet will not offer any negotiated distribution services during the 2021-2026 regulatory period. If the AER classifies any of AusNet’s services as negotiated distribution services in the future, AusNet would be required to negotiate in accordance with a framework approved by the AER as part of its 5 yearly distribution determination (including a dispute resolution process)<sup>758</sup>
  - **connection and access**, as AusNet has no ability to discriminate in favour of Origin Energy Markets’ retail electricity business as there is a regulatory framework that regulates connection and access to electricity distribution networks.<sup>759</sup> This includes requirements to make offers during specific timeframes, regardless of the customers’ electricity retailer.<sup>760</sup> Additionally, there is no way to ensure improved connection services would benefit Origin Energy Markets, as retail electricity customers can switch retailers at any time<sup>761</sup>
  - **augmentation and investment**, as it is subject to the regulatory framework, which includes a publicly transparent augmentation and investment planning process conducted jointly with other Victorian distribution networks and with AEMO and AER oversight.<sup>762</sup> Additionally, there is a risk that reducing maintenance or quality of services in a particular part of the distribution network would create safety hazards and reputational, legal and compliance risks for AusNet that would outweigh any potential incentive<sup>763</sup>
  - **renewal, maintenance and outages**, as a failure to renew or maintain any part of AusNet’s distribution networks would equally harm Origin Energy Markets’ customers and Origin Energy Markets’ retail rivals’ customers.<sup>764</sup> Similarly to augmentation and investment, any failure to maintain or renew the distribution network would be a breach of electricity safety laws, licence and National Electricity Rules requirements.<sup>765</sup> Additionally, distribution maintenance and renewal activities are subject to a high degree of transparency and regulatory oversight, and the ring-fencing guideline includes a non-discrimination

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<sup>756</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1209].

<sup>757</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1147] – [1155].

<sup>758</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1156].

<sup>759</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1186] – [1207].

<sup>760</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1192].

<sup>761</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1192].

<sup>762</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1210] – [1211].

<sup>763</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1212].

<sup>764</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1216].

<sup>765</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1217] – [1223].

requirement.<sup>766</sup> In relation to manual load shedding, this is controlled by AEMO rather than distribution networks themselves<sup>767</sup>

- **cross-subsidising or discriminating**, as the Distribution Ring-Fencing Guideline requires legal separation and internal accounting procedures to be in place between distribution businesses and contestable businesses. In combination with the AER's approved cost allocation methodology, this ensures that a distribution business cannot cross-subsidise a contestable business.<sup>768</sup>

### *Mr Houston's report*

- 6.293. Relatedly, Mr Houston's report which is relied on by the Applicants presents analysis of AusNet's ability to foreclose rival retailers through:
- raising prices for direct control services or negotiated distribution services (these types of services are explained in Section 5)
  - reducing the quality of distribution services
  - provision of information to affiliates.
- 6.294. Mr Houston's report also assesses the potential effect of any such conduct, where relevant.
- 6.295. With respect to the prices for direct control services, Mr Houston's view is that AusNet has no ability to foreclose rival retailers by increasing prices because of several factors related to regulated processes, regulatory oversight and transparency.<sup>769</sup>
- 6.296. With respect to prices for negotiated distribution services, and while acknowledging that AusNet does not provide these services currently, Mr Houston's view is that regulation would constrain AusNet's ability to foreclose rival retailers by increasing prices, and that any such strategy would not have a substantial effect on competition because customers for these services are likely to be 'large and sophisticated' and capable of using dispute resolution procedures.<sup>770</sup>
- 6.297. With respect to the quality of distribution services, Mr Houston's view is that:
- regulation constrains AusNet's ability to prioritise expenditure on system assets in a way that benefits customers of an affiliate
  - AusNet has no ability to foreclose rival retailers by reducing the quality of 'alternative control services' (a subset of direct control services that can be attributed to a particular customer, such as basic connections, metering and public lighting) because of prescriptive regulations, ring-fencing requirements not to discriminate, and difficulty in retaining the advantages of discrimination
  - AusNet has no ability to foreclose rival retailers by reducing the quality of negotiated distribution services because any such services would be subject to a negotiating framework (again, noting that AusNet does not provide these services currently).<sup>771</sup>

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<sup>766</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1224] – [1237].

<sup>767</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1238] – [1242].

<sup>768</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1243] – [1265].

<sup>769</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [370(b)].

<sup>770</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [370(d)].

<sup>771</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [436].



- 6.298. With respect to the provision of information to affiliates, Mr Houston's view is that AusNet does not have the ability to misuse information because of the requirements of the ring-fencing guidelines, which are complemented by broader restrictions in the National Electricity Rules around the use of confidential information.<sup>772</sup>

### ***Interested parties' submissions and consultation***

- 6.299. Engie notes that the AER's approvals of the distribution business' revenue and pricing proposals protect against discriminatory pricing practices.<sup>773</sup>
- 6.300. Engie expects an integrated network business to have incentives to provide its generation and retail arms with advantages due to their shared ownership (for example, be more open to waiving fees, actioning service orders and generally being more responsive than to retail competitors).<sup>774</sup> It adds that the extent of any discrimination against its competitors (by way of undue cost or service disadvantages, which could substantially distort the market as network costs are significant) depends on the sufficiency of the business' controls to maintain compliance with its ring-fencing obligations and the AER's ability to identify non-compliance and take enforcement action.<sup>775</sup>
- 6.301. The Clean Energy Council notes that AusNet's ability to discriminate against an electricity retailer in Victoria depends on the effectiveness of the Distribution Ring-Fencing Guideline in its current and future forms.<sup>776</sup> Similarly, EnergyAustralia notes as a main competition concern the importance of ensuring that ring-fencing between distribution and retail is effective.<sup>777</sup>

### ***ACCC view***

- 6.302. The ACCC considers that AusNet has only a limited ability to favour Origin Energy Markets and raise the cost of service, or otherwise adversely impact electricity distribution services, to Origin Energy Markets' retail rivals in the AusNet distribution area.
- 6.303. There are limited means by which AusNet could operate its distribution network to favour Origin Energy Markets' retail electricity business over rivals. Mr Hyslop and Mr Houston broadly agree that it is not feasible for a distribution network provider to preference an energy retailer on price or quality of access.<sup>778</sup>
- 6.304. The ACCC accepts that the electricity retail customers of Origin and its rivals, including EnergyAustralia, are dispersed throughout AusNet's electricity distribution network. Accordingly, the ACCC considers that it may be impracticable for AusNet to benefit Origin Energy Markets' electricity retail business at a general level by selectively upgrading, degrading, maintaining, or renewing specific parts of its distribution network.

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<sup>772</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [471].

<sup>773</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: [Redacted – Confidential], at p. 3.

<sup>774</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: [Redacted – Confidential], at p. 4.

<sup>775</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: [Redacted – Confidential], at p. 3.

<sup>776</sup> Clean Energy Council record of oral submission, 25 July 2023, at [14].

<sup>777</sup> EnergyAustralia record of oral submission, 25 July 2023, at [5].

<sup>778</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [57] – [59]; Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [356].

- 6.305. Further, there is also a limited ability for AusNet to engage in discrimination in relation to the pricing of direct control services (and negotiated distribution services, if it offers these in the future), as these are subject to a number of regulations and oversight, including through the AER's 5 yearly distribution determinations and its tariff controls.
- 6.306. On the other hand, the ACCC considers that there is some (albeit limited) scope for a Victorian distribution provider to both share information with and offer preferential network services to an affiliated retailer in such a way which would materially disadvantage rival retailers on its network and be capable of resulting in competitive harm.<sup>779</sup> For example, it may be possible that some information sharing could be advantageous to Origin Energy Markets, such as by assisting it to identify customers in the AusNet distribution area who may be particularly valuable due to, say, their ability and willingness to provide demand response. While Origin Energy Markets would then need to successfully win or retain such customers, AusNet may be able to assist by prioritising or offering such customers who choose Origin Energy Markets a more streamlined path to obtaining any needed network-related works or value-added distribution services compared to customers of rival retailers who would require similar services.
- 6.307. In the medium to longer term, the ACCC considers that the potential risks to retail competition from the Proposed Acquisition are likely to increase as the market for electricity retailing becomes more complicated and interlinked with distribution. The ACCC considers it likely that more consumers will shift to more complicated energy offers over time, which could include elements of retailing, storage, roof-top-solar, electric vehicle charging and the ability for the energy provider to call upon household and vehicle storage capacity at peak times. As the market shifts towards this type of model for more households, the role of the distribution network will likely become more central, as the network is likely to be needed to facilitate such 'household energy solutions'. Therefore, there may be an increased ability of the distributor to favour an affiliated retailer in the provision of more complicated energy solutions for households. However, the ACCC considers that such shifts are unlikely to occur for most customers in the next 5 to 10 years, and a strategy of vertical foreclosure of rivals that are competing with Origin Energy Markets in the provision of complicated household energy solutions would be a slow and incremental process. Given it is likely BGTF will exit its investment in Origin Energy Markets within the next 12 years,<sup>780</sup> the ACCC considers that a substantial effect on energy retailing competition is not likely. Further, such conduct arising from the Proposed Acquisition would only take place in one of five distribution areas in Victoria.
- 6.308. On balance, the ACCC considers that the Proposed Acquisition gives rise to the possibility of a lessening of competition in the supply of electricity retailing to customers in AusNet's distribution area. That said, the potential for such conduct in the AusNet distribution area alone to have a substantial effect on competition between retailers across Victoria as a whole would be much more modest, noting

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<sup>779</sup> Mr Hyslop identifies a specific example is where an affiliated retailer receives early notice of lowering distribution tariffs from the affiliated distribution provider, which allows it to undercut its competitor offerings, which are set based on published higher tariffs but notes that there would be limited ability for the affiliated retailer to use such information: Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [60] – [61].

<sup>780</sup> The Applicants state that BGTF, as a closed fund with an expected operating term of 12 years, will exit its investment in Origin Energy Market prior to the end of the fund's term: Application for merger authorisation (MA1000024), 5 June 2023, at p. 8.

that only about 25% of Victorian customers are connected to the AusNet distribution network.

### **ACCC conclusion**

6.309. In relation to the markets for the retail supply of electricity to Victorian household and business customers connected to AusNet's distribution network in Victoria, the ACCC has reached different conclusions on whether it is satisfied that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition depending on the geographic scope of the area being considered as the relevant markets. In respect of the vertical link between Brookfield's electricity distribution and retail interests in electricity distribution, having considered the available evidence, the ACCC:

- is satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the market for the retail supply of electricity to Victorian household and business customers in *Victoria more broadly*, and
- has not reached the requisite affirmative belief and accordingly is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition<sup>781</sup> in the market for the retail supply of electricity to Victorian household and business customers connected to AusNet's distribution network.

### **Smart meters and behind the meter services and retailing**

6.310. The key potential competition concerns considered by the ACCC in respect of smart meters and behind the meter services and retailing are whether:

- a) Origin Energy Markets could leverage its positions in various state retail electricity markets to benefit Intellihub or foreclose Intellihub's competitors by solely acquiring its smart meters from Intellihub, or otherwise discriminate against Intellihub's smart meter competitors
- a) Intellihub could leverage its position in the smart metering market to benefit Origin Energy Markets or foreclose Origin Energy Markets' competitors by refusing to supply them smart meters, or otherwise discriminate against Origin Energy Markets' retail competitors.

6.311. The potential foreclosure concerns are relevant across the NEM. The roll-out of smart meters across the NEM consumer market (excluding Victoria) is estimated to be approximately 30%.<sup>782</sup> The roll-out is picking up, and the AEMC has recommended universal uptake by 2030 in the NEM.<sup>783</sup> Intellihub estimate that there are approximately 5.9 million smart meters remaining to be deployed across the NEM (excluding Victoria) in the next 7 years, with approximately 50% (3 million) of these currently uncontracted and contestable.<sup>784</sup>

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<sup>781</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [99].

<sup>782</sup> AEMC, [Review of the regulatory framework for metering services – Draft Report](#), 3 November 2022, at [19]. Victoria has a 99% smart meter penetration rate: Statement of Jonathan Hammond (Intellihub), 5 June 2023, at [24].

<sup>783</sup> AEMC, [Review of the regulatory framework for metering services – Final Report](#), 30 August 2023, at [19].

<sup>784</sup> Statement of Jonathan Hammond (Intellihub), 5 June 2023, at [60].

## **Applicants' submissions**

6.312. The Applicants submit that Intellihub does not have the ability or incentive to use its position in the Australian smart meter market to discriminate against Origin Energy Markets' retail competitors,<sup>785</sup> and lessen competition in the electricity retail market, as:

- Intellihub does not have market power<sup>786</sup>
- there is a high level of competition in the supply of smart meters and related services.<sup>787</sup> The Applicants submit that Intellihub's 3 largest competitors are Vector Metering, Yurika and PLUS ES, and that all 3 have reached sufficient scale to compete effectively in Australia<sup>788</sup>
- it would not make financial sense, as Origin Energy Markets' combined mass market and embedded network customers only make up **[Redacted – Confidential]** *[public text: 40-50%]* of Intellihub's Australian revenue,<sup>789</sup> and there are still approximately 3 million smart meters that remain uncontracted and contestable.<sup>790</sup>

6.313. The Applicants further submit that Origin Energy Markets does not have the ability or incentive to use its position in the electricity retail market to foreclose against Intellihub's smart meter competitors and lessen competition in the smart meter market, as:<sup>791</sup>

- Origin Energy Markets already has a **[Redacted – Confidential]** agreement with Intellihub to purchase **[Redacted – Confidential]** Origin Energy Markets' smart meter requirements<sup>792</sup>
- Origin Energy Markets does not have market power in relation to the acquisition of smart meters, as it only accounts for approximately 24% of customers in the NEM,<sup>793</sup> and
- it would not make commercial or financial sense for Origin Energy Markets to award its remaining **[Redacted – Confidential]** unallocated smart meters to a supplier that was not offering it the best terms.<sup>794</sup>

6.314. The Applicants submit that energy retailers (including Origin Energy Markets) cannot access smart meter data due to obligations imposed by the National Electricity Rules upon AEMO to limit access to the data to an exhaustive list of authorised persons.<sup>795</sup> Further, the Applicants note relevant contracts include provisions that prevent Intellihub from providing a retailer's commercially sensitive

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<sup>785</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1506].

<sup>786</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1480].

<sup>787</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1482].

<sup>788</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [6.17] – [6.18].

<sup>789</sup> **[Redacted – Confidential]**.

<sup>790</sup> Statement of Jonathan Hammond (Intellihub), 5 June 2023, at [60]; Application for merger authorisation (MA1000024), 5 June 2023, at [1497].

<sup>791</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1516].

<sup>792</sup> **[Redacted – Confidential]**.

<sup>793</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1511].

<sup>794</sup> **[Redacted – Confidential]**.

<sup>795</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [6.7].

data to another retailer.<sup>796</sup> The Applicants also submit that there are strict internal protocols in place within Intellihub, that limit the Intellihub personnel that can access the smart meter data.<sup>797</sup> Finally, in any event, the Applicants submit Intellihub only retains very limited information post-installation.<sup>798</sup>

- 6.315. Origin Energy Markets states that **[Redacted – Confidential]**.<sup>799</sup> **[Redacted – Confidential]**.<sup>800</sup>
- 6.316. The Applicants also state that Intellihub and Origin Energy Markets are held in different Brookfield funds with separate management teams and separate Boards.<sup>801</sup>
- 6.317. Mr Houston's report which is relied on by the Applicants examines the potential foreclosure of:
- Origin Energy Markets' rival electricity retailers, by Intellihub increasing the price (or reducing the quality) of metering services provided to those retailers, and
  - Intellihub's rival metering service providers, by Origin Energy Markets purchasing fewer metering services from those competitors.<sup>802</sup>
- 6.318. Mr Houston's view is that it is unlikely that Intellihub would be able to foreclose Origin Energy Markets' rival electricity retailers by raising the price of metering services (or reducing their quality) because:

'a. there are three other large providers of metering services to the mass market that electricity retailers are able to use if Intellihub increased its prices, in addition to a number of smaller providers;

b. competition for mass market metering services occurs through periodic tenders for large contracts organised by electricity retailers that intensifies the degree of competition for each contract and implies that Intellihub risks losing a substantial amount of revenue if it offers a higher price than it otherwise would;

c. a large electricity retailer is able to sponsor entry to provide mass market metering services if it is dissatisfied with the metering services available;

d. demand for mass market metering services is likely to grow in the next five to ten years, enhancing competition between providers of that service, and the likelihood of entry;

e. electricity retailers are unlikely to be substantially affected by Intellihub increasing its prices for mass market metering services because the cost of metering is a relatively small part of the cost of providing retail electricity services to small customers; and

f. I understand that Intellihub's operating model is agnostic to the identity of the customer, and so Intellihub is not able provide an advantage to Origin over other retailers.<sup>803</sup>

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<sup>796</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1489].

<sup>797</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [6.10].

<sup>798</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1489].

<sup>799</sup> **[Redacted – Confidential]**.

<sup>800</sup> **[Redacted – Confidential]**.

<sup>801</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1514].

<sup>802</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [546].

<sup>803</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [547] – [548].

6.319. It is also Mr Houston's view that Origin Energy Markets would not be able to foreclose Intellihub's rival metering service providers by purchasing fewer services from those competitors because, among other reasons, there are already a number of other large metering providers in the market and these firms do not need Origin Energy Markets to achieve a significant market share.<sup>804</sup>

### ***Interested parties' submissions and consultation***

- 6.320. The ACCC received few submissions that referred to smart meter retailing or behind the meter services.
- 6.321. EnergyAustralia submits that without ring-fencing, competition concerns may arise in behind the meter services and retailing. EnergyAustralia submits that if there was a cross pollination of data between Origin Energy Markets, AusNet and Intellihub, Origin Energy Markets could offer customers in the AusNet area better behind the meter solutions due to the smart meter data from distributors that it would have access to.<sup>805</sup>
- 6.322. Engie submits that the market for behind the meter and smart meter services is currently competitive and is unlikely to be significantly impacted by Intellihub's shared ownership with a generation and retail business.<sup>806</sup>
- 6.323. Engie observes that metering costs are not currently a significant proportion of the total cost of supplying retail energy services, such that if Intellihub were to financially discriminate against Origin Energy Markets' retail competitors by charging them higher prices, that conduct is unlikely to significantly distort the market.<sup>807</sup>
- 6.324. **[Redacted – Confidential].**<sup>808</sup> **[Redacted – Confidential].**<sup>809</sup>
- 6.325. Other competitors such as Alinta and ACEN state that they do not have concerns in relation to smart meters.<sup>810</sup> Alinta considers that there are many different smart meter providers, including some with affiliated generation businesses.<sup>811</sup>

### ***ACCC view***

- 6.326. The ACCC considers that the Proposed Acquisition may result in Origin Energy Markets selecting Intellihub to deploy all of its remaining smart meter requirements, both new installations and replacements, as existing smart meters reach their end of life. This could give Intellihub a greater market share of smart meters in Australia.
- 6.327. Although there are a large number of accredited smart meter providers in the market,<sup>812</sup> the ACCC understands that there are only 4 smart meter providers with a greater than 5% share of the mass market in the NEM (excluding Victoria), and 3

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<sup>804</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [549].

<sup>805</sup> EnergyAustralia record of oral submission, 4 July 2023, at [9].

<sup>806</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 4.

<sup>807</sup> Engie s90(6)(c) Response to Notice issued 19 July 2023: **[Redacted – Confidential]**, at p. 5.

<sup>808</sup> **[Redacted – Confidential]**.

<sup>809</sup> **[Redacted – Confidential]**.

<sup>810</sup> Alinta Energy record of oral submission, 30 June 2023, at [9]; ACEN Australia record of oral submission, 4 July 2023, at [21].

<sup>811</sup> Alinta Energy record of oral submission, 30 June 2023, at [9].

<sup>812</sup> AEMO, [National Electricity Market Accredited Metering Providers](#), 1 August 2023.

smart meter providers with a greater than 10% share of embedded network customers in the NEM (including Victoria) (with a cumulative group of 'other' and 'customer-managed' suppliers also having a greater than 10% share).<sup>813</sup> The ACCC considers that barriers to entering and especially to expanding in smart meter markets are not insignificant. In particular, customer stickiness combined with the need to build a local track record to establish a strong brand reputation and attract skilled technicians to deploy meters are likely to constitute meaningful barriers to expansion. In some cases, new entrant or small suppliers may struggle to achieve sufficient scale to compete effectively. **[Redacted – Confidential]**.<sup>814</sup>

- 6.328. At the margin, to the extent that Origin Energy Markets favouring Intellihub in the deployment of all of its remaining smart meter requirements reduces the ability of other providers to capture scale efficiencies and thereby raises rivals' costs, the Proposed Acquisition could reduce innovation among smart meter providers and lead to higher prices for smart metering services.
- 6.329. At the same time, the ACCC notes that Origin has approximately 27% of customers in the residential retail electricity market. While a significant portion of the market is not held by Origin, it is the largest customer base held by a single retailer. AGL and EnergyAustralia have approximately 22% and approximately 15% of retail residential customers, respectively, and the remaining 36% of customers are with primary regional retailers or Tier 2 retailers.<sup>815</sup>
- 6.330. In this context, the ACCC notes:
- Mr Hyslop's view that Origin not holding a dominant position in any retail market segment is one factor that mitigates the risks of any discrimination by Origin Energy Markets in favour of Intellihub<sup>816</sup>
  - Mr Houston's view that rival metering providers to Intellihub do not need Origin Energy Markets as a customer to achieve a significant market share.<sup>817</sup>
- 6.331. At the same time, the ACCC is concerned that the roll-out of smart meters in the NEM outside Victoria is at a relatively early stage and it represents an emerging market. There is a risk that anti-competitive discrimination by Origin Energy Markets, as the largest electricity retailer in the NEM, at such an early stage could hinder the ability of smaller suppliers of smart metering and related services to achieve an efficient scale and compete effectively.
- 6.332. With respect to electricity retailing, the ACCC considers, supported by the views of Mr Hyslop and Mr Houston, that the risk of competitive harm to electricity retail markets arising from Intellihub foreclosing Origin Energy Markets' competitors is mitigated by several factors, such as:
- metering services for new customers being contestable, meaning there are alternative metering providers to Intellihub

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<sup>813</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [712] (Figure 80), [713] (Figure 81).

<sup>814</sup> **[Redacted – Confidential]**.

<sup>815</sup> AER, [State of the Energy Market 2022](#), 29 September 2022, at p. 203 (Figure 6.17). For underlying data, see: AER, [State of the energy market 2022 data](#), accessed 4 October 2023.

<sup>816</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [65]. Origin had less than 26% share of retail market load in 2021-2022. AER, [State of the Energy Market 2022](#), 29 September 2022, at p. 205 (Figure 6.19). For underlying data, see: AER, [State of the energy market 2022 data](#), accessed 4 October 2023.

<sup>817</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [549(a)].

- metering services being a relatively small component of the cost of retailing, meaning that any foreclosure is likely to have a limited effect on retail prices and therefore limited influence a customer's choice of retailer, and
  - possibilities for other large retailers to sponsor the entry of metering provider services where it is considered there is insufficient competition.<sup>818</sup>
- 6.333. The ACCC further considers that the stickiness of electricity retail customers is also a factor which would inhibit Origin Energy Markets and Intellihub's ability to induce customers away from rival electricity retailers and foreclose competitors.
- 6.334. The ACCC acknowledges that there is a potential risk of Intellihub sharing information relating to non-affiliate retailers with Origin Energy Markets, but notes the various mitigants outlined in paragraph 6.332 above.<sup>819</sup>

### **ACCC conclusion**

- 6.335. In respect of the vertical link between Brookfield's electricity retail and smart meter and behind the meter interests, having considered the available evidence, the ACCC:
- is satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the market for the retail supply of electricity to household and business customers in each of the NEM states separately or the NEM more broadly
  - has not reached the requisite affirmative belief and accordingly is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition<sup>820</sup> in the market for the supply of smart meters and behind the meter services to electricity retailers in each of the NEM states separately or the NEM more broadly.

### **Gas distribution and retail**

- 6.336. The ACCC has considered whether the Proposed Acquisition would give rise to competition issues because of integration between Origin Integrated Gas' retailing interests and AusNet's gas distribution interests and the resulting vertical integration of gas retailing and gas distribution in Victoria.
- 6.337. AusNet owns one of three Victorian gas distribution networks. The AusNet gas distribution network distributes gas to approximately 792,000 residential, industrial and commercial customers in Melbourne, Geelong and parts of Western Victoria.<sup>821</sup>
- 6.338. Origin, through its gas retailing business, has customers connected to AusNet's gas distribution network. Data published by the AEMC in 2020 identified Origin as the third largest gas retailer in Victoria with 16% market share.<sup>822</sup>

<sup>818</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [65]; Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [547].

<sup>819</sup> [Redacted – Confidential]; [Redacted – Confidential]; [Redacted – Confidential]; [Redacted – Confidential]; Transcript of Examination under section 155(1)(c), [Redacted – Confidential], 8 August 2023, at [T95 L.3] – [T98 L.26].

<sup>820</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [99].

<sup>821</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [516].

<sup>822</sup> AEMC, [Victoria Retail Market Structure](#), accessed 29 September 2023.



- 6.339. The key potential competition concern arising from Brookfield’s co-ownership of Victorian gas distribution networks provider AusNet, and Origin Integrated Gas’ retail business in Victoria is whether AusNet would have the ability and incentive to foreclose, which could manifest through:
- lowering the quality of distribution services provided to retail customers serviced by Origin Integrated Gas’ retailer competitors
  - raising the price of network connections and use for Origin Integrated Gas’ retailer competitors to squeeze retail margins
  - providing Origin Integrated Gas with access to commercially sensitive information in a manner that could advantage Origin Integrated Gas over its retail rivals.<sup>823</sup>
- 6.340. The ACCC considers that this could potentially harm competition in the retail supply of gas to household and business customers connected to AusNet’s distribution network (in Victoria) or across Victoria more broadly.

### ***Applicants’ submissions***

- 6.341. The Applicants submit that AusNet does not have the ability or incentive to use its position as a gas distributor to foreclose Origin Integrated Gas’ retail rivals as:
- the gas regulatory regime, in particular the application of full regulation by the AER, regulation of connection services under the National Gas Rules and gas ring-fencing guidelines
  - retail gas customers are dispersed across a gas distribution network making many theoretical foreclosure strategies impossible
  - there is a high degree of transparency over AusNet’s gas distribution network generally.<sup>824</sup>
- 6.342. Mr Houston’s report which is relied on by the Applicants presents analysis of AusNet’s ability to foreclose rival gas retailers through:
- raising prices for ‘reference services’ (the prices of which are subject to a higher degree of regulatory control<sup>825</sup>) and ‘non-reference services’, and
  - reducing the quality of gas distribution services.
- 6.343. With respect to prices for reference services, Mr Houston’s view is that AusNet does not have the ability to raise prices because of the prescriptive nature of the relevant regulation.<sup>826</sup>
- 6.344. With respect to prices for non-reference services, Mr Houston’s view is that AusNet’s ability to raise prices is constrained because of potential of substitution with reference services and because customers have recourse to dispute resolution processes.<sup>827</sup>

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<sup>823</sup> Paul Hyslop (ACIL Allen), Report to ACCC: Response to questions, 10 August 2023, at [66].

<sup>824</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1310].

<sup>825</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [122].

<sup>826</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [496(a)].

<sup>827</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [496(b)].

- 6.345. With respect to the quality of gas distribution services, Mr Houston's view is that AusNet does not have the ability to foreclose rival gas retailers because:
- a. reducing the quality of gas distribution services may have implications for the quality and safety of AusNet's services and AusNet faces strong scrutiny on these aspects of its services;
  - b. targeting the effect of service quality to advantage AusNet's gas retail affiliates and disadvantage AusNet's gas retail competitors may often be difficult because gas pipeline assets serve many customers; and
  - c. retaining any advantages conferred upon a gas retail affiliate by service quality is difficult because many of these advantages would also benefit a competitor if the end consumer of gas were to switch gas retailers.<sup>828</sup>

### ***Interested parties' submissions and consultation***

- 6.346. The ACCC received no submissions expressing concerns regarding the co-ownership between AusNet's gas distribution network and Origin Integrated Gas' retailing business.

### ***ACCC view***

- 6.347. The ACCC considers AusNet is limited in its ability to favour Origin Integrated Gas by lowering network quality selectively, as Origin Integrated Gas' customers and Origin Integrated Gas' competitors' retail customers are dispersed throughout AusNet's distribution network. AusNet would be unable to select certain portions of the network to upgrade, or selectively maintain which would only benefit Origin Integrated Gas' retail business.<sup>829</sup>
- 6.348. As noted above in Section 5 the AusNet gas distribution network is subject to full regulation, which requires the AER to approve the reference tariffs offered to all users of this network. While the National Gas Law stipulates prohibitions on preventing or hindering access, and ring-fencing and associate contract provisions, these regulatory arrangements are unlikely to remove the ability for a gas distributor to engage in foreclosure or other forms of discrimination in favour of Origin Integrated Gas' retail business.<sup>830</sup>
- 6.349. By way of example, in relation to customer connections, theoretically there could be an ability for AusNet to favour Origin Integrated Gas' retail customers by delaying rival competitor customer connections, in relation to customer connections at new supply addresses, to later in the 20-day timeframe for customer connections under the Gas Distribution System Code of Practice,<sup>831</sup> noting the advantage to Origin Integrated Gas of this delay may be limited.
- 6.350. However, the ACCC notes that any ability AusNet has to discriminate against Origin Integrated Gas' retail rivals in relation to connection to its gas distribution network (for example through delaying connection) is likely to diminish over the coming years. The AER, for example, noted that AusNet's gas distribution network faces

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<sup>828</sup> Expert report of Greg Houston (HoustonKemp Economists) for the Applicants, 8 June 2023, at [524].

<sup>829</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1334].

<sup>830</sup> See: *National Gas (South Australia) Act 2008* (SA), sch 1 ('National Gas Law') ss 133, 139 – 141, 147 – 148.

<sup>831</sup> Essential Services Commission, [Gas Distribution System Code of Practice](#), 1 January 2023, cl 3.1(b).

declining demand as the number of customers are expected to significantly reduce their reliance on gas appliances, or to leave the gas market completely.<sup>832</sup>

- 6.351. The Victorian government announced from 1 January 2024, planning permits will no longer be approved for new homes and residential subdivisions to connect to gas networks. Further, all new public buildings that had not reached design stage by 28 July 2023 will also be all-electric.<sup>833</sup> Therefore, the number of new residential connections to AusNet's gas distribution is expected to significantly fall further reducing the potential impact on competition.
- 6.352. As a result, the ACCC considers the ability of AusNet to favour Origin Integrated Gas' retail business by virtue of its gas distribution networks is very limited.

### **ACCC conclusion**

- 6.353. In respect of the vertical co-ownership link between Brookfield's gas distribution and retail interests, having considered the available evidence, the ACCC is satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the market for the retail supply of gas to household and business customers connected to AusNet's distribution network (in Victoria) or across Victoria more broadly.

### **Horizontal overlap effects**

#### **Wholesale gas**

- 6.354. Under the Proposed Acquisition, MidOcean will initially acquire Origin's 27.5% interest in APLNG and will immediately sell part of this interest to ConocoPhillips (2.49%), leaving MidOcean with a 25.01% interest in APLNG.<sup>834</sup>
- 6.355. MidOcean Energy has also entered a definitive agreement to acquire Tokyo Gas's minority interests in 4 LNG projects, including a 1.25% interest in QCLNG.<sup>835</sup> The acquisition is expected to complete in **[Redacted – Confidential]**.<sup>836</sup>
- 6.356. Neither the sale of the 2.49% interest in APLNG to ConocoPhillips nor the proposed acquisition of the Tokyo Gas interests are 'conduct for which authorisation is sought'.<sup>837</sup> However, whether or not the likely benefits, detriments or effects of them are to be weighed in the application of the statutory test, the ACCC considers that both are part of the 'relevant circumstances' of the Proposed Acquisition.<sup>838</sup>
- 6.357. Following the Proposed Acquisition, MidOcean Group will have interests in two of the three LNG projects in Queensland - QCLNG and APLNG – which are both major suppliers of gas to the east coast Australian gas market as well as selling LNG overseas.

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<sup>832</sup> AER, [Final Decision – AusNet Gas Services Gas distribution access arrangement – 1 July 2023 to 30 June 2028](#), 2 June 2023, at p. 6.

<sup>833</sup> Victoria State Government, [New Victorian Homes to go all Electric from 2024](#), 28 July 2023, accessed 22 August 2023.

<sup>834</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [270].

<sup>835</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [595].

<sup>836</sup> **[Redacted – Confidential]**.

<sup>837</sup> The statutory test is directed to the effects of the conduct for which authorisation is sought, not the effects of other conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought: *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [145].

<sup>838</sup> See: *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [711].

- 6.358. The ACCC is concerned that MidOcean Group, following the Proposed Acquisition, will obtain commercially sensitive information from APLNG and QCLNG projects (due to its shareholding in both projects), particularly with respect of information regarding pricing and marketing relating to the east coast Australian wholesale gas market.
- 6.359. The ACCC is concerned that MidOcean Group's possession of this information could create conditions that may facilitate anti-competitive coordinated conduct between APLNG and QCLNG which could result in higher prices and/or lower supply into the domestic market.
- 6.360. The ACCC considers that this could potentially harm competition in the market for the wholesale supply of gas to customers (including retailers) in eastern Australia (specifically, the eastern states of Queensland, New South Wales, Victoria and South Australia, as well as in the Australian Capital Territory).

### **Applicants' submissions**

- 6.361. The Applicants submit that MidOcean's acquisition of Origin's interest in APLNG will not result in any lessening of competition.<sup>839</sup>
- 6.362. The Applicants submit that their proposed 1.25% interest in QCLNG is *de minimis*.<sup>840</sup> Further, the Applicants submit that MidOcean Energy will not control QCLNG, nor have a role in selling gas from the project, nor receive competitively sensitive information.<sup>841</sup>
- 6.363. The Applicants submit that MidOcean Group will not be able to facilitate information sharing between the 2 LNG projects because:
- clauses in the Joint Operating Agreements for QCLNG mean MidOcean Energy would not receive meaningful commercially sensitive information in relation to QCLNG's domestic gas sales, such that it would have nothing it could share with APLNG<sup>842</sup>
  - there are strict confidentiality obligations under the Joint Operating Agreements and shareholder agreements for both APLNG and QCLNG,<sup>843</sup> and
  - MidOcean Energy would not have visibility over the pricing of gas sold to end customers or individual volumes they receive.<sup>844</sup>
- 6.364. The Applicants submit that MidOcean Group will not have an incentive to engage in information sharing because it:
- would benefit little from doing so, because it receives revenue from a small share of QCLNG domestic sales given its 1.25% overall interest<sup>845</sup>
  - would contravene confidentiality restrictions under each of the gas sale agreements with Walloons Coal Seam Gas Company Pty Limited, who is the

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<sup>839</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1538].

<sup>840</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1539].

<sup>841</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [1540].

<sup>842</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [7.6(b)], [7.7].

<sup>843</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [7.8]; Applicants' response to ACCC's Second Transparency Letter: Annexure B, 1 September 2023, at [16] – [19], [32] – [34].

<sup>844</sup> Applicants' response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [7.22].

<sup>845</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure B, 1 September 2023, at [4(a)], [19].

marketer for QCLNG's sales to the east coast gas market, and QCLNG Coordination and Joint Venture Alliance Agreement and the shareholder agreements for APLNG<sup>846</sup>

- would damage MidOcean Group's and EIG's reputation,<sup>847</sup> and
- would be a breach of the *Competition and Consumer Act 2010* (Cth) that is highly likely to be revealed by the ACCC's east coast gas market inquiry.<sup>848</sup>

### ***Interested parties' submissions and consultation***

- 6.365. The ACCC did not receive any submissions from interested parties raising concerns about concentration resulting from MidOcean Group's ownership of both a 1.25% interest in QCLNG and a 25.01% interest in APLNG.
- 6.366. Shell QGC, the operator of QCLNG, made a submission raising concerns about information sharing due to MidOcean Group's interests in both QCLNG and APLNG. Shell QGC submits that because of MidOcean Energy's 1.25% interest in QCLNG, MidOcean Energy will have access to:
- QCLNG project and gas sales agreements
  - commercially sensitive information from the QCLNG project, and
  - LNG contracts.<sup>849</sup>
- 6.367. Shell QGC submits that because of MidOcean Group's interest in APLNG and its interest in QCLNG, MidOcean Group will have detailed information about two of the three LNG projects on the east coast. Shell QGC submits MidOcean Group will need to manage receiving competitively sensitive information from both projects.<sup>850</sup>
- 6.368. In the case of the QCLNG project, Shell QGC submits that MidOcean Energy will be required, as a participant in that project, to sell its share of gas to Walloons and therefore will have visibility of sensitive price and volume information.<sup>851</sup>
- 6.369. In response to Shell QGC's submissions and the Second ACCC Transparency Letter, the Applicants submit MidOcean Group has a non-controlling minority interest in both LNG projects.<sup>852</sup> They submit that it does not have any ownership interest in Walloons.<sup>853</sup>
- 6.370. In relation to the concerns raised by Shell QGC about the visibility of price and volume information, the Applicants submit that:
- MidOcean Group will not be responsible for marketing gas for either QCLNG or APLNG and so will not have competitively sensitive information to share<sup>854</sup>

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<sup>846</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure B, 1 September 2023, at [4(b)(i)], [14(d)(ii)], [16] – [18], [32] – [34].

<sup>847</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure B, 1 September 2023, at [4(b)(ii)].

<sup>848</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure B, 1 September 2023, at [4(b)(iii)], [14(d)(i)].

<sup>849</sup> Shell QGC submission in response to ACCC Transparency Letter, 10 August 2023, at [8(e)].

<sup>850</sup> Shell QGC submission in response to ACCC Transparency Letter, 10 August 2023, at [8(h)].

<sup>851</sup> Shell QGC submission in response to ACCC Transparency Letter, 10 August 2023, at [9(a)].

<sup>852</sup> Applicants' second response to interested party submissions: Annexure B, 24 August 2023, at [2.2].

<sup>853</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure B, 1 September 2023, at [2(c)], [23] – [25].

<sup>854</sup> Applicants' second response to interested party submissions: Annexure B, 24 August 2023, at [2.3]; Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [2(a)], [2(b)], [8] – [11], [20] – [22].

- MidOcean Energy will not have visibility over sensitive price information for QCLNG, as it will only receive pricing information on an aggregated basis<sup>855</sup>
  - if MidOcean did possess competitively sensitive information from APLNG, MidOcean would be unable to share this information with QCLNG as a result of strict confidentiality obligations which may put its stake in APLNG at risk.<sup>856</sup>
- 6.371. While the Applicants submit that MidOcean Group will not have visibility over sensitive price information, they have offered to waive any rights to individual customers or pricing information for east coast gas supply from QCLNG for the duration that it holds interests in both the QCLNG and APLNG projects.<sup>857</sup>
- 6.372. Regarding supply decisions, the Applicants submit that MidOcean Energy, as a 1.25% participant in the QCLNG project, will not have an ability to control production, expansion or curtailment decisions.<sup>858</sup>

### **ACCC view**

- 6.373. The ACCC acknowledges that MidOcean Group would have only minority stakes in both QCLNG and APLNG and that it would not be responsible for marketing gas for either of these LNG projects. However, the ACCC considers that there are incentives for a party with access to gas supply and pricing information from 2 different LNG projects to share that information to either advantage one project or to advantage both projects compared to the broader east coast domestic gas market.
- 6.374. As noted by the Applicants,<sup>859</sup> under the relevant APLNG and QCLNG agreements there are provisions restricting the sharing of confidential information.<sup>860</sup> **[Redacted – Confidential]**.<sup>861</sup>
- 6.375. The Applicants submit that MidOcean Energy ‘will not have access to any competitively sensitive information in respect of QCLNG’s east coast gas market sales.’<sup>862</sup> **[Redacted – Confidential]**.<sup>863</sup>
- 6.376. The ACCC has investigated what information MidOcean Group will have regarding the 2 projects and considered whether this could create the incentive or ability for MidOcean Group to share competitively sensitive information between the 2 projects or otherwise utilise this information in a manner that would facilitate anti-competitive coordination between APLNG and QCLNG.
- 6.377. In short, the ACCC considers may be some mechanisms whereby MidOcean Energy could obtain confidential information which may be competitively sensitive and give rise to an incentive or ability to share this information with APLNG.
- 6.378. The ACCC considers the potential competitive harm may be limited to some degree by:

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<sup>855</sup> Applicants’ second response to interested party submissions: Annexure B, 24 August 2023, at [2.7].

<sup>856</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure B, 1 September 2023, at [16] – [19].

<sup>857</sup> Applicants’ second response to interested party submissions: Annexure B, 24 August 2023, at [2.10].

<sup>858</sup> Applicants’ second response to interested party submissions: Annexure B, 24 August 2023, at [2.12].

<sup>859</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure B, 1 September 2023, at [16], [17], [32], [33].

<sup>860</sup> **[Redacted – Confidential]**.

<sup>861</sup> **[Redacted – Confidential]**.

<sup>862</sup> Applicants’ response to ACCC’s Second Transparency Letter: Annexure B, 1 September 2023, at [31].

<sup>863</sup> See, e.g.: **[Redacted – Confidential]**.

- MidOcean Group having little or no ability to control the marketing of gas for either APLNG<sup>864</sup> or QCLNG<sup>865</sup>
- MidOcean Energy receiving only aggregated **[Redacted – Confidential]** price information about Walloons’ sales to the east coast gas market **[Redacted – Confidential]** which cannot be used to calculate individual customer pricing,<sup>866</sup> and its offer to waive any contractual rights it may have to receive individual customer or pricing information (other than aggregate information) from QCLNG,<sup>867</sup> and
- MidOcean Energy not having any ability to control production decisions (including curtailment, expansion or production) due to its minimal shareholding,<sup>868</sup> and although it will have visibility of QCLNG gas production volumes, any competitive benefit from this information being limited because:
  - information on actual production and the 7-day production outlook is published daily on the Natural Gas Services Bulletin Board<sup>869</sup>
  - information on uncontracted gas that is expected to be produced over the next 24 months must be published by producers on their website in accordance with the Gas Code of Conduct.<sup>870</sup>

6.379. Despite the limitations identified above, APLNG and QCLNG are 2 of the main suppliers of gas to the east coast Australian gas market, and any coordinated conduct between them may have significant impacts on the price and supply of gas in a market where there have been projected shortfalls in the total supply.

### **ACCC conclusion**

6.380. In respect of the horizontal overlap of MidOcean Group’s interests, having considered the available evidence, the ACCC has not reached the requisite affirmative belief and accordingly is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition<sup>871</sup> in the market for the wholesale supply of gas to customers (including retailers) in eastern Australia (specifically, the eastern states of Queensland, New South Wales, Victoria, and South Australia, as well as in the Australian Capital Territory).

### **The ACCC’s conclusion on competitive effects**

6.381. Pursuant to the Competition Test, the ACCC is able to grant authorisation if it is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition. As outlined in its analysis above, in respect of the vertical link between Brookfield’s electricity transmission and generation interests, the ACCC is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in the markets for:

<sup>864</sup> **[Redacted – Confidential]**.

<sup>865</sup> Applicants’ second response to interested party submissions: Annexure B, 24 August 2023, at [2.3] – [2.5].

<sup>866</sup> **[Redacted – Confidential]**.

<sup>867</sup> Applicants’ second response to interested party submissions: Annexure B, 24 August 2023, at [2.10].

<sup>868</sup> Applicants’ second response to interested party submissions: Annexure B, 24 August 2023, at [2.10].

<sup>869</sup> AEMO, [Gas Production, Gas Bulletin Board](#), accessed 4 October 2023.

<sup>870</sup> *Competition and Consumer (Gas Market Code) Regulations 2023* (Cth) reg 34.

<sup>871</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [99].

- the wholesale physical supply of electricity in the Victorian region of the NEM<sup>7</sup>, or the NEM more broadly
  - the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
  - the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria.
- 6.382. Further, the ACCC has not reached the requisite affirmative belief and accordingly is not satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition:<sup>872</sup>
- in respect of the vertical link between Brookfield’s electricity distribution and retail interests, in the market for the retail supply of electricity to Victorian household and business customers connected to AusNet’s distribution network
  - in respect of the vertical link between Brookfield’s electricity retail and smart meter and behind the meter interests, in the market for the supply of smart meters and behind the meter services to electricity retailers in each of the NEM states separately or the NEM more broadly
  - in respect of the horizontal overlap of MidOcean Group’s interests, in the market for the wholesale supply of gas to customers (including retailers) in eastern Australia (specifically, the eastern states of Queensland, New South Wales, Victoria and South Australia, as well as in the Australian Capital Territory).
- 6.383. As outlined in its analysis above, the ACCC is satisfied in all the circumstances that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition:
- in respect of the vertical link between Brookfield’s electricity distribution and embedded generation interests, in the markets for:
    - the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
    - the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
    - the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria
    - the supply of embedded generation network support services to Victorian or NEM distribution and transmission networks
  - in respect of the vertical link between Brookfield’s electricity distribution and retail interests, in the market for the retail supply of electricity to Victorian household and business customers, and in Victoria more broadly<sup>873</sup>
  - in respect of the vertical link between Brookfield’s electricity retail and smart meter and behind the meter interests, in the market for the retail supply of electricity to household and business customers in each of the NEM states separately or the NEM more broadly

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<sup>872</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [99].

<sup>873</sup> As opposed to the AusNet distribution area referenced in paragraph 6.308.



- in respect of the vertical link between Brookfield's gas distribution and retail interests, in the market for the retail supply of gas to household and business customers connected to AusNet's distribution network (in Victoria) or across Victoria.

## 7. Likely public benefits and detriments

- 7.1. This section provides the ACCC's views on the public benefits and detriments that are likely to result from the Proposed Acquisition, for the purposes of assessing whether the ACCC is satisfied in respect of s 90(7)(b) of the Act. The section is structured as follows:
- first, it provides an overview of how the ACCC assesses public benefits and detriments in applying the Net Public Benefit Test
  - second, it considers whether there are public detriments that are likely to result from the Proposed Acquisition
  - third, it considers whether there are public benefits that are likely to result from the Proposed Acquisition.
- 7.2. How the proffered undertakings impact the ACCC's assessment of the public benefits and detriments that are likely to result from the Proposed Acquisition is set out in section 8. In section 9, the ACCC sets out its view on whether it is satisfied that the likely public benefits outweigh the likely public detriments.

### Framework for assessment of public benefits and detriments

- 7.3. The Net Public Benefit Test requires the ACCC to consider the public benefits and detriments that would result, or be likely to result, from the proposed conduct and to determine whether the likely benefits outweigh the likely detriments.<sup>874</sup>
- 7.4. There must be a causal relationship between the conduct for which authorisation is sought and the public benefits and detriments resulting from the proposed conduct.<sup>875</sup> The Tribunal has drawn a distinction between effects, benefits and detriments of conduct that are causally related to the conduct for which authorisation is sought and those that result from conduct 'coincident' with the conduct for which authorisation is sought. Consideration of the effects, benefits and detriments of 'coincident' conduct for the purposes of applying s 90(7) would, the Tribunal said, 'be inconsistent with [the] statutory regime'.<sup>876</sup>
- 7.5. To assist it in identifying the public benefits and detriments that are likely to result from the Proposed Acquisition (in the sense that they have a causal connection to the Proposed Acquisition), and to make an evaluative judgment of the likely extent of those benefits and detriments, the ACCC compares the future in which the Proposed Acquisition occurs with the future in which the Proposed Acquisition does not occur.
- 7.6. As to the assessment of public benefits and detriments, the Tribunal has said that:
- (a) a benefit to the public includes anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress;

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<sup>874</sup> *Competition and Consumer Act 2010 (Cth)*, s 90(7)(b); *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [695].

<sup>875</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [153] and the other cases there cited.

<sup>876</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [147].

- (b) a detriment to the public includes any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency; and
- (c) a claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process.<sup>877</sup>
- 7.7. Claimed benefits and detriments must be of substance and have durability,<sup>878</sup> and must rise above the ephemeral and trivial.<sup>879</sup> While detailed quantification in numerical terms is not required, the nature of the public benefits and detriments should be defined with some precision, and any estimates involved should be robust and commercially realistic.<sup>880</sup> There must be a factual basis for concluding that the public benefits and detriments are likely to result.<sup>881</sup>
- 7.8. The Tribunal has also previously accepted that ‘direct merger benefits’ which will accrue to the parties seeking merger authorisation may constitute a public benefit, where there is some gain to the community either directly or indirectly in whole or in part. In these circumstances, the weight given to the ‘direct merger benefits’ will depend on the distribution of the gains which flow to the merger parties and the wider public.<sup>882</sup> The Tribunal has explained that:
- the enquiry should be directed towards the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of “anything of value to the community generally”? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?<sup>883</sup>
- 7.9. The scope of relevant competitive benefits or detriments is not confined to the ‘substantial lessening of competition’ within the meaning of section 50 of the Act, and which applies in the Competition Test in section 90(7)(a). In applying the Net Public Benefit Test, the ACCC assesses all benefits and detriments, not just those related to effects on competition.
- 7.10. Section 90(7)(b) requires the ACCC to consider the benefits and detriments likely to result from the Proposed Acquisition. It does not necessarily follow that if the ACCC is not satisfied that a substantial lessening of competition is not likely in any market, the ACCC also considers that a competitive detriment is likely to result from the Proposed Acquisition. Further, it does not follow that if the ACCC is satisfied that a substantial lessening of competition is not likely in any market, there is no

<sup>877</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [695].

<sup>878</sup> *Re Qantas Airways Limited* [2004] ACompT 9, at [205]; *Application by Sea Swift Pty Limited* [2016] ACompT 9, at [46]; *Application by Tabcorp Holdings Limited* [2017] ACompT 1, at [90]; *Applications by Tabcorp Holdings Limited* [2017] ACompT 5, at [28].

<sup>879</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [126]; *Application by Tabcorp Holdings Limited* [2017] ACompT 1, at [90]; *Applications by Tabcorp Holdings Limited* [2017] ACompT 5, at [28].

<sup>880</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [125] citing *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065, at [201] citing *Howard Smith* (1977) 28 FLR 385, at p. 392; *Application by Tabcorp Holdings Limited* [2017] ACompT 1, at [90]; *Applications by Tabcorp Holdings Limited* [2017] ACompT 5, at [28].

<sup>881</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [125] citing *Qantas Airways* [2004] ACompT 9; (2005) ATPR 42-065, at [201] citing *Howard Smith* (1977) 28 FLR 385, at p. 392; *Application by Tabcorp Holdings Limited* [2017] ACompT 1, at [90]; *Applications by Tabcorp Holdings Limited* [2017] ACompT 5 at [28].

<sup>882</sup> *Re Qantas Airways Limited* [2004] ACompT 9, at [187] – [189]; *Applications by Tabcorp Holdings Limited* [2017] ACompT 5, at [28], [45] – [46]; *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [122].

<sup>883</sup> *Re Qantas Airways Limited* [2004] ACompT 9, at [188].

competitive detriment likely to result from the Proposed Acquisition. An effect on competition does not have to be 'substantial' in the sense of the section 50 test to be a detriment to the public that is relevant to the ACCC's assessment in section 90(7)(b).

### **Public detriments**

- 7.11. In considering the public detriments that may result from the Proposed Acquisition, the ACCC has considered the Applicants' submissions regarding competition effects, effects on employment and Origin's delisting as potential public detriments.<sup>884</sup> The Applicants submit that the Proposed Acquisition will not give rise to any public detriments but that any would be *de minimis* and outweighed by 'substantial' public benefits.
- 7.12. The ACCC has first considered competitive public detriments, and then considered other potential public detriments.

### **Competitive public detriments**

#### **Electricity transmission-generation and distribution-retail**

- 7.13. At paragraph 6.257, the ACCC concluded that it is not satisfied that the vertical integration of Brookfield's electricity transmission and generation interests would not be likely to substantially lessen competition. As explained at paragraphs 6.202 to 6.256, the ACCC is concerned that, if the Proposed Acquisition proceeds, AusNet post-merger, would have the ability and incentive to operate its transmission network to benefit Origin Energy Markets' generation business, and this conduct would harm competition in the markets for:
- the wholesale physical supply of electricity in the Victorian region of the NEM or the NEM more broadly
  - the supply of wholesale hedging instruments to electricity retailers operating in the Victorian region of the NEM
  - the supply of new renewable and firming generation and storage services in response to government policy incentives and private demand in Victoria.
- 7.14. The ACCC considers that neither the separate fund structure, the contractual obligations regarding related party transactions nor the minority shareholding of co-investors in Origin Energy Markets or AusNet are sufficient to allay its competition concerns. The ACCC considers that there are mechanisms available to AusNet that enable it to favour Origin Energy Markets, such as by sharing competitively sensitive information, delaying generator connections or operating the network to favour Origin Energy Markets' generators (particularly at peak times).
- 7.15. Further, the ACCC considers that the regulatory framework (including the applicable ring-fencing guidelines and rules) mitigates concerns to a degree but do not sufficiently counter the risk of foreclosure. The regulations may restrict obvious and blatant discrimination but there is a real prospect of more subtle or difficult-to-detect discrimination that would not be caught by the regime. The ACCC is concerned that even subtle discrimination such as applying connection criteria more stringently to a

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<sup>884</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [928].

competing connection applicant has the potential to have a material (in the sense of important) anti-competitive effect.

- 7.16. At paragraph 6.309, the ACCC concluded that it is satisfied that the vertical integration of Brookfield's electricity distribution and retail interests would not be likely to substantially lessen competition in the Victoria-wide market but has not reached the requisite affirmative belief in relation to the market for the retail supply of electricity to customers connected to AusNet's distribution network. Notwithstanding these conclusions, the ACCC considers that this vertical integration does give rise to likely effects on competition that are relevant to its consideration of benefits and detriments likely to result from the Proposed Acquisition.
- 7.17. These detriments are not of the same order as the likely detriments in markets for generation and transmission. A Victorian distribution provider such as AusNet could share information with and offer preferential network services to an affiliated retailer in such a way which would materially disadvantage rival retailers on its network and there are some longer-term potential competition harms if the market moves towards more complicated household energy solutions which require coordination with the distributor. However, the ACCC recognises that AusNet likely has only a limited ability to favour Origin Energy Markets over its retail rivals due to the regulatory and practical barriers on opportunities to discriminate on price and quality of access.

### **Smart metering**

- 7.18. At paragraph 6.335, the ACCC concluded that it is satisfied that the vertical integration of Brookfield's electricity retail and smart meter and behind the meter interests would not be likely to substantially lessen competition in the electricity retail market but has not reached the requisite affirmative belief in relation to the market for the supply of smart meters and behind the meter services. Notwithstanding these conclusions, the ACCC considers that this vertical integration does give rise to likely effects on competition that are relevant to its consideration of benefits and detriments likely to result from the Proposed Acquisition.
- 7.19. As explained at paragraphs 6.326 to 6.331, the ACCC's concerns relate to whether Origin Energy Markets could leverage its position in retail electricity markets to benefit Intellihub or foreclose Intellihub's competitors, or otherwise discriminate against Intellihub's competitors, which is particularly concerning given these concerns relate to an emerging market. The ACCC's concerns also relate to whether Intellihub could leverage its position in the smart metering market to benefit Origin Energy Markets or foreclose Origin Energy Markets' competitors, or otherwise discriminate against Origin Energy Markets' retail competitors, but notes the various factors which mitigate the risk of this competitive harm arising outlined in paragraphs 6.332 to 6.334.

### **Common ownership of APLNG and QCLNG**

- 7.20. At paragraph 6.380, the ACCC concluded that it has not reached the requisite affirmative belief that the horizontal overlap of MidOcean Group's interests in APLNG and QCLNG would not be likely to substantially lessen competition in the market for the wholesale supply of gas in eastern Australia. Notwithstanding this conclusion, the ACCC considers that this horizontal overlap does give rise to likely

effects on competition that are relevant to its consideration of benefits and detriments likely to result from the Proposed Acquisition.

- 7.21. As explained at paragraphs 6.373 to 6.379, the ACCC considers that there is a risk that the Proposed Acquisition may enable competitively sensitive information to be shared between APLNG and QCLNG which could facilitate coordinated conduct. As APLNG and QCLNG are 2 of the main suppliers of gas to the east coast Australian gas market, any coordinated conduct between them may have significant impacts on the price and supply of gas in a market where there have been projected shortfalls in the total supply.

### Other competitive detriments

- 7.22. For the reasons outlined in Section 6, the ACCC considers that the Proposed Acquisition also gives rise to likely effects on competition, that are relevant to its consideration of benefits and detriments, in respect of:
- the market(s) relevant for the vertical link between Brookfield's electricity distribution and embedded generation interests described in paragraph 6.286, and
  - the market(s) relevant for the vertical link between Brookfield's gas distribution and retail interests described in paragraph 6.353.

### Other public detriments

- 7.23. The Applicants sought to address other possible public detriments: employment impacts, arising from the closure of Eraring power station, **[Redacted – Confidential]**, and the impacts on the investment market of Origin delisting.<sup>885</sup>
- 7.24. No industry participants made submissions on these potential public detriments.
- 7.25. The Applicants submit that the closure of Eraring is not dependent on the Proposed Acquisition and any job losses from its closure would occur whether the Proposed Acquisition proceeds or not.<sup>886</sup> The Applicants say that the BGTF Consortium is committed to a 'just transition' that includes 'support packages around re-skilling, career support and redeployment into new roles, where possible'.<sup>887</sup>
- 7.26. **[Redacted – Confidential]:**
- **[Redacted – Confidential]**<sup>888</sup>
  - **[Redacted – Confidential]**.<sup>889</sup>
- 7.27. Further, the Applicants submit that any job losses arising from the Proposed Acquisition will be more than offset by the jobs created both directly and indirectly by the Proposed Acquisition.<sup>890</sup>

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<sup>885</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [932] – [946].

<sup>886</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [933].

<sup>887</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [934].

<sup>888</sup> **[Redacted – Confidential]**.

<sup>889</sup> **[Redacted – Confidential]**.

<sup>890</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [933]; citing research that they submit 'shows that renewable energy will be a major source of jobs for Australians in the medium-term, especially in regional areas, across a diverse range of occupations': University of Technology Sydney Institute for Sustainable Futures, *Renewable Energy Jobs*

- 7.28. The ACCC considers that, in assessing the effects of the Proposed Acquisition, any job creation that may occur from an acceleration of the Applicants' renewables build-out plan (considered at paragraphs 7.264 to 7.270), must also be offset against any accelerated job losses that may result from any acceleration of the closure of Eraring power station. The closure of Eraring is expected to lead to the loss of approximately 400 direct jobs (with some redeployment of positions) and 600 indirect job losses.<sup>891</sup> However, as noted below at paragraph 7.164, the ACCC considers there are too many factors outside of Brookfield's control for the ACCC to determine that the closure will happen sooner and with more certainty than if the Proposed Acquisition does not proceed. Given the ACCC's view regarding the closure of Eraring, the ACCC has not considered any job losses or accelerated job losses as a material factor.
- 7.29. **[Redacted – Confidential]**.<sup>892</sup>
- 7.30. Although the impact on directly employed individuals may be mitigated by Brookfield's proposed transition measures and redeployment into other operations, the ACCC considers that the existence of likely job losses reduces the extent of any net employment-creating effects of Brookfield's operations. The ACCC has not come to the conclusion that the loss of employment due to the above factors is by itself likely to be a material public detriment.
- 7.31. In relation to Origin's delisting, the ACCC notes that there may be some long-term public detriment if many ASX-listed companies delist, which would lessen the depth of the stock market and options for direct investment, particularly for smaller investors. However, a single company delisting, particularly one that is not in the top 20 ASX by market cap, is unlikely, in and of itself, to raise a material public detriment.

### **Conclusion on public detriments**

- 7.32. As outlined above, the ACCC considers that a number of competitive detriments are likely to result from the Proposed Acquisition. The relative significance and varying likelihoods of these detriments will be analysed and assessed as part of the weighing exercise in section 9.

## **Public benefits**

### **Overview**

- 7.33. The Applicants submit that the Proposed Acquisition will result in substantial public benefits,<sup>893</sup> in particular:
- the Applicants intend to deliver the 'green build-out' plan for Origin Energy Markets, which they submit will result in the 'rapid'<sup>894</sup>, 'substantial'<sup>895</sup> and

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*in Australia: Stage One* (June 2020) pages 5, 32 <https://www.uts.edu.au/sites/default/files/2020-06/Renewable-Jobs-Australia-ISF%20F.pdf>

<sup>891</sup> See e.g.: Mark Ludlow and Angela Macdonald-Smith, [Plan Needed for Exit of Thousands of Coal Workers](#), 17 February 2022, accessed 25 September 2023; Daniel Wild and Kevin You, [IPA Report: The Employment Consequences Of The Early Closure Of The Eraring Power Station](#), 11 May 2022, at p. 3.

<sup>892</sup> **[Redacted – Confidential]**.

<sup>893</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [28], [718] – [719], [948].

<sup>894</sup> Application for merger authorisation (MA1000024), 5 June 2023, at p. 3.

<sup>895</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [44].

‘significant’<sup>896</sup> acceleration of Origin Energy Markets’ renewable generation development in Australia.<sup>897</sup> The Applicants claim that they will address Origin Energy Markets’ renewables transition ‘much sooner and with more certainty’<sup>898</sup> and will provide for an increase of up to 10 GW of renewable generation and storage capacity for Origin Energy Markets than otherwise would occur under Origin’s current strategy. The ‘green build-out’ plan is expected to reduce absolute emissions produced by Origin Energy Markets by more than 70% by 2030<sup>899</sup>

- through the Applicants’ renewables build-out of Origin Energy Markets, there will be an acceleration of the development of renewables for Australia,<sup>900</sup> and ‘significant’ total renewable generation being built in Australia.<sup>901</sup> The Applicants submit this will make a ‘material difference’ to achieving Australia’s net zero targets,<sup>902</sup> result in an accelerated and more certain transition to net zero,<sup>903</sup> as well as a more rapid and extensive decarbonisation in Australia<sup>904</sup>
- there will be additional economic and social benefits arising from the ‘green build-out’, including:
  - downward pressure on consumer and business prices<sup>905</sup>
  - the development of new renewable technologies delivered to Australia earlier and on a more cost-efficient basis<sup>906</sup>
  - direct and indirect job creation<sup>907</sup>
  - the development and funding of behind the meter solutions to meet growing consumer demand and facilitate decarbonisation in Australia<sup>908</sup>
  - development of local supply chains<sup>909</sup>
  - the growth of Australia’s renewable energy industry.<sup>910</sup>

7.34. The ACCC has considered the public benefits the Applicants claim are likely to result from the Proposed Acquisition, and that are relevant to the ACCC’s assessment, in the following categories:<sup>911</sup>

- an acceleration of, or additional, renewable generation and storage development for Origin Energy Markets and a decrease in absolute emissions produced by Origin Energy Markets

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<sup>896</sup> Application for merger authorisation (MA1000024), 5 June 2023, at p. 4.

<sup>897</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [44], [718].

<sup>898</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [718].

<sup>899</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [790].

<sup>900</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [782].

<sup>901</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [789].

<sup>902</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [50].

<sup>903</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [791].

<sup>904</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [788].

<sup>905</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [60], [876] – [900].

<sup>906</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [59], [901] – [903].

<sup>907</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [720], [904] – [906], [938] – [940].

<sup>908</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [56], [907] – [923].

<sup>909</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [57], [924] – [926].

<sup>910</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [58], [927].

<sup>911</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [28] – [68].



- an acceleration of, or additional, renewable generation and storage build-out in Australia
- downward pressure on retail electricity prices
- earlier and more cost-efficient access to new renewable technologies in Australia
- development of the Australian renewables industry in the form of local supply chains and onshore manufacturing, leading to the development of Australian businesses and direct and indirect employment
- acceleration of behind the meter solutions.

7.35. Set out below is a summary of the submissions received from the Applicants (and evidence from its executives), interested parties and economic experts, together with the ACCC's assessment of each of the claimed public benefits.

7.36. As noted above, to assess whether the claimed public benefits are likely to result from the Proposed Acquisition, the ACCC has compared the future in which the Proposed Acquisition occurs with the future in which the Proposed Acquisition does not occur.

### ***Future without the Proposed Acquisition***

#### **What Origin will do if the Proposed Acquisition does not proceed**

##### ***Applicants' submissions***

7.37. The Applicants submit that if the Proposed Acquisition does not proceed, Origin will continue to operate its business in accordance with its existing strategy and business plan,<sup>912</sup> as a publicly-listed gentailer. The Applicants submit that Origin will continue to maintain a short electricity position, meaning its generation portfolio will not cover its entire retail load. Origin's short position will be managed through a range of financial instruments (e.g. Swaps, Caps, Insurance, Settlement Residue Auctions) and by purchasing electricity from the wholesale market.<sup>913</sup>

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<sup>912</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [355].

<sup>913</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [373].

- 7.38. In relation to developing renewable generation and storage capacity and reducing greenhouse gas emissions, Origin submits that it will continue to pursue its Climate Transition Action Plan, including:<sup>914</sup>
- plans to grow its renewables and storage capacity within its generation portfolio to 4 GW by 2030, through a combination of direct investment in generation assets or offtake agreements with third-party developers
  - an ambition to achieve net zero emissions by 2050
  - plans to achieve a 40% reduction in Scope 1, 2 and 3 equity emissions intensity by 2030, relative to a financial year 2018-19 baseline
  - plans to achieve a 20-million-tonne reduction in absolute Scope 1, 2 and 3 equity emissions by 2030, relative to a financial year 2018-19 baseline.
- 7.39. To promote achievement of its emissions targets, Origin has linked executive remuneration to short-term emissions reduction.<sup>915</sup>
- 7.40. Origin has provided evidence to the ACCC that it will require an additional 2,332 MW of renewable generation and storage capacity between now and 2030, on top of its existing generation portfolio, to achieve its renewables goal of 4 GW by 2030.<sup>916</sup> As noted above, Origin could achieve this through a mixture of developing its own generation assets and by entering into offtake agreements with third-party developers.
- 7.41. In sworn evidence provided by an Origin senior executive, **[Redacted – Confidential]**,<sup>917</sup> **[Redacted – Confidential]**.<sup>918</sup> **[Redacted – Confidential]**,<sup>919</sup> **[Redacted – Confidential]**.<sup>920</sup>
- 7.42. **[Redacted – Confidential]**.<sup>921</sup> **[Redacted – Confidential]**.<sup>922</sup> **[Redacted – Confidential]**.<sup>923</sup>
- 7.43. Separately, to enable a like-for-like comparison with Brookfield’s build-out plans up to 2033, the Applicants estimate that Origin will develop 4 GW in total new renewable and storage capacity between now and 2033 (that is, additional to Origin’s current renewables portfolio of 1,668 MW).<sup>924</sup> This is distinct from Origin’s goal, as set out in its Climate Transition Action Plan, to achieve 4 GW of renewable generation and storage capacity by 2030, as this target includes its existing capacity.

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<sup>914</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at pp. 10, 17.

<sup>915</sup> Application for merger authorisation (MA1000024): Annexure 5 (Origin) – Origin 2022 Annual Report, 5 June 2023, at p. 46.

<sup>916</sup> Statement of Anthony Lucas (Origin), 5 June 2023, at [23]; **[Redacted – Confidential]**.

<sup>917</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T66 L.4].

<sup>918</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T111 L.11].

<sup>919</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T23 LL.18 – 25].

<sup>920</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T25 L.28].

<sup>921</sup> **[Redacted – Confidential]**.

<sup>922</sup> **[Redacted – Confidential]**.

<sup>923</sup> **[Redacted – Confidential]**.

<sup>924</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [364]-[365]. This assumes that Origin develops new capacity at an accelerated rate after 2030 to achieve 4 GW of new renewable and storage capacity by 2033.

- 7.44. [Redacted – Confidential].<sup>925</sup> [Redacted – Confidential].<sup>926</sup>
- 7.45. [Redacted – Confidential].<sup>927</sup> [Redacted – Confidential].<sup>928</sup>
- 7.46. The Climate Transition Action Plan recognises risks to achieving the 2030 emissions targets and the 2050 ambition, including, among other factors, timing and alignment of portfolio decisions, delays to renewables projects, access to infrastructure and land, market volatility and security of supply throughout the energy transition, demand for energy, access to critical skills and supplies, access to capital and carbon markets, technology development and stakeholder expectations.<sup>929</sup> While the Applicants acknowledge the challenges Origin will face, and that these will influence the speed and scale of Origin’s energy transition plans,<sup>930</sup> the Applicants nonetheless consider their estimate of 4 GW in total new renewable and storage capacity by 2033 is achievable.<sup>931</sup>

### **ACCC view**

- 7.47. The ACCC considers that if the Proposed Acquisition does not proceed, Origin will:
- likely achieve its emissions reduction target and its target of 4 GW of renewable generation and storage capacity by 2030 (including its existing renewables portfolio), as defined in the Climate Transition Action Plan, taking account of:
    - evidence that [Redacted – Confidential]
    - the remuneration incentives for Origin’s executives to achieve those plans
    - Origin’s public commitment to the Climate Transition Action Plan
    - evidence from [Redacted – Confidential],<sup>932</sup> and
  - likely develop 4 GW in total **new** renewable generation and storage capacity by 2033, in line with the Applicants’ estimation.
- 7.48. The ACCC considers Origin [Redacted – Confidential].

### **What Brookfield will do if the Proposed Acquisition does not proceed**

#### **Applicants’ submissions**

- 7.49. The Applicants submit that if the Proposed Acquisition does not proceed, Brookfield will still invest in renewable generation and storage capacity in Australia, however, it will do so in a piecemeal fashion and much less than the 14 GW proposed under the ‘green build-out’ plan.<sup>933</sup> Presently, Brookfield does not own any generation or

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<sup>925</sup> [Redacted – Confidential].

<sup>926</sup> [Redacted – Confidential]; [Redacted – Confidential]; Transcript of Examination under section 155(1)(c), [Redacted – Confidential], 26 July 2023, at [T41 LL.5 – 12], [T48 LL.1 – 8].

<sup>927</sup> [Redacted – Confidential].

<sup>928</sup> [Redacted – Confidential].

<sup>929</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 21.

<sup>930</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [390].

<sup>931</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [381].

<sup>932</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 17; [Redacted – Confidential].

<sup>933</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [295], [352].

storage assets in Australia, but has interests in X-Elio and AusNet, which own assets in Australia.<sup>934</sup>

- 7.50. Brookfield is currently pursuing opportunities in Australia, being Moonlight Range and 2 other projects with Greenleaf Renewables, all in Queensland.<sup>935</sup> The Moonlight Range project is at a more advanced stage and expected to come online around 2028, whereas the other projects with Greenleaf Renewables are still in the land negotiation stage and **[Redacted – Confidential]**.<sup>936</sup> Moonlight Range if it proceeds, will provide up to 315 MW and 105 MW of generation and storage capacity respectively by around 2028.<sup>937</sup> However, the Applicants submit that the development of both the Moonlight Range and Greenleaf Renewables opportunities are dependent on the Brookfield Investment Committee approving a final investment decision.<sup>938</sup> While additional investment could occur if the Proposed Acquisition does not proceed, the Applicants submit it is not a certainty.<sup>939</sup> Information provided by Brookfield indicates that any renewable generation or storage projects it pursues will be funded from a combination of equity and project debt finance, and will therefore be subject to finance.<sup>940</sup>
- 7.51. The Applicants note that Brookfield has considered investing in renewable generation and storage assets in Australia previously. As at the date of the Application, BGTF had assessed over **[Redacted – Confidential]** GW of potential renewable generation and storage projects in Australia.<sup>941</sup> While Brookfield chose not to pursue most of those projects, of the projects it chose to pursue:<sup>942</sup>
- it is currently assessing opportunities totalling approximately **[Redacted – Confidential]** GW
  - it actively pursued **[Redacted – Confidential]** GW (of which Brookfield was unsuccessful in bidding for **[Redacted – Confidential]** GW). The remaining **[Redacted – Confidential]** GW of capacity is being pursued in the form of Moonlight Range and projects with Greenleaf Renewables.
- 7.52. Further, the Applicants submit that since starting a team in Australia, Brookfield has an aspiration to develop 5 GW of renewable generation and storage capacity in the medium term, however, it has no specific plan or incentives associated with achieving this aspiration.<sup>943</sup> As noted in paragraph 6.25, **[Redacted – Confidential]**.<sup>944</sup> Therefore, it is realistic that Victoria will remain an area of focus for pursuing renewable opportunities absent the Proposed Acquisition.
- 7.53. The Applicants consider that a major barrier to Brookfield's investment in Australia is finding an offtaker willing to sign a long-term power purchase agreement to underwrite a project's revenues. This is typically a requisite step for a project to

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<sup>934</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [296].

<sup>935</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [303].

<sup>936</sup> **[Redacted – Confidential]**.

<sup>937</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [352].

<sup>938</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [304].

<sup>939</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [294] – [354].

<sup>940</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [315].

<sup>941</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [309].

<sup>942</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [309(b)], [309(c)].

<sup>943</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [318].

<sup>944</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [303] – [308]; **[Redacted – Confidential]**.

obtain financing and reach financial close.<sup>945</sup> **[Redacted – Confidential]**.<sup>946</sup> According to the Applicants, without a guaranteed offtaker, Brookfield would need to negotiate offtake agreements on a piecemeal basis, which adds cost and risk to each project.<sup>947</sup> **[Redacted – Confidential]**.<sup>948</sup> The Applicants therefore submit that if the Proposed Acquisition does not proceed, the level of capacity Brookfield will build in Australia is highly uncertain.<sup>949</sup>

### **ACCC view**

- 7.54. The ACCC considers that if the Proposed Acquisition does not proceed, Brookfield will likely build some renewable generation and storage capacity in Australia in the medium term, up to its target of 5 GW.
- 7.55. The ACCC notes that many of Brookfield's attributes that the Applicants claim will assist Brookfield in undertaking the renewables build-out of Origin Energy Markets will remain irrespective of the Proposed Acquisition. These include project expertise and global procurement capabilities which are detailed in paragraphs 7.148 to 7.153 below. Nonetheless, the ACCC accepts that Brookfield's incentives to develop renewable generation and storage in Australia will be different if the Proposed Acquisition does not proceed, and as discussed below, there are certain characteristics of a Brookfield-owned Origin that are unique and will not apply to Brookfield in a future without the Proposed Acquisition.

### **The expected roll-out of renewables in Australia**

#### **Applicants' submissions**

- 7.56. The Applicants submit that if the Proposed Acquisition does not proceed, other industry participants will develop renewable generation and storage capacity at a pace similar to, or only slightly quicker than, the current pace of renewables development.<sup>950</sup> In particular, the Applicants suggest there is market failure in respect of the development of generation and storage projects, due to difficulties in accessing capital for high-emitting businesses, securing long-term offtake agreements (or other mechanisms that provide price certainty), scarce equipment, input and skills, and the global competition for capital.<sup>951</sup>
- 7.57. The Applicants cite AEMO's pipeline of potential renewable generation and storage projects as evidence of the challenges facing such projects. AEMO classifies projects into categories, based on whether the projects have satisfied certain commitment criteria and the certainty that they will proceed:<sup>952</sup>
- **'committed'**: projects that will proceed with known timing and have satisfied all 5 commitment criteria. This is the most indicative stage of a project progressing

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<sup>945</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [328] – [329].

<sup>946</sup> **[Redacted – Confidential]**.

<sup>947</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [311].

<sup>948</sup> **[Redacted – Confidential]**.

<sup>949</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [316].

<sup>950</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [408].

<sup>951</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [414] – [416].

<sup>952</sup> See: AEMO, [Generation information](#), accessed 3 October 2023. There are 5 Commitment Criteria: Land, Contracts, Planning, Finance and Construction.

- **‘committed\*’**: projects that are highly likely to proceed, satisfying Land, Finance and Construction criteria, and either Planning or Contracts criteria
- **‘anticipated’**: projects that have sufficiently progressed towards meeting 3 of the 5 commitment criteria
- **‘publicly announced’**: projects that have been announced publicly but have not sufficiently progressed to meet a more certain classification (i.e. Anticipated, Committed\* or Committed).

7.58. The Applicants note that of the 209 GW of capacity that has been ‘publicly announced’ (and noting AEMO predicts 125 GW must be built by 2050 to reach net zero),<sup>953</sup> only 7.9 GW has been ‘committed’.<sup>954</sup>

7.59. **[Redacted – Confidential]**.<sup>955</sup>

### ***Interested parties’ submissions and consultation***

7.60. The ACCC has received mixed feedback regarding the extent of renewable generation investment, including in relation to the likelihood of Australia achieving its target of 82% renewable energy generation by 2030.<sup>956</sup>

7.61. In response to questions put to him by the ACCC, Mr Harris expresses the opinion that, while Australia’s latest emissions projections fall just short of the 2030 target, he expects the target to be met given:

- national emissions projections tend to fall significantly each year because of improvements in technology and new policies
- the required acceleration of the recent trend in renewable energy growth to meet the 82% renewables ‘target’ is likely, and
- there is sufficient time between now and 2030 for ‘further technology and policy improvements to achieve the relatively small gap to the target’.<sup>957</sup>

7.62. Some interested parties claim that while renewables investment may increase in the future, it will not be sufficient to meet the 82% renewables target unless something changes. Rystad Energy predicts that Australia will achieve 64% of renewables by 2030, based on ‘current federal and state funding allocations’.<sup>958</sup>

7.63. Interested parties also submit that network congestion and connection bottlenecks are the major barriers to building generation capacity in the NEM, and that these issues will persist irrespective of the Proposed Acquisition.<sup>959</sup>

<sup>953</sup> AEMO, [2022 Integrated System Plan \(ISP\)](#), 30 June 2022, at p. 38.

<sup>954</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [415].

<sup>955</sup> **[Redacted – Confidential]**.

<sup>956</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T112 LL.11 – 13]; Independent report of Matt Harris (Frontier Economics) for the ACCC, 9 August 2023, at [43]; Expert report of David Dixon (Rystad Energy) for the Applicants, 25 August 2023, at p. 6.

<sup>957</sup> There is a question as to whether the transaction might be one of the types of unforeseen developments that contributes to the regular decreases in emissions projections. This question has not been put to Mr Harris. However, the ACCC assumes that his answer would be ‘it is not’ given other opinions he expresses.

<sup>958</sup> Expert report of David Dixon (Rystad Energy): Annexure 2, 25 August 2023, at p. 1.

<sup>959</sup> Alinta Energy record of oral submission, 30 June 2023, at [10]; Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [2] – [3]; ACEN Australia record of oral submission, 4 July 2023, at [16]; Grattan Institute record of oral submission, 3 July 2023, at [15], [17]; Iberdrola record of oral submission, 1 August 2023, at [17].

- 7.64. While Mr Harris also acknowledges bottlenecks are a barrier, he considers they can be alleviated by government schemes supporting investment in transmission infrastructure.<sup>960</sup> Specifically, Mr Harris considers:
- in the future, there will be an acceleration in renewables development as evidenced by AEMO's Integrated System Plan, the pipeline of proposed projects in the NEM,<sup>961</sup> the increase in connection applications and projects in construction in the last 12 months, and upgrades to the network and development of Renewable Energy Zones,<sup>962</sup> and
  - there are numerous Commonwealth and State policies that are aimed at spurring investment in renewables, most of which reduce price or volume risk for developers.<sup>963</sup>
- 7.65. Some interested parties support Mr Harris' views, in particular that there is significant capital looking to invest in green assets, and that renewables development will accelerate after transmission network upgrades are completed.<sup>964</sup>
- 7.66. Other interested parties, such as EnergyAustralia and Iberdrola, submit that while the market will likely develop the generation capacity proposed by Brookfield if the Proposed Acquisition does not proceed, it will do so at a slower pace.<sup>965</sup>
- 7.67. In response to the submissions of interested parties and Mr Harris' expert report, the Applicants submit that Australia is not likely to achieve its renewables targets for 2030 or 2050 unless something changes and note modelling that supports their position, as well as statements from industry leaders, regulators and climate advisors. The Applicants consider Mr Harris' analysis makes unsubstantiated assumptions and ignores complicating factors in the transition, particularly going forward.<sup>966</sup>

### **ACCC view**

- 7.68. The ACCC considers that if the Proposed Acquisition does not proceed, the degree of investment by other market participants in renewable generation and storage

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<sup>960</sup> Independent report of Matt Harris (Frontier Economics) for the ACCC, 9 August 2023, at [16].

<sup>961</sup> Independent report of Matt Harris (Frontier Economics) for the ACCC, 9 August 2023, at [43].

For example, Matt Harris notes that information published by AEMO (from July 2023) lists a total of 43.8 GW of proposed utility solar projects, 77.4 GW of proposed onshore wind projects and 52.5 GW of proposed offshore wind projects.

<sup>962</sup> Independent report of Matt Harris (Frontier Economics) for the ACCC, 9 August 2023, at [43].

<sup>963</sup> Independent report of Matt Harris (Frontier Economics) for the ACCC, 9 August 2023, at [50] – [70], [71] – [73].

<sup>964</sup> Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [2] – [5]; Clean Energy Council record of oral submission, 25 July 2023, at [1], [21]; Grattan Institute record of oral submission, 3 July 2023, at [13], [15], [17] – [18].

<sup>965</sup> EnergyAustralia record of oral submission, 4 July 2023, at [25]; Iberdrola record of oral submission, 1 August 2023, at [23] – [24].

<sup>966</sup> Applicants' response to interested party submissions, 28 July, at [8], [20]. For example, the Applicants have provided data indicating the pace of new renewable generation capacity is decelerating, and consider that Mr Harris' assumption that there will be an 'acceleration' in renewable generation and storage capacity is flawed because:

- despite government modelled outcomes and policy objectives (such as those reflected in AEMO's Integrated System Plan) there are commercial challenges that projects are facing. The Applicants note that while there is an abundance of 'proposed or anticipated' projects in AEMO's pipeline, projects are struggling to reach financial close or come online. This is consistent with recent data, for example the Clean Energy Council noted that in Q2 2023, 348 MW of capacity reached financial commitment, and generation projects had their slowest first half of the year since 2017.
- Mr Harris' projections rely on further government intervention (e.g., contracting or direct investment), which is speculative and not supported by the effectiveness of government policies to date.

The Applicants also highlight that Mr Harris has focused on whether or not the Proposed Acquisition will assist in the achievement of government policies, and submit that there is benefit in additional renewable generation and storage (and the consequent emissions reduction) that exceeds government targets or modelling.



projects is unclear. The ACCC notes the comments made by the Applicants regarding the challenges faced by renewables developers are broadly consistent with those of interested parties and are supported by AEMO's categorisation of the project pipeline. The ACCC considers that government mechanisms in place will incentivise the development of new projects, however, it is unclear to what extent these will increase the speed at which investment will occur.

## *Future with the Proposed Acquisition*

### **Accelerated or additional renewable generation and storage development by Origin Energy Markets**

#### ***Applicants' submissions***

- 7.69. The Applicants submit that, if the Proposed Acquisition proceeds, the proposed 'green build-out' of Origin Energy Markets will result in the following public benefits:
- 'a substantial acceleration of Origin Energy Markets renewable generation development'<sup>967</sup>
  - improved 'speed and certainty' of Origin Energy Markets' transition to net zero<sup>968</sup>
  - an increase of up to 10 GW of renewable generation and storage capacity for Origin Energy Markets by 2033,<sup>969</sup> and
  - a reduction in absolute emissions produced by Origin Energy Markets by more than 70% by 2030.<sup>970</sup>
- 7.70. The Applicants submit that Brookfield will invest AUD 20-30 billion in renewable generation, including wind and solar renewables, and storage assets to develop up to approximately 14 GW of capacity.<sup>971</sup> Specifically, the Applicants' renewables build-out target is approximately: **[Redacted – Confidential]**.<sup>972</sup> Brookfield will also retain Origin's generation portfolio, which at the time of the Application totals 7,835 MW, comprising Origin-owned and contracted capacity.<sup>973</sup>
- 7.71. The Applicants anticipate that developing up to 14 GW of renewable generation and storage assets will allow Brookfield to cover approximately **[Redacted – Confidential]** of Origin Energy Markets' aggregate customer load requirements by 2033.<sup>974</sup> The remainder will be supplied by Origin Energy Markets' gas peaking plants or purchased from the wholesale market or through power purchase agreements or other hedges.<sup>975</sup> Under the proposed build-out, **[Redacted – Confidential]**:<sup>976</sup>
- **[Redacted – Confidential]**

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<sup>967</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [44].

<sup>968</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [768].

<sup>969</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [49], [52], [806] (Figure 92).

<sup>970</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [790].

<sup>971</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [788].

<sup>972</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [806] (Figure 92).

<sup>973</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [610].

<sup>974</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [45].

<sup>975</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [786(b)], fn 449, [806] (Figure 92).

<sup>976</sup> **[Redacted – Confidential]**.



- [Redacted – Confidential]
- [Redacted – Confidential]
- [Redacted – Confidential].

7.72. The Applicants submit that the ACCC can be confident that the proposed build-out of Origin Energy Markets will be completed because of the following factors:

- Brookfield’s plan: Brookfield has a comprehensive plan to achieve the proposed build-out<sup>977</sup>
- Brookfield’s incentives: Brookfield has strong financial, commercial and reputational incentives to carry out its plans<sup>978</sup>
- Origin’s retail base: Brookfield will be able to benefit from Origin’s customer base as a guaranteed offtaker<sup>979</sup>
- Origin’s firming capacity: Brookfield will be able to leverage Origin’s existing firming capacity<sup>980</sup>
- Brookfield’s capital: Brookfield has significant capital to support its investment in the proposed build-out<sup>981</sup>
- Brookfield’s expertise: Brookfield has significant project expertise and bulk procurement capabilities that it can rely on to execute the proposed build-out.<sup>982</sup>

7.73. Each of these factors is considered in more detail below.

#### ***Interested parties’ submissions and consultation***

7.74. In respect of this claimed public benefit, the ACCC has received public submissions from the following interested parties:

- gentailers and generator developers: EnergyAustralia, Alinta Energy, ACEN Australia, Syncline Energy and Iberdrola
- financial institutions: ANZ and Commonwealth Bank of Australia
- a petroleum company: Ampol
- an industry body and a research institute and a customer: Grattan Institute and Clean Energy Council
- a submission where the identity of the submitter is confidential.

7.75. Further, the ACCC has consulted with Mr Harris and has had regard to his opinion. See above discussion in Section 4.

7.76. The ACCC also requested and received information under section 90(6)(c) and (d) of the Act from AEMO, Origin, Temasek, and the Applicants.

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<sup>977</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: [Redacted – Confidential], at [40]; Applicants’ response to [Redacted – Confidential].

<sup>978</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [767], [863], [866] – [867]; Brookfield and Origin record of oral submission, 4 August 2023, at [14] – [17].

<sup>979</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [831].

<sup>980</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [442], [810]; Statement of Luke Edwards (Brookfield), 5 June 2023, at [36(a)].

<sup>981</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [818].

<sup>982</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [855], [784], [812].

### **How the ACCC has assessed this claimed public benefit**

- 7.77. In assessing this claimed public benefit, the ACCC has considered whether the Proposed Acquisition would result, or be likely to result, in an acceleration of, or additional, renewable generation and storage development for Origin Energy Markets and a decrease in absolute emissions produced by Origin Energy Markets. In particular, this has involved consideration of:
- the likelihood that Brookfield will complete the proposed build-out of Origin Energy Markets by reference to:
    - the issues identified in paragraph 7.72 above (Brookfield's plans, incentives, capital, expertise, and Origin's retail base and firming capacity)
    - the factors that may delay or reduce Brookfield's ability to carry out the proposed build-out, including transmission constraints
    - the extent to which the Proposed Acquisition may result in the early closure of the Eraring power station
  - the extent to which a renewables build-out would still occur if the Proposed Acquisition does not proceed, and
  - the differential between the future with and the future without the Proposed Acquisition, to determine if the future with the Proposed Acquisition is likely to result in a public benefit.
- 7.78. The ACCC notes that the Applicants made claims that the Proposed Acquisition would result in increased *certainty* of Origin Energy Markets' transition to net zero. The ACCC has considered this claim of a more certain transition by reference to the likelihood that the proposed build-out will occur and therefore the likelihood of any benefit arising. The ACCC also notes the Applicants' claims in respect of Origin's transition to net zero. The ACCC has had regard to this claim in assessing the nature and magnitude of the claimed public benefit.

### **Brookfield's plan**

- 7.79. The ACCC has considered Brookfield's confidential development plans, relating to how and when projects will be built, to analyse the likelihood of Brookfield achieving the proposed build-out. The Applicants submit that Brookfield has planned the build-out with a target of **[Redacted – Confidential]** GW by 2030 and **[Redacted – Confidential]** GW by 2033.<sup>983</sup>
- 7.80. **[Redacted – Confidential]**.<sup>984</sup> **[Redacted – Confidential]**.<sup>985</sup>
- 7.81. **[Redacted – Confidential]**.<sup>986</sup> **[Redacted – Confidential]**.<sup>987</sup> The build-out will comprise assets Brookfield develops itself, **[Redacted – Confidential]**, and possibly via offtake agreements (power purchase agreements) if economically viable.<sup>988</sup> **[Redacted – Confidential]**.<sup>989</sup>

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<sup>983</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [40].

<sup>984</sup> **[Redacted – Confidential]**.

<sup>985</sup> **[Redacted – Confidential]**.

<sup>986</sup> **[Redacted – Confidential]**.

<sup>987</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023 at [64].

<sup>988</sup> **[Redacted – Confidential]**; Application for merger authorisation (MA1000024), 5 June 2023, at [435].

<sup>989</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

- 7.82. The Applicants submit that Brookfield has conducted internal modelling to confirm that 14 GW of capacity is achievable. **[Redacted – Confidential]**.<sup>990</sup> **[Redacted – Confidential]**.<sup>991</sup>
- 7.83. In relation to Brookfield’s staffing plans, the Applicants submit **[Redacted – Confidential]**.<sup>992</sup> Brookfield itself presently has a team of 5 Australian-based development staff, supported by technical, procurement and commercial teams globally. If the Proposed Acquisition proceeds, Brookfield expects to retain the same staff in-house, and possibly add one to two more renewables development professionals to support the investment in Origin Energy Markets.<sup>993</sup>
- 7.84. As to funding for the build-out, the Applicants submit this will be through a combination of:<sup>994</sup>
- Origin Energy Markets’ cashflow which will be retained by Origin Energy Markets rather than paid out as dividends
  - third-party debt, **[Redacted – Confidential]**,<sup>995</sup> and
  - capital recycling. The Applicants claim that once a project has been constructed and de-risked, Brookfield will sell down an interest in the project to a third-party. According to the Applicants, investors would be willing to pay a premium above the construction cost to reflect the value of these assets being de-risked. The capital from these sales will be reinvested into new projects.
- 7.85. **[Redacted – Confidential]**.<sup>996</sup> **[Redacted – Confidential]**.<sup>997</sup> **[Redacted – Confidential]**.<sup>998</sup> Further, BGTF will provide additional equity if there are years in which Origin Energy Markets’ cashflows are low and additional capital is required.<sup>999</sup>
- 7.86. As noted above, the Applicants submit that if the Proposed Acquisition proceeds, Brookfield will develop up to 14 GW of renewable generation and storage assets by 2033. **[Redacted – Confidential]**, although they consider such a situation is ‘extremely unlikely’.<sup>1000</sup> The Applicants submit Brookfield has modelled for various market sensitivities and its forecast equity internal rate of return is robust in multiple different market scenarios.<sup>1001</sup> Therefore, they consider there is a high probability that the build-out, or a significant proportion of it, will be achieved even if there are material changes to market conditions.<sup>1002</sup>
- 7.87. **[Redacted – Confidential]**.<sup>1003</sup>

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<sup>990</sup> **[Redacted – Confidential]**.

<sup>991</sup> **[Redacted – Confidential]**.

<sup>992</sup> **[Redacted – Confidential]**.

<sup>993</sup> Applicants’ response to ACCC’s Transparency Letter: Annexure A, 1 September 2023, at [58].

<sup>994</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [821] – [825].

<sup>995</sup> **[Redacted – Confidential]**.

<sup>996</sup> **[Redacted – Confidential]**.

<sup>997</sup> **[Redacted – Confidential]**.

<sup>998</sup> **[Redacted – Confidential]**.

<sup>999</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [822].

<sup>1000</sup> **[Redacted – Confidential]**.

<sup>1001</sup> Applicants’ response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [8.26] – [8.27].

<sup>1002</sup> Applicants’ response to ACCC Transparency Letter: Annexure A, 27 July 2023, at [8.27].

<sup>1003</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

*ACCC conclusion: Brookfield's plan*

- 7.88. The ACCC considers that the plan is consistent with the Applicants' submissions regarding the long-term nature of the proposed build-out. The ACCC also considers that the existence of such a plan, albeit at a high-level, will support the completion of the build-out.
- 7.89. The ACCC acknowledges there is inherent uncertainty about the future of the proposed build-out in circumstances where relevant factors are changing rapidly. There are necessarily multiple scenarios that could occur, **[Redacted – Confidential]**. However, as discussed in more detail at paragraphs 7.96 and 7.97 based on the evidence before it, the ACCC considers it is unlikely Brookfield will materially depart from its plans to complete the build-out.

**Brookfield's incentives**

*Financial incentives*

- 7.90. The Applicants submit that Brookfield is incentivised to complete the build-out because the projected returns over the life of the fund, as well as the financial returns for Brookfield and its staff, are maximised if it achieves a faster and more extensive build-out.<sup>1004</sup>
- 7.91. Brookfield's internal documents show that **[Redacted – Confidential]**.<sup>1005</sup> **[Redacted – Confidential]**.<sup>1006</sup>
- 7.92. Brookfield has also provided evidence to the ACCC that BAM, as asset manager of BGTF, is financially incentivised to maximise returns, and therefore to complete the build-out, as are the individuals responsible for its management. This is because:
- BAM earns a 'carried interest' for maximising financial returns of the investments it manages comprising **[Redacted – Confidential]** of any profit over and above that which delivers the investors an **[Redacted – Confidential]** internal rate of return (the target internal rate of return for BGTF is **[Redacted – Confidential]**).<sup>1007</sup> The higher the returns, the higher the carried interest
  - **[Redacted – Confidential]**.<sup>1008</sup>
- 7.93. As noted above, **[Redacted – Confidential]**.<sup>1009</sup>
- 7.94. **[Redacted – Confidential]**.<sup>1010</sup>
- 7.95. **[Redacted – Confidential]**.<sup>1011</sup> Further, in sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1012</sup>

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<sup>1004</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [866] – [867].

<sup>1005</sup> **[Redacted – Confidential]**.

<sup>1006</sup> **[Redacted – Confidential]**.

<sup>1007</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [7].

<sup>1008</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>1009</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>1010</sup> **[Redacted – Confidential]**.

<sup>1011</sup> **[Redacted – Confidential]**.

<sup>1012</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, [T57 LL.2 – 13].

### *ACCC conclusion – financial incentives*

- 7.96. The ACCC notes there is tension between the Applicants' claims that Brookfield is financially incentivised to complete the proposed build-out up to 14 GW and **[Redacted – Confidential]**.<sup>1013</sup> **[Redacted – Confidential]**.
- 7.97. The ACCC therefore considers that, **[Redacted – Confidential]**, Brookfield's returns are likely to be higher if Brookfield completes the full build-out of 14 GW, such that it is financially incentivised to do so. The ACCC also considers that Brookfield's internal documents support finding Brookfield individuals to be financially incentivised to maximise the returns of BGTF, which favour completing the build-out.

### *Commercial incentives (commitments to investors)*

- 7.98. The Applicants submit that BGTF is a dual-objective fund, which seeks to achieve attractive financial returns as well as generate measurable environmental impact.<sup>1014</sup> The Private Placement Memorandum provided to investors in BGTF sets out the dual objectives of BGTF,<sup>1015</sup> the market opportunities presented by the transition to net zero,<sup>1016</sup> and BGTF's clean energy investment theme.<sup>1017</sup> The Private Placement Memorandum also sets out:
- **[Redacted – Confidential]**<sup>1018</sup>
  - **[Redacted – Confidential]**,<sup>1019</sup> and
  - an overview of the Impact Measurement and Management System, which is the way Brookfield measures its environmental impacts and reports to investors.<sup>1020</sup> The Private Placement Memorandum **[Redacted – Confidential]**,<sup>1021</sup> **[Redacted – Confidential]**.<sup>1022</sup>
- 7.99. **[Redacted – Confidential]**.<sup>1023</sup>
- 7.100. The Applicants submit that GIC and Temasek are investing in Brookfield LP on the basis that the stated investments in renewable energy will be made, and that to the best of Brookfield's knowledge, GIC and Temasek relied on the same capital expenditure plan and financial model as BGTF to inform their investment decision in Brookfield LP.<sup>1024</sup> **[Redacted – Confidential]**.<sup>1025</sup>

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<sup>1013</sup> **[Redacted – Confidential]**.

<sup>1014</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [863].

<sup>1015</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [20]; **[Redacted – Confidential]**.

<sup>1016</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [49]; **[Redacted – Confidential]**.

<sup>1017</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [49]; **[Redacted – Confidential]**.

<sup>1018</sup> **[Redacted – Confidential]**.

<sup>1019</sup> **[Redacted – Confidential]**.

<sup>1020</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [49].

<sup>1021</sup> **[Redacted – Confidential]**.

<sup>1022</sup> **[Redacted – Confidential]**.

<sup>1023</sup> **[Redacted – Confidential]**.

<sup>1024</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [862]; Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [53].

<sup>1025</sup> **[Redacted – Confidential]**; Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [52].

- 7.101. Other documents provided to GIC and Temasek prior to their investment decision include documents provided to the ACCC in response to information requests issued under section 155(1)(a) and (b) of the Act. **[Redacted – Confidential]**.<sup>1026</sup>
- 7.102. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1027</sup>
- 7.103. The Applicants note that in relation to statements made to potential investors, Brookfield has obligations not to make misleading representations.<sup>1028</sup>

*ACCC conclusion – commercial incentives (commitments to investors)*

- 7.104. The ACCC **[Redacted – Confidential]**,<sup>1029</sup> and notes that Brookfield has not made a set commitment to investors to build any specific amount of renewable generation or storage.
- 7.105. Overall, the ACCC considers that, based on the evidence before it:
- investors in Brookfield LP are investing on the basis that Brookfield will complete a significant build-out of renewable energy generation and storage capacity over the investment period, and expect that this will correlate with strong financial returns, and
  - investors in BGTF expect their money will be invested in global renewable energy projects with a decarbonisation theme, and that this will correlate with strong financial returns.
- 7.106. The ACCC therefore considers that Brookfield is incentivised by the commitments it made to investors to complete the build-out.

*Commercial incentives (governance arrangements)*

- 7.107. The Applicants submit that:
- investments made by BGTF must be made in accordance with the BGTF dual fund mandate and meet the ‘4A criteria’,<sup>1030</sup> and
  - its Impact Measurement and Management System will apply to promote transparency and accountability to investors against its impact objectives.<sup>1031</sup> Approved investments made by BGTF are subject to Brookfield’s Impact Measurement and Management System, which informs business plans for specific investments and imposes obligations to monitor and report against ‘impact targets’ and **[Redacted – Confidential]**.<sup>1032</sup> The Impact Measurement and Management System will apply to the investment in Brookfield LP.

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<sup>1026</sup> **[Redacted – Confidential]**.

<sup>1027</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T62 LL.15-25].

<sup>1028</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [32].

<sup>1029</sup> **[Redacted – Confidential]**.

<sup>1030</sup> The 4A Criteria assess whether a prospective investment meets the following criteria: 1. Alignment with achievement of the fund’s overarching objectives 2. Additionality requires achievement of outcomes above the status quo 3. Accountability requires a plan to measure impact and set net-zero aligned targets and 4. Avoidance of unintended negative consequences; See: Application for merger authorisation (MA1000024), 5 June 2023, at [767].

<sup>1031</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [38]; Applicants’ further submissions following ACCC meeting on 4 August 2023, 17 August 2023, at [2] – [7].

<sup>1032</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

- 7.108. **[Redacted – Confidential]**.<sup>1033</sup>
- 7.109. Brookfield notes that the specific ‘impact targets’, which will be embedded in the business plan of Brookfield LP, are the development of **[Redacted – Confidential]** and **[Redacted – Confidential]**.<sup>1034</sup> Brookfield LP will also have scope 1, 2 and material scope 3 emissions reduction targets,<sup>1035</sup> aligned with sector specific pathways.<sup>1036</sup>
- 7.110. Further, ongoing impact results/reporting will be provided at the asset and fund level, at least annually,<sup>1037</sup> and **[Redacted – Confidential]**.<sup>1038</sup> **[Redacted – Confidential]**.<sup>1039</sup>
- 7.111. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**:
- **[Redacted – Confidential]**,<sup>1040</sup> and
  - **[Redacted – Confidential]**.<sup>1041</sup>

*ACCC conclusion – Commercial incentives (governance arrangements)*

- 7.112. **[Redacted – Confidential]**.<sup>1042</sup> Nevertheless, the ACCC considers that the disclosure and reporting requirements within the Impact Measurement and Management System will facilitate transparency and accountability, reducing the likelihood that Brookfield will materially depart from its investment strategy over the investment period.

*Reputational incentives*

- 7.113. The Applicants also submit that Brookfield will be incentivised to complete the build-out, as there are real risks to its reputation and ability to attract investors for future funds if it does not adhere to its environmental objectives for its current funds.<sup>1043</sup>

*ACCC conclusion – Reputational incentives*

- 7.114. As outlined above, the ACCC considers that investors in BGTF and Brookfield LP have done so on the basis that they are investing in renewable energy. The ACCC therefore considers that there would be reputational consequences for Brookfield if it were to materially depart from its investment thesis, and accepts this will incentivise Brookfield to complete the build-out.

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<sup>1033</sup> **[Redacted – Confidential]**.

<sup>1034</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [40].

<sup>1035</sup> Brookfield s90(6)(b) Response to Notice issued 25 August 2023: **[Redacted – Confidential]**, at [40].

<sup>1036</sup> **[Redacted – Confidential]**.

<sup>1037</sup> **[Redacted – Confidential]**.

<sup>1038</sup> **[Redacted – Confidential]**.

<sup>1039</sup> **[Redacted – Confidential]**.

<sup>1040</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T55 L.24] – [T56 L.9].

<sup>1041</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T61 LL.22 – 30], [T62 L.8] – [T63 L.8].

<sup>1042</sup> **[Redacted – Confidential]**.

<sup>1043</sup> Brookfield and Origin record of oral submission, 4 August 2023, at [14] – [17].

### *Overall ACCC conclusion – Brookfield’s incentives*

- 7.115. The ACCC considers that Brookfield has strong incentives to complete the proposed build-out of up to 14 GW of renewable generation and storage capacity by 2033, for the following reasons:
- while Brookfield (and individuals responsible for managing BGTF) is primarily motivated by financial returns, there is an alignment of the achievement of financial returns and the completion of the build-out, as underpinned by its modelling; that is, **[Redacted – Confidential]**
  - an express purpose of the BGTF is investment in renewable energy projects and decarbonisation, and investors have joined the fund on this basis
  - internal governance arrangements require Brookfield to regularly measure and report against specific ‘impact targets’ for its renewables build-out (which are **[Redacted – Confidential]** and **[Redacted – Confidential]**) and Paris-aligned emissions reduction targets, and
  - a failure to complete the build-out may impact Brookfield’s ability to attract investors and raise capital for future funds.

### **Access to Origin’s retail base**

- 7.116. The Applicants submit that if the Proposed Acquisition proceeds, Brookfield will have access to a guaranteed offtaker in the form of Origin’s retail base, which will:
- provide certainty when seeking renewables project financing<sup>1044</sup>
  - provide certainty when negotiating transmission connection for new generation projects,<sup>1045</sup> and
  - reduce ‘friction’ (project delays and costs) arising from the need, as a developer of new generation, to negotiate an offtake agreement with an acquirer of electricity, as part of an interdependent set of negotiations which include an offtake agreement, transmission connection terms and financing.<sup>1046</sup>
- 7.117. As discussed at paragraph 7.53, securing an offtake agreement, such as a power purchase agreement, is typically a requisite step for a project to obtain financing and reach financial close. This is because a power purchase agreement provides a developer with revenue certainty. The Applicants submit that it is rare for a developer to take a project to market without a power purchase agreement.<sup>1047</sup> Further, the Applicants submit that government schemes, particularly the long-term energy service agreements in New South Wales, do not replace the need for a power purchase agreement.<sup>1048</sup>

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<sup>1044</sup> Statement of Luke Edwards (Brookfield), 5 June 2023, at [63], [75(b)], [157] – [158]; Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T78 L.25] – [T79 L.8].

<sup>1045</sup> Statement of Anthony Lucas (Origin), 5 June 2023, at [40(c)].

<sup>1046</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T78 L.25] – [T79 L.8]; Statement of Anthony Lucas (Origin), 5 June 2023, at [40(c)].

<sup>1047</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [329]; Applicants’ response to ACCC Second Transparency Letter: Annexure A, 1 September 2023, at [44].

<sup>1048</sup> Brookfield s90(6)(b) Response to Notice issued 16 August 2023: **[Redacted – Confidential]**, at [76], [89].



- 7.118. The Applicants consider that finding an offtaker has been a major barrier to renewables investment in Australia.<sup>1049</sup> In particular, the Applicants submit that challenges to securing a power purchase agreement include:<sup>1050</sup>
- finding an offtaker willing to sign a long-term power purchase agreement,
  - cost which can be materially impacted by the time negotiating risk allocation, legal documentation, operating and maintenance agreements, and contract management,
  - increasing uncertainty, and therefore risk and costs, as a result of the delay between pricing negotiations and contracting, whereby the customer's needs, the cost of the build-out and pricing might have changed, and
  - delay, in circumstances where the assets under a power purchase agreement are not yet developed, a tension arises when negotiating risk allocation as the developer and offtaker are focused on different objectives.

- 7.119. The Applicants submit acquiring Origin's existing customer base will 'significantly simplify the commercial requirements for each project, resulting in a material acceleration of the timeline to reach financial close'<sup>1051</sup> and reduce a project's cost.<sup>1052</sup> For example, the Applicants submit:

Developing a new renewable generation or storage project without a guaranteed offtaker presents a high degree of risk [...] Owning a large platform, such as Origin Energy Markets with ~2.73 million electricity customer accounts and a demand profile of ~36 TWh (FY22) that provides a ready-made offtaker, substantially eliminates this aspect of the development risk.<sup>1053</sup>

- 7.120. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1054</sup>

- 7.121. The ACCC has received mixed feedback from interested parties, and in consultations, regarding the value of a generator developer having access to a retail base. Some interested parties recognise access to a retail base provides a natural hedge against the volatility in the wholesale electricity market,<sup>1055</sup> and Iberdrola supports that there is commercial risk involved with not securing a power purchase agreement.<sup>1056</sup> Further, Iberdrola submits that an existing retail base allows generators to manage a lower discount rate on their cost of capital. Iberdrola notes that if the Proposed Acquisition proceeds, Brookfield will be able to lower its cost of capital by allocating renewable generation projects to its customers.<sup>1057</sup>

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<sup>1049</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [328] – [329].

<sup>1050</sup> Brookfield s90(6)(b) Response to Notice issued 16 August 2023: **[Redacted – Confidential]**, at [101].

<sup>1051</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [831].

<sup>1052</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [311], [330].

<sup>1053</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [44].

<sup>1054</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T76 L.9] – [T77 L.12], [T78 LL.1 – 24], [T78 L.25] – [T79 L.8].

<sup>1055</sup> Grattan Institute record of oral submission, 3 July 2023, at [10]; Clean Energy Council record of oral submission, 25 July 2023, at [20].

<sup>1056</sup> Iberdrola record of oral submission, 1 August 2023, at [13].

<sup>1057</sup> Iberdrola record of oral submission, 1 August 2023, at [12].

- 7.122. However, some interested parties submit that having a retail base is one strategy, but it does not provide a significant financial advantage, and power purchase agreements offer a viable alternative.<sup>1058</sup>
- 7.123. Mr Harris supports this view, and expresses the opinion that ‘the benefit of a retail customer base appears minimal given current policy settings and [the] development of the power purchase agreement market.’<sup>1059</sup> He highlights the growing demand for power purchase agreements by corporate entities, including Amazon, Apple, Microsoft, BHP, Anglo American, Telstra, Woolworths, Coles and Ikea, alongside government schemes.<sup>1060</sup> Likewise, the Clean Energy Council submits that there is capital willing to purchase power purchase agreements, and this is in part due to the growth of corporates’ emission reduction targets.<sup>1061</sup>
- 7.124. Conversely, some interested parties submit that the power purchase agreement market is limited and there are difficulties in securing long-term offtake agreements.<sup>1062</sup> ACEN Australia explains that this can arise from divergent price expectations between generators and purchasers, and there can be a trade-off between the length of a power purchase agreement and the revenue it provides. Consequently, many developers are forced to sacrifice revenue to gain long-term price certainty. Difficulty in securing price certainty in the form of a long-term offtake agreement can reduce the viability of developing projects.<sup>1063</sup> ACEN Australia also acknowledges it can require significant negotiation to secure a commercially reasonable offtake agreement.<sup>1064</sup>
- 7.125. ANZ submits that government schemes have had a positive effect on the investment outlook of renewables, but notes they do not negate the need for a power purchase agreement to secure project financing.<sup>1065</sup> ANZ further submits that, notwithstanding the growing demand for power purchase agreements, it is important that electricity retailer power purchase agreements grow from existing levels, in conjunction with government schemes and corporate power purchase agreements, to stimulate private investment.<sup>1066</sup>

*ACCC conclusion - Access to Origin’s retail base*

- 7.126. The ACCC notes the importance of revenue certainty for a developer to access project financing and begin development. While the ACCC understands that power purchase agreements and government schemes can provide revenue certainty to a degree, the difficulties associated with negotiating and securing a long-term power purchase agreement indicate that a retail base provides a material advantage as a means of securing project financing. The ability to bypass negotiations with a third-party also allows a developer to accelerate a project’s timeline.

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<sup>1058</sup> Alinta Energy record of oral submission, 30 June 2023, at [14]; Grattan Institute record of oral submission, 3 July 2023, at [10]; EnergyAustralia record of oral submission, 4 July 2023, at [19].

<sup>1059</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [108].

<sup>1060</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [108] – [112].

<sup>1061</sup> Clean Energy Council record of oral submission, 25 July 2023, at [21].

<sup>1062</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [7] – [8]; ACEN Australia record of oral submission, 4 July 2023, at [4] – [6]; Iberdrola record of oral submission, 1 August 2023, at [12].

<sup>1063</sup> ACEN Australia record of oral submission, 4 July 2023, at [4] – [6].

<sup>1064</sup> ACEN Australia record of oral submission, 4 July 2023, at [4].

<sup>1065</sup> ANZ submission, 24 August 2023, at p. 1.

<sup>1066</sup> ANZ submission, 24 August 2023, at p. 1.

7.127. The ACCC therefore considers that access to a retail base can contribute to accelerating the build-out of renewable generation and storage assets, because it removes the need to negotiate offtake agreements which can take considerable time and increase project costs, particularly in relation to long-term financing.

### ***Origin's firming capacity***

7.128. The Applicants submit that Origin's existing firming capacity will support the overall renewables build-out and facilitate a smooth transition from coal-fired generation.<sup>1067</sup> Firming capacity refers to flexible forms of energy generation that can dispatch when intermittent generators (e.g. renewables) cannot. Examples of firming capacity include gas, hydro and battery generators.<sup>1068</sup>

7.129. **[Redacted – Confidential].**<sup>1069</sup> **[Redacted – Confidential]:**

- **[Redacted – Confidential]**<sup>1070</sup>
- **[Redacted – Confidential]**<sup>1071</sup>
- **[Redacted – Confidential].**<sup>1072</sup>

7.130. **[Redacted – Confidential].**<sup>1073</sup> **[Redacted – Confidential].**<sup>1074</sup>

7.131. **[Redacted – Confidential].**<sup>1075</sup> **[Redacted – Confidential].**<sup>1076</sup>

7.132. Evidence provided by Origin supports the Applicants' submission that gas peaking plants will play a key role in firming capacity in the future. In sworn evidence provided by an Origin senior executive, **[Redacted – Confidential].**<sup>1077</sup>

7.133. Some interested parties support the Applicants' submission that Origin's existing gas generation assets will provide firming capacity to facilitate Brookfield's build-out.<sup>1078</sup> For example, ACEN Australia submits:

Origin has attractive assets and once they close down coal generation, even if they split off gas they will likely have underlying contracts with their peaking gas fleet which complements renewable generation to provide firming capacity [...] ACEN submits that between Origin's gas generation assets and Brookfield's proposed development in renewable generation, Brookfield would have a strong generation portfolio with firming capacity.<sup>1079</sup>

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<sup>1067</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [442], [810]; Statement of Luke Edwards (Brookfield), 5 June 2023, at [36(a)].

<sup>1068</sup> AER, [State of the Energy Market 2021](#), 2 July 2021, at p. 22.

<sup>1069</sup> **[Redacted – Confidential].**

<sup>1070</sup> **[Redacted – Confidential].**

<sup>1071</sup> **[Redacted – Confidential].**

<sup>1072</sup> **[Redacted – Confidential].**

<sup>1073</sup> **[Redacted – Confidential].**

<sup>1074</sup> **[Redacted – Confidential].**

<sup>1075</sup> For example, Mortlake Battery next to Mortlake gas-fired power station and wind turbines. Statement of Anthony Lucas (Origin), 5 June 2023, at [33(b)]; **[Redacted – Confidential].**

<sup>1076</sup> **[Redacted – Confidential].**

<sup>1077</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T53 L.18] – [T54 L.9].

<sup>1078</sup> ACEN Australia record of oral submission, 4 July 2023, at [11]; Iberdrola record of oral submission, 1 August 2023, at [7].

<sup>1079</sup> ACEN Australia record of oral submission, 4 July 2023, at [11].

### *ACCC conclusion - Origin's firming capacity*

- 7.134. The ACCC notes that peaking plants and renewables storage can act as a natural financial hedge against the costs of meeting expected and unexpected periods of peak demand during periods of under-supply by renewables, as well as satisfy AEMO's demands for firming capacity linked directly to renewables projects, to ensure grid stability.
- 7.135. The ACCC considers that firming capacity will play an important role in transitioning Australia away from coal-fired generation, as it will provide capacity to smooth out the 'peaks and troughs' in the market.<sup>1080</sup>
- 7.136. The ACCC therefore considers Brookfield's access to Origin's existing firming capacity is relevant to the speed at which it can complete the build-out, including because it assists in periods of peak demand, meets AEMO's demands to ensure grid stability and may provide additional benefits in terms of an existing transmission connection for co-location. However, the ACCC recognises that Origin's firming capacity may also support a degree of renewables investment by Origin if the Proposed Acquisition does not proceed.

### ***Brookfield's access to capital and long-term investment horizon***

- 7.137. The Applicants submit the fact Brookfield has earmarked significant capital to the proposed build-out evidences its intention to complete the build-out.<sup>1081</sup>
- 7.138. The Applicants note the consortium will not require dividends, and this will allow Brookfield to deploy substantial amounts of capital to the build-out.<sup>1082</sup> Further, in sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1083</sup> The BGTF fund has a 12-year period of return, which the Applicants submit provides greater certainty as to the funding of the build-out. According to the Applicants, many other institutional investors are reluctant to assume construction risk or invest in high-emitting companies.<sup>1084</sup> The Applicants further submit that Brookfield will also have the capacity to supplement capital as needed and recycle capital through the partial sell-down of ownership of completed projects.<sup>1085</sup> The Applicants submit that this will provide Origin Energy Markets with the flexibility to pursue longer-term capital-intensive renewables projects.<sup>1086</sup>
- 7.139. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1087</sup> Further, documents provided in support of the Application indicate there is increasingly negative market sentiment towards high-emitting companies and this can adversely affect their cost of capital or ability to raise capital.<sup>1088</sup>

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<sup>1080</sup> AEMO, [AEMO CEO speech at Australian Energy Week](#), 20 July 2023, accessed 12 September 2023; AEMO, [2022 Integrated System Plan](#), 30 June 2022, at pp. 10 – 11.

<sup>1081</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [818].

<sup>1082</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [836].

<sup>1083</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T86 L.25] – [T88 L.11].

<sup>1084</sup> Brookfield s90(6)(b) Response to Notice issued 16 August 2023: **[Redacted – Confidential]**, at [31].

<sup>1085</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [821] – [824]; Applicants' response to ACCC Transparency Letter, 27 July 2023, at [8.30] – [8.39].

<sup>1086</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [836].

<sup>1087</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T86 L.25] – [T88 L.11].

<sup>1088</sup> Statement of Luke Edwards (Brookfield): Annexure LE-7, 5 June 2023, at pp. 4 – 15; Statement of Luke Edwards (Brookfield), 5 June 2023, at [45].

- 7.140. Further, in sworn evidence provided by an Origin senior executive, **[Redacted – Confidential]**.<sup>1089</sup>
- 7.141. However, Mr Harris expresses the opinion that attracting finance does not appear to be a barrier once a connection approval and a power purchase agreement are secured (including government contracts). In Mr Harris' view, long-term government contracts or direct government investment should address most issues related to finance and access to capital.<sup>1090</sup>
- 7.142. In contrast, in a report prepared for AGL, Grant Samuel highlights that capital markets are becoming increasingly sensitive to environmental, social and governance issues. Specifically, the report highlights that AGL's cost of capital has been adversely impacted by its ownership of coal-fired power stations.<sup>1091</sup> EnergyAustralia expresses a similar view, in an oral submission, that renewable developers have a simpler pathway to access finance compared to entities with fossil fuel assets that need to be transitioned.<sup>1092</sup>

*ACCC conclusion - Brookfield's access to capital and long-term investment horizon*

- 7.143. The ACCC considers that Brookfield is well-placed to invest in renewables, due to its capital structure, in that BGTF is not required to pay dividends throughout the fund's life, and has capital ready to deploy. Further, the ACCC considers Brookfield may be able to reduce its risks by pursuing multiple projects simultaneously, with the expectation that at least some will come to fruition. This is likely to increase the speed by which Brookfield can complete the build-out.
- 7.144. The ACCC considers increasing concerns about environmental, social and governance issues are likely to impact the cost of capital, and that Brookfield may have an advantage in this regard, because BGTF was established with the intention, in-part, to decarbonise carbon-intensive businesses.<sup>1093</sup>
- 7.145. The ACCC considers that it is possible for a publicly listed company to access capital and take a longer-term investment horizon. Nonetheless, the ACCC considers that under this particular Proposed Acquisition, a Brookfield-owned Origin is better placed than a publicly listed Origin to achieve the build-out.

***Brookfield's expertise***

*Brookfield's large-scale diversified construction capabilities*

- 7.146. The Applicants submit that a Brookfield-owned Origin will be able to draw on Brookfield's large-scale construction capabilities across a diversified range of technologies in the renewables sector.<sup>1094</sup> The Applicants submit that Brookfield's capabilities are demonstrated by its track record of renewables development. This includes completion of approximately 4 GW of renewables projects in the last 12

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<sup>1089</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T107 LL.1 – 12], [T109 L.23] – [T110 L.1].

<sup>1090</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [89], [107].

<sup>1091</sup> AGL, [ASX Release - Scheme Booklet](#), 6 May 2022, at p. 174.

<sup>1092</sup> EnergyAustralia record of oral submission, 4 July 2023, at [26].

<sup>1093</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [766(a)].

<sup>1094</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [855].

months, as well as its plans to deliver more than 15 GW globally over the next 3 years (excluding the Proposed Acquisition of Origin).<sup>1095</sup>

**[Redacted – Confidential]**

7.147. **[Redacted – Confidential]**.<sup>1096</sup>

*Project expertise and bulk procurement capabilities*

7.148. The Applicants submit that the build-out will be supported by Brookfield's internal expertise and international bulk procurement program through existing supply chains.<sup>1097</sup> In particular:

- Brookfield's project experience in Australia, across a variety of technologies<sup>1098</sup>
- international project experience, in a variety of countries, across a variety of technologies,<sup>1099</sup> and
- demonstrated bulk purchase discounts and ability to source supply during periods of scarcity.<sup>1100</sup>

7.149. The Applicants submit that, in practice, Brookfield will support the build-out through **[Redacted – Confidential]**.<sup>1101</sup> For example, the Applicants submit that Brookfield's Australian-based development staff will draw on Brookfield's global banking and supplier relationships, and experience constructing large-scale generation assets to support the build-out.<sup>1102</sup>

7.150. The Applicants submit the benefits of global relationships with key suppliers have been realised in the form of volume discounts, security of supply and quality control. **[Redacted – Confidential]**.<sup>1103</sup>

7.151. Further, in sworn evidence provided by an Origin senior executive, **[Redacted – Confidential]**.<sup>1104</sup>

7.152. The ACCC has received mixed feedback from interested parties about the advantages Brookfield derives from its global and centralised procurement capabilities. Some interested parties submit that the supply chain in Australia may become generally constrained, which Brookfield may not be able to overcome.<sup>1105</sup> For example, Grattan Institute notes:

Brookfield is well-placed to develop renewable generation because of its exposure to the sector overseas and the ability to secure supply of components. However, Australia could find itself in a supply chain that is constrained. While Brookfield is well-

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<sup>1095</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [855].

<sup>1096</sup> **[Redacted – Confidential]**.

<sup>1097</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [784], [812]

<sup>1098</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [8.41] – [8.43].

<sup>1099</sup> Application for merger authorisation (MA1000024):: Annexure B (Applicants) – Public benefits: Brookfield's global experience, 5 June 2023, pp. 1 – 6; Statement of Luke Edwards (Brookfield), 5 June 2023, at [93], [94], [98] – [100].

<sup>1100</sup> Statement of Luke Edwards (Brookfield), 5 June 2023, at [29], [105].

<sup>1101</sup> **[Redacted – Confidential]**.

<sup>1102</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [59] – [62].

<sup>1103</sup> **[Redacted – Confidential]**.

<sup>1104</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T32 L.24] – [T33 L.15].

<sup>1105</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [2], [13]; EnergyAustralia record of oral submission, 4 July 2023, at [27]; Grattan Institute record of oral submission, 3 July 2023, at [11].

placed to participate in a global supply chain, there are other businesses that are well-placed as well.<sup>1106</sup>

- 7.153. Conversely, ACEN Australia submits that Brookfield's global procurement capabilities might give it an advantage over other developers to overcome global supply chain issues, and allow it to acquire materials cheaper.<sup>1107</sup> Iberdrola submits that any advantage in terms of cheaper pricing will likely be minor, although a company like Brookfield will benefit from being able to procure inputs at scale and manage a portfolio of projects:

Iberdrola submitted that as a global company, it derives benefits from its global procurement capabilities. Iberdrola often procures from equipment manufacturers and because it has such scale, it can use the equipment for other projects in its portfolio if a particular project does not proceed. Iberdrola further noted that it may have some advantage from buying at scale and getting preferential pricing. However, Iberdrola considered that it is not significant. When Infigen was acquired by Iberdrola, Infigen thought the preferential pricing would be incredibly useful. While it has not yet been as beneficial as initially hoped, the supply-chain is quite constrained at the moment and would possibly be more beneficial in a normal economic climate.<sup>1108</sup>

#### *ACCC conclusion – Brookfield's expertise*

- 7.154. The ACCC notes that Brookfield is not unique in being a global renewables developer. Notwithstanding the Applicants' submission that Brookfield has been able to achieve discounts on inputs due to its centralised procurement capabilities, the ACCC does not accept Brookfield will necessarily be able to build projects at a lower cost than other developers.
- 7.155. However, the ACCC considers that Brookfield's global renewables expertise and procurement scale advantage may enable it to increase the speed of the build-out. In particular, Brookfield will benefit from centralised procurement capabilities, including access to a wider range of supply chains, and group-level negotiations with suppliers. Brookfield will also benefit from its global renewables expertise, including its experience in developing grid-scale wind generation and storage assets.

#### ***Closure of Eraring Power Station***

- 7.156. In assessing the claimed public benefit of an accelerated and incrementally additional renewables build-out of Origin Energy Markets, the ACCC has assessed the extent to which the build-out might impact the date of retirement of the Eraring power station.
- 7.157. The Applicants submit that the proposed build-out is linked to Eraring's retirement, because it will provide certainty and timeliness to the replacement capacity required to facilitate the timely closure of Eraring.<sup>1109</sup> The Applicants further submit that if the Proposed Acquisition does not proceed, Origin will face several uncertainties in reaching its 2030 emissions targets and 2050 ambition, one of which is the delay to

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<sup>1106</sup> Grattan Institute record of oral submission, 3 July 2023, at [11].

<sup>1107</sup> ACEN Australia record of oral submission, 4 July 2023, at [13].

<sup>1108</sup> Iberdrola record of oral submission, 1 August 2023, at [9] – [10].

<sup>1109</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [951].

the closure of Eraring. The Applicants suggest the Proposed Acquisition will address this risk.<sup>1110</sup>

- 7.158. Origin's Climate Transition Action Plan outlines its ambition to close Eraring as early as August 2025, noting that this will make a significant contribution to Origin achieving its emissions reduction target by 2030.<sup>1111</sup> However, Origin recognises there is the possibility for material delays to Eraring's decommissioning date.<sup>1112</sup> Nevertheless, in sworn evidence provided by an Origin senior executive, **[Redacted – Confidential]**.<sup>1113</sup>
- 7.159. Brookfield has similar intentions to close Eraring as early as August 2025. **[Redacted – Confidential]**.<sup>1114</sup> **[Redacted – Confidential]**.<sup>1115</sup> **[Redacted – Confidential]**.<sup>1116</sup> Notwithstanding, Brookfield submits it will consult with the New South Wales government regarding a closure date to **[Redacted – Confidential]**.<sup>1117</sup>
- 7.160. While Brookfield and Origin both intend to close Eraring as early as August 2025, the Applicants submit that Brookfield will be able to retire Eraring at least as soon as, and potentially sooner, than Origin could without the Proposed Acquisition.<sup>1118</sup> According to the Applicants, Brookfield has a proven ability to build generation and storage assets to replace retired assets at pace.<sup>1119</sup>
- 7.161. The ACCC has received limited information from interested parties regarding Eraring's possible closure date.

#### *ACCC conclusion – closure of Eraring Power Station*

- 7.162. The ACCC understands there are external factors that will likely impact Eraring's retirement date, which are outside Brookfield or Origin's control. In particular, the New South Wales government may intervene to delay the closure in certain circumstances, including to ensure system stability or reliability. This possibility is contemplated in AEMO's 2023 Electricity Statement of Opportunities, which forecasts a reliability gap in New South Wales from 2025-26 in parallel with the estimated retirement of Eraring. AEMO considers that there are different options to rectify the reliability gap, one of which is keeping 2 Eraring units in operation for an additional 2 years to August 2027, and another is through tenders for additional firming infrastructure and/or storage capacity.<sup>1120</sup> The New South Wales government has also recently announced it will start engaging with Origin about closure timeframes.<sup>1121</sup>

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<sup>1110</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [874] – [875].

<sup>1111</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 16.

<sup>1112</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 21.

<sup>1113</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T23 L.26] – [T24 L.7].

<sup>1114</sup> **[Redacted – Confidential]**.

<sup>1115</sup> **[Redacted – Confidential]**.

<sup>1116</sup> **[Redacted – Confidential]**.

<sup>1117</sup> **[Redacted – Confidential]**.

<sup>1118</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [92]; Application for merger authorisation (MA1000024), 5 June 2023, at [874].

<sup>1119</sup> Applicants' response to ACCC's Second Transparency Letter: Annexure A, 1 September 2023, at [92]; Application for merger authorisation (MA1000024), 5 June 2023, at [951].

<sup>1120</sup> AEMO, [2023 Electricity Statement of Opportunities](#), 31 August 2023, at [7.3] – [7.4].

<sup>1121</sup> NSW Government, [NSW Government rescues the Energy Roadmap to deliver the transition to renewables](#), 5 September 2023, accessed 11 September 2023.



7.163. Documents obtained under the ACCC’s compulsory information gathering powers indicate that Brookfield considers **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**<sup>1122</sup>
- **[Redacted – Confidential]**<sup>1123</sup>
- **[Redacted – Confidential]**.<sup>1124</sup>

7.164. To the extent that the Proposed Acquisition results in a faster build-out of renewable generation and storage (that can replace Eraring’s generation), this may assist the partial or full closure of Eraring sooner than under Origin’s existing ownership. However, the ACCC considers there are too many factors outside of Brookfield’s control for the ACCC to determine that the closure will happen sooner and with more certainty than if the Proposed Acquisition does not proceed.

***Factors that may delay or reduce Brookfield’s renewables build-out plans for Origin Energy Markets***

7.165. In assessing the claimed public benefit of an accelerated and incrementally additional renewables build-out of Origin Energy Markets, the ACCC has also considered matters which may delay or increase the uncertainty of the build-out.

7.166. The Applicants submit that network and grid bottlenecks represent significant constraints on the development of new renewables, and there are currently government and industry-led processes underway to address these issues.<sup>1125</sup>

7.167. The Applicants submit they have taken into account the constraints as part of the proposed build-out over the approximate 10 year investment period.<sup>1126</sup> Where transmission constraints will result in projects waiting for connections, the Applicants submit that an integrated developer like Brookfield (with generation development, a significant retail base and existing generation within the same portfolio) is more likely to move the project forward than a non-integrated developer, and can continue to advance projects so they can be developed rapidly once transmission constraints are addressed.<sup>1127</sup>

7.168. **[Redacted – Confidential]**.<sup>1128</sup> **[Redacted – Confidential]**:

- **[Redacted – Confidential]**
- **[Redacted – Confidential]**
- **[Redacted – Confidential]**.<sup>1129</sup>

7.169. **[Redacted – Confidential]**.<sup>1130</sup>

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<sup>1122</sup> **[Redacted – Confidential]**; **[Redacted – Confidential]**.

<sup>1123</sup> **[Redacted – Confidential]**.

<sup>1124</sup> **[Redacted – Confidential]**.

<sup>1125</sup> Brookfield s90(6)(b) Response to Notice issued 16 August 2023: **[Redacted – Confidential]**, at [22] – [26].

<sup>1126</sup> Applicants’ response to ACCC Second Transparency Letter: Annexure A, 1 September 2023, at [76].

<sup>1127</sup> Applicants’ response to ACCC Second Transparency Letter: Annexure A, 1 September 2023, at [77].

<sup>1128</sup> **[Redacted – Confidential]**.

<sup>1129</sup> **[Redacted – Confidential]**.

<sup>1130</sup> **[Redacted – Confidential]**.

7.170. [Redacted – Confidential].<sup>1131</sup>

7.171. [Redacted – Confidential]:

[Redacted – Confidential].<sup>1132</sup>

7.172. [Redacted – Confidential],<sup>1133</sup> [Redacted – Confidential].<sup>1134</sup>

7.173. [Redacted – Confidential].

**Table 1: Proposed transmission upgrades and resulting generation investments by region, with an indication of timing**

[Redacted – Confidential]<sup>1135</sup>

Source: [Redacted – Confidential].

**Table 2: Proposed transmission upgrades and resulting storage investments by region, with an indication of timing**

[Redacted – Confidential]<sup>1136</sup>

Source: [Redacted – Confidential].

7.174. The Applicants also submit that Brookfield has considered the impact a change in forward wholesale electricity prices would have on its investment, for example in the instance that prices decline to a level that it becomes uneconomic to develop renewable generation projects.<sup>1137</sup>

7.175. As noted, above, [Redacted – Confidential].<sup>1138</sup> [Redacted – Confidential].<sup>1139</sup>

7.176. Factors raised by interested parties that may delay or increase uncertainty in building renewables projects include:

- site identification, negotiation of land purchase, development approval, environmental approvals, network modelling and connections approvals<sup>1140</sup>
- existing transmission network issues substantially constraining the location of sites<sup>1141</sup>

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<sup>1131</sup> [Redacted – Confidential].

<sup>1132</sup> [Redacted – Confidential].

<sup>1133</sup> [Redacted – Confidential].

<sup>1134</sup> [Redacted – Confidential].

<sup>1135</sup> [Redacted – Confidential].

<sup>1136</sup> [Redacted – Confidential].

<sup>1137</sup> Applicants' response to ACCC Transparency Letter, 27 July 2023, at [8.24] – [8.25].

<sup>1138</sup> [Redacted – Confidential].

<sup>1139</sup> [Redacted – Confidential]; [Redacted – Confidential].

<sup>1140</sup> Alinta Energy record of oral submission, 30 June 2023, at [11]; Grattan Institute record of oral submission, 3 July 2023, at [16]; EnergyAustralia record of oral submission, 4 July 2023, at [23]; ACEN Australia record of oral submission, 4 July 2023, at [16]; Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [15]; Clean Energy Council record of oral submission, 25 July 2023, at [7]; Iberdrola record of oral submission, 1 August 2023, at [14].

<sup>1141</sup> Clean Energy Council record of oral submission, 25 July 2023, at [1]; Iberdrola record of oral submission, 1 August 2023, at [17].

- issues with the processes to upgrade transmission networks (e.g. social licence, ecological issues, government permitting process, supply chain issues, engineering issues)<sup>1142</sup>
- rapid changes in project construction costs due to inflation and shortages in labour and materials.<sup>1143</sup>

7.177. Interested parties' submissions frequently cite transmission constraints as a key issue in delaying and reducing the viability of renewables projects. For example:

- the Grattan Institute submits that the biggest impediment to transitioning the NEM to renewable energy sources is building out the transmission network and connection arrangements<sup>1144</sup>
- the Clean Energy Council submits that the biggest and most fundamental challenge for developing large-scale assets has been the lack of viable and suitable places to connect, which is in large part due to the lack of sufficient investment in transmission<sup>1145</sup>
- Iberdrola notes that the development pipeline for new renewable energy generation projects is subject to the transmission network.<sup>1146</sup>

7.178. Likewise, in his response to the ACCC's questions, Mr Harris expresses the view that the biggest barriers to new renewable investment are grid connection bottlenecks and network capacity.<sup>1147</sup>

*ACCC conclusion – factors that may delay or reduce Brookfield's renewables build-out plans for Origin Energy Markets*

7.179. The ACCC considers that Brookfield's access to capital may mitigate some of the factors that typically cause delays in renewables projects, for instance, if Brookfield can juggle multiple early-stage projects across the NEM in the expectation that at least some will come to fruition. As discussed above at 7.115, the ACCC considers Brookfield has incentives to complete its build-out on time, and therefore to manage these delays.

7.180. However, there are some fundamental issues that Brookfield is less able to overcome, particularly network capacity constraints and exogenous events beyond its control.

7.181. In this regard, the Finkel review noted the legacy transmission architecture of the NEM was designed in order to transmit energy from a small number of concentrated, dispatchable power sources, which also provided certain services to the system, including physical inertia, system strength and voltage control.<sup>1148</sup> This architecture is ill-suited to an energy system based on large numbers of distributed and intermittent renewable power sources, including a significant contribution from

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<sup>1142</sup> Grattan Institute record of oral submission, 3 July 2023, at [15], [17] – [18]; ACEN Australia record of oral submission, 4 July 2023, at [16]; Anonymous record of oral submission [Redacted – Confidential], 5 July 2023, at [3].

<sup>1143</sup> Clean Energy Council record of oral submission, 25 July 2023, at [2] – [3]; Iberdrola record of oral submission, 1 August 2023, at [14].

<sup>1144</sup> Grattan Institute record of oral submission, 3 July 2023, at [17].

<sup>1145</sup> Clean Energy Council record of oral submission, 3 July 2023, at [1].

<sup>1146</sup> Iberdrola record of oral submission, 3 July 2023, at [20].

<sup>1147</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [100].

<sup>1148</sup> Alan Finkel et al., [Independent Review into the Future Security of the National Electricity Market](#), June 2017, at p. 52.

small-scale renewable sources, such as household rooftop solar and batteries.<sup>1149</sup> As more renewables come online, the energy demand profile of the NEM will change, which will place increased pressure on the transmission network.<sup>1150</sup>

- 7.182. In various reports, AEMO has identified the following as the main transmission issues constraining renewables projects:
- transmission capacity: many components of the NEM are capacity constrained and not able to carry significantly more electricity loads
  - low system strength<sup>1151</sup> zones: AEMO notes that: 'low system strength zones are typically electrically weak and remote parts of the network that have attracted high volumes of renewable resources due to favourable wind and sun conditions'<sup>1152</sup>
  - curtailment<sup>1153</sup> risk: a renewables generator may be curtailed when there are system security or other operability constraints in the network, or there is simply over-abundant renewable energy available (even if demand is high in another area but transmission capacity is insufficient to move the energy from the area of excess supply to excess demand).<sup>1154</sup> A high risk of curtailment means that a renewables project is less likely to be commercially viable
  - time to complete modelling and engineering designs to satisfy AEMO and transmission network operators' requirements<sup>1155</sup>
  - in some states, difficulty gaining high priority for connection consideration by AEMO and network providers until funding and offtake agreements (or another supply path) have been settled.
- 7.183. In 2018, AEMO published a strategic infrastructure development plan, the Integrated System Plan, which was intended to facilitate an orderly energy system transition under a range of scenarios.<sup>1156</sup> AEMO has since updated and expanded the Integrated System Plan every 2 years to take account of new developments, emerging risks and evolving opportunities, in consultation with industry stakeholders.
- 7.184. AEMO's 2022 Integrated System Plan includes a comprehensive optimal development path to improve transmission constraints. The optimal development path identifies 22 transmission network investments which are required to 'support Australia's complex and rapid energy transformation towards net zero emissions, enabling low-cost firm renewable energy and essential transmission to provide consumers in the NEM with reliable, secure and affordable power.'<sup>1157</sup>

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<sup>1149</sup> Alan Finkel et al., [Independent Review into the Future Security of the National Electricity Market](#), June 2017, at pp. 53 – 64.

<sup>1150</sup> Alan Finkel et al., [Independent Review into the Future Security of the National Electricity Market](#), June 2017, at pp. 54, 66 – 69, 138 – 139.

<sup>1151</sup> System strength is the ability of the grid to maintain its voltage and waveform. It is related to inertia as system strength can be provided by synchronous generators or compensators.

<sup>1152</sup> AEMO, [Connections in Low System Strength Zones](#), accessed 15 September 2023.

<sup>1153</sup> Curtailment or spillage means that a renewables generator is not dispatched in the NEM despite available generation capacity.

<sup>1154</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 46.

<sup>1155</sup> For an outline of the connection process and typical timeframes, see: AEMO, [NSP Connection Process Overview Diagram v. 2.0](#), 8 October 2018.

<sup>1156</sup> AEMO, [2018 Integrated System Plan](#), July 2018, at p. 3.

<sup>1157</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 8.

- 7.185. The optimal development path includes comprehensive details on the sequencing, timeframes for implementation and nature of the required 22 transmission network upgrades. However, it has been developed to balance a wide range of constraining factors including capital availability. Accordingly, it is sequential, and transmission upgrades are spread over the period to 2050.<sup>1158</sup>
- 7.186. Further, to achieve the transmission upgrades, AEMO has identified the following issues which require priority action (and without which significant delays are likely):
- mechanisms to support earlier progression of projects including: ‘government support through finance, underwriting or other measures, fast-tracked licencing and environmental assessments, and streamlining of the regulatory framework’<sup>1159</sup>
  - the need for extensive preparatory activities (including extensive and expensive modelling and engineering reports) to improve the design for renewable energy zone expansions and flow path upgrades and renewable energy zone design reports triggered by development opportunities
  - securing social licence for generation and transmission investments. AEMO recommends substantially expanded community engagement programs that help to improve the recognition of these additional benefits of the upgrades, improve recognition of the impacts and provide greater sharing of the benefits with landholders and communities who are hosting renewable developments and transmission infrastructure
  - securing social licence for greater distributed energy resource coordination (that is, better coordination of the two-way flow of energy demand and supply at the consumption level). AEMO notes that this requires a ‘a step change in engagement between consumers, retailers, virtual power plant operators, networks and other market participants to orchestrate their resources’<sup>1160</sup>
  - coordination to improve supply chain efficiency and alleviate potential supply constraints (including in funding, steel, concrete, engineering equipment and labour, and technical and project management skills)
  - urgent action through AEMO’s Engineering Framework to prepare the NEM to be capable of operating on 100% instantaneous renewable dispatched generation during peak periods by 2025.<sup>1161</sup>
- 7.187. The ACCC considers that the ability of renewables developers to install large-scale renewables projects (in particular, generation projects) is currently significantly limited due to transmission constraints. However, the ACCC notes that planned transmission investment will add some additional capacity in the coming years, and that Brookfield has taken account of the constraints that will exist in the meantime.
- 7.188. Further, the ACCC notes that the factors which may delay or increase the uncertainty of the proposed build-out are not unique to Brookfield and would exist in both the future with and future without the Proposed Acquisition.

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<sup>1158</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at pp. 21-27.

<sup>1159</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 16.

<sup>1160</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 16.

<sup>1161</sup> AEMO, [2022 Integrated System Plan](#), 30 June 2022, at p. 17.

**Overall ACCC conclusion – likelihood of Brookfield completing the proposed build-out**

7.189. In summary, the ACCC considers:

- a) that Brookfield’s plan is consistent with the Applicants’ submissions regarding the long-term nature of the proposed build-out, and the existence of such a plan, albeit at a high-level, supports the completion of the build-out
- b) Brookfield has strong commercial, financial and reputational incentives to complete the proposed build-out
- c) access to Origin’s retail customer base provides Brookfield with an advantage and could contribute to an enhanced ability to quickly build renewable generation and storage
- d) access to Origin’s existing firming capacity will assist Brookfield in executing its build-out plan
- e) access to capital may provide some advantages to Brookfield in executing the proposed build-out, as it will be able to reduce its risks by pursuing a number of projects simultaneously, with the expectation that at least some will come to fruition. Brookfield, being a private company, will also have greater flexibility to make long-term capital investments in renewables than Origin would absent the Proposed Acquisition, and
- f) Brookfield may be able to leverage its existing project expertise and global procurement abilities to successfully execute the proposed build-out.

7.190. However, the ACCC considers that there is the possibility Brookfield may not achieve the build-out of up to 14 GW in full, and notes factors such as:

- Brookfield has not developed a detailed plan for how it will achieve the proposed build-out, and once it does, may encounter issues that result in delays
- transmission constraints and difficulty with connections and obtaining sites are potentially a major limiting factor, particularly in the short-term, and
- **[Redacted – Confidential]**.

7.191. Notwithstanding, the ACCC considers these challenges are not so significant as to make completion of the build-out unlikely. The ACCC acknowledges it is possible Brookfield will develop less than 14 GW by 2033, **[Redacted – Confidential]**. However, on balance, the evidence supports that Brookfield will be likely to complete the build-out of up to **[Redacted – Confidential]**.

7.192. As discussed in Section 9, the Brookfield Undertaking aims to reduce some of the uncertainty, and further increase the likelihood that Brookfield will largely complete the proposed build-out of Origin Energy Markets.

**ACCC view**

7.193. The ACCC has considered whether the Proposed Acquisition would result, or be likely to result, in a public benefit in the form of:

- an **acceleration** of Origin Energy Markets’ renewable generation and storage development,

- **additional** renewable generation and storage development of Origin Energy Markets, and
  - a reduction of absolute emissions by Origin Energy Markets.
- 7.194. The ACCC considers that if Brookfield were to achieve any or all of the claims listed in paragraph 7.69 above, this would constitute a material public benefit.
- 7.195. In particular, the ACCC considers that if Origin transitions away from fossil fuels to renewables at a faster pace and/or at a larger scale, that would be of value to the community.
- 7.196. As outlined in Section 5, reducing greenhouse gas emissions is critical to reducing the severity of the impacts of climate change. As Origin is a large retailer, the ACCC considers that reducing its reliance on fossil fuels to cover its retail load would help Australia mitigate its contribution to climate change, and assist Australia in meeting or exceeding national emissions reduction targets. The ACCC's assessment is that an acceleration of, and additional, renewable investment for Origin and a reduction in Origin's emissions would be a public benefit of considerable value, both to Origin customers and to Australians more broadly.
- 7.197. To determine whether the public benefit has a causal connection to the Proposed Acquisition, the ACCC has considered the future with and without the Proposed Acquisition. Specifically, the ACCC has considered:
- the volume of renewable generation and storage capacity that will exist within Origin, with and without the Proposed Acquisition, and
  - the extent to which Origin retail customers will be supplied with renewable energy, with and without the Proposed Acquisition.
- 7.198. The ACCC notes that regardless of whether the Proposed Acquisition proceeds, Origin will have access to a significant retail base and firming capacity. Accordingly, the Proposed Acquisition will not result in Origin gaining these characteristics. However, the ACCC accepts that as a publicly listed company, Origin faces challenges in leveraging these assets in its own renewable generation and storage development relative to Brookfield.

*Volume of renewable generation and storage*

- 7.199. In the future without the Proposed Acquisition, the ACCC considers Origin is likely to achieve the 4 GW renewable generation and storage capacity goal outlined in its Climate Transition Action Plan, and possibly may achieve **[Redacted – Confidential]**.<sup>1162</sup> The ACCC considers it is likely Origin may develop 4 GW of total new renewable generation capacity by 2033, as estimated by the Applicants.
- 7.200. As to what Brookfield would develop in the future without the Proposed Acquisition, the ACCC notes the Applicants' submission that Brookfield may develop between 420 MW to 5 GW of renewables, however, it would do so in a more piecemeal fashion and at a slower pace.<sup>1163</sup> The ACCC considers that Brookfield would at least develop 420 MW, which is the capacity of its Moonlight Range project.<sup>1164</sup>

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<sup>1162</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [383] – [384].

<sup>1163</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [303], [318], [354].

<sup>1164</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [352].

- 7.201. In a future with the Proposed Acquisition, the ACCC considers Brookfield is likely to complete the proposed build-out of Origin Energy Markets to a material extent, namely up to **[Redacted – Confidential]** GW by 2033.
- 7.202. Comparing the future with and without the Proposed Acquisition, the ACCC considers that the expected additional renewable generation and storage arising from the Proposed Acquisition by 2033 is likely to be below 14 GW, but still material and up to approximately **[Redacted – Confidential]** GW, given:
- in a future with the Proposed Acquisition, Brookfield will likely develop up to **[Redacted – Confidential]** GW of renewables
  - in a future without the Proposed Acquisition, Origin will likely develop 4 GW of renewables by 2033,<sup>1165</sup> and Brookfield will likely build at least 420 MW by 2033.
- 7.203. The ACCC considers that even if the possible maximum amount of additional generation (**[Redacted – Confidential]** GW) is not achieved, it is likely there will be a significant increase in Origin Energy Markets' renewable generation and storage capacity with the Proposed Acquisition compared to without. The ACCC notes factors that may inhibit Brookfield from completing its build-out would also likely impact renewables investment by other developers in a future without the Proposed Acquisition. This would result in a lower comparison point when assessing the level of additional generation brought about by the Proposed Acquisition. In other words, the ACCC does not consider it is appropriate to compare the maximum investment contemplated without the Proposed Acquisition, to the minimum investment contemplated with the Proposed Acquisition.
- 7.204. The ACCC has not reached a concluded view on whether or not Origin Energy Markets' own absolute emissions from generation will reduce with the Proposed Acquisition. As set out in paragraphs 7.162 to 7.164, in light of the energy security concerns being considered by the New South Wales government and the impacts this may have on the timing of the closure of Eraring, the ACCC is not satisfied Eraring will likely close earlier due to the Proposed Acquisition. As Eraring represents Origin's main contribution to emissions, the timing of Eraring's closure is material to considering Origin Energy Markets' absolute emissions under the Proposed Acquisition. However, the ACCC is satisfied that Origin Energy Markets' generation portfolio's average emissions intensity will reduce earlier due to the Proposed Acquisition as its generation portfolio will have a higher percentage of renewables than without the Proposed Acquisition. Further, the emissions associated with supplying Origin Energy Markets' significant retail load will be reduced, as there will be an earlier reduction in the emissions intensity of NEM generation overall due to the Proposed Acquisition likely bringing forward renewable generation development.

#### *Meeting Origin's retail demand*

- 7.205. The Applicants submit that in the future without the Proposed Acquisition, up to 4 GW of Origin's retail demand would be covered by internal or contracted renewables by 2033. The remainder may be supplied by Origin's gas peaking plants (**[Redacted – Confidential]** GW) or purchased in the wholesale market, either unhedged from the spot market or hedged via contracts. The percentage of Origin's retail energy demand supplied by renewables would then depend on the percentage of renewables sold in the spot market by other parties.

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<sup>1165</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [365].



7.206. By contrast, in the future with the Proposed Acquisition, Brookfield submits that it will develop generation assets equivalent to approximately **[Redacted – Confidential]** of Origin Energy Markets’ projected retail load by 2033.<sup>1166</sup> As a consequence of Origin Energy Markets developing more renewables itself, the ACCC considers that Origin Energy Markets will also cover a greater proportion of its retail load with renewable generation than it would without the Proposed Acquisition.

#### *ACCC conclusion*

7.207. The ACCC concludes that the Proposed Acquisition would result, or be likely to result, in:

- an acceleration of renewable generation and storage development for Origin Energy Markets
- additional renewable generation and storage development for Origin Energy Markets. This additional generation could be up to **[Redacted – Confidential]** GW by 2033, and in any case will be materially more than what Origin would likely achieve absent the Proposed Acquisition, and
- a decrease in Origin Energy Markets’ emissions intensity.

7.208. The ACCC considers that these constitute material public benefits, in the sense that they are important and of value, for the reasons outlined in paragraphs 7.195 to 7.198 above.

#### **Will the Proposed Acquisition increase overall investment in renewables in Australia**

7.209. The ACCC considers it is necessary to assess whether increased investment in renewable generation and storage by Brookfield will result in an accelerated build-out of, and/or additional, renewable generation and storage in Australia overall, or whether Brookfield’s investment will be offset by a reduction in investment by others. In other words, the ACCC has considered to what extent the investment by Brookfield might ‘crowd-out’ investment by others, such that there is no (or less) acceleration of, or additional, renewable generation and storage development in Australia.

#### ***Applicants’ submissions***

7.210. The Applicants submit that the proposed build-out will result in:

- an acceleration of the build-out of renewables for Australia<sup>1167</sup>
- significant total renewable generation being built in Australia, equal to a 10 GW increment (less whatever capacity BGTF may be able to develop by 2033 if the Proposed Acquisition did not proceed on a standalone basis)<sup>1168</sup>
- a material difference to achieving Australia’s net zero targets<sup>1169</sup>
- an accelerated and more certain transition to net zero<sup>1170</sup>

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<sup>1166</sup> **[Redacted – Confidential]**.

<sup>1167</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [782].

<sup>1168</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [789].

<sup>1169</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [50].

<sup>1170</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [791].

- a more rapid and extensive decarbonisation in Australia.<sup>1171</sup>

- 7.211. The Applicants note that Brookfield will not rely on government funding/subsidies, and therefore these will remain available to other potential investors.<sup>1172</sup>
- 7.212. Additionally, in sworn evidence provided by an Origin senior executive, **[Redacted – Confidential]**.<sup>1173</sup>

### ***Interested parties' submissions and consultation***

- 7.213. In carrying out its assessment, the ACCC has considered submissions from interested parties. Syncline Energy,<sup>1174</sup> Alinta Energy,<sup>1175</sup> a submission where the identity of the submitter is confidential<sup>1176</sup> and Grattan Institute<sup>1177</sup> submit that there is no shortage of willing investors in renewables in Australia. AEMO's records also show a large pipeline of potential projects.<sup>1178</sup>
- 7.214. Several interested parties consider that the Proposed Acquisition would be unlikely to crowd-out other developers of renewables.<sup>1179</sup> Specifically, Grattan Institute submits:
- in capital intensive industries, businesses will make announcements to scare off the opposition, as much as to pursue new projects. When Snowy 2.0 was announced, there were pumped hydro projects that got put on hold. However, crowding out would only occur when two firms are looking to build a similar plant in the same region and one firm announcing a development could dissuade the other. Considering the amount that needs to be spent on transmission networks and renewable energy storage, while \$20 billion is significant capital, it is not likely to dominate the market or scare anybody off. It may be hard for a small player to compete, but that is regardless of the Proposed Acquisition.<sup>1180</sup>
- 7.215. Likewise, ACEN Australia considers upgrades to transmission infrastructure is the key issue for potential investors, and Brookfield's proposed build-out will not inherently crowd-out investment.<sup>1181</sup>
- 7.216. Alinta submits that Brookfield's investment would have no impact on its investment decisions, the market is competitive and if Brookfield does not complete its build-out, another developer would.<sup>1182</sup>
- 7.217. Mr Harris expresses the view that the biggest barriers to new renewable investment are grid connection bottlenecks and network capacity.<sup>1183</sup>

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<sup>1171</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [788].

<sup>1172</sup> Brookfield and Origin record of oral submission, 4 August 2023, at [35].

<sup>1173</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T112 L.23] – [T113 L.6].

<sup>1174</sup> Syncline Energy submission, 25 June 2023, at p. 6

<sup>1175</sup> Alinta Energy record of oral submission, 30 June 2023, at [6].

<sup>1176</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [2].

<sup>1177</sup> Grattan Institute record of oral submission, 3 July 2023, at [11] – [13].

<sup>1178</sup> AEMO, [NEM Generation Information September 2023](#), 3 October 2023, accessed 4 October 2023.

<sup>1179</sup> Grattan Institute record of oral submission, 3 July 2023, at [14]; Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [4].

<sup>1180</sup> Grattan Institute record of oral submission, 3 July 2023, at [14].

<sup>1181</sup> ACEN Australia record of oral submission, 4 July 2023, at [17].

<sup>1182</sup> Alinta Energy record of oral submission, 30 June 2023, at [15] – [17].

<sup>1183</sup> Matt Harris (Frontier Economics), Expert Report, 9 August 2023, at [100].

### ***How the ACCC has assessed this claimed public benefit***

- 7.218. In assessing this claimed public benefit, the ACCC has considered whether the Proposed Acquisition would result, or be likely to result, in a public benefit in the form of an acceleration of, or additional, renewable generation and storage build-out in Australia.
- 7.219. The ACCC notes that the Applicants made claims that the Proposed Acquisition would result in a more certain transition to net zero. The ACCC has considered this claim by reference to the likelihood that the proposed build-out will occur, and therefore the likelihood any benefit will arise. In this regard, the ACCC refers to its analysis above in respect of the likelihood that Brookfield will complete the proposed build-out. The ACCC has also had regard to this claim – a more certain transition to net zero – and the Applicants’ claim in respect of decarbonisation, in assessing the nature and magnitude of the public benefit. In this regard, the ACCC refers to its analysis above in respect of decarbonisation and transition to net zero in paragraphs 7.195 to 7.198 in Section 7 as it applies to Australia.
- 7.220. Further, the ACCC notes that:
- it has considered both renewable generation and storage when assessing this public benefit given the proposed build-out includes developing both renewable generation and storage capacity,<sup>1184</sup> and
  - the ACCC has sought to assess the public benefit by reference to the differential between the future with and future without the Proposed Acquisition. Any reduction in emissions should follow from an increase (or earlier increase) in renewable capacity.

### ***ACCC view***

- 7.221. To determine if the Proposed Acquisition will ‘crowd-out’ other potential investors, the ACCC has considered the risk that the Proposed Acquisition inhibits access to:
- government funding and subsidies for renewable generation and storage investments
  - renewable generation and storage development projects that are already in the ‘pipeline’, and
  - already limited access to the transmission network, as well as available and appropriate sites for renewable generation and storage development.
- 7.222. In addition, the ACCC has considered whether increased investment by Brookfield could lead to large price falls and/or negative prices during periods of high renewable generation output, such that there may be a crowding out impact through pricing impacts.
- 7.223. As to the risk of the Proposed Acquisition crowding out access to government incentives, the ACCC notes that Brookfield’s proposed build-out does not rely on

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<sup>1184</sup> The ACCC understands that building storage and firming capacity alongside generation is a necessary component of the wider renewables electricity build-out. Although storage capacity does not offset non-renewable generation directly, generally storage capacity will be accruing energy when prices are low which will be times of high renewable output (i.e. windy and/or clear sunny conditions) and releasing energy when prices are high (when the alternative is likely to be non-renewable gas or coal fired generation). The build-out of firming capacity is also an integral part of the wider renewables build-out, with AEMO tasked with ensuring grid reliability and stability targets. Accordingly, the ACCC’s analysis has considered the public benefits of building both renewables generation, storage and firming capacity together.

such incentives.<sup>1185</sup> However, the Applicants claim they would consider any available government support where appropriate.<sup>1186</sup> **[Redacted – Confidential]**.<sup>1187</sup>

- 7.224. The ACCC notes that part of Brookfield’s plans for the build-out includes purchasing projects that are already in the ‘pipeline’ and are at various stages of development. To the extent that these would be commissioned anyway, Brookfield’s build-out would not result in additional generation and storage capacity across Australia. However, the ACCC considers that there is evidence that in the absence of new funding or offtake arrangements (i.e., as would be provided by the Proposed Acquisition), many of those projects would not progress.<sup>1188</sup>
- 7.225. **[Redacted – Confidential]**.<sup>1189</sup>
- 7.226. **[Redacted – Confidential]**.<sup>1190</sup>
- 7.227. Overall, the ACCC considers there is a clear potential for ‘crowding out’ of investment if the Proposed Acquisition proceeds, particularly in relation to access to transmission capacity. This may impact the extent to which the Proposed Acquisition increases development of renewable generation and storage in Australia overall. However, the ACCC considers that this ‘crowding out’ effect will only partially offset Brookfield’s renewable generation and storage development that would occur with the Proposed Acquisition. It is difficult to predict the scale of the ‘crowding out’ effect as it would require a detailed assessment of every potential project and the impact on rival projects. However, the ACCC considers that while it is likely there will be some situations where investment by Brookfield makes it unlikely a rival will invest in that area, there will be other situations where Brookfield’s investment does not change significantly the likelihood of investment by others.

#### *ACCC conclusion*

- 7.228. The ACCC concludes that the Proposed Acquisition would result, or be likely to result, in an acceleration of renewable generation and storage build-out in Australia, and that this constitutes a public benefit. The ACCC considers this will result in a decrease in absolute emissions for Australia as a whole, as this acceleration will displace fossil-fuel generation earlier than would occur absent the Proposed Acquisition.
- 7.229. The ACCC has not reached an affirmative view regarding whether the Proposed Acquisition would in the much longer term ultimately result in additional renewable generation and storage capacity being built in Australia, as in the future without the Proposed Acquisition, Australia may ultimately reach a similar level of renewable

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<sup>1185</sup> Brookfield and Origin record of oral submission, 4 August 2023, at [35].

<sup>1186</sup> Brookfield and Origin record of oral submission, 4 August 2023, at [35].

<sup>1187</sup> **[Redacted – Confidential]**.

<sup>1188</sup> Brookfield s90(6)(b) Response to Notice issued 16 August 2023: **[Redacted – Confidential]**, at [13] – [17]. The Applicants cite the progression of solar and wind projects in the NEM from July 2020 to July 2023, using data provided at [AEMO’s NEM Generation Information](#). The data demonstrates that for solar generation projects, year-on-year, anticipated / proposed projects grew at approximately 4,800 MW while existing projects grew at approximately 1,100 MW. For wind generation projects, year-on-year, anticipated / proposed projects grew at approximately 29,000 MW whereas existing projects grew at approximately 400 MW. The Applicants submit this demonstrates a low conversion rate for projects progressing from anticipated / proposed to existing.

<sup>1189</sup> **[Redacted – Confidential]**.

<sup>1190</sup> **[Redacted – Confidential]**.

generation and storage as is reached with the Proposed Acquisition. However, an acceleration of the build-out leading to earlier investment, is still a public benefit.

## **Downward pressure on retail electricity prices**

### ***Applicants' submissions***

7.230. The Applicants submit that if the Proposed Acquisition proceeds, the accelerated or additional build-out of renewable generation and storage by Brookfield will place downward pressure on retail electricity prices for consumers and businesses.<sup>1191</sup>

7.231. The Applicants submit this will occur because:

- renewables are the cheapest form of electricity generation. 'Wind and solar energy generators in particular typically have zero fuel costs and thus near-zero marginal costs'<sup>1192</sup>
- adding new renewables will displace more expensive generators thereby lowering wholesale electricity prices.<sup>1193</sup> 'The marginal costs of coal-fired generation are higher, principally because of the cost of coal. Further, coal-fired generators, face significant costs turning on and off, so usually bid into the NEM on a must-run basis. The marginal cost of gas-fired generation is higher again, although gas-fired generators can operate flexibly. In simple terms, this means that as more wind and solar generation capacity enters the system, those generators will always be dispatched first by AEMO to meet the necessary demand'<sup>1194</sup>
- renewables insulate wholesale prices from global price shocks. 'Electricity prices will continue to be vulnerable to fluctuations in international fuel prices as long as internationally tradable fuels contribute to a large proportion of Australia's supply. Over time, however, as the development of firmed renewables expands, the cost of energy will be reduced, and consumer electricity prices will be protected from global commodity shocks'<sup>1195</sup>
- lower wholesale prices will lead to lower retail prices. The 'regulatory framework for energy regulators will facilitate the flow through of reduced wholesale prices to retail prices for consumers and businesses.'<sup>1196</sup>

7.232. The Applicants submit that while 'the closure of coal-fired generation may increase prices temporarily',<sup>1197</sup> this impact on prices is temporary, provided new renewables continue to be built.<sup>1198</sup>

### ***Interested parties' submissions***

7.233. The ACCC has received limited information from interested parties regarding the impact the Proposed Acquisition will have on retail electricity prices. However, some

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<sup>1191</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [888].

<sup>1192</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [881] – [882].

<sup>1193</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [885].

<sup>1194</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [886].

<sup>1195</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [896].

<sup>1196</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [898].

<sup>1197</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [893].

<sup>1198</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [893].

interested parties submit that electricity prices are influenced by numerous factors,<sup>1199</sup> and it is difficult to determine whether more renewables in the NEM would reduce wholesale prices.<sup>1200</sup>

### **ACCC view**

- 7.234. The ACCC considers that, if the Proposed Acquisition is likely to result in downward pressure on retail electricity prices, this would be a public benefit because it would directly reduce costs for Australian consumers and businesses. However, the ACCC considers that there are factors that weigh against the Applicants' submissions on this public benefit being likely to result from the Proposed Acquisition.
- 7.235. The ACCC accepts that the marginal cost of commissioned renewable generation is essentially zero and therefore considerably lower than the marginal cost of coal or gas fired generation. Accordingly, over time, as more renewable generation comes online, it is likely to make inflexible baseload generation unprofitable and lead to the exit of coal-fired generation from the NEM. The ACCC also considers that prices in wholesale electricity markets, both in the spot market and hedging contract market, flow through to retail prices, although this may take several years to occur.<sup>1201</sup>
- 7.236. However, the ACCC considers that:
- the marginal cost of unbuilt renewable generation is not zero and, in order to be built, must recover (or expect to recover) its up-front fixed costs
  - as accepted by the Applicants, the exit of baseload coal-fired generation from the NEM means that during times of poor renewable generation conditions, the marginal cost of electricity will be more frequently set by very high-cost gas peaking plants.<sup>1202</sup> The increasing divergence in marginal costs during periods of high and low renewables generation implies significant price volatility for the foreseeable future as coal fired power stations continue to close. This is **[Redacted – Confidential]**,<sup>1203</sup> and referred to in the Anthony Lucas witness statement.<sup>1204</sup> The ACCC notes more price volatility will lead to higher hedging costs for retailers
  - the cost of the necessary installation and maintenance of firming capacity in order to maintain system reliability and stability must also be recovered during periods of poor generation or otherwise subsidised as a service purchased directly by AEMO (or an equivalent entity), raising the overall costs of electricity
  - the build-out of renewables (including by Brookfield) demands increased investment in transmission capacity, a portion of which is also intended to be recovered through increased electricity pricing. **[Redacted – Confidential]**.<sup>1205</sup>
- 7.237. Further, electricity prices are affected by multiple other factors such as global commodities markets, supply chains, the entry and exit of industry participants, the

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<sup>1199</sup> Anonymous record of oral submission **[Redacted – Confidential]**, 5 July 2023, at [13].

<sup>1200</sup> EnergyAustralia record of oral submission, 4 July 2023, at [28] – [29].

<sup>1201</sup> ACCC, [Inquiry into the National Electricity Market](#), 2 June 2023, at p. 11.

<sup>1202</sup> Noting the Applicants consider price increases are likely to be temporary. See, Application for merger authorisation (MA1000024), 5 June 2023, at [893].

<sup>1203</sup> **[Redacted – Confidential]**.

<sup>1204</sup> Statement of Anthony Lucas (Origin), 2 June 2023, at [53].

<sup>1205</sup> **[Redacted – Confidential]**.

entry and exit of infrastructure, hedging costs, operational costs, environmental costs, changing costs of capital, and wholesale and retail price regulation. Consequently, the ACCC considers that it cannot be assumed, and the ACCC does not conclude, that any accelerated or additional development of renewable generation and storage in Australia arising from the Proposed Acquisition would put downward pressure on average and total electricity prices in Australia.

## **Earlier and more cost-efficient access to new renewable technologies in Australia**

### ***Applicants' submissions***

- 7.238. The Applicants submit that the Proposed Acquisition supports the development of new renewable technologies.<sup>1206</sup> The Applicants submit that a Brookfield-owned Origin Energy Markets will have greater opportunities to invest in new and proven renewables technologies at a commercially viable scale.<sup>1207</sup> Due to Brookfield's 'global expertise, economies of scale and investment in new technologies', the Applicants submit that the Proposed Acquisition will likely result in 'early and more cost-efficient access' to these new renewable technologies in Australia than would occur absent the Proposed Acquisition.<sup>1208</sup>
- 7.239. The Applicants submit this will occur because:
- it is beneficial to include a diverse range of renewable technologies in Origin Energy Markets' generation portfolio given their intermittent nature<sup>1209</sup>
  - Origin Energy Markets (through the BGTF Consortium) will be able to draw on Brookfield's expansive market reach and involvement in a diverse range of projects focused on identifying and scaling new renewable technologies<sup>1210</sup>
  - 'Brookfield is involved in projects where it invests alongside new technologies, like the development of green power to power hydrogen electrolyzers (as opposed to investing in the hydrogen manufacturing process itself), as well as projects where it invests in new and emerging transition focused technologies, like carbon capture [...] These are not large scale projects, but Brookfield is providing the scaling capital to help them grow',<sup>1211</sup> and
  - Origin Energy Markets, with its retail base, provides a platform of scale for those new technologies, making it attractive and economic for Brookfield to invest in them in Australia.<sup>1212</sup>
- 7.240. In his witness statement, Mr Lucas submits that, while Origin is exploring new technology opportunities, Brookfield, as a private company with a longer-term investment focus, has greater scope to 'support participation in emerging technologies such as hydrogen and offshore wind'.<sup>1213</sup>
- 7.241. Origin's Climate Transition Action Plan also outlines Origin's aims to commence green hydrogen supply from the mid-2020s and ultimately supply domestic and

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<sup>1206</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [59].

<sup>1207</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [902].

<sup>1208</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [903].

<sup>1209</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [902].

<sup>1210</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [902].

<sup>1211</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [902].

<sup>1212</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [903].

<sup>1213</sup> Statement of Anthony Lucas (Origin), 5 June 2023, at [84].

export markets.<sup>1214</sup> Origin is presently pursuing hydrogen production facilities in New South Wales and has undertaken feasibility investigations for exporting green hydrogen from Tasmania.<sup>1215</sup>

### ***Interested parties' submissions***

7.242. The ACCC has not received submissions from interested parties regarding this claimed public benefit.

### ***ACCC view***

7.243. The ACCC considers that, if the Proposed Acquisition is likely to result in 'early and most cost-efficient access' to new renewable technologies in Australia, this would be a public benefit.

7.244. The ACCC notes that, based on the information provided in the Applicants' submissions and in internal documents obtained under the ACCC's compulsory information gathering powers, there are 3 avenues by which Brookfield may develop or deliver green hydrogen technologies:

- by using new renewable power sources to power hydrogen electrolyzers
- by developing new renewable technologies to power hydrogen electrolyzers
- **[Redacted – Confidential]**.

7.245. The ACCC notes that Origin has plans to develop hydrogen from electrolysis. The Climate Transition Action Plan outlines Origin's aims to commence green hydrogen supply from the mid-2020s and ultimately supply domestic and export markets.<sup>1216</sup> Origin is presently pursuing hydrogen production facilities in New South Wales and has undertaken feasibility investigations for exporting green hydrogen from Tasmania.<sup>1217</sup>

7.246. However, the ACCC has also obtained evidence which identifies some of the challenges faced by Origin in delivering on its Climate Transition Action Plan in relation to hydrogen projects. For example, **[Redacted – Confidential]**.<sup>1218</sup>

7.247. Further, internal Brookfield documents **[Redacted – Confidential]**.<sup>1219</sup> Based on these internal Brookfield documents, the ACCC considers that **[Redacted – Confidential]**.

7.248. This claimed public benefit turns on the Applicants' submission that a Brookfield-owned Origin Energy Markets will have greater opportunities to invest in new and proven renewable technologies at a commercially viable scale, which will result in 'earlier and more cost-efficient access' to these new technologies in Australia.<sup>1220</sup>

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<sup>1214</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 18.

<sup>1215</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 18; Statement of Anthony Lucas (Origin), 5 June 2023, at [35].

<sup>1216</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 18.

<sup>1217</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 18; Statement of Anthony Lucas (Origin), 5 June 2023, at [35].

<sup>1218</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 26 July 2023, at [T109 LL.8 – 12].

<sup>1219</sup> **[Redacted – Confidential]**.

<sup>1220</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [902] – [903].



7.249. However, while the ACCC considers that the Applicants have demonstrated an opportunity for the incorporation of new renewables technologies in Australia, including green hydrogen, there is insufficient evidence before the ACCC to conclude that:

- the development and delivery of new renewable technologies, and
- the result of earlier and more cost-efficient access to such technologies in Australia,

are likely to be consequent on the Proposed Acquisition.

### **Development of the Australian renewables industry in the form of local supply chains and onshore manufacturing, leading to the development of Australian businesses and direct and indirect employment**

#### ***Applicants' submission***

7.250. The Applicants submit the Proposed Acquisition will result in the following public benefits:

- Brookfield will develop **local supply chains** by supporting a local manufacturing industry that will contribute to manufacturing components and parts for renewables development in Australia, particularly solar, wind and batteries.<sup>1221</sup> Brookfield will also seek to onshore some aspects of renewables manufacturing to facilitate Brookfield's broader renewables build-out<sup>1222</sup>
- Brookfield will **facilitate the growth of Australia's renewable power industry**,<sup>1223</sup> including by partnering with or outsourcing to various third parties different stages of the supply chain (e.g. the initial phases of a project, such as permitting and approvals) to deliver on the proposed build-out plan for Origin Energy Markets<sup>1224</sup>
- Brookfield's build-out will result in **job creation** (both direct and indirect).<sup>1225</sup> The Applicants submit that direct job creation will occur as **[Redacted – Confidential]** and there will be indirect job creation through Brookfield's partnerships with third parties in respect of the build-out and in ancillary industries as described in the above 2 points.<sup>1226</sup> There will also be direct job creation as **[Redacted – Confidential]**.<sup>1227</sup>

7.251. In support of its submission about job creation, the Applicants highlight research commissioned by the Clean Energy Council and undertaken by the UTS Institute for Sustainable Futures which shows that:

renewable energy will be a major source of jobs for Australians in the medium-term, especially in regional areas, across a diverse range of occupations.<sup>1228</sup>

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<sup>1221</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [924].

<sup>1222</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [924].

<sup>1223</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [927].

<sup>1224</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [927].

<sup>1225</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [905].

<sup>1226</sup> Application for merger authorisation (MA1000024), 5 June 2023, at **[Redacted – Confidential]** – [906].

<sup>1227</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [940].

<sup>1228</sup> UTS Institute for Sustainable Futures, [Renewable Energy Jobs in Australia: Stage One](#), June 2020, at pp. 4 – 5, 11.

- 7.252. In support of its submission about developing local supply chains, the Applicants note that Brookfield has already performed initial high-level feasibility analysis of potential opportunities to support local supply chains.<sup>1229</sup> Specifically, the Applicants submit that Brookfield has worked with a consultant to identify potential opportunities in Australia, who concluded that: towers and blades are the most attractive components for onshoring, and there is an opportunity to onshore pack assembly and containerisation activities associated with cell manufacturing for lithium ion batteries.<sup>1230</sup>
- 7.253. Further, Brookfield Asset Management recently announced that it has signed 2 memorandums of understanding, with Reliance Industries and Envision Group.<sup>1231</sup>
- 7.254. Reliance Industries is an Indian multinational company which operates across several industries, including energy, retail, entertainment and digital services.<sup>1232</sup> Reliance Industries already has a presence in Australia through several subsidiaries including Addverb, Sodium-ion Batteries, Sterling and Wilson Solar, and GCO Solar, which variously provide automation services for supply chain operations, battery supplies, and turnkey solutions for large-scale solar projects.<sup>1233</sup>
- 7.255. The Memorandum of Understanding with Reliance Industries, signed in August 2023, deals with exploring capital investment opportunities for the manufacture of renewables and decarbonisation equipment in Australia, including PV modules, long duration battery storage and components for wind energy.<sup>1234</sup>
- 7.256. Envision Group is a Shanghai-based global green technology company which designs, sells and operates smart wind turbines, smart storage system and green hydrogen solutions, and Artificial Intelligence of Things batteries.<sup>1235</sup>
- 7.257. The Memorandum of Understanding with Envision, also signed in August 2023, deals with exploring direct capital investment in the Australian renewable energy industry for the localisation of renewable power and decarbonisation manufacturing supply chains.<sup>1236</sup>
- 7.258. In support of its submission about facilitating the growth of Australia's renewable power industry, the Applicants submit that Brookfield has partnered with or outsourced work to third parties in other jurisdictions, in particular Brazil, and expects this operating model will be effective in Australia.<sup>1237</sup>

### ***Interested parties' submissions***

- 7.259. The ACCC has not received submissions from interested parties regarding this claimed public benefit.

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<sup>1229</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [924].

<sup>1230</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [924].

<sup>1231</sup> Varun Vyas, [India's Reliance teams up with Brookfield for Australia renewable energy push](#), 1 August 2023, accessed 25 August 2023; David Carroll, [Brookfield teams with Envision on Australian renewable energy push](#), 16 August 2023, accessed 25 August 2023.

<sup>1232</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [580].

<sup>1233</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [582] – [587].

<sup>1234</sup> Reliance Industries Limited, [Media release: Brookfield signs MoU with Reliance Industries for onshore renewable power and decarbonization equipment manufacturing in Australia](#), 1 August 2023, at p. 1.

<sup>1235</sup> Statement of Luke Edwards (Brookfield): Annexure LE-22, 14 September 2023, at p. 3.

<sup>1236</sup> Statement of Luke Edwards (Brookfield): Annexure LE-22, 14 September 2023, at p. 2.

<sup>1237</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [927].

## **ACCC view**

- 7.260. The ACCC accepts that the scale of Brookfield’s proposed build-out of Origin Energy Markets may justify a business case to develop local supply chains, including onshore manufacturing, noting the Applicants’ submission about global supply chain shortages.
- 7.261. The ACCC considers that, if the Proposed Acquisition is likely to result in the development of local supply chains through onshoring manufacturing, this would be a public benefit. Furthermore, the ACCC considers that the development of local supply chains may result in the development of Australia’s renewable power industry and, if this was a likely result of the Proposed Acquisition, it would also constitute a public benefit.
- 7.262. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1238</sup> Further, in sworn evidence provided by another Brookfield senior executive, **[Redacted – Confidential]**.<sup>1239</sup> **[Redacted – Confidential]**.<sup>1240</sup>
- 7.263. However, the high-level feasibility analysis undertaken by Brookfield and memorandums of understanding are too preliminary to give the ACCC sufficient confidence that they will lead to increased onshore manufacturing. Accordingly, the ACCC does not consider that the Proposed Acquisition is likely to result in the development of local supply chains through onshoring manufacturing.
- 7.264. The ACCC considers that to the extent the Proposed Acquisition would result in direct or indirect job creation, this would be a public benefit.
- 7.265. The ACCC notes that AEMO’s step change scenario for the Australian renewables build-out (see paragraphs 5.129 and 5.130) requires an estimated increase in the workforce of the energy sector from 44,000 in 2023 to 56,000 in 2025, peaking at 81,000 in 2049.<sup>1241</sup> Further, the ACCC notes interested parties such as Iberdrola acknowledge AEMO’s step change scenario would require a significant workforce.<sup>1242</sup>
- 7.266. In this regard, the ACCC notes that in an Appendix to the Application, an executive to Brookfield submits that:
- it is likely that under BGTF Consortium ownership, the Origin Energy Markets business will have greater prospects of attracting highly skilled personnel from all over the world to join the new development team and other parts of the business. This will be particularly critical in supplementing Origin’s wind-power generation capabilities [...]. In addition, Brookfield also has the advantage of being able to second skilled workers from other companies within the Brookfield network to the extent that there are shortages in particular areas.<sup>1243</sup>
- 7.267. The ACCC also notes the Applicants’ submission that it may deploy its existing workforce to assist with the build-out:

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<sup>1238</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T137 LL.2 – 5].

<sup>1239</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T108 LL.22 – 25].

<sup>1240</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 22 August 2023, at [T109 L.5] – [T110 L.30].

<sup>1241</sup> AEMO, [The Australian Electricity Workforce for the 2022 Integrated System Plan: Projections to 2050 – Revision 1](#), January 2023, at pp. 3 – 4.

<sup>1242</sup> Iberdrola record of oral submission, 1 August 2023, at [14].

<sup>1243</sup> Statement of Luke Edwards (Brookfield), 5 June 2023, at [128].

[a]nother widely acknowledged challenge for the renewable transition is the difficulty of recruiting personnel with the necessary specialist skills and expertise. The personnel required includes construction and engineering specialists, and personnel with expertise in dealing with local communities and planning approvals. Brookfield has over 100 years' experience as a global owner and operator of assets across a range of sectors, including a diverse set of clean energy and decarbonisation assets. Brookfield is one of the world's largest investors in renewable power and climate transition assets across a range of technologies [...] Brookfield has a skilled workforce across the globe that it is able to deploy to assist with the 'green build-out'.<sup>1244</sup>

- 7.268. The ACCC has not been provided with sufficiently detailed information regarding **[Redacted – Confidential]** and therefore has not considered how this aspect of the Proposed Acquisition may result in direct employment benefits.
- 7.269. The ACCC considers that a significant portion, if not all, of the direct employment that may be created by the Proposed Acquisition is likely to come from Brookfield's existing specialised employees from other Brookfield entities internationally. Accordingly, the ACCC cannot conclude that the Proposed Acquisition will result, or be likely to result, in an increase in direct employment in a way that would be of benefit to the Australian public.
- 7.270. In relation to indirect employment, the ACCC accepts that an accelerated build-out of renewable generation and storage will require an additional workforce (particularly the on-the-ground workforce required to physically plan for installing the assets). However, the ACCC notes that the sector is forecast to already face significant capacity constraints in obtaining the necessary expertise for the build-out, and the relevant skills are likely also deployable in other valuable industries. In light of these factors, the ACCC does not consider that indirect job creation is a public benefit that would result, or would be likely to result from the Proposed Acquisition.

## Acceleration of behind the meter solutions

### *Applicants' submissions*

- 7.271. The Applicants submit that the Proposed Acquisition will lead to public benefits from the development and funding of behind the meter solutions to meet growing consumer demand and to facilitate decarbonisation in Australia.<sup>1245</sup>
- 7.272. In particular, the Applicants submit that the following public benefits are likely to arise from the development and funding of these solutions:
- a) **more extensive decarbonisation in Australia** - the Proposed Acquisition will 'facilitate more extensive decarbonisation in Australia through the development and expansion of sophisticated behind the meter solutions for consumers. [...] Under the Proposed Acquisition, the BGTF Consortium plans to transform Origin Energy Markets [*sic*] existing distributed energy platform to amplify its impact for residential and C&I customers, and meet growing consumer demand in this sector',<sup>1246</sup> and

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<sup>1244</sup> Brookfield s90(6)(b) Response to Notice issued 16 August 2023: **[Redacted – Confidential]**, at [0628].

<sup>1245</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [907].

<sup>1246</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [56].

- b) **energy security and reliability at the centralised grid level** - ‘in Australia, a growing number of consumers already use or are interested in distributed energy resources,<sup>1247</sup> demanding new and improved products and services to drive down their energy bills. When the energy from distributed energy resource assets is aggregated and operating together through decentralised power grids (like virtual power plants), there are substantial benefits for energy security and reliability at the centralised grid level.’<sup>1248</sup>

7.273. The Applicants submit that Brookfield will be able to achieve these claimed public benefits through its plans for Origin Zero, Origin Loop, and Community Energy Services, including by introducing other ‘energy as a service’ products through these businesses.<sup>1249</sup> The Applicants submit that Brookfield is better placed to expand the capabilities of Origin’s behind the meter services because:

- Origin has less flexibility in relation to capital expenditure, as a publicly listed company,<sup>1250</sup> and
- Brookfield also has overseas experience in assisting large businesses to reduce their demand for grid supplied energy and developing distributed generation capacity.<sup>1251</sup> This includes Enercare, a home and commercial services energy solutions company, which sells, rents, repairs and maintains energy products to 1.9 million customers in Canada and the United States.<sup>1252</sup>

### ***Interested parties’ submissions***

7.274. The ACCC has not received submissions from interested parties regarding this claimed public benefit.

### ***ACCC analysis***

#### *Origin Zero*

7.275. Origin introduced Origin Zero in 2022, which offers large businesses tailored renewable energy solutions to support them in achieving their renewable energy targets. Origin Zero allows its customers to choose from options including: renewable electricity, carbon credits, behind the meter solutions that are connected to Origin’s virtual power plant,<sup>1253</sup> end-to-end electric vehicle fleet management solutions, and software driven energy efficiency demand management.<sup>1254</sup> The Applicants submit that Brookfield intends to expand the Origin Zero business.

7.276. The ACCC has considered Origin’s plans for the Origin Zero business in the future with and without the Proposed Acquisition. This includes reviewing possible product

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<sup>1247</sup> For example, household and commercial scale renewable generation and storage solutions, like rooftop solar, batteries, hot water systems, smart appliances etc.

<sup>1248</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [907].

<sup>1249</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [907] – [923].

<sup>1250</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [911]; Statement of Luke Edwards (Brookfield), 5 June 2023, at [115], [119] – [120].

<sup>1251</sup> Statement of Luke Edwards (Brookfield), 5 June 2023, at [101] – [103]; Application for merger authorisation (MA1000024): Annexure B (Applicants) – Public benefits: Brookfield’s global experience, 5 June 2023.

<sup>1252</sup> Statement of Luke Edwards (Brookfield), 5 June 2023, at [120] – [122].

<sup>1253</sup> A virtual power plant is a network of homes or small businesses whose ‘behind the meter’ assets, such as domestic water systems, home solar systems, batteries and electric vehicle smart chargers, are aggregated by a software platform. Origin’s virtual power plant can then control these assets through smart meters and shift energy demand to non-peak periods.

<sup>1254</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 19.

offerings and the business' estimated growth in Origin's and Brookfield's business plans to conclude whether Origin Zero will likely expand more rapidly under Brookfield's ownership.

- 7.277. Origin Zero currently has around a **[Redacted – Confidential]** market share (amongst commercial and industrial customers in the NEM with an interest in behind the meter energy solutions) and is targeted to capture at least **[Redacted – Confidential]**.<sup>1255</sup> Origin predicts **[Redacted – Confidential]** under its current plans.<sup>1256</sup>
- 7.278. In sworn evidence provided by a Brookfield senior executive, **[Redacted – Confidential]**.<sup>1257</sup> **[Redacted – Confidential]**.<sup>1258</sup>
- 7.279. Documents obtained under the ACCC's compulsory information gathering powers show Brookfield recognises the: **[Redacted – Confidential]**.<sup>1259</sup>
- 7.280. **[Redacted – Confidential]**.<sup>1260</sup>
- 7.281. **[Redacted – Confidential]**.<sup>1261</sup>

#### *Origin Loop*

- 7.282. Origin Loop is Origin's virtual power plant. Brookfield claims Origin Loop is one of the largest virtual power plants in Australia with approximately 615 MW under management and over 230,000 connected services. Origin Loop installs and monitors battery and solar setups (including controlling dispatch if applicable) and electric vehicle charging systems. It can also shift demand loads to non-peak periods by remotely switching hot water and charging systems off and on. Further, **[Redacted – Confidential]**.<sup>1262</sup>
- 7.283. The ACCC has considered Origin's plans for the Origin Loop business in the future with and without the Proposed Acquisition. This includes reviewing possible product offerings and the business' estimated growth in Origin's and Brookfield's business plans to conclude whether Origin Loop will likely expand more rapidly under Brookfield's ownership.
- 7.284. Origin's Climate Transition Action Plan envisages it will grow its virtual power plant (the Origin Loop business) to manage 2 GW of resources.<sup>1263</sup> Further, **[Redacted – Confidential]**.<sup>1264</sup>

#### **Table 3: [Redacted – Confidential]**

**[Redacted – Confidential]**

Source: **[Redacted – Confidential]**.

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<sup>1255</sup> **[Redacted – Confidential]**.

<sup>1256</sup> **[Redacted – Confidential]**.

<sup>1257</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T102 L.28] – [T103 L.14].

<sup>1258</sup> Transcript of Examination under section 155(1)(c), **[Redacted – Confidential]**, 28 July 2023, at [T101 L.24] – [T102 L.14].

<sup>1259</sup> **[Redacted – Confidential]**.

<sup>1260</sup> **[Redacted – Confidential]**.

<sup>1261</sup> **[Redacted – Confidential]**.

<sup>1262</sup> **[Redacted – Confidential]**.

<sup>1263</sup> Origin Energy, [Climate Transition Action Plan](#), August 2022, at p. 18.

<sup>1264</sup> **[Redacted – Confidential]**.

- 7.285. [Redacted – Confidential].<sup>1265</sup>
- 7.286. The Applicants submit that following the Proposed Acquisition, [Redacted – Confidential]:
- [Redacted – Confidential]
  - [Redacted – Confidential]
  - [Redacted – Confidential].<sup>1266</sup>
- 7.287. In respect to growing Origin Loop, in sworn evidence provided by a Brookfield senior executive, [Redacted – Confidential].<sup>1267</sup>
- 7.288. In contrast to the Applicants’ and Origin’s submissions, documents obtained under the ACCC’s compulsory information gathering powers state that: [Redacted – Confidential].<sup>1268</sup> [Redacted – Confidential].<sup>1269</sup> [Redacted – Confidential].<sup>1270</sup> [Redacted – Confidential].<sup>1271</sup>

### *Community Energy Services*

- 7.289. Origin’s Community Energy Services business provides hot water, natural gas and other related services (for example, communal solar and battery systems) to embedded networks,<sup>1272</sup> such as [Redacted – Confidential].<sup>1273</sup> The ACCC has considered evidence relating to the following topics to conclude whether this business will grow more rapidly under Brookfield’s ownership:
- the expected growth of the Community Energy Services business with and without the Proposed Acquisition
  - reasons why Brookfield will be able to grow Origin’s Community Energy Services business.
- 7.290. [Redacted – Confidential].<sup>1274</sup> [Redacted – Confidential].<sup>1275</sup> [Redacted – Confidential].<sup>1276</sup>
- 7.291. [Redacted – Confidential].<sup>1277</sup>
- 7.292. [Redacted – Confidential].<sup>1278</sup>
- 7.293. [Redacted – Confidential].<sup>1279</sup>

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<sup>1265</sup> [Redacted – Confidential].

<sup>1266</sup> Application for merger authorisation (MA1000024), 5 June 2023, at [914].

<sup>1267</sup> Transcript of Examination under section 155(1)(c), [Redacted – Confidential], 28 July 2023, at [T107 L.14] – [T108 L.11].

<sup>1268</sup> [Redacted – Confidential].

<sup>1269</sup> [Redacted – Confidential].

<sup>1270</sup> [Redacted – Confidential].

<sup>1271</sup> [Redacted – Confidential].

<sup>1272</sup> Origin Energy, [Origin acquires WINconnect, adding further scale to its growing community energy services business](#), 20 December 2012, accessed 27 September 2023.

<sup>1273</sup> [Redacted – Confidential].

<sup>1274</sup> [Redacted – Confidential].

<sup>1275</sup> [Redacted – Confidential].

<sup>1276</sup> [Redacted – Confidential].

<sup>1277</sup> [Redacted – Confidential].

<sup>1278</sup> [Redacted – Confidential].

<sup>1279</sup> [Redacted – Confidential].



### **ACCC view**

- 7.294. The ACCC considers that public benefits could arise from additional development and funding of Origin's behind the meter business on the basis that the aggregation of distributed energy resources can improve the electricity grid's security and reliability. However, the evidence before the ACCC does not support the proposition that the Proposed Acquisition is likely to lead to this development as compared to a future without the Proposed Acquisition.
- 7.295. **[Redacted – Confidential]**.
- 7.296. Accordingly, the ACCC considers that the Applicants' submissions are not consistent with evidence as to what is likely to occur if the Proposed Acquisition does not proceed and does not, therefore, conclude that the Proposed Acquisition is likely to result in an acceleration of behind the meter solutions.

### **Conclusion on public benefits**

- 7.297. As outlined in its analysis above, the ACCC considers that the Proposed Acquisition would result, or be likely to result, in an acceleration of, and additional, renewable generation and storage development for Origin Energy Markets. This additional generation could be up to **[Redacted – Confidential]** GW by 2033, and in any case will be more than what Origin would likely achieve absent the Proposed Acquisition. In particular, the ACCC considers that the nature of BGTF and Brookfield's financial, reputational and commercial incentives, in combination with its global renewables expertise and procurement scale advantage, will enable it to increase the speed of the build-out, and favour a completed build-out. The ACCC considers that Brookfield's proposed build-out plan will be further supported by access to Origin's retail base and existing firming capacity. The ACCC acknowledges the various factors that may delay Brookfield's renewables build-out but considers that these would also be likely to delay other renewables developers, including Origin under its current ownership structure. The ACCC also considers that the Proposed Acquisition would result, or be likely to result, in a decrease in Origin Energy Markets' emissions intensity.
- 7.298. The ACCC considers that these constitute material public benefits, in the sense that they are important and of value, both to Origin's customers and to Australians more broadly for the reasons outlined in the analysis above.
- 7.299. The ACCC also considers that the Proposed Acquisition would result, or be likely to result, in an acceleration of renewable generation and storage build-out in Australia, and that this constitutes a public benefit. However, the ACCC has not reached an affirmative view regarding whether the Proposed Acquisition will, in the much longer-term, result in additional renewable generation and storage capacity being built in Australia, as in the future without the Proposed Acquisition, Australia may ultimately reach a similar level of renewable generation and storage as is reached with the Proposed Acquisition.
- 7.300. For the reasons set out above, the ACCC considers that the Proposed Acquisition would not result, or be likely to result, in public benefits in the form of:
- downward pressure on retail electricity prices
  - earlier and more cost-efficient access to new renewable technologies in Australia



- development of the Australian renewables industry in the form of local supply chains and onshore manufacturing, leading to the development of Australian businesses and direct and indirect employment
- the acceleration of behind the meter solutions.

7.301. In Section 10, the ACCC provides its view on whether it is satisfied that the likely public benefits of the Proposed Acquisition outweigh the likely public detriments.

## 8. Section 87B undertakings

### ACCC's power to specify conditions of authorisation

- 8.1. Section 88(3) of the Act provides that the ACCC may specify conditions in an authorisation. Such conditions may include, but are not limited to, a condition that a person must give and comply with an undertaking under section 87B of the Act.<sup>1280</sup> The legal protection provided by an authorisation does not apply if a condition is imposed and is not complied with.<sup>1281</sup>
- 8.2. There is no express limit upon the kinds of conditions that may be imposed, but the power to impose conditions is constrained by the subject matter, scope and purpose of the statute.<sup>1282</sup> It is for the ACCC to determine the nature, form and scope of any conditions imposed. The ACCC may impose conditions on an authorisation 'to address elements of the conduct which are cause for concern, rather than denying the application outright on the basis of those concerns'.<sup>1283</sup>
- 8.3. In these circumstances, the ACCC considers it appropriate to specify conditions requiring that undertakings be given and complied with that do one or more of reducing the likelihood of some public detriment and increasing the likelihood of some public benefit, such that, overall, the net public benefit is raised to a sufficient level.<sup>1284</sup>
- 8.4. Recognising the concerns raised about the Proposed Acquisition during the ACCC's consultation process, the Brookfield Parties, the AusNet Parties and the MidOcean Parties have each offered to provide an undertaking pursuant to section 87B of the Act to the ACCC, being the Brookfield Undertaking, the AusNet Undertaking and the MidOcean Undertaking. The ACCC has considered whether it would be appropriate to authorise the Proposed Acquisition on the conditions that the Brookfield Parties, the AusNet Parties and the MidOcean Parties give, and comply with, each of these undertakings.
- 8.5. Whilst the ACCC accepts that there are likely to be material public benefits arising from the Proposed Acquisition, there are also likely to be material public detriments. The imposition of conditions is one of many factors that the ACCC has taken into account in weighing those likely benefits and detriments in order to evaluate whether a net public benefit is likely to arise as a consequence of the Proposed Acquisition. This is discussed in further detail in Section 10 below.

<sup>1280</sup> *Competition and Consumer Act 2010* (Cth), s 88(4).

<sup>1281</sup> *Competition and Consumer Act 2010* (Cth), s 88(3).

<sup>1282</sup> *Application by Medicines Australia Inc* [2007] ACompT 4, at [129]. See also: *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36, at [42] citing *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, at 505.

<sup>1283</sup> See: [Explanatory Memorandum](#), Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) at [9.30].

<sup>1284</sup> See for example *Application by Medicines Australia Inc* [2007] ACompT 4, at [133].

- 8.6. For the reasons set below, the ACCC considers it appropriate to specify conditions in the authorisation that:
- the Brookfield Parties must give, and comply with, the Brookfield Undertaking
  - the AusNet Parties must give, and comply with, the AusNet Undertaking, and
  - the MidOcean Parties must give, and comply with, the MidOcean Undertaking.
- 8.7. The ACCC considers that these undertakings will do one or more of:
- reducing the likelihood of some public detriment, and
  - increasing the likelihood of some public benefit.
- 8.8. The ACCC considers what this impact on likelihood means when giving weight to each of the public benefits and detriments under the Net Public Benefit Test in Section 10 below.
- 8.9. The clearest authority on the ACCC's discretion to grant an authorisation on a condition is the Tribunal's decision in *Application by Medicines Australia Inc* [2007] ACompT 4. As it predated the current dual test for merger authorisation, this decision was necessarily silent on the effect of conditions on the Competition Test.
- 8.10. The ACCC considers that the undertakings proffered reduce the likelihood of competitive harm occurring. This clearly has the potential to affect the ACCC's assessment of whether it is satisfied that the Proposed Acquisition is not likely to have the effect of substantially lessening of competition. The ACCC does not consider that it is necessary to reach a conclusion on the impacts of the Brookfield Undertaking, AusNet Undertaking and MidOcean Undertaking on the Competition Test in this particular case given the ACCC's conclusion on the Net Public Benefit Test in Section 10 below.

## **Brookfield Undertaking**

### ***Increase in likelihood of some public benefit resulting from Brookfield's delivery of the proposed build-out plan***

- 8.11. The public benefits discussed at paragraphs 7.297 to 7.299 flow from the ACCC's consideration of the likelihood of Brookfield completing the proposed build-out of Origin Energy Markets, including the development of up to 14 GW of renewable generation and storage assets by 2033, if the Proposed Acquisition proceeds.
- 8.12. For the reasons outlined at paragraph 7.115 and 7.189 to 7.192 above, the ACCC considers that Brookfield has strong incentives to complete the proposed build-out of Origin Energy Markets and therefore has concluded that the proposed build-out is likely. There is, however, some degree of uncertainty as to whether Brookfield will achieve the build-out of up to 14 GW of renewable generation and storage assets by 2033.
- 8.13. The Brookfield Undertaking aims to reduce some of this uncertainty, and further increase the likelihood that Brookfield will complete a higher proportion of the full proposed build-out (of up to 14 GW) of Origin Energy Markets. In particular, the Brookfield Undertaking includes obligations on Brookfield to:

- record its commitment to Origin Energy Markets achieving the objectives of the proposed renewables build-out,<sup>1285</sup> and
  - report annually on the progress of Origin Energy Markets in meeting the objectives of the proposed renewables build-out.<sup>1286</sup> This report will be provided to the ACCC and published on Brookfield's website.
- 8.14. The ACCC considers that the obligations on Brookfield to record its commitment to the objectives of the proposed build-out plan,<sup>1287</sup> and to deploy its resources, capabilities and expertise to enable Origin Energy Markets to achieve the plan,<sup>1288</sup> go to Brookfield's reputation and will increase the likelihood of Brookfield completing a higher proportion of the full proposed build-out (of up to 14 GW) of Origin Energy Markets. The public reporting obligations will further incentivise Brookfield to complete the build-out by providing greater transparency and accountability of Brookfield's delivery of the build-out.
- 8.15. Overall, the ACCC considers that these obligations in the Brookfield Undertaking will increase the likelihood of some public benefits described in paragraphs 7.297 to 7.299 being realised from the Proposed Acquisition.

### ***Vertical links between AusNet and Origin Energy Markets – electricity generation and transmission***

- 8.16. To address the competitive detriment identified at paragraphs 7.13 to 7.15 the Brookfield Undertaking requires:
- the separation of Brookfield Infrastructure (which manages its interest in AusNet) and Brookfield Renewables (which will manage its interest in Origin Energy Markets) by providing for separate groups of Brookfield personnel to manage AusNet on one hand and Origin Energy Markets on the other (and that each group of personnel will have no involvement in management of the other interest, will not become a member of the other group, and by placing restrictions on communication between the groups), separation of information relating to AusNet and Origin Energy Markets, physical separation of Brookfield personnel through designated work areas, and restrictions on Brookfield Infrastructure personnel's remuneration or incentives being linked to Origin Energy Markets and vice versa for Brookfield Renewables personnel<sup>1289</sup>
  - the separation of AusNet and Origin Energy Markets management by providing for separation of directors, separation of senior management and certain other employees, separation of information relating to AusNet and Origin Energy Markets, physical separation through separate premises and restrictions on AusNet senior management's remuneration or incentives being linked to Origin Energy Markets and vice versa for Origin Energy Markets senior management<sup>1290</sup> and
  - the prevention of possible conflicts and transparency in relation to connections to AusNet's transmission network by requiring that Brookfield Infrastructure

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<sup>1285</sup> Brookfield Undertaking, cl 8.1(d).

<sup>1286</sup> Brookfield Undertaking, cl 8.

<sup>1287</sup> Brookfield Undertaking, cl 8.1(d).

<sup>1288</sup> Brookfield Undertaking, cl 8.2(b).

<sup>1289</sup> Brookfield Undertaking, cl 5.

<sup>1290</sup> Brookfield Undertaking, cl 6.

personnel and Brookfield appointed directors are not involved in any Origin Energy Market applications to connect to the network and that information in respect of such applications (including location of the generation asset, location of the proposed connection, type (technology) and size of facility to be connection, and date of planned connection) are published on Origin Energy Market's website.<sup>1291</sup>

- 8.17. The ACCC considers that while these obligations may not address all possible foreclosure, they do mitigate the likelihood of the competitive detriment occurring, including because:
- the separation of both Brookfield personnel and AusNet and Origin Energy Markets personnel reduces the opportunities for sharing of information (albeit not entirely), which in turn reduces the ability for Brookfield to influence AusNet to foreclose Origin Energy Market's generation rivals
  - the restrictions on incentives of both Brookfield personnel and senior management of AusNet and Origin Energy Markets reduce any direct financial incentive for individuals to engage in conduct which would benefit the other (including for AusNet to favour Origin Energy Markets)
  - the restrictions on Brookfield involvement in Origin Energy Markets connection applications reduce the ability for Brookfield to directly influence AusNet to preference Origin Energy Markets, while the public reporting obligations also provide a level of disincentive to do so (as it may be more easily detected).
- 8.18. The Brookfield Undertaking also contains an obligation that prevents Brookfield Renewables from selling its interest in Origin Energy Markets, in a way which results in a single corporate group controlling or managing, or a related entity, related party or entity connected to the single corporate group controlling or managing an economic interest of 10% or more in both AusNet and Origin Energy Markets. The ACCC considers this obligation may serve to mitigate any longer-term competitive impacts as a result of this kind of vertical integration between generation and transmission (given it is expected Brookfield LP will sell its interest in Origin Energy Markets within 12 – 14 years).
- 8.19. Moreover, the ACCC considers the independent auditing provisions contained in the Brookfield Undertaking, as well as the requirement to publish a public report of the independent auditor's findings, may help detect any non-compliance with the Brookfield Undertaking, and will therefore act as a disincentive for Brookfield to engage in discriminatory conduct.

### ***Vertical links between AusNet and Origin Energy Markets – electricity distribution and retail***

- 8.20. In respect of the competitive detriment identified at paragraphs 7.16 and 7.17, the ACCC considers that the obligations in the Brookfield Undertaking relating to separation of Brookfield Infrastructure and Brookfield Renewables and AusNet and Origin Energy Markets described in paragraph 8.16 above, aim to reduce the likelihood that the competitive detriment will arise. This is because (as considered previously) the separation obligations reduce the opportunities for sharing information (albeit not entirely), which, in turn, reduces the ability for Brookfield to influence AusNet to foreclose Origin Energy Market's retail rivals.

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<sup>1291</sup> Brookfield Undertaking, cl 7.

- 8.21. Similarly, the obligation relating to Brookfield Renewables' sale of its interest in Origin Energy Markets and the independent auditing provisions described at paragraphs 8.18 and 8.19 above are expected to have a similar effect in respect of this kind of vertical integration in mitigating longer term competitive impacts and acting as a disincentive to engage in discriminatory conduct.

### ***Vertical links between AusNet and Origin Energy Markets – embedded electricity generation and distribution, and gas distribution and retail***

- 8.22. The obligations in the Brookfield Undertaking relating to the vertical links between AusNet and Origin Energy Markets in respect of electricity distribution and retail are also relevant to other vertical links in respect of embedded electricity generation and distribution, and gas distribution and retail (see paragraph 7.22) given those links also involve vertical integration between Brookfield's interests in AusNet and Origin Energy Markets.

### **Vertical links between Intellihub and Origin Energy Markets**

- 8.23. To address the competitive detriment identified at paragraph 7.18, the Brookfield Undertaking contains obligations that seek to ensure Intellihub does not share confidential information of an electricity retailer (other than Origin Energy Markets), or other customers of Intellihub, with Origin Energy Markets.<sup>1292</sup>
- 8.24. The ACCC considers that this obligation may have some impact on reducing the likelihood of any competitive detriment occurring in the relevant retail markets, as it reduces the ability for Brookfield to influence Intellihub to share confidential information with Origin Energy Markets which could be used to Origin Energy Market's advantage in retail markets.

### **AusNet Undertaking**

### ***Vertical links between AusNet and Origin Energy Markets – electricity generation and transmission***

- 8.25. In addition to the obligations in the Brookfield Undertaking, the AusNet Undertaking contains various obligations which are relevant to the competitive detriment in respect of the vertical integration between electricity generation and transmission. In particular, it includes obligations regarding:
- the separation of AusNet and Origin Energy Markets personnel in respect of AusNet senior management, directors and certain employees<sup>1293</sup>
  - connections to AusNet's transmission network by ensuring that Brookfield Infrastructure personnel and Brookfield appointed directors are not involved in Origin Energy Markets' applications to connect to the AusNet's transmission network, and that AusNet will notify relevant connection applicants of the existence of the AusNet Undertaking, a link to the Brookfield website containing a copy of the Brookfield Undertaking and details of the independent auditor<sup>1294</sup>
  - independent auditing of AusNet's compliance with the AusNet Undertaking and with the non-discrimination obligations contained in the AER's Transmission

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<sup>1292</sup> Brookfield Undertaking, cl 10.

<sup>1293</sup> AusNet Undertaking, cl 5.

<sup>1294</sup> AusNet Undertaking, cl 6.

Ring-Fencing Guideline (but only in respect of discrimination relating to Origin Energy Markets as a related electricity service provider). In addition, auditing and reporting against the AER's Transmission Ring-Fencing Guideline for negotiated transmission services (until the Guideline does apply to these services). A public version of the audit report will be published. It is also acknowledged and agreed that the ACCC may direct the independent auditor to provide copies of each audit report to the AER.<sup>1295</sup>

- 8.26. The ACCC notes that the AusNet Undertaking is designed to supplement the Brookfield Undertaking. For similar reasons to those outlined in paragraph 8.17, the ACCC considers that the obligations relating to separation and connections are expected to reduce the ability for Brookfield to influence AusNet to preference Origin Energy Markets, while the notification obligations also provide a level of disincentive to do so given such conduct may be more easily detected. The audit obligations are expected to similarly act as a disincentive, especially where audit reports may be provided to the AER which is the responsible regulator for the Transmission Ring-Fencing Guideline. In this regard, the ACCC notes that the independent audit will go further than the current Transmission Ring-Fencing Guideline given it extends to negotiated transmission services.
- 8.27. The ACCC considers the obligations in the AusNet Undertaking will have some impact in reducing the likelihood of the competitive detriment arising from the Proposed Acquisition.
- 8.28. Overall, the ACCC considers that the Brookfield Undertaking and the AusNet Undertaking reduce the likelihood, to a modest extent, of some public detriments being realised than would otherwise occur from the competitive effects of the Proposed Acquisition.

### **MidOcean Undertaking**

- 8.29. To address the competitive detriment identified at paragraphs 7.20 and 7.21, the MidOcean Undertaking includes an obligation on MidOcean Energy to provide a written waiver in favour of Shell QGC (currently a wholly owned subsidiary of Shell and the operator of QCLNG) and Walloons that, for the term of the MidOcean Undertaking, it waives any rights it might have under the contractual arrangements for the QCLNG project to obtain specific types of competitively sensitive information. It also requires MidOcean Energy to delete or destroy any such information if it is received by MidOcean Energy.<sup>1296</sup>
- 8.30. The ACCC considers that these obligations in the MidOcean Undertaking will reduce, to a moderate extent, the ability and incentive of MidOcean Group to engage in conduct which would create conditions that may facilitate coordinated conduct between the APLNG and QCLNG projects, thereby advantaging one or both gas projects. As such, the ACCC considers the MidOcean Undertaking will reduce, to a moderate extent, the likelihood of the public detriment being realised from the Proposed Acquisition.

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<sup>1295</sup> AusNet Undertaking, cl 7.

<sup>1296</sup> MidOcean Undertaking, cl 5.3.



## ACCC conclusion

- 8.31. The ACCC considers that the obligations contained in the Brookfield Undertaking, AusNet Undertaking and MidOcean Undertaking will do one or more of reducing the likelihood of some public detriment occurring and increasing the likelihood of some public benefit occurring.
- 8.32. The ACCC considers it appropriate to specify conditions in the authorisation that:
- the Brookfield Parties must give, and comply with, the Brookfield Undertaking
  - the AusNet Parties must give, and comply with, the AusNet Undertaking, and
  - the MidOcean Parties must give, and comply with, the MidOcean Undertaking.

## 9. Weighing of public benefits and detriments

- 9.1. The ACCC must not grant authorisation in relation to conduct which is the subject of an application for authorisation unless it is satisfied in all the circumstances that one of the statutory preconditions for authorisation in section 90(7) of the Act is met: here, either the Competition Test in section 90(7)(a) or the Net Public Benefit Test in section 90(7)(b).<sup>1297</sup>
- 9.2. The Net Public Benefit Test requires the ACCC to be satisfied in all the circumstances that the conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.<sup>1298</sup>
- 9.3. The ACCC's assessment of whether it is satisfied that the likely public benefits of the Proposed Acquisition will outweigh the likely public detriments requires a balancing exercise.<sup>1299</sup> The public detriments which the ACCC considers in this assessment include, but are not limited to, any reduction in competition likely to result from the Proposed Acquisition.
- 9.4. In deciding whether it is satisfied that the likely public benefits of the Proposed Acquisition would outweigh the likely public detriments, the ACCC makes an evaluative assessment and judgment.
- 9.5. The Tribunal has observed that:

[...] it does not necessarily follow that the net public benefit test for authorisation in s 90 of the Act also has as its sole objective the unconstrained promotion of efficient resource allocation. The authorisation provisions of the Act, unlike those of Pt IV, are not solely concerned with the promotion of competition or the achievement of a socially efficient allocation of resources. The test for authorisation does, after all, provide for a balancing of public benefit against anti competitive detriment, which necessarily calls on us to consider policy imperatives and broader social values, and balance those against competition concerns. As the Tribunal stated in *Re 7 Eleven Stores Pty Ltd* (supra) at 42,677:

The object of the restrictive practices provisions of the Act is the promotion of competition. Nevertheless, the very existence of authorization points to the recognition that there may be exceptional circumstances in which business conduct associated

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<sup>1297</sup> *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2, at [91], [99], [111] – [129].

<sup>1298</sup> *Competition and Consumer Act 2010* (Cth), s 90(7)(b).

<sup>1299</sup> *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, at [7].

with a lessening of competition may have value to society. We cannot rely upon the functioning of competitive markets to deliver everything 'of value to the community generally'.<sup>1300</sup>

- 9.6. The ACCC considers the Proposed Acquisition would result, or be likely to result, in material public benefits in the form of:
- an acceleration of renewable generation and storage development for Origin Energy Markets
  - additional renewable generation and storage development for Origin Energy Markets, and
  - a decrease in Origin Energy Markets' emissions intensity.
- 9.7. While the ACCC considers that the public benefits described in paragraph 9.6 above are not readily quantified, it is of the view that they are material, in the sense that they are important and of value, both to Origin's customers and Australians more broadly. The ACCC recognises that countries around the world, including Australia, must reduce greenhouse gas emissions to avoid the most severe impacts of climate change and achieve the warming limits contemplated by the projected climate change scenarios. In assessing the materiality of these public benefits, the ACCC has had regard to the importance of reducing greenhouse gas emissions, and the significant emissions produced within Australia's energy sector.
- 9.8. The need to reduce greenhouse gas emissions is recognised in the Australian Government's 2030 and 2050 emissions targets (discussed in Section 5). The ACCC also recognises that there will be environmental gains if Australia is able to exceed or increase the certainty of meeting these emissions reduction targets, including by achieving them faster.
- 9.9. The ACCC therefore considers that there is a material benefit to the Australian public by increasing the speed and extent to which one of Australia's largest emitters, Origin, transitions towards renewable generation and storage capacity. This will reduce Australia's greenhouse gas emissions and help address climate change impacts. Accordingly, the ACCC has given significant weight to this public benefit.
- 9.10. The ACCC also considers the Proposed Acquisition would result, or be likely to result, in a public benefit in the form of an acceleration of renewable generation and storage build-out in Australia. This benefit is valuable to Australians for similar reasons to those outlined above.
- 9.11. In respect of the additional economic and social benefits described at paragraphs 7.230 to 7.296 above, the ACCC has concluded that these claimed benefits are not likely to result from the Proposed Acquisition and therefore the ACCC has not taken them into account in the weighing exercise.
- 9.12. The ACCC has considered how the Brookfield Undertaking impacts its assessment of the benefits likely to result from the Proposed Acquisition. The ACCC's view is that the Brookfield Undertaking increases the likelihood, to a small extent, that Brookfield will complete a higher proportion of the full proposed build-out (of up to 14 GW) of Origin Energy Markets. The ACCC considers that the obligations on Brookfield to record its commitment to the objectives of the proposed build-out

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<sup>1300</sup> *Applications by Qantas Airways Limited and Air New Zealand Limited* [2004] ACompT 9, at [180].



plan,<sup>1301</sup> as well as to deploy its resources, capabilities and expertise to achieve the plan,<sup>1302</sup> provide greater certainty that Brookfield will achieve a higher proportion of the proposed build-out. The public reporting obligations also assist with firming the incentives for Brookfield to complete the build-out by providing greater transparency and accountability as well as reputational risk for Brookfield's delivery of the plan. The ACCC therefore considers that the Brookfield Undertaking increases the weight (to a small extent) to be given to the public benefits identified above.<sup>1303</sup>

- 9.13. Against this, the ACCC must balance the detriment to the public that would result, or be likely to result, from the Proposed Acquisition. As discussed in Section 7, the ACCC considered a number of potential competitive detriments associated with the various vertical and horizontal links established across electricity and gas markets if the Proposed Acquisition proceeds. The ACCC has also had regard to a number of potential non-competitive detriments that may arise from the Proposed Acquisition.
- 9.14. The ACCC considers that the Proposed Acquisition would result, or be likely to result, in a material public detriment as a result of competitive effects arising from the vertical integration of electricity generation and transmission. As outlined in sections 6 and 7, the ACCC considers it likely that competitive harm would occur through discrimination by AusNet in relation to connections to AusNet's transmission network against Origin Energy Markets' generation rivals, operation of AusNet's transmission network to favour Origin Energy Markets, and/or information sharing between AusNet and Origin Energy Markets. Such conduct has the potential to have a material anti-competitive effect in the markets for the supply of wholesale electricity, wholesale hedging instruments, and new renewable and firming generation and storage services as described in paragraph 7.13. It comes at a time when there is increased pressure for the connection of new generation to the transmission network as Australia transitions to renewable energy. This vertical integration therefore raises the possibility for long-term competitive harm. The ACCC has placed considerable weight on this detriment.
- 9.15. The ACCC also considers that the Proposed Acquisition would result, or be likely to result, in further public detriments as a result of competitive effects arising from the vertical integration of electricity distribution and retail and the vertical integration of electricity retail and smart meters/behind the meter services. While these public detriments are not considered to be of the same magnitude and likelihood as those described in the paragraph above, for the reasons set out in sections 6 and 7, they are still considered to be meaningful and have been weighted accordingly.
- 9.16. The competitive detriments arising from the vertical integration of electricity distribution and embedded generation and vertical integration of gas distribution and retail have also been taken into account in the weighing exercise. Based on the analysis in Section 6, the ACCC considers these detriments to be less significant and likely than the competitive detriments described above and has placed limited weight on them.
- 9.17. The ACCC considers that the Brookfield Undertaking and the AusNet Undertaking reduce the likelihood, to a modest extent, of some public detriments being realised than would otherwise occur as a result of the Proposed Acquisition. The Brookfield Undertaking and the AusNet Undertaking contain obligations directed toward the

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<sup>1301</sup> Brookfield Undertaking, cls 8.1(d) and 8.3.

<sup>1302</sup> Brookfield Undertaking, cl 8.2(b).

<sup>1303</sup> *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1, at [388].

separation of Brookfield Infrastructure and Brookfield Renewables as well as AusNet and Origin Energy Markets, in terms of the separation of senior management and other decision-making personnel, physical separation in office premises, IT systems and information flows and direct financial incentives. There are also independent auditing provisions in both undertakings, as well as a requirement to publish a public report of the auditor's findings, which will act as a disincentive for Brookfield and AusNet to engage in discriminatory conduct.<sup>1304</sup> To a meaningful extent, these obligations reduce the likelihood of some public detriments occurring because they reduce the opportunities for sharing of information (albeit not entirely), which in turn reduces the ability for Brookfield to influence AusNet to discriminate in favour of Origin Energy Markets or otherwise foreclose Origin Energy Markets' rivals. The ACCC therefore considers that the Brookfield Undertaking reduces the weight (to a modest extent) of the public detriments arising from the vertical integration between AusNet, Intellihub and Origin Energy Markets as a result of the Proposed Acquisition.<sup>1305</sup>

- 9.18. The horizontal overlap between MidOcean Group's interests in APLNG and QCLNG is also considered to give rise to likely effects on competition, which constitutes a further public detriment. For the reasons outlined in sections 6 and 7, there is the potential for significant impacts in relevant markets. However, in light of the mitigating factors described at paragraph 6.378, and the ACCC's consideration that the MidOcean Undertaking will reduce the likelihood of the competitive detriment arising, the ACCC has not placed significant weight on this detriment in its weighing exercise.
- 9.19. In relation to the other non-competitive detriments considered by the ACCC at paragraphs 7.23 to 7.31, the ACCC concluded that none of these potential detriments are likely to result from the Proposed Acquisition and has not taken them into account in the weighing exercise.
- 9.20. Acknowledging the inherent difficulty in weighing competitive harm against public benefits, the ACCC has made the evaluative judgment applied by the Tribunal and the Court in analogous cases.<sup>1306</sup>
- 9.21. The ACCC considers the weighing exercise to be finely balanced. While there are material public detriments likely to result from the Proposed Acquisition, there are also material public benefits likely to result from the Proposed Acquisition which are important and valuable to Australians.
- 9.22. For the reasons set out above, the ACCC considers it appropriate to specify conditions in the authorisation that:
- a) the Brookfield Parties must give, and comply with, the Brookfield Undertaking
  - b) the AusNet Parties must give, and comply with, the AusNet Undertaking, and
  - c) the MidOcean Parties must give, and comply with, the MidOcean Undertaking.<sup>1307</sup>

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<sup>1304</sup> Brookfield Undertaking, cl 13; AusNet Undertaking, cl 7.

<sup>1305</sup> *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited* [2014] ACompT 1, at [388].

<sup>1306</sup> *ACCC v Australian Competition Tribunal* (2017) 254 FCR 341, at [7]; *ACCC v Pacific National (No 2)* [2019] FCA 669, at [1276].

<sup>1307</sup> *Competition and Consumer Act 2010* (Cth), s 88(4).

- 9.23. It is the ACCC's view that these undertakings do one or more of reducing the likelihood of some public detriments, and increasing the likelihood of some public benefits, resulting from the Proposed Acquisition. This has the impact of increasing the likelihood of the claimed net public benefit resulting from the Proposed Acquisition to a sufficient level for the purposes of section 90(7)(b).<sup>1308</sup>
- 9.24. Therefore, the ACCC is satisfied in all the circumstances that, on the conditions described at paragraph 9.22 above, the Proposed Acquisition would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Acquisition.

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<sup>1308</sup> *Application by Medicines Australia Inc* [2007] ACompT 4, at [133].

## 10. Determination

### Granting an authorisation

- 10.1. Section 88 of the Act (relevantly) sets out the power to grant an authorisation,<sup>1309</sup> the effect of an authorisation,<sup>1310</sup> and the powers for the ACCC to specify a condition,<sup>1311</sup> including a condition that a person give and comply with an undertaking under section 87B<sup>1312</sup> and to grant a single authorisation dealing with several types of conduct.<sup>1313</sup>
- 10.2. The power to grant an authorisation is discretionary but is constrained by the requirements in section 90(7) of the Act that the ACCC must not grant an authorisation under section 88(1) of the Act in relation to conduct specified in the authorisation, unless it is satisfied in all the circumstances that:
- a) the conduct would not have the effect, or not be likely to have the effect, of substantially lessening competition, or
  - b) the conduct would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.
- 10.3. Engagement in conduct specified in the authorisation is protected (relevantly to a merger authorisation) from the prohibition in section 50 of the Act that is engaged in by:
- a) the applicant<sup>1314</sup>
  - b) any other person named or referred to in the application as a person who is engaged in, or who is proposed to be engaged in, the conduct,<sup>1315</sup> and
  - c) any particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct.<sup>1316</sup>
- 10.4. It is necessary for the ACCC, in granting an authorisation, to specify the conduct that is protected and to identify the persons or class of persons (in addition to the applicant) who are the beneficiaries of that protection.

### The application

- 10.5. On 5 June 2023 Brookfield LP and MidOcean lodged an application, MA1000024, with the ACCC seeking authorisation under section 88(1) of the Act.
- 10.6. The Applicants seek authorisation of their proposed acquisition of Origin, comprising 2 interdependent acquisitions:

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<sup>1309</sup> *Competition and Consumer Act 2010* (Cth), s 88(1).

<sup>1310</sup> *Competition and Consumer Act 2010* (Cth), s 88(2).

<sup>1311</sup> *Competition and Consumer Act 2010* (Cth), s 88(3).

<sup>1312</sup> *Competition and Consumer Act 2010* (Cth), s 88(4).

<sup>1313</sup> *Competition and Consumer Act 2010* (Cth), s 88(5).

<sup>1314</sup> *Competition and Consumer Act 2010* (Cth), s 88(2)(a).

<sup>1315</sup> *Competition and Consumer Act 2010* (Cth), s 88(2)(b).

<sup>1316</sup> *Competition and Consumer Act 2010* (Cth), s 88(2)(c).

- a) **Scheme Acquisition:** It is proposed that MidOcean will acquire 100% of the ordinary shares in Origin pursuant to a scheme of arrangement under the *Corporations Act 2001* (Cth). To implement the Scheme Acquisition, a binding Scheme Implementation Deed was signed on 27 March 2023 by Origin, MidOcean and Brookfield Renewable Group Australia Pty Ltd. The Scheme Acquisition is subject to various conditions precedent, as set out in the Scheme Implementation Deed (see Annexure 5.1 of the Application), including Foreign Investment Review Board approval, ACCC authorisation, Origin shareholder approval and Court approval
- b) **On-Sale Acquisition:** Conditional upon, and as soon as possible following implementation of the Scheme Acquisition, MidOcean will procure that Origin and its interests are divided into 2 separate businesses, being the Origin Energy Markets business and the Origin Integrated Gas business. Origin's Energy Markets business comprises Origin's energy retailing business, electricity generating assets, energy wholesale and trading business, development assets relating to energy production and storage, its investment in Octopus Energy and its LPG business and domestic gas trading business. Origin's Integrated Gas business comprises Origin's upstream gas interests and shareholding in APLNG. The division of Origin will be implemented by MidOcean procuring the sale of the various Origin subsidiaries and assets comprising the Origin Energy Markets business to various entities wholly owned by Brookfield LP. MidOcean will retain 100% of the shares in Origin which, following completion of the sale of the Origin Energy Markets business, will own only the Origin Integrated Gas business. The terms of Brookfield LP's acquisition of the Origin Energy Markets business are set out in the Commitment Deed (see Annexure 5.3 of the Application) and the steps that MidOcean and Brookfield LP will take to prepare for the implementation of the Scheme Acquisition and the On-Sale Transaction are set out in the Bid Conduct Deed (see Annexure 5.2 of the Application).

10.7. The Applicants seek authorisation of the Proposed Acquisition on their own behalf, and on behalf of the following classes of person:

- a) any entity that is a related body corporate of Brookfield LP that acquires any part of the Origin Energy Markets business, and
- b) any entity that is a related body corporate of MidOcean Energy, LLC that acquires any part of the Origin Integrated Gas business.

## Authorisation

10.8. For the reasons outlined in the Reasons for Determination, the ACCC is satisfied, in all the circumstances that, on the conditions, pursuant to section 88(4) of the Act, that:

- EOS Aggregator (Bermuda) L.P., Brookfield Asset Management ULC and Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489) and Brookfield Corporation (the **Brookfield Parties**) must give, and comply with, the section 87B undertaking in the form at Attachment A (the **Brookfield Undertaking**)
- AusNet Pty Ltd (ACN 603 317 559) and Australian Energy Holdings No 1 Pty Ltd (ACN 654 672 670) (the **AusNet Parties**) must give, and comply with, the section 87B undertaking in the form at Attachment B (the **AusNet Undertaking**), and

- MidOcean Energy Holdings Pty Ltd (ACN 662 741 415) and MidOcean Energy Parent Pty Ltd (ACN 666 688 786) (the **MidOcean Parties**) must give, and comply with, the section 87B undertaking in the form at Attachment C (the **MidOcean Undertaking**),

the Proposed Acquisition would be likely to result in a benefit to the public, and that benefit would outweigh the detriment to the public that would result or be likely to result from the Proposed Acquisition.

- 10.9. The ACCC has not identified any reasons for it to conclude that it ought not exercise its discretion to grant the authorisation sought.
- 10.10. The ACCC grants authorisation MA1000024, on the conditions set out in paragraph 10.8 above, as a single authorisation (pursuant to section 88(5) of the Act) granted in respect of the 2 interdependent acquisitions that comprise the conduct defined above as the Proposed Acquisition.
- 10.11. The protection of authorisation MA1000024 extends to:
- a) the Applicants,
  - b) any entity that is, at the date on which the authorisation is made, a related body corporate of Brookfield LP that acquires any part of the Origin Energy Markets business, and
  - c) any entity that is, at the date on which the authorisation is made, a related body corporate of MidOcean Energy, LLC that acquires any part of the Origin Integrated Gas business.<sup>1317</sup>
- 10.12. The Act allows the ACCC to grant authorisation for a period specified in the authorisation and remains in force for that period only.<sup>1318</sup> The ACCC will generally grant a merger authorisation for a period of no longer than 12 months, in which time the authorised persons or classes of persons must complete the acquisition in order to have the benefit of the protection of the authorisation.
- 10.13. Authorisation MA1000024 is granted, on the conditions set out in paragraph 10.8 above, on 10 October 2023 and is effective for a period of 12 months.

### **Date authorisation comes into effect**

- 10.14. This determination is made on 10 October 2023. If no application for the review of the determination is made to the Australian Competition Tribunal, it will come into force on 1 November 2023.<sup>1319</sup>

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<sup>1317</sup> The ACCC notes that any subsequent acquisition that would result in a new person acquiring a material interest in a company in a position to control the entities to which the protections of the authorisation extend would potentially fall for consideration under section 50 of the Act.

<sup>1318</sup> *Competition and Consumer Act 2010* (Cth), s 91(1).

<sup>1319</sup> *Competition and Consumer Act 2010* (Cth), s 91(1A)(a).

## Attachment A: Brookfield Undertaking

# Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by EOS Aggregator (Bermuda) L.P., Brookfield Asset Management ULC and Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489) and Brookfield Corporation

# Attachment A: Brookfield Undertaking

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## Attachment A: Brookfield Undertaking

### 1. Person giving the Undertaking

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This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:

- (a) EOS Aggregator (Bermuda) L.P. (**Brookfield LP**);
  - (b) Brookfield Asset Management ULC and its subsidiary, Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489), jointly and severally, (**Brookfield Manager**); and
  - (c) Brookfield Corporation,
- (together referred to as the **Brookfield Parties** in this Undertaking).

### 2. Background

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#### The parties to the Proposed Acquisition

- 2.1. **Brookfield LP**: Brookfield will invest in and control Brookfield LP via the Brookfield Global Transition Fund (**BGTF**), Brookfield Renewable Partners L.P., and certain other Brookfield-managed co-investors. The Brookfield-managed portion of Brookfield LP is expected to be 67.6% on completion of the Proposed Acquisition. The balance of Brookfield LP is expected to be owned by Buckland Investment Pte. Ltd. (which is managed by GIC Special Investments Private Limited, which is in turn wholly owned by GIC Private Limited) (22.5%) and Davis Investments Pte. Ltd. (which is indirectly wholly owned by Temasek Holdings (Private) Limited) (9.9%).
- 2.2. **MidOcean Bidco**: MidOcean Reef Bidco Pty Ltd (**MidOcean Bidco**) is currently a wholly owned subsidiary of MidOcean Energy, LLC, an LNG company formed and managed by EIG Management Company LLC to build a diversified, resilient, cost and carbon competitive LNG portfolio.
- 2.3. **Origin**: Origin Energy Limited (**Origin**) is an ASX listed integrated energy company. Origin has two core businesses, the Origin Energy Markets business responsible for electricity generation and electricity and gas retailing across Australia, and the Origin Integrated Gas Business which includes a 27.5% interest in Australia Pacific LNG. It also operates, or has interests in, a range of other businesses in future energy, non-energy and energy adjacent sectors.

#### The application for merger authorisation

- 2.4. On 5 June 2023 Brookfield LP and MidOcean Bidco (collectively, the **Applicants**) lodged an application with the ACCC for merger authorisation (the **Application**).
- 2.5. The Applicants sought authorisation to engage in the conduct described in application MA1000024, being the proposed acquisition of Origin, comprising two interdependent acquisitions:
  - (a) **Scheme Acquisition**: It is proposed that MidOcean Bidco will acquire 100% of the ordinary shares in Origin pursuant to a scheme of arrangement under the Corporations Act (the **Scheme Acquisition**). To implement the Scheme Acquisition, a binding Scheme Implementation Deed (**SID**) was signed on 27 March 2023 by Origin, MidOcean Bidco and Brookfield Renewable Group Australia Pty Ltd. The Scheme Acquisition is subject to various conditions precedent, as set out in the SID (see Annexure 5.1 of the

## Attachment A: Brookfield Undertaking

Application), including FIRB approval, ACCC authorisation, Origin shareholder approval and Court approval, and

- (b) **On-Sale Acquisition:** Conditional upon, and as soon as possible following implementation of the Scheme Acquisition, MidOcean Bidco will procure that Origin and its interests are divided into two separate businesses, being the Origin Energy Markets business and the Origin Integrated Gas Business. Origin's Energy Markets business comprises Origin's energy retailing business, electricity generating assets, energy wholesale and trading business, development assets relating to energy production and storage, its investment in Octopus Energy and its LPG business and domestic gas trading business. Origin's Integrated Gas Business comprises Origin's upstream gas interests and shareholding in Australia Pacific LNG. The division of Origin will be implemented by MidOcean Bidco procuring the sale of the various Origin subsidiaries and assets comprising the Origin Energy Markets business to various entities wholly owned by Brookfield LP. MidOcean Bidco will retain 100% of the shares in Origin which, following completion of the sale of the Origin Energy Markets business, will own only the Origin Integrated Gas Business. The terms of Brookfield LP's acquisition of the Origin Energy Markets business are set out in the Commitment Deed (see Annexure 5.3 of the Application) and the steps that MidOcean Bidco and Brookfield LP will take to prepare for the implementation of the Scheme Acquisition and the On Sale Transaction are set out in the Bid Conduct Deed (see Annexure 5.2 of the Application).

The Scheme Acquisition and the On-Sale Acquisition are together the **Proposed Acquisition**.

- 2.6. The Application was made pursuant to section 88(1) of the CCA. A merger authorisation provides protection from legal action under section 50 of the CCA, which otherwise prohibits acquisitions of shares or assets that would or would be likely to have the effect of substantially lessening competition in any market.
- 2.7. The Applicants sought authorisation of the Proposed Acquisition on their own behalf, and on behalf of the following classes of person:
- (a) any entity that is a related body corporate of Brookfield LP that acquires any part of the Origin Energy Markets business.
  - (b) any entity that is a related body corporate of MidOcean Energy, LLC that acquires any part of the Origin Integrated Gas Business.
- 2.8. The Applicants requested that the ACCC grant a single authorisation under section 88(5) of the CCA of the two interdependent acquisitions which, taken together, form the Proposed Acquisition.
- 2.9. The objective of this Undertaking is to address the concerns about the Proposed Acquisition raised by the ACCC in its Reasons for Determination in respect of the Application (the **Undertaking Objectives**).

### **3. Commencement of this Undertaking**

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This Undertaking comes into effect when:

- (a) this Undertaking is executed by the Brookfield Parties; and

## Attachment A: Brookfield Undertaking

(b) this Undertaking so executed is accepted by the ACCC,  
(the **Commencement Date**).

### **4. Cessation of Ongoing Obligations**

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#### **4.1. Withdrawal**

Any Brookfield Party may request withdrawal of this Undertaking pursuant to section 87B of the CCA at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

#### **4.2. Revocation**

The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading. Such a revocation must be express and in writing.

#### **4.3. Waiver**

The ACCC may, at any time, waive any of the obligations contained in this Undertaking. Such a waiver must be express and in writing.

#### **4.4. Extension of time to comply with obligations**

The ACCC may, at any time, extend the date by which any of the obligations in this Undertaking are to be satisfied. Such an extension must be express and in writing.

#### **4.5. Survival**

Unless and until this Undertaking is withdrawn in accordance with clause 4.1, clauses 1, 2, 3, 4, 14, 15, 16, 17, 18, 19, 20, 21 and 22 survive completion of the obligations in clauses 5 to 13 (inclusive).

### **5. Separation of Brookfield Infrastructure and Brookfield Renewables**

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#### **5.1. Purpose**

The purpose of this clause 5 is to separate Brookfield Infrastructure's management of its interest in AusNet on the one hand and Brookfield Renewables' management of its interest in Origin Energy Markets on the other. The clause does so by providing for:

- (a) separation of management;
- (b) separation of information;
- (c) physical separation; and
- (d) restrictions on cross incentives.

## Attachment A: Brookfield Undertaking

### 5.2. Separation of Management

#### ***Who can manage Brookfield Infrastructure's interest in AusNet***

- (a) Brookfield Manager must ensure that from the Control Date:
- (i) with the exception of Above-the-Wall Personnel, the only Brookfield Personnel who Participate in Managing AusNet are BI AusNet Supervisory Personnel;
  - (ii) only BI AusNet Supervisory Personnel are appointed by Brookfield Infrastructure to the boards of the AusNet Holding Companies; and
  - (iii) BR Origin Supervisory Personnel do not Participate in Managing AusNet or otherwise have any involvement in Brookfield Infrastructure's interest in AusNet.
- (b) ***Participate in Managing AusNet*** means, subject to paragraph (c), making, guiding, influencing or otherwise participating in decisions or actions of AusNet in relation to the conduct of its business, including:
- (i) participating in negotiating and in approving agreements for connection to the AusNet Transmission Network and AusNet Distribution Network;
  - (ii) participating in decisions affecting the operation and maintenance of the AusNet Transmission Network and AusNet Distribution Network;
  - (iii) participating in decisions affecting investments in or expansions of the AusNet Transmission Network and AusNet Distribution Network;
  - (iv) being seconded to AusNet; or
  - (v) approving capital expenditure by AusNet (including by being a member of the committee currently known as the Brookfield Infrastructure Capex Committee).
- (c) Participate in Managing AusNet does not include:
- (i) approving the drawdown of additional monies from Brookfield Infrastructure funds for use by AusNet, including for a follow-on investment where new capital is required, or approving a divestment of, or by, AusNet (being the function currently performed by the Brookfield Infrastructure Investment Committee); or
  - (ii) high level oversight of the global Brookfield Infrastructure business by personnel outside Australia with global oversight roles in and of Brookfield Infrastructure or Brookfield.

#### ***Who can manage Brookfield Renewables' interest in Origin Energy Markets***

- (d) Brookfield Manager must ensure that from the Control Date:
- (i) with the exception of Above-the-Wall Personnel, the only Brookfield Personnel who Participate in Managing Origin Energy Markets are BR Origin Supervisory Personnel;

## Attachment A: Brookfield Undertaking

- (ii) only BR Origin Supervisory Personnel are appointed by Brookfield Renewables to the boards of the Origin Energy Markets Holding Companies; and
  - (iii) BI AusNet Supervisory Personnel do not Participate in Managing Origin Energy Markets or otherwise have any involvement in Brookfield Renewables' interest in Origin Energy Markets.
- (e) **Participate in Managing Origin Energy Markets** means, subject to paragraph (f), making, guiding, influencing, or otherwise participating in decisions or actions of Origin Energy Markets in relation to the conduct of its business, including:
- (i) participating in negotiating and approving agreements for connection by Origin Energy Markets to the AusNet Transmission Network and AusNet Distribution Network;
  - (ii) participating in decisions affecting the operation and maintenance of electricity generation assets of Origin Energy Markets;
  - (iii) participating in decisions affecting the management of the electricity and gas retail supply businesses of Origin Energy Markets;
  - (iv) participating in decisions affecting the development of renewable generation and storage projects of Origin Energy Markets;
  - (v) being seconded to Origin Energy Markets; or
  - (vi) approving capital expenditure by Origin Energy Markets (including by being a member of any capex committee established by Brookfield Renewables from time to time).
- (f) Participate in Managing Origin Energy Markets does not include:
- (i) approving the drawdown of additional monies from Brookfield Renewables funds for use by Origin Energy Markets, including for a follow-on investment where new capital is required, or approving a divestment of, or by, Origin Energy Markets (being the function currently performed by the Brookfield Renewable Investment Committee); or
  - (ii) the high level oversight of the global Brookfield Renewables business by personnel outside Australia with global oversight roles in and of Brookfield Renewables or Brookfield.

### **BI AusNet Supervisory Personnel**

- (g) BI AusNet Supervisory Personnel are persons who:
- (i) are eligible to be BI AusNet Supervisory Personnel in accordance with paragraph (h); and
  - (ii) are included on the list of BI AusNet Supervisory Personnel prepared in accordance with paragraph (i).

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- (h) In order to be eligible to be BI AusNet Supervisory Personnel, a person must:
  - (i) be an employee of Brookfield (excluding an employee of any portfolio company in which funds or vehicles Controlled or managed by Brookfield holds an interest) who is engaged in the business of Brookfield Infrastructure;
  - (ii) have provided a personal undertaking as required by paragraph (o); and
  - (iii) not be, or have previously been, BR Origin Supervisory Personnel.
- (i) Brookfield Manager:
  - (i) must provide a list of BI AusNet Supervisory Personnel (**BI AusNet Supervisory Personnel List**) to the ACCC and the Approved Independent Auditor prior to the Control Date;
  - (ii) must provide an amended BI AusNet Supervisory Personnel List to the ACCC and the Approved Independent Auditor within 5 Business Days of making any amendments to that list;
  - (iii) must ensure that only persons eligible to be BI AusNet Supervisory Personnel are included on the BI AusNet Supervisory Personnel List; and
  - (iv) prior to the Control Date and within 5 Business Days of making any amendment, must publish the current BI AusNet Supervisory Personnel List in accordance with clause 12.4(a)(ii).

### ***BR Origin Supervisory Personnel***

- (j) BR Origin Supervisory Personnel are persons who:
  - (i) are eligible to be BR Origin Supervisory Personnel in accordance with paragraph (k); and
  - (ii) are included on the list of BR Origin Supervisory Personnel prepared in accordance with paragraph (l).
- (k) In order to be eligible to be BR Origin Supervisory Personnel, a person must:
  - (i) be an employee of Brookfield (excluding an employee of any portfolio company in which funds or vehicles Controlled or managed by Brookfield holds an interest) who is engaged in the business of Brookfield Renewables;
  - (ii) have provided a personal undertaking as required by paragraph (o); and
  - (iii) not be, or have previously been, BI AusNet Supervisory Personnel.

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- (l) Brookfield Manager:
  - (i) must provide a list of BR Origin Supervisory Personnel (**BR Origin Supervisory Personnel List**) to the ACCC and the Approved Independent Auditor prior to the Control Date;
  - (ii) must provide an amended BR Origin Supervisory Personnel List to the ACCC and the Approved Independent Auditor within 5 Business Days of making any amendments to that list;
  - (iii) must ensure that only persons eligible to be BR Origin Supervisory Personnel are included on the BR Origin Supervisory Personnel List; and
  - (iv) prior to the Control Date and within 5 Business Days of making any amendment, must publish the current BR Origin Supervisory Personnel List in accordance with clause 12.4(a)(iii).

### ***Above-the-Wall Personnel***

- (m) Above-the-Wall Personnel are:
  - (i) personnel who are responsible for the management of Brookfield's interests on an Asia Pacific regional basis who have oversight of BI AusNet Supervisory Personnel and BR Origin Supervisory Personnel, being:
    - (A) as at the Commencement Date, the Regional Head of Asia Pacific, Mr Stewart Upson; and
    - (B) any person appointed to such a role after the Commencement Date, as notified in advance to the ACCC, provided there are at no time more than 3 such persons,  
  
**(Senior Above-the-Wall Personnel);**
  - (ii) personnel whose only role in relation to Brookfield Infrastructure's interest in AusNet or Brookfield Renewables' interest in Origin Energy Markets, or both, is to provide administrative, finance and accounting, legal, compliance, tax, insurance and risk, internal audit, capital markets and treasury, human resources, payroll, marketing, media and communications, office management or information technology support services in Australia (or other services of a support nature approved by the ACCC in writing), provided they are not at the relevant time:
    - (A) BI AusNet Supervisory Personnel; or
    - (B) BR Origin Supervisory Personnel,  
  
**(Support Service Personnel);** and
  - (iii) the Compliance Officer.
- (n) For the avoidance of doubt, this Undertaking does not preclude BI AusNet Supervisory Personnel or BR Origin Supervisory Personnel from becoming Above-the-Wall Personnel. Brookfield Manager will notify the ACCC within

## Attachment A: Brookfield Undertaking

10 Business Days if BI AusNet Supervisory Personnel or BR Origin Supervisory Personnel become Above-the-Wall Personnel.

### **Personal Undertakings**

- (o) Brookfield Manager must ensure that all individuals identified as BI AusNet Supervisory Personnel and BR Origin Supervisory Personnel provide a personal undertaking to the Brookfield Parties in the form of Schedule 3:
  - (i) by the Control Date; and
  - (ii) annually thereafter by each anniversary of the Control Date.
- (p) Brookfield Manager must ensure that Senior Above-the-Wall Personnel provide a personal undertaking to the Brookfield Parties in the form of Schedule 4:
  - (i) by the Control Date; and
  - (ii) annually thereafter by each anniversary of the Control Date.
- (q) If an employee of Brookfield Manager is in breach of the personal undertaking given by the employee under this clause 5.2, Brookfield Manager must:
  - (i) take disciplinary action against the employee for breach of the employee's personal undertaking, with such action to be proportionate to the breach and consistent with applicable employment laws and regulations;
  - (ii) consult with the ACCC in relation to any such breach and the disciplinary action to be taken under paragraph (q)(i) above; and
  - (iii) without limiting paragraph (q)(i) above, dismiss an employee if they are proven to have deliberately caused, or deliberately attempted to cause, AusNet to discriminate in favour of Origin Energy Markets or against Origin Energy Markets' competitors in relation to connections to the AusNet Transmission Network or the AusNet Distribution Network.

### 5.3. **Separation of information**

#### ***Prohibition on accessing AusNet information***

- (a) Brookfield Manager must ensure that from the Control Date:
  - (i) BR Origin Supervisory Personnel are not able to access non-public information received from or relating to AusNet, including its Subsidiaries, business, assets or operations (**AusNet Non-Public Information**) using Brookfield Information Technology Systems;
  - (ii) BR Origin Supervisory Personnel are not able to access information (whether or not public) received from or relating to AusNet, including its Subsidiaries, business, assets or operations (**AusNet Information**) that has been created or that is stored by BI AusNet Supervisory Personnel using Brookfield Information Technology Systems;



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- (iii) neither AusNet nor BI AusNet Supervisory Personnel send or disclose AusNet Information to BR Origin Supervisory Personnel; and
- (iv) BI AusNet Supervisory Personnel and BR Origin Supervisory Personnel do not communicate with each other about either AusNet Information or AusNet, including its Subsidiaries, business, assets or operations (including any of the matters described in clauses 5.2(b)(i) to 5.2(b)(v)).

### ***Prohibition on accessing Origin Energy Markets information***

- (b) Brookfield Manager must ensure that from the Control Date:
  - (i) BI AusNet Supervisory Personnel are not able to access non-public information received from or relating to Origin Energy Markets, including its Subsidiaries, business, assets or operations (**Origin Non-Public Information**) using Brookfield Information Technology Systems;
  - (ii) BI AusNet Supervisory Personnel are not able to access information (whether or not public) received from or relating to Origin Energy Markets, including its Subsidiaries, business, assets or operations (**Origin Information**) that has been created or that is stored by BR Origin Supervisory Personnel using Brookfield Information Technology Systems;
  - (iii) neither Origin Energy Markets nor BR Origin Supervisory Personnel send or disclose Origin Information to BI AusNet Supervisory Personnel; and
  - (iv) BR Origin Supervisory Personnel and BI AusNet Supervisory Personnel do not communicate with each other about either Origin Information or Origin Energy Markets, including its Subsidiaries, business, assets or operations (including any of the matters described in clauses 5.2(e)(i) to 5.2(e)(vi)).

### ***IT Separation***

- (c) Brookfield Manager must ensure that, by no later than the Control Date, security measures are established and maintained for the Brookfield Information Technology Systems to ensure compliance with paragraphs (a)(i), (a)(ii), (b)(i) and (b)(ii).
- (d) Brookfield Manager must ensure that from the Control Date its email system blocks, and diverts to the Compliance Officer, all emails sent from:
  - (i) BI AusNet Supervisory Personnel to BR Origin Supervisory Personnel;
  - (ii) an AusNet email address to BR Origin Supervisory Personnel;
  - (iii) BR Origin Supervisory Personnel to an AusNet email address;
  - (iv) BR Origin Supervisory Personnel to BI AusNet Supervisory Personnel;

## Attachment A: Brookfield Undertaking

- (v) an Origin Energy Markets email address to BI AusNet Supervisory Personnel; and
- (vi) BI AusNet Supervisory Personnel to an Origin Energy Markets email address,  
  
(each a **Blocked Email**).
- (e) From the Control Date, the Compliance Officer must review Blocked Emails. The Compliance Officer may forward a Blocked Email to its intended recipient provided the Blocked Email:
  - (i) does not contain any AusNet Information or Origin Information;
  - (ii) does not request any AusNet Information or Origin Information; and
  - (iii) does not otherwise relate to either AusNet or Origin Energy Markets.
- (f) If the Compliance Officer does forward a Blocked Email in accordance with paragraph (e), the Compliance Officer must copy that email to the Approved Independent Auditor.
- (g) if the Compliance Officer does not forward a Blocked Email in accordance with paragraph (e), the Compliance Officer must notify, and provide a copy of that email to, the Approved Independent Auditor within 10 Business Days of reviewing the Blocked Email.
- (h) For the avoidance of doubt, it will not be a breach of this Undertaking if an email is blocked under paragraph (d) provided that it is not released in accordance with paragraph (e).

### ***Use of information by Above-the-Wall Personnel***

- (i) Brookfield Manager must ensure that from the Control Date:
  - (i) Senior Above-the-Wall Personnel, do not use:
    - (A) AusNet Non-Public Information, for the purposes of their oversight role in connection with Origin Energy Markets; and
    - (B) Origin Non-Public Information, for the purposes of their oversight role in connection with AusNet; and
  - (ii) Support Service Personnel do not use:
    - (A) AusNet Non-Public Information, for the purposes of providing relevant support services to Origin Energy Markets; and
    - (B) Origin Non-Public Information, for the purposes of providing relevant support services to AusNet.
- (j) From the Control Date, the Compliance Officer will only use either AusNet Non-Public Information or Origin Non-Public Information for the purposes of performing their role under this Undertaking.

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- (k) Brookfield Manager must ensure, from the Control Date, that Above-the-Wall Personnel:
  - (i) do not share Origin Non-Public Information with BI AusNet Supervisory Personnel or AusNet; and
  - (ii) do not share AusNet Non-Public Information with BR Origin Supervisory Personnel or Origin Energy Markets.

### 5.4. Physical separation

- (a) From the Control Date, Brookfield Manager must maintain separate Work Areas in Australia for each of Brookfield Renewables and Brookfield Infrastructure such that:
  - (i) there is a designated Work Area from which the employees of Brookfield Renewables (except Above-the-Wall Personnel) work (**Renewables Work Area**);
  - (ii) there is a designated Work Area from which the employees of Brookfield Infrastructure (except Above-the-Wall Personnel) work (**Infrastructure Work Area**);
  - (iii) the Renewables Work Area and the Infrastructure Work Area are on separate floors;
  - (iv) the Renewables Work Area can only be entered with a security pass or equivalent and cannot be accessed by BI AusNet Supervisory Personnel; and
  - (v) the Infrastructure Work Area can only be entered with a security pass or equivalent and cannot be accessed by BR Origin Supervisory Personnel.
- (b) From the Control Date:
  - (i) BI AusNet Supervisory Personnel must not enter the Renewables Work Area; and
  - (ii) BR Origin Supervisory Personnel must not enter the Brookfield Infrastructure Work Area.

### 5.5. Remuneration and incentives

- (a) Brookfield Manager must ensure that from the Control Date:
  - (i) subject to paragraph (b), the remuneration (including any long-term incentives) of BI AusNet Supervisory Personnel is not linked in any way to Origin Energy Markets or any Brookfield fund or listed entity with an economic interest in Origin Energy Markets; and
  - (ii) subject to paragraph (b), the remuneration (including any long-term incentives) of BR Origin Supervisory Personnel is not linked in any way to AusNet or any Brookfield fund or listed entity with an economic interest in AusNet.
- (b) BI AusNet Supervisory Personnel and BR Origin Supervisory Personnel may receive as part of their remuneration (including long term incentives)

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options in, or other incentives linked to the performance of, Brookfield Corporation or Brookfield Asset Management Ltd. (that is, linked to the performance of all assets owned by, or under the management of, Brookfield globally).

### 6. Separation of AusNet and Origin Energy Markets

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#### 6.1. Purpose

The purpose of this clause 6 is to separate the management of AusNet and Origin Energy Markets. The clause does so by providing for:

- (a) separation of directors;
- (b) separation of senior management and certain other employees;
- (c) separation of information;
- (d) physical separation; and
- (e) restrictions on cross incentives.

#### 6.2. Separation of Directors

##### ***Who can be an AusNet director***

- (a) Brookfield Manager must ensure that from the Control Date no person is appointed by Brookfield Infrastructure to be a director, alternative director, observer or secretary of any AusNet Holding Company, who is, or has been:
  - (i) a director, alternative director, observer or secretary of any Origin Energy Markets Holding Company or Origin Energy Markets;
  - (ii) BR Origin Supervisory Personnel; or
  - (iii) Origin Energy Markets Senior Management.
- (b) Brookfield Manager must ensure that the only directors, alternative directors, observers or secretaries of any AusNet board are employees of AusNet unless otherwise approved in writing by the ACCC.

##### ***Who can be an Origin director***

- (c) Brookfield LP must ensure that from the Control Date no person is appointed to be a director, alternative director, observer or secretary of any Origin Energy Markets Holding Company, or Origin Energy Markets, who is, or has been:
  - (i) a director, alternative director, observer or secretary of any AusNet Holding Company or AusNet;
  - (ii) BI AusNet Supervisory Personnel; or
  - (iii) AusNet Senior Management.

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### 6.3. Separation of Senior Management

- (a) Brookfield Manager must take all steps available to it within its powers to ensure that from the Control Date no person will be employed:
  - (i) as AusNet Senior Management who is, or has been in the previous 6 months, employed by Origin Energy Markets as Origin Energy Markets Senior Management; or
  - (ii) by AusNet who is, or has been in the previous 6 months, employed by Origin Energy Markets in a role that involved the commercial aspects of the development of new generation assets and the negotiation of connections to the AusNet Transmission Network.
- (b) Brookfield LP must ensure that from the Control Date no person will be employed:
  - (i) as Origin Energy Markets Senior Management who is, or has been in the previous 6 months, employed by AusNet as AusNet Senior Management; or
  - (ii) by Origin Energy Markets who is, or has been in the previous 6 months, employed by AusNet in a role that involved the commercial aspects of connections to the AusNet Transmission Network and the negotiation of connection agreements.

### 6.4. Separation of Information

- (a) Brookfield Manager must ensure that from the Control Date:
  - (i) AusNet will have a separate information technology system from Origin Energy Markets; and
  - (ii) no employee of Origin Energy Markets will be able to access the information technology system of AusNet or information stored on that system.
- (b) Brookfield Manager and Brookfield LP must ensure that from the Control Date:
  - (i) Origin Energy Markets will have a separate information technology system from AusNet; and
  - (ii) no employee of AusNet will be able to access the information technology system of Origin Energy Markets or information stored on that system.

### 6.5. Physical separation

Brookfield Manager and Brookfield LP must ensure that from the Control Date Origin Energy Markets and AusNet have entirely separate premises.

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### 6.6. Remuneration and incentives

- (a) Brookfield Manager must ensure that from the Control Date the remuneration (including any long-term incentives) of AusNet Senior Management is not linked in any way to Origin Energy Markets or any Brookfield fund or listed entity with an economic interest in Origin Energy Markets; and
- (b) Brookfield LP must ensure that from the Control Date the remuneration (including any long-term incentives) of Origin Senior Management is not linked in any way to AusNet or any Brookfield fund or listed entity with an economic interest in AusNet.

## 7. Connections to the AusNet Transmission Network

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### 7.1. Purpose

The purpose of this clause 7 is to prevent possible conflicts and facilitate transparency in relation to connections to the AusNet Transmission Network.

### 7.2. Origin Energy Markets applications to connect to the AusNet Transmission Network

Brookfield Manager must ensure that from the Control Date:

- (a) BI AusNet Supervisory Personnel are not involved in the negotiation or consideration of applications to connect to the AusNet Transmission Network that are made by Origin Energy Markets (**Origin Connection Application**); and
- (b) to the extent that the approval of one or more AusNet Holding Company or AusNet boards is required for an Origin Connection Application, Brookfield appointed directors on the relevant board do not:
  - (i) receive board papers;
  - (ii) participate in board discussions; or
  - (iii) vote on board resolutions,

regarding an Origin Connection Application.

### 7.3. Publication of information about Origin Energy Markets connections

- (a) If Origin Energy Markets applies to connect to the AusNet Transmission Network, Brookfield LP must ensure that Origin Energy Markets publishes:
  - (i) the following information about that connection application in a prominent location on the Origin Energy Markets website within 10 Business Days of making the application:
    - (A) location of the generation asset and the location of the proposed connection to the AusNet Transmission Network;
    - (B) type (technology) and size of facility to be connected;
    - (C) date of planned connection; and

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- (ii) the charges to be levied for the provision of Connection Services and Shared Network Capability Services in relation to that connection application (the **Pricing Terms**), within 10 Business Days of being offered to Origin Energy Markets,

(the **Connections Data**).

- (b) Brookfield LP must ensure that Origin Energy Markets updates the Connections Data provided under paragraph (a) within 10 Business Days of a material change to that Connections Data and within 10 Business Days of entering into a final connection or related agreement with AusNet.

### 8. The Green Build-Out

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#### 8.1. Purpose

- (a) Brookfield LP's largest investor, BGTF, was established with two objectives: to achieve attractive risk adjusted financial returns and to generate measurable environmental change. The co-investors in Brookfield LP share these objectives.
- (b) If Proposed Acquisition completes, Brookfield LP's objective is to put Origin Energy Markets on a 1.5-degree Paris aligned emissions pathway by 2033. In particular, Brookfield LP has the objective of ensuring that at least 80-90 percent of Origin Energy Market's electricity customer demand is serviced by clean energy sources including renewable generation (wind and solar) and storage by 2033. Based on forecast electricity customer demand in FY33 (35 TWh), this will require Origin Energy Markets to Develop or procure the Development of approximately 13,700 MW of renewable generation and storage in the ten years to 2033. This is referred to as the **Green Build-Out Plan**.
- (c) Delivering the Green Build-Out plan is essential to ensuring that Brookfield LP's proposed investment in Origin Energy Markets meets the two objectives of the BGTF. Both the financial returns to Brookfield LP (and therefore BGTF) and achieving measurable environmental change are dependent on achieving the Green Build-Out.
- (d) The purpose of this clause 8 is to:
  - (i) record Brookfield LPs commitment to Origin Energy Markets achieving the objectives of the Green Build-Out Plan; and
  - (ii) require Brookfield LP to report annually on the progress of Origin Energy Markets in meeting the Green Build-Out Plan objectives.

#### 8.2. The Green Build-Out

- (a) Brookfield LP intends that, under its ownership, Origin Energy Markets will:
  - (i) Develop, or procure the Development, of 13.7GW of renewable generation (wind and solar) and storage by the tenth anniversary of the Control Date; and
  - (ii) put Origin Energy Markets on a 1.5 degree Paris aligned emissions pathway by the tenth anniversary of the Control Date,(together, the **Green Build Out Objectives**).

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- (b) Brookfield LP will exercise its powers, and deploy the resources, available to it on commercially reasonable terms, to enable Origin Energy Markets to achieve the Green Build-Out Objectives. In particular, Brookfield LP:
  - (i) intends to commit between A\$20 to A\$30 billion towards the Green Build-Out Plan. This would be funded by (A) applying the profits of Origin Energy Markets towards the Green Build-Out in priority to making distributions to shareholders and (B) recycling capital from future sell downs of operating renewables assets;
  - (ii) will operate flexibly with a view to achieving the Green Build-Out through Developing a mix of grid scale renewables and storage, Developing behind the meter renewables and storage solutions, rolling out technology that facilitates the efficient use of energy by consumers, and, potentially by supporting new technologies being Developed at scale;
  - (iii) will use Brookfield Renewables' global procurement capability to facilitate the procurement of goods and services by Origin Energy Markets for the purposes of the Green Build-Out Plan; and
  - (iv) will make Brookfield Renewables global renewables expertise, including in the development of wind, solar and grid scale battery generation, available to Origin Energy Markets.

### 8.3. Reporting obligations

- (a) Brookfield LP must, by no later than the date that is 4 calendar months after the Control Date, provide to the ACCC a document showing yearly targets for Origin Energy Markets leading to Origin Energy Markets:
  - (i) Developing, or procuring the Development, of 13.7 GW of renewable generation and storage by the tenth anniversary of the Control Date; and
  - (ii) having Origin Energy Markets on a 1.5 degree Paris aligned emissions pathway by the tenth anniversary of the Control Date,(together, the **Green Build-Out Target Pathway**).
- (b) Brookfield LP must procure that Origin Energy Markets prepares, and publishes, a yearly report by no later than each anniversary of the Control Date showing Origin Energy Markets' progress towards:
  - (i) Developing, or procuring the Development, of 13.7 GW of renewable generation and storage by the tenth anniversary of the Control Date; and
  - (ii) having Origin Energy Markets on a 1.5 degree Paris aligned emissions pathway by the tenth anniversary of the Control Date,compared to the Green Build-Out Target Pathway (the **Yearly Green Build-Out Report**).
- (c) The Yearly Green Build-Out Report must include:
  - (i) information about the total grid-scale generation, grid-scale storage and behind the meter generation and storage Developed; and



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- (ii) for each grid-scale project reflected in the Yearly Green Build-Out Report, information about the stage that project had reached when Origin Energy Markets became involved in that project, including whether the project was already in Origin Energy Market's pipeline as at the Control Date.
- (d) Brookfield LP must ensure that each Yearly Green Build-Out Report:
  - (i) is published in accordance with clause 12.4(a)(iv); and
  - (ii) is provided to the ACCC. Brookfield LP acknowledges that the ACCC may publish the Yearly Green Build-Out Report on its website, in its discretion.

### 9. Future sale of Origin Energy Markets

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#### 9.1. Purpose

- (a) BGTF is a closed end fund. BGTF is expected to close and return capital to investors within 12 years (with the option for two one-year extensions). As a result, it is expected that Brookfield LP will sell its interest in Origin Energy Markets to a purchaser that is not an Affiliate of Brookfield (**Third Party Purchaser**) within that period unless exceptional circumstances exist (e.g., where divestment before the end of BGTF's fund term is not possible).
- (b) The purpose of this clause 9 is to ensure that, following Brookfield LP's sale of its interest in Origin Energy Markets to a Third Party Purchaser:
  - (i) AusNet and Origin Energy Markets are not both Controlled or managed by that Third Party Purchaser, or an entity that Controls, is Controlled by or under common Control with or manages that Third Party Purchaser; and
  - (ii) Brookfield or an Affiliate of Brookfield does not both Control or manage AusNet and retain rights to manage interests in Origin Energy Markets sold to that Third Party Purchaser.

#### 9.2. Undertaking in relation to sale of interest in Origin Energy Markets

Brookfield LP must ensure that, when Brookfield LP sells all of its economic interest in Origin Energy Markets to a Third Party Purchaser, it will not do so in a way that results in:

- (a) that Third Party Purchaser or an entity that Controls, is Controlled by, or under common Control with or manages that Third Party Purchaser controlling or managing an economic interest of 10% or more in both AusNet and Origin Energy Markets; and
- (b) Brookfield, or an Affiliate of Brookfield:
  - (i) controlling or managing an economic interest of 10% or more in AusNet; and
  - (ii) having rights to manage an economic interest of 10% or more in Origin Energy Markets acquired or held by that Third Party Purchaser,

unless the ACCC otherwise approves in writing.

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### 10. Intellihub Confidential Information

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#### 10.1. Purpose

The purpose of this clause 10 is to ensure that Intellihub does not share confidential information of an electricity retailer (other than Origin Energy Markets), or other customer of Intellihub, with Origin Energy Markets.

#### 10.2. Confidential metering information

**Confidential Metering Information** means:

- (a) the terms of any agreement under which Intellihub provides metering services to its energy retailer customers; and
- (b) non-public data collected by Intellihub under any agreement referred to in paragraph (a), including any service order data, NMI standing data, and metering data.

#### 10.3. Undertaking in relation to Intellihub confidential information

Brookfield Manager must take all steps available to it within its powers to ensure that from the Control Date, Intellihub does not, unless required by the National Energy Law or National Electricity Rules, provide:

- (a) Confidential Metering Information of an electricity retailer (other than Origin Energy Markets) or other customer of Intellihub to Origin Energy Markets or BR Origin Supervisory Personnel; and
- (b) Confidential Metering Information of Origin Energy Markets to another electricity retailer or other customer of Intellihub.

### 11. ACCC Review

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#### 11.1. Review process

- (a) The ACCC may review the terms of this Undertaking after the second anniversary of the Control Date and thereafter not more than once in any five year period to consider whether any changes to the terms of this Undertaking are necessary given the Undertaking Objectives.
- (b) On deciding to conduct a review under paragraph (a), the ACCC may invite submissions from the Brookfield Parties and other parties with an interest in the operation of the Undertaking on whether any changes to the terms of this Undertaking are necessary in order to ensure that this Undertaking continues to achieve the Undertaking Objectives.
- (c) The factors to which the ACCC may have regard in making a decision whether to review under paragraph (a) or in conducting the review, include but are not limited to:
  - (i) the Audit Reports prepared by the Approved Independent Auditor in accordance with clause 13.7;
  - (ii) any changes in circumstances since the Commencement Date or the last review conducted under paragraph (a);

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- (iii) any complaints made to the ACCC or Approved Independent Auditor regarding the Brookfield Parties' compliance with this Undertaking, and the outcomes of any subsequent investigations; and
- (iv) any submissions from parties with an interest in the operation of the Undertaking.

### 11.2. Amendment Notice

Following a review in accordance with clauses 11.1(a), 11.1(b) and 11.1(c), if the ACCC is satisfied that a variation is necessary to ensure that the Undertaking continues to achieve the Undertaking Objectives, the ACCC may give the Brookfield Parties an amendment notice (**Amendment Notice**) which sets out any changes that the ACCC considers should be made to the Undertaking and an explanation for those changes. The ACCC will, subject to removing any confidential information of the Brookfield Parties, Origin, AusNet or any other person:

- (a) publish the Amendment Notice on the ACCC's website; and
- (b) publicly consult on the Amendment Notice.

### 11.3. Proposed Variations to this Undertaking following ACCC review

- (a) Following any consultation on the Amendment Notice, if the ACCC decides that changes to this Undertaking are necessary in order to ensure that the Undertaking continues to achieve the Undertaking Objectives, the ACCC will provide the Brookfield Parties with a notice setting out the terms of a proposed variation to the Undertaking which is acceptable to the ACCC (**Variation Notice**).
- (b) The Brookfield Parties must:
  - (i) consult in good faith with the ACCC with a view to proposing variations to this Undertaking necessary in order to ensure that the Undertaking continues to achieve the Undertaking Objectives, and which will have regard to the matters stated in the Variation Notice; and
  - (ii) notify the ACCC within 90 days of receiving a Variation Notice if they agree to seek a variation to the Undertaking:
    - (A) in the form set out in the Variation Notice; or
    - (B) in a form agreed between the ACCC and the Brookfield Parties following the consultations undertaken under paragraph (b)(i); or
    - (C) otherwise, in a form that the Brookfield Parties consider will be sufficient in order to ensure that the Undertaking continues to achieve the Undertaking Objectives.
- (c) If the Brookfield Parties notify the ACCC that they agree to seek a variation to the Undertaking under paragraph (b)(ii)(A) or paragraph (b)(ii)(B), at the same time, the Brookfield Parties must provide a proposed variation to the Undertaking to the ACCC for the purpose of seeking ACCC consent in accordance with section 87B(2) of the CCA.

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### 11.4. Referral to expert determination

- (a) If the Brookfield Parties:
- (i) do not agree to seek a variation to this Undertaking in accordance with clause 11.3(b)(ii)(A) or clause 11.3(b)(ii)(B); or
  - (ii) intend to seek a variation to this Undertaking in accordance with clause 11.3(b)(ii)(C),
- (each a **Variation Dispute**), they must provide a written notice to the ACCC of the Variation Dispute.
- (b) The written notice of the Variation Dispute must include:
- (i) written reasons explaining why:
    - (A) the Brookfield Parties do not propose to seek a variation to the Undertaking; or
    - (B) the Brookfield Parties intend to seek a variation to this Undertaking in accordance with clause 11.3(b)(ii)(C);
  - (ii) the identity of a proposed independent expert who will be appointed to conduct the expert determination (**Proposed Independent Expert**);
  - (iii) details of the Proposed Independent Expert's relevant qualifications and experience necessary to carry out the expert determination independently of Brookfield Parties; and
  - (iv) whether the Proposed Independent Expert has been:
    - (A) an employee or officer of any of the Brookfield Parties or any other entity that holds an interest in an energy business in which the Brookfield Parties also have an interest, whether current or in the past 3 years;
    - (B) a professional adviser of any of the Brookfield Parties or any other entity that holds an interest in an energy business in which the Brookfield Parties also have an interest, whether current or in the past 3 years;
    - (C) a person who has a contractual relationship with any of the Brookfield Parties or any other entity that holds an interest in an energy business in which the Brookfield Parties also have an interest; or
    - (D) an employee or contractor for a firm or company referred to in paragraph (b)(iv)(C),
- (Variation Dispute Notice).**
- (c) Within 10 Business Days of the Brookfield Parties providing a Variation Dispute Notice to the ACCC, the ACCC will provide written notice to the Brookfield Parties informing them of its decision to agree or not agree to the Proposed Independent Expert identified pursuant to paragraph (b)(ii).

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- (d) If the Brookfield Parties and the ACCC do not agree on an independent expert to be appointed to determine the Variation Dispute within 20 Business Days of the Brookfield Parties providing a Variation Dispute Notice to the ACCC, then the President of the NSW Bar Council will determine the identity of the independent expert and the Variation Dispute will be referred to that independent expert for determination.
- (e) The cost of the independent expert will be borne by the Brookfield Parties.
- (f) The Brookfield Parties will use best endeavours to ensure that the independent expert is provided with:
  - (i) all relevant information available to them in relation to the Variation Dispute; and
  - (ii) all reasonable assistance, in a timely manner, to enable the expert to make a determination in relation to the Variation Dispute Notice within 60 Business Days of referral to that expert.
- (g) The independent expert will decide whether the ACCC's proposed variation to the Undertaking as set out in the Variation Notice is necessary to ensure that the Undertaking continues to meet the Undertaking Objectives.
- (h) If the independent expert decides that the ACCC's proposed variation to the Undertaking as set out in the Variation Notice (with such minor modifications as the expert considers necessary) is necessary to ensure that the Undertaking continues to meet the Undertaking Objectives, the Brookfield Parties must proffer a proposed variation in accordance with the ACCC's proposed variation to the ACCC for the purpose of seeking ACCC consent in accordance with section 87B(2) of the CCA within 5 Business Days of the independent expert's decision.
- (i) If the independent expert decides that a variation is necessary to ensure that the Undertaking continues to meet the Undertaking Objectives, but this variation differs materially from the ACCC's proposed variation (including, but not limited to, a variation consistent with a variation to which clause 11.3(b)(ii)(C) applies), the Brookfield Parties must proffer a proposed variation in accordance with the independent expert's proposed variation to the ACCC for the purpose of seeking ACCC consent in accordance with section 87B(2) of the CCA within 5 Business Days of the independent expert's decision. The ACCC may in its complete discretion decide whether or not to consent to the variation proffered by the Brookfield Parties.
- (j) If the independent expert decides that a variation is not necessary to ensure that the Undertaking continues to meet the Undertaking Objective, the ACCC's Variation Notice lapses.
- (k) The independent expert's decision will be final and binding on the Brookfield Parties and they must take all steps to ensure that the independent expert's decision is fulfilled or otherwise given effect to.
- (l) Nothing in this clause 11 prevents the ACCC from investigating a potential breach of this Undertaking or from applying to the Court for orders pursuant to section 87B of the CCA in respect of a breach of this Undertaking at any time.

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- (m) Notwithstanding any other provision in this clause 11, any change to the Undertaking proposed by the ACCC or the independent expert must be consistent with the approach to achieving the Undertaking Objectives taken in this Undertaking, and in particular must not require the divestiture of all or part of Brookfield's economic interest in either AusNet or Origin Energy Markets.

### 12. Compliance

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#### 12.1. Purpose

The purpose of this clause 12 is to establish mechanisms that ensure the Brookfield Parties comply with the terms of this Undertaking.

#### 12.2. Compliance Officer

- (a) The Brookfield Parties must jointly appoint and maintain a Compliance Officer to assist them to ensure they comply with this Undertaking.
- (b) The Brookfield Parties must inform the ACCC of the identity of the proposed Compliance Officer at least 1 month prior to the Control Date. The Brookfield Parties must consider any comments of the ACCC regarding the identity of the proposed Compliance Officer in good faith.
- (c) The Compliance Officer:
  - (i) must be appointed on or before the Control Date; and
  - (ii) must provide a personal undertaking to the Brookfield Parties in the form of Schedule 5:
    - (A) by the Control Date; and
    - (B) annually thereafter by each anniversary of the Control Date.
- (d) If the Compliance Officer resigns or the Brookfield Parties otherwise propose to replace the Compliance Officer, the Brookfield Parties must:
  - (i) inform the ACCC and the Approved Independent Auditor about the resignation or decision within 5 Business Days of the resignation or decision;
  - (ii) inform the ACCC and the Approved Independent Auditor of the identity of the proposed new Compliance Officer within 5 Business Days of the proposed new Compliance Officer being identified and consider any comments of the ACCC regarding the identity of the proposed new Compliance Officer in good faith; and
  - (iii) procure that the new Compliance Officer provides a personal undertaking as contemplated in paragraph (c)(ii).
- (e) The Brookfield Parties must procure that the Compliance Officer:
  - (i) notifies the ACCC and the Approved Independent Auditor of any breaches of this Undertaking of which it becomes aware within 10 Business Days of becoming so aware; and

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- (ii) on request by the ACCC or the Approved Independent Auditor provides a written report regarding the Brookfield Parties' compliance with this Undertaking.
- (f) The ACCC may direct the Brookfield Parties to terminate the appointment of the Compliance Officer and appoint a replacement, if in the ACCC's view the Compliance Officer acts inconsistently with the provisions of the Undertaking.
- (g) Brookfield Manager must:
  - (i) take disciplinary action against the Compliance Officer for a breach of the Compliance Officer's personal undertaking, with such action to be proportionate to the breach and consistent with applicable employment laws and regulations;
  - (ii) consult with the ACCC in relation to any such breach and the disciplinary action to be taken under paragraph (g)(i); and
  - (iii) without limiting paragraph (g)(ii) above, dismiss the Compliance Officer if they are proven to have deliberately caused, or deliberately attempted to cause, AusNet to discriminate in favour of Origin Energy Markets or against Origin Energy Markets' competitors in relation to connections to the AusNet Transmission Network or the AusNet Distribution Network.

### 12.3. Compliance training

- (a) Brookfield Manager must implement a compliance education program for BI AusNet Supervisory Personnel that:
  - (i) provides training and information on:
    - (A) the obligations of each of the Brookfield Parties under this Undertaking;
    - (B) the obligations of BI AusNet Supervisory Personnel, including in relation to the personal undertakings they have provided in accordance with clause 5.2(o); and
    - (C) appropriate information and other security practices, including measures to ensure login credentials, security passes or equivalent remain secure and not discussing confidential information in public, shared or common areas;
  - (ii) is given once a year to BI AusNet Supervisory Personnel; and
  - (iii) is given to new appointees to the BI AusNet Supervisory Personnel List pursuant to clause 5.2 prior to their appointment.
- (b) Brookfield Manager must implement a compliance education program for BR Origin Supervisory Personnel that:
  - (i) provides training and information on:
    - (A) the obligations of each of the Brookfield Parties under this Undertaking;

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- (B) the obligations of the BR Origin Supervisory Personnel, including in relation to the personal undertakings they have provided in accordance with clause 5.2(o); and
    - (C) appropriate information and other security practices, including measures to ensure login credentials, security passes or equivalent remain secure and not discussing confidential information in public, shared or common areas;
  - (ii) is given once a year to BR Origin Supervisory Personnel; and
  - (iii) is given to new appointees to the BR Origin Supervisory Personnel List pursuant to clause 5.2 prior to their appointment.
- (c) Brookfield Manager must implement a compliance education program for Above-the-Wall Personnel within Brookfield Infrastructure and Brookfield Renewables (excluding Senior Above-the-Wall Personnel) that:
- (i) provides training and information on:
    - (A) the obligations of each of the Brookfield Parties under this Undertaking; and
    - (B) the obligations of Above-the-Wall Personnel under this Undertaking;
  - (ii) is given once a year to Support Service Personnel within Brookfield Infrastructure and Brookfield Renewables; and
  - (iii) is included in the onboarding training provided to new Support Service Personnel within Brookfield Infrastructure and Brookfield Renewables.
- (d) Brookfield Manager must implement a compliance education program for Senior Above-the-Wall Personnel that:
- (i) provides training and information on:
    - (A) the obligations of each of the Brookfield Parties under this Undertaking;
    - (B) the obligations of the Senior Above-the-Wall Personnel under this Undertaking; and
    - (C) the obligations of the Senior Above-the-Wall Personnel in relation to the personal undertakings they have provided in accordance with clause 5.2(p);
  - (ii) is given once a year to Senior Above-the-Wall Personnel; and
  - (iii) is given to a new appointee to the role of Senior Above-the-Wall Personnel prior to their appointment.
- (e) Brookfield Manager must ensure that the compliance education programs implemented under this clause 12.3 are administered separately for each of BI AusNet Supervisory Personnel, BR Origin Supervisory Personnel and Above-the-Wall Personnel.



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- (f) Brookfield Manager must maintain a register showing all training provided pursuant to this clause 12.3 including the individuals to whom training was provided and the date on which it was provided.

### 12.4. Transparency

- (a) Brookfield Manager must establish a page on the Brookfield Australia Website in a prominent location on which it publishes:
  - (i) a copy of this Undertaking prior to the Control Date;
  - (ii) the BI AusNet Supervisory Personnel List prior to the Control Date and within 5 Business Days of any change (whether by addition or removal) of any BI AusNet Supervisory Personnel to the BI AusNet Supervisory Personnel List;
  - (iii) the BR Origin Supervisory Personnel List prior to the Control Date and within 5 Business Days of any change (whether by addition or removal) of any BR Origin Supervisory Personnel to the BR Origin Supervisory Personnel List;
  - (iv) the Yearly Green Build-Out Report as required under clause 8.3(d);
  - (v) the identity of the Approved Independent Auditor and their contact details prior to the Control Date and within 5 Business Days of any change of Approved Independent Auditor or their contact details;
  - (vi) a copy of each Public Report from the Approved Independent Auditor prepared under clause 13.8 within 5 Business Days of the Public Report being agreed or determined by an independent expert (as applicable) under clauses 13.8(c) to 13.8(e);
  - (vii) a copy of each public report from the approved independent auditor prepared under clause 7.4 of the AusNet Undertaking within 5 Business Days of the public report being agreed under clause 7.4 of the AusNet Undertaking; and
- (b) Brookfield Manager must ensure that each of AusNet and Origin Energy Markets publishes a link in a prominent location on its website to the Brookfield Australia Website page referred to in paragraph (a).

## 13. Independent Audit

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### 13.1. Purpose

The purpose of this clause 13 is to establish an audit regime to provide assurance that the Brookfield Parties are complying with this Undertaking.

### 13.2. Obligation to appoint an Approved Independent Auditor

The Brookfield Parties must jointly appoint and maintain an Approved Independent Auditor to audit and report upon their compliance with this Undertaking.

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### 13.3. Process for approving a Proposed Independent Auditor

- (a) At least 15 Business Days before the Control Date, the Brookfield Parties must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 2 to this Undertaking (**Proposed Independent Auditor Notice**), including draft terms of appointment and a draft audit plan.
- (b) The Approved Independent Auditor is to be appointed for a term of two years. Within 15 Business Days of the end of the Approved Independent Auditor's term, The Brookfield Parties must provide the ACCC with a new Proposed Independent Auditor Notice. A person who is, or who has been, the Approved Independent Auditor is eligible for reappointment as the Approved Independent Auditor.
- (c) If clauses 13.10(a), 13.10(b), or 13.10(c) apply, the Brookfield Parties must provide the ACCC with a Proposed Independent Auditor Notice within 5 Business Days after the relevant event occurs, otherwise clause 13.5(b) applies.
- (d) The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Auditor identified in the Proposed Independent Auditor Notice.
- (e) Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Auditor, the factors to which the ACCC may have regard include whether the:
  - (i) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
  - (ii) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of the Brookfield Parties;
  - (iii) draft terms of appointment and the draft audit plan are consistent with this Undertaking; and
  - (iv) draft terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.

### 13.4. Appointment of the Approved Independent Auditor

After receiving a written notice from the ACCC of its approval of a Proposed Independent Auditor, the draft terms of appointment and draft audit plan, the Brookfield Parties must by the Control Date:

- (a) appoint the person approved by the ACCC as the Approved Independent Auditor on the Approved Terms of Appointment; and
- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

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### 13.5. Failure to appoint

- (a) If:
- (i) the Approved Independent Auditor has not been appointed by the Control Date;
  - (ii) the Approved Independent Auditor has not been appointed within 15 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Auditor pursuant to clause 13.10(a), 13.10(b), or 13.10(c); or
  - (iii) the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 13.3(b);
- then paragraph (b) applies.
- (b) If this paragraph (b) applies, the ACCC at its absolute discretion may:
- (i) identify and approve a person as the Approved Independent Auditor, including approving the draft terms of appointment and draft audit plan; and/or
  - (ii) direct the Brookfield Parties to appoint a person who the ACCC has deemed is an Approved Independent Auditor.

### 13.6. Obligations and powers of the Approved Independent Auditor

- (a) The Brookfield Parties must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:
- (i) maintain his or her independence from the Brookfield Parties, apart from appointment to the role of Approved Independent Auditor, including not forming any relationship of the types described in clause 2.2 of Schedule 2 to this Undertaking with the Brookfield Parties for the period of his or her appointment;
  - (ii) conduct compliance auditing according to the Approved Audit Plan;
  - (iii) provide the following reports directly to the ACCC:
    - (A) a scheduled written Audit Report as described in clause 13.7(a);
    - (B) a public version of the Audit Report as described in clause 13.8; and
    - (C) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
  - (iv) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.

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- (b) The Brookfield Parties must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:
  - (i) access the facilities, sites or operations of Brookfield Infrastructure, Brookfield Renewables, AusNet and Origin Energy Markets in Australia as required by the Approved Independent Auditor;
  - (ii) interview or request documents from the following personnel:
    - (A) BR Origin Supervisory Personnel;
    - (B) BI AusNet Supervisory Personnel; and
    - (C) Above-the-Wall Personnel;
  - (iii) require the production of emails of BR Origin Supervisory Personnel and BI AusNet Supervisory Personnel;
  - (iv) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and
  - (v) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.
- (c) The Brookfield Parties must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:
  - (i) establish a mechanism (such as a public email) through which market participants can raise issues and questions about this Undertaking;
  - (ii) publicise this mechanism and the public email address;
  - (iii) request that the Brookfield Parties include details of the Approved Independent Auditor and information about, and a link to, the public email address on the Brookfield Australia website in a prominent location. If such a request is made, the Brookfield Parties must comply with this request within 10 Business Days.
- (d) Should market participants raise concerns about the Brookfield Parties' compliance with this Undertaking, the Approved Independent Auditor may use its powers under this clause 13.6 to investigate those issues and make recommendations to the Brookfield Parties.
- (e) The Brookfield Parties acknowledge that the Approved Independent Auditor may treat as confidential and not disclose to the Brookfield Parties information provided in confidence by market participants, including information that may identify a person who has requested anonymity (**Market Confidential Information**).
- (f) The Approved Terms of Appointment for the Approved Independent Auditor may provide that:

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- (i) If the Approved Independent Auditor proposes to rely on Market Confidential Information that is adverse to the Brookfield Parties in making a finding of non-compliance under clause 13.7(a)(ii), the Approved Independent Auditor will:
  - (A) notify the Brookfield Parties of that fact and the relevance of the Market Confidential Information to the finding; and
  - (B) invite the Brookfield Parties to make representations to the Approved Independent Auditor within 5 Business Days.
- (ii) The requirements of this clause do not oblige the Approved Independent Auditor to disclose to the Brookfield Parties or entitle the Brookfield Parties to receive Market Confidential Information.

### 13.7. Compliance Audit

- (a) The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) that includes:
  - (i) the Approved Independent Auditor's procedures in conducting the audit, or any change to audit procedures and processes since the previous Audit Report;
  - (ii) an audit of the Brookfield Parties' compliance with this Undertaking;
  - (iii) identification of any areas of uncertainty or ambiguity in the Approved Independent Auditor's interpretation of any obligations contained in this Undertaking;
  - (iv) all of the reasons for the conclusions reached in the Audit Report;
  - (v) any qualifications made by the Approved Independent Auditor in forming his or her views;
  - (vi) any recommendations by the Approved Independent Auditor to improve:
    - (A) the Approved Audit Plan;
    - (B) the integrity of the auditing process;
    - (C) the Brookfield Parties' processes or reporting systems in relation to compliance with this Undertaking; and
    - (D) the Brookfield Parties' compliance with this Undertaking; and
  - (vii) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- (b) The Approved Independent Auditor is to provide an Audit Report to the ACCC and the Brookfield Parties at the following times:
  - (i) within 2 months after the Control Date, at which time the Audit Report is to include the results of the initial audit and any recommended changes to the Approved Audit Plan, including the Approved Independent Auditor's proposed procedures and processes for conducting the audit;

## Attachment A: Brookfield Undertaking

- (ii) every 12 months after the date of provision of the last Audit Report, until the ACCC confirms in writing to the Brookfield Parties that it is satisfied that the Brookfield Parties have fulfilled their obligations pursuant to this Undertaking; and
  - (iii) a final report due three months after the last report provided pursuant to paragraph (b)(ii).
- (c) The Brookfield Parties must implement any recommendations made by the Approved Independent Auditor in Audit Reports, and notify the ACCC of the implementation of the recommendations within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.
- (d) The Brookfield Parties must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).
- (e) The Brookfield Parties acknowledge and agree that the ACCC may direct that the Approved Independent Auditor provide copies of each Audit Report to the AER at the same time that they are provided to the ACCC and the Brookfield Parties, provided that a Senior Executive Service Employee engaged by or assisting the AER has acknowledged in writing to the ACCC and Brookfield that the AER will treat the Audit Reports in accordance with section 44AAF of the CCA, except to the extent that the content of the Audit Reports have been published under clause 13.8 of this Undertaking.
- (f) The Brookfield Parties acknowledge and agree that the ACCC may provide any information it receives from the Approved Independent Auditor or in relation to this Undertaking to the AER, provided that:
  - (i) the AER acknowledges in writing to the Brookfield Parties that it will treat that information in accordance with section 44AAF of the CCA; and
  - (ii) the ACCC identifies to the Brookfield Parties any correspondence or documents received from the Brookfield Parties that it provides to the AER.

### 13.8. Publication of Reports

- (a) A public version of the Audit Report should be prepared and published in accordance with this clause 13.8 (**Public Report**). The Public Report should in all cases disclose the key findings including conclusions of the Approved Independent Auditor, but with commercially sensitive confidential information redacted to the extent consistent with disclosing key findings including conclusions.
- (b) The Brookfield Parties shall have 5 Business Days from the Approved Independent Auditor providing the Audit Report to the ACCC to notify the ACCC of commercially sensitive confidential information that the Brookfield Parties consider should be redacted from the Audit Report before publication.
- (c) If the ACCC agrees with the redactions proposed by the Brookfield Parties in paragraph (b), the Audit Report with those redactions will be the Public Report.

## Attachment A: Brookfield Undertaking

- (d) If the ACCC does not agree with the redactions proposed by the Brookfield Parties under paragraph (b), the ACCC and the Brookfield Parties will seek in good faith to agree redactions. If agreement is reached, the Audit Report with the agreed redactions will be the Public Report.
  - (e) If the ACCC and the Brookfield Parties are unable to reach agreement under paragraph (d) within 5 Business Days, either of them may refer the dispute to be determined by an independent expert. The independent expert may be agreed between the ACCC and the Brookfield Parties. Failing agreement within 5 Business Days, either the ACCC or the Brookfield Parties may request the independent expert to be selected by the President of the New South Wales Bar Council. The cost of the independent expert will be borne by the Brookfield Parties. The independent expert will determine what, if any, redactions should be made to the Audit Report within 10 Business Days of their appointment. The Audit Report with the redactions determined by the independent expert will be the Public Report.
  - (f) The Brookfield Parties will publish each Public Report in accordance with clause 12.4(a)(vi).
  - (g) The Brookfield Parties agree that the ACCC may publish the Public Report on its own website, in its discretion.
- 13.9. **The Brookfield Parties' obligations in relation to the Approved Independent Auditor**

- (a) Without limiting its obligations in this Undertaking, the Brookfield Parties must:
  - (i) comply with and enforce the Approved Terms of Appointment for the Approved Independent Auditor;
  - (ii) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
    - (A) indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor; and
    - (B) providing and paying for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor; and
  - (iii) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
    - (A) directing the Brookfield Parties, AusNet or Origin Energy Markets personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 13;

## Attachment A: Brookfield Undertaking

- (B) providing access to the facilities, sites or operations of Brookfield Infrastructure, Brookfield Renewables, AusNet and Origin Energy Markets in Australia as required by the Approved Independent Auditor;
- (C) providing to the Approved Independent Auditor any information or documents that they consider necessary for carrying out their functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
- (D) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC; and
- (E) not appointing the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.

### 13.10. Resignation, revocation or termination of the Approved Independent Auditor

- (a) The Brookfield Parties must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- (b) The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to the ACCC was incorrect, inaccurate or misleading.
- (c) The ACCC may approve any proposal by, or alternatively may direct, the Brookfield Parties to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking and/or the Approved Terms of Appointment or the Approved Independent Auditor fails to perform their role to an adequate standard.

### 14. Notification of key dates and ACCC requests for information

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- 14.1. The Brookfield Parties must notify the ACCC and the Approved Independent Auditor in writing of:
  - (a) the anticipated date of the Control Date, at least 5 Business Days before that date; and
  - (b) the occurrence of the Control Date, within 1 Business Day of that date.
- 14.2. The ACCC may direct the Brookfield Parties in respect of their compliance with this Undertaking to, and the Brookfield Parties must:
  - (a) furnish information to the ACCC in the time and in the form requested by the ACCC;



## Attachment A: Brookfield Undertaking

- (b) produce documents and materials to the ACCC within the Brookfield Parties' custody, power or control, including documents and materials in the possession of AusNet or Origin Energy Markets in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 14.3. Any direction made by the ACCC under clause 14.2 will be notified to the Brookfield Parties, in accordance with clause 21.2.
- 14.4. In respect of the Brookfield Parties' compliance with this Undertaking or an Approved Independent Auditor's compliance with its Approved Terms of Appointment, the ACCC may request any Approved Independent Auditor to:
  - (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the Approved Independent Auditor's custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 14.5. The Brookfield Parties will use their best endeavours to ensure that an Approved Independent Auditor complies with any request from the ACCC in accordance with clause 14.4.
- 14.6. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 14 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 14.7. The ACCC may in its discretion:
  - (a) advise any Approved Independent Auditor of any request made by it under this clause 14; and/or
  - (b) provide copies to any Approved Independent Auditor of any information furnished, documents and material produced or information given to it under this clause 14.
- 14.8. Nothing in this clause 14 requires the provision of information or documents in respect of which the Brookfield Parties, AusNet or Origin Energy Markets have a claim of legal professional or other privilege.

### **15. Disclosure of this Undertaking**

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The Brookfield Parties each acknowledge that the ACCC may:

- (a) make this Undertaking publicly available;
- (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
- (c) from time to time publicly refer to this Undertaking.

## Attachment A: Brookfield Undertaking

### 16. Obligation to procure

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- 16.1. Brookfield Corporation undertakes to take all steps within its power to ensure that Brookfield Manager and Brookfield LP comply with their obligations under this Undertaking.
- 16.2. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of the Brookfield Parties to take or refrain from taking some action, the Brookfield Parties will procure that Related Body Corporate to take or refrain from taking that action.
- 16.3. As soon as practicable after the Commencement Date, the Brookfield Parties must direct its relevant personnel, including directors, contractors, managers, officers, employees and agents not to do anything inconsistent with Brookfield Parties' obligations under this Undertaking.
- 16.4. The Brookfield Parties must ensure that any Related Body Corporate provides all necessary assistance and information so that the Brookfield Parties are in a position to comply with any:
- (a) direction from the ACCC under clause 14.2; or
  - (b) request from the Approved Independent Auditor in accordance with clause 13,
- for the purposes of the ACCC or the Approved Independent Auditor (as applicable) investigating the Brookfield Parties' compliance with this Undertaking.

### 17. No Derogation

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- 17.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the Brookfield Parties of any term of this Undertaking.
- 17.2. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the CCA for penalties or other remedies in the event that the Brookfield Parties do not fully implement and/or perform their obligations under this Undertaking or in any other event where the ACCC decides to take action under the CCA for penalties or other remedies.

### 18. Change of Control

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- 18.1. In the event that a Change of Control is reasonably expected to occur, the Brookfield Parties must:
- (a) notify the ACCC of this expectation as soon as practicable; and
  - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the Brookfield Parties pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified the Brookfield Parties in writing that a section 87B undertaking under this clause is not required.

### 19. Costs

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- 19.1. The Brookfield Parties must pay their own respective costs incurred in relation to this Undertaking.

## Attachment A: Brookfield Undertaking

### 20. Jurisdiction

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- 20.1. Each Brookfield Party irrevocably submits to the jurisdiction of the Federal Court of Australia in relation to this Undertaking.
- 20.2. Unless and until notified in writing by the Brookfield Parties to the ACCC of the appointment of another person as agent within Australia, Brookfield LP, Brookfield Corporation and Brookfield Asset Management ULC appoint Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489), as their agent for the purposes of service of process in relation to this Undertaking.

### 21. Notices

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#### Giving Notices

- 21.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)  
Attention: Executive General Manager  
Merger and Authorisation Review Division

**With a copy sent to:**

Email address: [mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)  
Attention: Director, Remedies Unit  
Coordination and Strategy Branch  
Merger and Authorisation Review Division

- 21.2. Any notice or communication to the Brookfield Parties pursuant to this Undertaking must be sent to:

Name: **[Redacted – Confidential]**  
Address: **[Redacted – Confidential]**  
Email address: **[Redacted – Confidential]**  
Phone number: **[Redacted – Confidential]**  
Attention: **[Redacted – Confidential]**

**With a copy sent to:**

Name: **[Redacted – Confidential]**  
Address: **[Redacted – Confidential]**  
Email address: **[Redacted – Confidential]**  
Phone number: **[Redacted – Confidential]**  
Attention: **[Redacted – Confidential]**

- 21.3. If sent by post, notices are taken to be received 3 Business Days after posting (or 7 Business Days after posting if sent to or from a place outside Australia).

## Attachment A: Brookfield Undertaking

21.4. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

### 21.5. **Change of contact details**

- (a) The Brookfield Parties must notify the ACCC of a change to its contact details within 3 Business Days.
- (b) Any notice or communication will be sent to the most recently advised contact details and subject to clauses 21.3 and 21.4, will be taken to be received.

## **22. Defined terms and interpretation**

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### 22.1. **Definitions in the Dictionary**

- (a) A term or expression starting with a capital letter:
  - (i) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
  - (ii) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

### 22.2. **Interpretation**

- (a) Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

## Attachment A: Brookfield Undertaking

Executed as an Undertaking


Executed by **Brookfield Investment Management Australia Pty Ltd** (ACN 662 118 489) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director	Signature of a director/company secretary
Name of director (print)	Name of director/company secretary (print)
Date	Date

## Attachment A: Brookfield Undertaking

Executed as an Undertaking


**Signed sealed and delivered** for **Brookfield Corporation** by its authorised representative in the presence of:

		
Witness		Authorised Representative
Name (print)		Name (print)
		Title
Date		Date

## Attachment A: Brookfield Undertaking

Executed as an Undertaking


**Signed sealed and delivered** for **EOS Aggregator (Bermuda) L.P.** by its general partner **BGTF Bermuda GP Limited** by its authorised representative in the presence of:

		
Witness		Authorised Representative
Name (print)		Name (print)
		Title
Date		Date

## Attachment A: Brookfield Undertaking

Executed as an Undertaking

**Signed sealed and delivered** for **Brookfield Asset Management ULC** by its authorised representative in the presence of:

		
Witness		Authorised Representative
Name (print)		Name (print)
		Title
Date		Date



## Attachment A: Brookfield Undertaking

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

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Date

and signed on behalf of the Commission:

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Chair

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Date

## Attachment A: Brookfield Undertaking

### Schedule 1 – Dictionary and interpretation

#### 1. Dictionary

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**Above-the-Wall Personnel** has the meaning given to it in clause 5.2(m) of this Undertaking.

**ACCC** means the Australian Competition and Consumer Commission.

**Affiliate** of Brookfield means any person, directly or indirectly, through one or more intermediaries and alone or together with any other Affiliate of Brookfield, controlling, controlled by or under common control with such party by means of possessing or being subject to, directly or indirectly, the power to direct or cause the direction of the management or policies, whether through the ownership or power to exercise or direct the majority voting rights of the entity's governing body (including general partner interests if applicable), the right to appoint or remove a majority of the directors or other members of the entity's governing body, by contract, agency or otherwise.

**Agreements** means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

**Amendment Notice** has the meaning given to it in clause 11.2 of this Undertaking.

**Application** has the meaning given to it in clause 2.4 of this Undertaking.

**Approved Audit Plan** means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

**Approved Independent Auditor** means the person approved by the ACCC and appointed under clause 13 of this Undertaking.

**Approved Terms of Appointment** means the terms of appointment of the Approved Independent Auditor approved by the ACCC in accordance with this Undertaking.

**Associated Entity** has the meaning given by section 50AAA of the Corporations Act.

**Audit Report** has the meaning given to it in clause 13.7(a) of this Undertaking.

**AusNet** means AusNet Pty Ltd and its Subsidiaries.

**AusNet Distribution Network** means the electricity and gas distribution network operated by AusNet in Victoria.

**AusNet Holding Companies** means Australian Energy Holdings No 1 Pty Ltd and each Subsidiary of Australian Energy Holdings No 1 Pty Ltd that is a Holding Company of AusNet.

**AusNet Information** has the meaning given to it in clause 5.3(a)(ii) of this Undertaking.

**AusNet Non-Public Information** has the meaning given to it in clause 5.3(a)(i) of this Undertaking.

**AusNet Senior Management** means the AusNet Chief Executive Officer and his or her direct reports.

## Attachment A: Brookfield Undertaking

**AusNet Transmission Network** means the electricity transmission network operated by AusNet in Victoria.

**AusNet Undertaking** means the undertaking given under section 87B of the CCA by AusNet Pty Ltd (ACN 603 317 559) and Australian Energy Holdings No 1 Pty Ltd (ACN 654 672 670).

**BGTF** has the meaning given to it in clause 2.1 of this Undertaking.

**BI AusNet Supervisory Personnel** has the meaning given to it in clause 5.2(g) of this Undertaking.

**BI AusNet Supervisory Personnel List** has the meaning given to it in clause 5.2(i)(i) of this undertaking.

**BR Origin Supervisory Personnel** has the meaning given to it in clause 5.2(j) of this Undertaking.

**BR Origin Supervisory Personnel List** has the meaning given to it in clause 5.2(l)(i) of this Undertaking.

**Brookfield** means Brookfield Corporation, Brookfield Asset Management Ltd. and each of their respective Affiliates.

**Brookfield Australia Website** means, as at the date of this Undertaking, <https://au.brookfield.com/> or any substantially equivalent or replacement website maintained by Brookfield.

**Brookfield Information Technology Systems** means email, network drives, SharePoint, OneDrive, Microsoft Teams, file server data, document repositories and any equivalent replacement systems.

**Brookfield Infrastructure** means the Brookfield Infrastructure business unit, including the private funds, listed entities and corporate entities within that business unit, including Brookfield Super-Core Infrastructure Partners, Brookfield Infrastructure Partners L.P. and Australian Energy Holdings No 1 Pty Ltd, to the extent the business unit operates or holds assets in Australia.

**Brookfield LP** means EOS Aggregator (Bermuda) L.P..

**Brookfield Parties** has the meaning given to it in clause 1 of this Undertaking.

**Brookfield Personnel** means any employee of Brookfield.

**Brookfield Renewables** means the Brookfield Renewable Power and Transition unit, including the private funds, listed entities and corporate entities within that business unit, including Brookfield Global Transition Fund I, Brookfield Renewable Partners L.P. and Brookfield LP, to the extent the business unit operates or holds assets in Australia.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in New South Wales, Australia.

**CCA** means the *Competition and Consumer Act 2010* (Cth).

## Attachment A: Brookfield Undertaking

**Change of Control** means:

- (a) the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of the Origin Energy Markets to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- (b) the sale or transfer of any assets necessary, or which may be necessary, to enable the Brookfield Parties to continue to comply with this Undertaking in its entirety.

**Commencement Date** has the meaning given to it in clause 3 of this Undertaking.

**Compliance Officer** means the person appointed as Compliance Officer pursuant to clause 12.2 of this Undertaking.

**Confidential Metering Information** has the meaning given by clause 10.2 of this Undertaking.

**Connections Data** has the meaning given in clause 7.3(a) of this Undertaking.

**Connection Services** has the meaning given to it in the NER.

**Control** has the meaning given in section 50AA of the Corporations Act.

**Control Date** means the date of completion of the Proposed Acquisition.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Develop** includes Origin Energy Markets developing and owning renewable generation and storage assets itself or Origin Energy Markets entering into a long term power purchase agreement enabling a third party to develop and own renewable generation and storage assets. A renewable generation and storage asset will be treated as having been Developed if physical construction of that asset has commenced. If Origin Energy Markets divests part of a renewable generation or storage asset Developed by it, that asset will continue to be treated as having been Developed by Origin Energy Markets.

**Entities Connected** has the meaning given by section 64B of the Corporations Act.

**Green Build-out Plan** has the meaning given to it in clause 8.1 of this Undertaking.

**GW** means gigawatts.

**Holding Company** has the meaning given to it in section 9 of the Corporations Act, but on the basis that 'Subsidiary' has the meaning given in this Undertaking.

**Intellihub** means IntelliHUB Australia Pty Ltd.

**Market Confidential Information** has the meaning given to it in 13.6(e) of this Undertaking.

**National Electricity Law or NEL** means the National Electricity Law set out in the schedule to the *National Electricity (South Australia) Act 1996* (SA), as applied by a participating jurisdiction and subject to any modification made to the National Electricity Law by that jurisdiction.

**National Electricity Rules or NER** means the rules called the National Electricity Rules made under Part 7 of the NEL, subject to any modification made to the National Electricity Rules by a jurisdiction.

## Attachment A: Brookfield Undertaking

**On-sale Acquisition** has the meaning given to it in clause 2.5(b) of this Undertaking.

**Origin** means Origin Energy Limited and its Subsidiaries.

**Origin Energy Markets** means Origin Subsidiaries and assets comprising the Origin Energy Markets business to be acquired by various entities wholly owned (directly or indirectly) by Brookfield LP pursuant to the Proposed Acquisition and, where applicable, any such businesses developed or acquired from time to time after the date of this Undertaking.

**Origin Connection Application** has the meaning given to it in clause 7.2(a) of this Undertaking.

**Origin Energy Markets Holding Companies** means the general partner of Brookfield LP and each Subsidiary of Brookfield LP that is a Holding Company of Origin Energy Markets.

**Origin Energy Markets Senior Management** means the Origin Energy Markets Chief Executive Officer and his or her direct reports.

**Origin Information** has the meaning given to it in clause 5.3(b)(ii) of this Undertaking.

**Origin Integrated Gas Business** means the upstream gas assets of Origin that will be acquired and retained by MidOcean BidCo pursuant to the Proposed Acquisition, and does not include Origin Energy Markets.

**Origin Non-Public Information** has the meaning given to it in clause 5.3(b)(i) of this Undertaking.

**Participate in Managing AusNet** has the meaning given to it in clauses 5.2(b) and 5.2(c) of this Undertaking.

**Participate in Managing Origin Energy Markets** has the meaning given to it in clauses 5.2(e) and 5.2(f) of this Undertaking.

**Pricing Terms** has the meaning given to it in clause 7.3(a)(ii) of this Undertaking.

**Proposed Acquisition** has the meaning given to it in clause 2.5 of this Undertaking.

**Proposed Independent Auditor** means a person named in a Proposed Independent Auditor Notice.

**Proposed Independent Auditor Notice** has the meaning given to it in clause 13.3(a) of this Undertaking.

**Proposed Independent Expert** has the meaning given to it in clause 11.4(b)(ii) of this Undertaking.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au).

**Public Report** has the meaning given to it in clause 13.8(a) of this Undertaking.

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Reasons for Determination** means the ACCC's reasons for determination in respect of the Application.

## Attachment A: Brookfield Undertaking

**Related Bodies Corporate** has the meaning given to it by section 50 of the Corporations Act.

**Related Entities** has the meaning given to it in section 9 of the Corporations Act.

**Related Parties** has the meaning given to it in section 228 of the Corporations Act.

**Scheme Acquisition** has the meaning given to it in clause 2.5(a) of this Undertaking.

**Senior Executive Service Employee** has the meaning given to it under the *Public Service Act 1999* (Cth).

**Shared Network Capability Services** has the meaning given to it in the NER.

**Senior Above-the-Wall Personnel** has the meaning given to it in clause 5.2(m)(i).

**Subsidiary** has the meaning given to it in section 9 of the Corporations Act but an entity (as defined under the Corporations Act) will also be taken to be a Subsidiary of an entity if it is Controlled by that entity and, without limitation:

- (a) a trust may be a Subsidiary, for the purposes of which a unit or other beneficial interest will be regarded as a share;
- (b) an entity may be a Subsidiary of a trust if it would have been a Subsidiary if that trust were a corporation; and
- (c) where a trust is a Subsidiary, the trustee of that trust (acting in that capacity) will also be a Subsidiary.

**Support Service Personnel** has the meaning given to it in clause 5.2(m)(ii).

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the CCA.

**Undertaking Objectives** has the meaning given to it in clause 2 of this Undertaking.

**Variation Dispute** has the meaning given to it in clause 11.4(a) of this Undertaking.

**Variation Dispute Notice** has the meaning given to it in clause 11.4(b) of this Undertaking.

**Variation Notice** has the meaning given to it in clause 11.3(a) of this Undertaking.

**Work Area** means the area within which relevant staff have offices and/or desk spaces from which they perform their work duties. Work Area includes all physical storage, printers and meeting spaces within that area.

## 2. Interpretation

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In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;

## Attachment A: Brookfield Undertaking

- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and

## Attachment A: Brookfield Undertaking

- (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, the Brookfield Parties will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.



## Attachment A: Brookfield Undertaking

### Schedule 2 – Approved Independent Auditor Form

---

This form sets out the information required by the ACCC in relation to the proposed appointment of the Approved Independent Auditor.

Please note in relation to information given pursuant to this form, giving false or misleading information is a serious offence.

#### 1. Method of Delivery to the ACCC

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The completed form with requested documents attached may be provided to the ACCC using the following method:

##### Email

Subject line: Proposed Independent Auditor Notice – [name of undertaking to be inserted]

Address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)

Attention: Executive General Manager – Mergers, Exemptions & Digital Division

With an email copy sent to:

Address: [mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)

Attention: Director, Remedies Unit - Policy, Coordination & Strategy Branch,  
Mergers, Exemptions & Digital Division

#### 2. Information Required

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The ACCC requires the following information in order to assess a Proposed Independent Auditor.

##### 2.1 Proposed Independent Auditor details:

- (a) the name of the Proposed Independent Auditor; and
- (b) the name of the Proposed Independent Auditor's employer and contact details including:
  - (i) address;
  - (ii) contact name;
  - (iii) telephone number; and
  - (iv) other contact details.

##### 2.2 A submission containing the following information:

- (a) details of the Proposed Independent Auditor's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking;
- (b) the names of the owner(s) and the director(s) of the Proposed Independent Auditor's employer;

## Attachment A: Brookfield Undertaking

- (c) details of any of the following types of relationships between the Brookfield Parties and the Proposed Independent Auditor or the Proposed Independent Auditor's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:
- (i) any of the Brookfield Parties and the Proposed Independent Auditor's employer are Associated Entities;
  - (ii) any of the Brookfield Parties are an Entity Connected with the Proposed Independent Auditor's employer;
  - (iii) the Proposed Independent Auditor's employer is an Entity Connected with any of the Brookfield Parties;
  - (iv) any of the Brookfield Parties and the Proposed Independent Auditor's employer are Related Entities;
  - (v) any of the Brookfield Parties and the Proposed Independent Auditor's employer are Related Parties;
  - (vi) any Related Party, Related Entity or Entity Connected with any of the Brookfield Parties is a Related Party, Related Entity or Entity Connected with the Proposed Independent Auditor;
  - (vii) any of the Brookfield Parties and the Proposed Independent Auditor or the Proposed Independent Auditor's employer have a contractual relationship or had one within the past three years, other than those attached to this form;
  - (viii) the Proposed Independent Auditor's employer is a supplier of any of the Brookfield Parties or has been in the past three years;
  - (ix) any of the Brookfield Parties is a supplier of the Proposed Independent Auditor's employer or has been in the past three years; and
  - (x) any other relationship between any of the Brookfield Parties and the Proposed Independent Auditor or the Proposed Independent Auditor's employer that allows one to affect the business decisions of the other; and
- (d) details of any existing or past contractual relationships between the Proposed Independent Auditor or the Proposed Independent Auditor's employer and the ACCC within the past three years.

- 2.3 A document outlining the terms of appointment for the Proposed Independent Auditor. This should identify the basis on which fees will be paid, including disclosure of any proposed performance-based fees.

## Attachment A: Brookfield Undertaking

### Schedule 3 – Supervisory Personnel Personal Undertaking

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This Deed Poll is made on

BY

[name] of [address] (the **employee**)

in favour of EOS Aggregator (Bermuda) L.P., Brookfield Asset Management ULC and its subsidiary Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489) (**Brookfield Manager**) and Brookfield Corporation (together, the **Brookfield Parties**).

I \_\_\_\_\_ (full name) (the **employee**) agree that:

1. I have been provided with a copy of the section 87B undertaking given by the Brookfield Parties dated [x] (**Undertaking**);
2. I will comply with the obligations set out in the Undertaking relevant to my role including (but not limited to):
  - a. the obligations in relation to separation of management in clause 5.2 of the Undertaking;
  - b. the obligations in relation to separation of information set out in clause 5.3 of the Undertaking; and
  - c. the obligations in relation to physical separation set out in clause 5.4 of the Undertaking.
3. I understand that a breach of clause 2 of this Deed Poll will be regarded as a serious breach of my obligations as an employee and that the sanctions for breach may include dismissal.
4. Without limiting clause 3 of this Deed Poll, if a breach has been proved to involve me deliberately causing, or deliberately attempting to cause, AusNet to discriminate in favour of Origin Energy Markets or against Origin Energy Markets' competitors in relation to connections to the AusNet Transmission Network or the AusNet Distribution Network that will result in dismissal.

**Executed and delivered as a Deed Poll** [ in [\*]].

[\*]

## Attachment A: Brookfield Undertaking

### Schedule 4 – Senior Above-the-Wall Personal Undertaking

---

**This Deed Poll** is made on

**BY**

[name] of [address] (the **employee**)

in favour of EOS Aggregator (Bermuda) L.P., Brookfield Asset Management ULC and its subsidiary Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489) (**Brookfield Manager**) and Brookfield Corporation (together, the **Brookfield Parties**).

I \_\_\_\_\_ (full name) (the **employee**) agree that:

1. I have been provided with a copy of the section 87B undertaking given by the Brookfield Parties dated [x] (**Undertaking**).
2. I will comply with the obligations set out in the Undertaking relevant to my role including the obligations in relation to separation of information set out in clauses 5.3(i)(i) and 5.3(k) of the Undertaking.
3. I understand that a breach of clause 2 of this Deed Poll will be regarded as a serious breach of my obligations as an employee and that the sanctions for breach may include dismissal.
4. Without limiting clause 3 of this Deed Poll, if a breach has been proved to involve me deliberately causing, or deliberately attempting to cause, AusNet to discriminate in favour of Origin Energy Markets or against Origin Energy Markets' competitors in relation to connections to the AusNet Transmission Network or the AusNet Distribution Network that will result in dismissal.

**Executed and delivered as a Deed Poll** [ in [\*]].

[\*]

## Attachment A: Brookfield Undertaking

### Schedule 5 – Compliance Officer Personal Undertaking

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This Deed Poll is made on

BY

[name] of [address] (the **employee**)

in favour of EOS Aggregator (Bermuda) L.P., Brookfield Asset Management ULC and its subsidiary Brookfield Investment Management Australia Pty Ltd (ACN 662 118 489) (**Brookfield Manager**) and Brookfield Corporation (together, the **Brookfield Parties**).

I \_\_\_\_\_ (full name) (the **employee**) agree that:

1. I have been provided with a copy of the section 87B undertaking given by the Brookfield Parties dated [x] (Undertaking);
2. I will comply with the obligations set out in the Undertaking relevant to my role including (but not limited to):
  - a. the obligations in relation to separation of information set out in clause 5.3(e), 5.3(f) and 5.3(g); and
  - b. the obligations in relation to my role as the Compliance Officer set out in clause 12.2.
3. I understand that a breach of clause 2 of this Deed Poll will be regarded as a serious breach of my obligations as an employee and that the sanctions for breach may include dismissal.
4. Without limiting clause 3 of this Deed Poll, if a breach has been proved to involve me deliberately causing, or deliberately attempting to cause, AusNet to discriminate in favour of Origin Energy Markets or against Origin Energy Markets' competitors in relation to connections to the AusNet Transmission Network or the AusNet Distribution Network that will result in dismissal.

**Executed and delivered as a Deed Poll [in [\*]].**

[\*]

## Attachment B: AusNet Undertaking

# Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by AusNet Pty Ltd (ACN 603 317 559) and Australian Energy Holdings No 1 Pty Ltd (ACN 654 672 670)

## Attachment B: AusNet Undertaking

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## Attachment B: AusNet Undertaking

### 1 Person giving the Undertaking

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This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:

- (a) AusNet Pty Ltd ACN 603 317 559 (**AusNet**); and
  - (b) Australian Energy Holdings No 1 Pty Ltd ACN 654 672 670 (**AEH1**),
- (together referred to as the **AusNet Parties** in this Undertaking).

### 2 Background

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#### The parties to the Proposed Acquisition

- 2.1 **Brookfield LP**: Brookfield will invest in and control EOS Aggregator (Bermuda) L.P. (**Brookfield LP**) via the Brookfield Global Transition Fund (**BGTF**), Brookfield Renewable Partners L.P., and certain other Brookfield-managed co-investors. The Brookfield-managed portion of Brookfield LP is expected to be 67.6% on completion of the Proposed Acquisition. The balance of Brookfield LP is expected to be owned by Buckland Investment Pte. Ltd. (which is managed by GIC Special Investments Private Limited, which is in turn wholly owned by GIC Private Limited) (22.5%) and Davis Investments Pte. Ltd. (which is indirectly wholly owned by Temasek Holdings (Private) Limited) (9.9%).
- 2.2 **MidOcean Bidco**: MidOcean Reef Bidco Pty Ltd (**MidOcean Bidco**) is currently a wholly owned subsidiary of MidOcean Energy, LLC, an LNG company formed and managed by EIG Management Company LLC to build a diversified, resilient, cost and carbon competitive LNG portfolio.
- 2.3 **Origin**: Origin Energy Limited (**Origin**) is an ASX listed integrated energy company. Origin has two core businesses, the Origin Energy Markets business responsible for electricity generation and electricity and gas retailing across Australia, and the Origin Integrated Gas Business which includes a 27.5% interest in Australia Pacific LNG. It also operates, or has interests in, a range of other businesses in future energy, non-energy and energy adjacent sectors.

#### The application for merger authorisation

- 2.4 On 5 June 2023 Brookfield LP and MidOcean Bidco (collectively, the **Applicants**) lodged an application with the ACCC for merger authorisation (the **Application**).
- 2.5 The Applicants sought authorisation to engage in the conduct described in application MA1000024, being the proposed acquisition of Origin, comprising two interdependent acquisitions:
  - (a) **Scheme Acquisition**: It is proposed that MidOcean Bidco will acquire 100% of the ordinary shares in Origin pursuant to a scheme of arrangement under the Corporations Act (the **Scheme Acquisition**). To implement the Scheme Acquisition, a binding Scheme Implementation Deed (**SID**) was signed on 27



## Attachment B: AusNet Undertaking

March 2023 by Origin, MidOcean Bidco and Brookfield Renewable Group Australia Pty Ltd. The Scheme Acquisition is subject to various conditions precedent, as set out in the SID (see Annexure 5.1 of the Application), including FIRB approval, ACCC authorisation, Origin shareholder approval and Court approval, and

- (b) **On-Sale Acquisition:** Conditional upon, and as soon as possible following implementation of the Scheme Acquisition, MidOcean Bidco will procure that Origin and its interests are divided into two separate businesses, being the Origin Energy Markets business and the Origin Integrated Gas Business. Origin's Energy Markets business comprises Origin's energy retailing business, electricity generating assets, energy wholesale and trading business, development assets relating to energy production and storage, its investment in Octopus Energy and its LPG business and domestic gas trading business. Origin's Integrated Gas Business comprises Origin's upstream gas interests and shareholding in Australia Pacific LNG. The division of Origin will be implemented by MidOcean Bidco procuring the sale of the various Origin subsidiaries and assets comprising the Origin Energy Markets business to various entities wholly owned by Brookfield LP. MidOcean Bidco will retain 100% of the shares in Origin which, following completion of the sale of the Origin Energy Markets business, will own only the Origin Integrated Gas Business. The terms of Brookfield LP's acquisition of the Origin Energy Markets business are set out in the Commitment Deed (see Annexure 5.3 of the Application) and the steps that MidOcean Bidco and Brookfield LP will take to prepare for the implementation of the Scheme Acquisition and the On Sale Transaction are set out in the Bid Conduct Deed (see Annexure 5.2 of the Application).

The Scheme Acquisition and the On-Sale Acquisition are together the **Proposed Acquisition**.

- 2.6 The Application was made pursuant to section 88(1) of the CCA. A merger authorisation provides protection from legal action under section 50 of the CCA, which otherwise prohibits acquisitions of shares or assets that would or would be likely to have the effect of substantially lessening competition in any market.
- 2.7 The Applicants sought authorisation of the Proposed Acquisition on their own behalf, and on behalf of the following classes of person:
- (a) any entity that is a related body corporate of Brookfield LP that acquires any part of the Origin Energy Markets business.
  - (b) any entity that is a related body corporate of MidOcean Energy, LLC that acquires any part of the Origin Integrated Gas Business.
- 2.8 The Applicants requested that the ACCC grant a single authorisation under section 88(5) of the CCA of the two interdependent acquisitions which, taken together, form the Proposed Acquisition.
- 2.9 The objective of this Undertaking is to address the concerns about the Proposed Acquisition raised by the ACCC in its Reasons for Determination in respect of the Application.

## Attachment B: AusNet Undertaking

### 3 Commencement of this Undertaking

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This Undertaking comes into effect when:

- (a) this Undertaking is executed by the AusNet Parties; and
- (b) this Undertaking so executed is accepted by the ACCC,  
(the **Commencement Date**).

### 4 Cessation of Ongoing Obligation

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#### 4.1 Withdrawal

Any AusNet Party may request withdrawal of this Undertaking pursuant to section 87B of the CCA at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

#### 4.2 Revocation

The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading. Such a revocation must be express and in writing.

#### 4.3 Waiver

The ACCC may, at any time, waive any of the obligations contained in this Undertaking. Such a waiver must be express and in writing.

#### 4.4 Extension of time to comply with obligations

The ACCC may, at any time, extend the date by which any of the obligations in this Undertaking is to be satisfied. Such an extension must be express and in writing.

### 5 Separation of personnel

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#### 5.1 Separation of Senior Management

AusNet must ensure that from the Control Date no person is employed as AusNet Senior Management who is, or has been in the previous 6 months, employed by Origin Energy Markets as Origin Energy Markets Senior Management.

#### 5.2 Separation of employees

AusNet must ensure that from the Control Date no person is employed by AusNet who is, or has been in the previous six months, employed by Origin Energy Markets in a role that involved the commercial aspects of the development of new generation assets and/or the negotiation of connections to the AusNet Transmission Network.

## Attachment B: AusNet Undertaking

### 5.3 Who can be an AusNet director

AusNet must ensure that the only directors, alternative directors, observers or secretaries of any AusNet board are employees of AusNet unless otherwise approved by the ACCC in writing.

## 6 Applications to connect to AusNet Transmission Network

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### 6.1 Origin Energy Markets applications to connect to the AusNet Transmission Network

The AusNet Parties must ensure that, from the Control Date:

- (a) BI AusNet Supervisory Personnel have no involvement in relation to applications to connect to the AusNet Transmission Network that are made by Origin Energy Markets (**Origin Connection Application**); and
- (b) where the approval of one or more AusNet Holding Company or AusNet boards is required for an Origin Connection Application, Brookfield appointed directors on the relevant board do not:
  - (i) receive board papers;
  - (ii) participate in board discussions; or
  - (iii) vote on board resolutions.

### 6.2 Advising connection applicants of Approved Independent Auditor details

From the Control Date, within 5 Business Days of AusNet being informed by (without limitation) the relevant applicant or by the Australian Energy Market Operator of an application to connect to the AusNet Transmission Network, AusNet must provide the applicant with information concerning the existence of this Undertaking, a link to the Brookfield Australia Website page referred to in clause 12.4(a) of the Brookfield Undertaking, and details of the Approved Independent Auditor including their contact details.

### 6.3 Link to Brookfield undertaking website

On and from the Control Date, AusNet must publish and maintain a link in a prominent location on its website to the Brookfield Australia Website page referred to in clause 12.4(a) of the Brookfield Undertaking.

## 7 Independent Audit

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### 7.1 Approved Independent Auditor

The AusNet Parties agree that the Approved Independent Auditor appointed in accordance with the Brookfield Undertaking will also be the Approved Independent Auditor under this Undertaking. The Approved Independent Auditor will, in conjunction with the audit it conducts under the Brookfield Undertaking, audit and report upon:

## Attachment B: AusNet Undertaking

- (a) AusNet's compliance with this Undertaking;
- (b) whether AusNet has complied with the non-discrimination obligations contained in the Transmission Ring Fencing Guidelines (as in force at the relevant time) but only in respect of discrimination relating to Origin Energy Markets as a related electricity service provider;
- (c) for so long as the Transmission Ring Fencing Guidelines do not apply to Negotiated Transmission Services, whether AusNet has engaged in conduct that would breach the non-discrimination obligations contained in the Transmission Ring Fencing Guidelines if those guidelines did apply to the provision of Negotiated Transmission Services with respect to the AusNet Transmission Network, but only in respect of discrimination relating to Origin Energy Markets as a related electricity service provider; and
- (d) if the Transmission Ring Fencing Guidelines contain provisions that have not commenced at the relevant time, whether AusNet has engaged in conduct that would breach the non-discrimination obligations contained in the Transmission Ring Fencing Guidelines if those provisions had commenced, but only in respect of discrimination relating to Origin Energy Markets as a related electricity service provider.

### 7.2 Obligations and powers of the Approved Independent Auditor

The AusNet Parties acknowledge and agree that the Approved Independent Auditor will have the same obligations and powers as set out in clause 13.6 of the Brookfield Undertaking in relation to AusNet, including under the Approved Terms of Appointment under the Brookfield Undertaking, with all changes necessary to reflect the application of clause 13.6 of the Brookfield Undertaking to AusNet.

### 7.3 Compliance Audit

- (a) The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) that includes:
  - (i) the Approved Independent Auditor's procedures in conducting the audit, or any change to audit procedures and processes since the previous Audit Report;
  - (ii) a full audit of the matters specified in clause 7.1;
  - (iii) identification of any areas of uncertainty or ambiguity in the Approved Independent Auditor's interpretation of any obligations contained in this Undertaking;
  - (iv) all of the reasons for the conclusions reached in the Audit Report;
  - (v) any qualifications made by the Approved Independent Auditor in forming his or her views;
  - (vi) any recommendations by the Approved Independent Auditor to improve:
    - (A) the Approved Audit Plan;

## Attachment B: AusNet Undertaking

- (B) the integrity of the auditing process;
  - (C) the AusNet Parties' processes or reporting systems in relation to compliance with this Undertaking; and
  - (D) the AusNet Parties' compliance with this Undertaking;
- (vii) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- (b) The Approved Independent Auditor is to provide an Audit Report to the ACCC and the AusNet Parties at the following times:
- (i) within 2 months after the Control Date, at which time the Audit Report is to include the results of the initial audit and any recommended changes to the Approved Audit Plan, including the Approved Independent Auditor's proposed procedures and processes for conducting the audit;
  - (ii) every 12 months after the date of provision of the last Audit Report, until the ACCC confirms in writing to the AusNet Parties that it is satisfied that the AusNet Parties have fulfilled their obligations pursuant to this Undertaking; and
  - (iii) a final report due three months after the last report provided pursuant to paragraph (ii) above.
- (c) The AusNet Parties must implement any recommendations made by the Approved Independent Auditor in Audit Reports, and notify the ACCC of the implementation of the recommendations within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.
- (d) The AusNet Parties must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).
- (e) The AusNet Parties acknowledge and agree that the ACCC may direct that the Approved Independent Auditor provide copies of each Audit Report to the AER at the same time that they are provided to the ACCC and the AusNet Parties provided that a Senior Executive Service Employee engaged by or assisting the AER has acknowledged in writing to the ACCC and AusNet that the AER will treat the Audit Reports in accordance with section 44AAF of the CCA, except to the extent that the content of the Audit Reports have been published under clause 7.4 of this Undertaking.
- (f) The AusNet Parties acknowledge and agree that the ACCC may provide any information it receives from the Approved Independent Auditor or in relation to this Undertaking to the AER, provided that:
- (i) the AER acknowledges in writing to AusNet that it will treat that information in accordance with section 44AAF of the CCA; and
  - (ii) the ACCC identifies to AusNet any correspondence or documents received from AusNet that it provides to the AER.

## Attachment B: AusNet Undertaking

### 7.4 Publication of Reports

- (a) A public version of the Audit Report should be prepared and published in accordance with this clause 7.4 (**Public Report**). The Public Report should in all cases disclose the key findings including conclusions of the Independent Auditor, but with commercially sensitive confidential information redacted to the extent consistent with disclosing key findings including conclusions.
- (b) The AusNet Parties shall have 5 Business Days from the Approved Independent Auditor providing the Audit Report to the ACCC to notify the ACCC of commercially sensitive information that the AusNet Parties consider should be redacted from the Audit Report before publication.
- (c) If the ACCC agrees with the redactions proposed by the AusNet Parties under paragraph (b), the Audit Report with those redactions will be the Public Report.
- (d) If the ACCC does not agree with the redactions proposed by the AusNet Parties under paragraph (b), the ACCC and the AusNet Parties will seek in good faith to agree redactions. If agreement is reached, the Audit Report with the agreed redactions will be the Public Report.
- (e) If the ACCC and the AusNet Parties are unable to reach agreement under paragraph (d) within 5 Business Days, either of them may refer the dispute to be determined by an independent expert. The independent expert may be agreed between the ACCC and the AusNet Parties. Failing agreement within 5 Business Days, either the ACCC or the AusNet Parties may request the independent expert to be selected by the President of the New South Wales Bar Council. The cost of the independent expert will be borne by the AusNet Parties. The independent expert will determine what, if any, redactions should be made to the Audit Report under paragraph (a) within 10 Business Days of their appointment. The Audit Report with the redactions determined by the independent expert will be the Public Report.
- (f) Within 5 Business Days of the Public Report being finalised, the AusNet Parties will provide the Public Report to Brookfield for publication by Brookfield in accordance with clause 12.4(a)(vii) of the Brookfield Undertaking.
- (g) The AusNet Parties agree that the ACCC may publish the Public Report on its own website, in its discretion.

### 7.5 The AusNet Parties' obligations in relation to the Approved Independent Auditor

Without limiting their obligations in this Undertaking, the AusNet Parties must not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:

- (a) directing the AusNet Parties personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 7;
- (b) providing access to the facilities, sites or operations of the AusNet Parties as required by the Approved Independent Auditor;

## Attachment B: AusNet Undertaking

- (c) providing to the Approved Independent Auditor any information or documents that they consider necessary for carrying out their functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
- (d) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC; and
- (e) not appointing the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.

### **8 ACCC requests for information**

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- 8.1 The ACCC may direct the AusNet Parties in respect of their compliance with this Undertaking to, and the AusNet Parties must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the AusNet Parties' custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 8.2 Any direction made by the ACCC under clause 8.1 will be notified to the AusNet Parties, in accordance with clause 13.2.
- 8.3 Nothing in this clause 8 requires the provision of information or documents in respect of which the AusNet Parties have a claim of legal professional or other privilege.

### **9 Disclosure of this Undertaking**

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The AusNet Parties each acknowledge that the ACCC may:

- (a) make this Undertaking publicly available;
- (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
- (c) from time to time publicly refer to this Undertaking.

### **10 No Derogation**

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- 10.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the AusNet Parties of any term of this Undertaking.

## Attachment B: AusNet Undertaking

- 10.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the CCA for penalties or other remedies in the event that the AusNet Parties do not fully implement and/or perform their obligations under this Undertaking or in any other event where the ACCC decides to take action under the CCA for penalties or other remedies.

### 11 Change of Control

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In the event that a Change of Control is reasonably expected to occur, the AusNet Parties must:

- (a) notify the ACCC of this expectation as soon as practicable; and
- (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the AusNet Parties pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified the AusNet Parties in writing that a section 87B undertaking under this clause is not required.

### 12 Costs

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The AusNet Parties must pay all of their own costs incurred in relation to this Undertaking.

### 13 Notices

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#### Giving Notices

- 13.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)

Attention: Executive General Manager

Mergers, Exemptions & Digital Division

**With a copy sent to:**

Email address: [mergersru@acc.gov.au](mailto:mergersru@acc.gov.au)

Attention: Director, Remedies Unit

Policy, Coordination & Remedies Branch

Mergers, Exemptions & Digital Division

- 13.2 Any notice or communication to the AusNet Parties pursuant to this Undertaking must be sent to:

Name: **[Redacted – Confidential]**

Address: **[Redacted – Confidential]**



## Attachment B: AusNet Undertaking

Email address: [Redacted – Confidential]

Phone number: [Redacted – Confidential]

Attention: [Redacted – Confidential]

**With a copy sent to:**

Name: [Redacted – Confidential]

Address: [Redacted – Confidential]

Email address: [Redacted – Confidential]

Phone number: [Redacted – Confidential]

Attention: [Redacted – Confidential]

13.3 If sent by post, notices are taken to be received 3 Business Days after posting (or 7 Business Days after posting if sent to or from a place outside Australia).

13.4 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

### 13.5 Change of contact details

- (a) The AusNet Parties must notify the ACCC of a change to its contact details within 3 Business Days.
- (b) Any notice or communication will be sent to the most recently advised contact details and subject to clauses 13.3 and 13.4, will be taken to be received.

## 14 Defined terms and interpretation

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### 14.1 Definitions in the Dictionary

- (a) A term or expression starting with a capital letter:
  - (i) which is defined in the Dictionary in Part 1 of Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary; or
  - (ii) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

### 14.2 Interpretation

- (a) Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

## Attachment B: AusNet Undertaking

Executed as an Undertaking

Executed by **AusNet Pty Ltd** (ACN 603 317 559) pursuant to section 127(1) of the *Corporations Act 2001* (Cth) by:

Signature of director	Signature of a director/company secretary
Name of director (print)	Name of director/company secretary (print)
Date	Date

## Attachment B: AusNet Undertaking

Executed by **Australian Energy Holdings No 1 Pty Ltd** (ACN 654 672 670) pursuant to section 127(1) of the *Corporations Act 2001* (Cth) by:

Signature of director	Signature of a director/company secretary
Name of director (print)	Name of director/company secretary (print)
Date	Date

## Attachment B: AusNet Undertaking

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

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Date

and signed on behalf of the Commission:

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Chair

---

Date

## Attachment B: AusNet Undertaking

### Schedule 1 – Dictionary and interpretation

#### 1 Dictionary

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**ACCC** means the Australian Competition and Consumer Commission.

**AER** means the Australian Energy Regulator.

**Agreements** means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

**Application** has the meaning given to it in clause 2.4 of this Undertaking.

**Approved Audit Plan** means the plan approved by the ACCC in accordance with the terms of the Brookfield Undertaking insofar as it applies to AusNet.

**Approved Independent Auditor** means the person appointed as the Approved Independent Auditor under clause 13 of the Brookfield Undertaking.

**Approved Terms of Appointment** means the terms of appointment of the Approved Independent Auditor approved by the ACCC in accordance with the terms of the Brookfield Undertaking insofar as they apply to AusNet.

**Audit Report** has the meaning given to it in clause 7.3 of this Undertaking.

**AusNet** means AusNet Pty Ltd and its Subsidiaries.

**AusNet Holding Companies** means Australian Energy Holdings No 1 Pty Ltd and each Subsidiary of Australian Energy Holdings No 1 Pty Ltd that is a Holding Company of AusNet.

**AusNet Parties** has the meaning given to it in clause 1 of this Undertaking.

**AusNet Senior Management** means the AusNet Chief Executive Officer and his or her direct reports.

**AusNet Transmission Network** means the electricity transmission network operated by AusNet in Victoria.

**BI AusNet Supervisory Personnel** has the meaning given to it in clause 5.2(g) of the Brookfield Undertaking.

**Brookfield** means Brookfield Corporation, Brookfield Asset Management Ltd. and each of their respective Affiliates.

**Brookfield Australia Website** means, as at the date of this Undertaking, <https://au.brookfield.com/> or any substantially equivalent or replacement website maintained by Brookfield.

**Brookfield LP** means EOS Aggregator (Bermuda) L.P..

**Brookfield Undertaking** means the undertaking given under section 87B of the CCA by EOS Aggregator (Bermuda) L.P., Brookfield Asset Management ULC and Brookfield

## Attachment B: AusNet Undertaking

Investment Management Australia Pty Ltd (ACN 662 118 489) and Brookfield Corporation.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in New South Wales, Australia.

**CCA** means the *Competition and Consumer Act 2010* (Cth).

**Change of Control** means:

- (a) the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of AusNet to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- (b) the sale or transfer of any assets necessary, or which may be necessary, to enable the AusNet Parties to continue to comply with this Undertaking in its entirety.

**Control** (as used in the definition of 'Subsidiary') has the meaning given in section 50AA of the Corporations Act.

**Control Date** means the date on which the Proposed Acquisition is completed.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Holding Company** has the meaning given to it in section 9 of the Corporations Act, but on the basis that 'Subsidiary' has the meaning given in this Undertaking.

**National Electricity Law or NEL** means the National Electricity Law set out in the schedule to the *National Electricity (South Australia) Act 1996* (SA), as applied by a participating jurisdiction and subject to any modification made to the National Electricity Law by that jurisdiction.

**National Electricity Rules or NER** means the rules called the National Electricity Rules made under Part 7 of the NEL, subject to any modification made to the National Electricity Rules by a jurisdiction.

**Negotiated Transmission Services** has the meaning given in the National Electricity Rules as at the date of this Undertaking.

**On-sale Acquisition** has the meaning given to it in clause 2.5(b) of this Undertaking.

**Origin Connection Application** has the meaning given to it in clause 6.1(a) of this Undertaking.

**Origin Energy Markets** means Origin Subsidiaries and assets comprising the Origin Energy Markets business to be acquired by various entities wholly owned (directly or indirectly) by Brookfield LP pursuant to the Proposed Acquisition and, where applicable, any such businesses developed or acquired from time to time after the date of this Undertaking.

**Origin Energy Markets Senior Management** means the Origin Energy Markets Chief Executive Officer and his or her direct reports.

## Attachment B: AusNet Undertaking

**Origin Integrated Gas Business** means the upstream gas assets of Origin that will be acquired by MidOcean BidCo pursuant to the Proposed Acquisition, and include the Origin interests in APLNG.

**Proposed Acquisition** has the meaning given to it in the Brookfield Undertaking.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au).

**Public Report** has the meaning given to it in clause 7.4(a).

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**Reasons for Determination** means the ACCC's reasons for determination in respect of the Application.

**Related Bodies Corporate** has the meaning given to it by section 50 of the Corporations Act.

**Scheme Acquisition** has the meaning given to it in clause 2.5(a) of this Undertaking.

**Senior Executive Service Employee** has the meaning given to it under the *Public Service Act 1999* (Cth).

**Subsidiary** has the meaning given to it in section 9 of the Corporations Act but an entity (as defined under the Corporations Act) will also be taken to be a Subsidiary of an entity if it is Controlled by that entity and, without limitation:

- (a) a trust may be a Subsidiary, for the purposes of which a unit or other beneficial interest will be regarded as a share;
- (b) an entity may be a Subsidiary of a trust if it would have been a Subsidiary if that trust were a corporation; and
- (c) where a trust is a Subsidiary, the trustee of that trust (acting in that capacity) will also be a Subsidiary.

**Transmission Ring Fencing Guidelines** means the transmission ring fencing guidelines prepared by the AER in accordance with clause 6A.21.2 of the National Electricity Rules.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the CCA.

## 2 Interpretation

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In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;

## Attachment B: AusNet Undertaking

- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:



## Attachment B: AusNet Undertaking

- (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
- (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, the AusNet Parties will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.

**[Redacted – Confidential]**

## Attachment C: MidOcean Undertaking

# Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by MidOcean Energy Holdings Pty Ltd (ACN 662 741 415) and MidOcean Energy Parent Pty Ltd (ACN 666 688 786).

## Attachment C: MidOcean Undertaking

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## Attachment C: MidOcean Undertaking

### 1. Person giving the Undertaking

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This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by:

- (a) MidOcean Energy Holdings Pty Ltd ACN 662 741 415 (**MidOcean Energy**); and
- (b) MidOcean Energy Parent Pty Ltd ACN 666 688 786 (**MidOcean HoldCo**),  
(together referred to as the **MidOcean Parties** in this Undertaking).

### 2. Background

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#### The parties to the Proposed Acquisition and Tokyo Gas Transaction

- 2.1. **MidOcean Energy, LLC, MidOcean Bidco and MidOcean Energy:** MidOcean Energy, LLC is an LNG company formed and managed by EIG Management Company LLC to build a diversified, resilient, cost and carbon competitive LNG portfolio. MidOcean Reef Bidco Pty Ltd (**MidOcean Bidco**) is currently a wholly owned subsidiary of MidOcean Energy, LLC that was established to acquire 100% of the ordinary shares in Origin Energy Limited (**Origin**) as part of the Proposed Acquisition. MidOcean Energy is currently a wholly owned subsidiary of MidOcean Energy, LLC that was established to acquire minority interests in the Gorgon, Pluto, Ichthys and Queensland Curtis LNG (**QCLNG**) projects from the Tokyo Gas Group.
- 2.2. **Brookfield LP:** Brookfield will invest in and control EOS Aggregator (Bermuda) L.P. (**Brookfield LP**) via the Brookfield Global Transition Fund (**BGTF**), Brookfield Renewable Partners L.P., and certain other Brookfield-managed co-investors. The Brookfield-managed portion of Brookfield LP is expected to be 67.6% on completion of the Proposed Acquisition. The balance of Brookfield LP is expected to be owned by Buckland Investment Pte. Ltd. (which is managed by GIC Special Investments Private Limited, which is in turn wholly owned by GIC Private Limited) (22.5%) and Davis Investments Pte. Ltd. (which is indirectly wholly owned by Temasek Holdings (Private) Limited) (9.9%).
- 2.3. **Origin:** Origin is an ASX listed integrated energy company. Origin has two core businesses, the Origin Energy Markets business responsible for electricity generation and electricity and gas retailing across Australia, and the Origin Integrated Gas Business which includes a 27.5% interest in Australia Pacific LNG. It also operates, or has interests in, a range of other businesses in future energy, non-energy or energy adjacent sectors.

#### The application for merger authorisation

- 2.4. On 5 June 2023 Brookfield LP and MidOcean Bidco (collectively, the **Applicants**) lodged an application with the ACCC for merger authorisation (the **Application**).
- 2.5. The Applicants sought authorisation to engage in the conduct described in application MA1000024, being the proposed acquisition of Origin, comprising two interdependent acquisitions:
  - (a) **Scheme Acquisition:** It is proposed that MidOcean Bidco will acquire 100% of the ordinary shares in Origin pursuant to a scheme of arrangement under the Corporations Act (the **Scheme Acquisition**). To implement the Scheme Acquisition, a binding Scheme Implementation Deed (**SID**) was

## Attachment C: MidOcean Undertaking

signed on 27 March 2023 by Origin, MidOcean Bidco and Brookfield Renewable Group Australia Pty Ltd. The Scheme Acquisition is subject to various conditions precedent, as set out in the SID (see Annexure 5.1 of the Application), including FIRB approval, ACCC authorisation, Origin shareholder approval and Court approval, and

- (b) **On-Sale Acquisition:** Conditional upon, and as soon as possible following implementation of the Scheme Acquisition, MidOcean Bidco will procure that Origin and its interests are divided into two separate businesses, being the Origin Energy Markets business and the Origin Integrated Gas Business. Origin's Energy Markets business comprises Origin's energy retailing business, electricity generating assets, energy wholesale and trading business, development assets relating to energy production and storage, its investment in Octopus Energy and its LPG business and domestic gas trading business. Origin's Integrated Gas Business comprises Origin's upstream gas interests and shareholding in Australia Pacific LNG. The division of Origin will be implemented by MidOcean Bidco procuring the sale of the various Origin subsidiaries and assets comprising the Origin Energy Markets business to various entities wholly owned by Brookfield LP. MidOcean Bidco will retain 100% of the shares in Origin which, following completion of the sale of the Origin Energy Markets business, will own only the Origin Integrated Gas Business. The terms of Brookfield LP's acquisition of the Origin Energy Markets business are set out in the Commitment Deed (see Annexure 5.3 of the Application) and the steps that MidOcean Bidco and Brookfield LP will take to prepare for the implementation of the Scheme Acquisition and the On Sale Transaction are set out in the Bid Conduct Deed (see Annexure 5.2 of the Application).

The Scheme Acquisition and the On-Sale Acquisition are together the **Proposed Acquisition**.

- 2.6. MidOcean Energy also proposes to acquire minority interests in the Gorgon, Pluto, Ichthys and QCLNG projects from the Tokyo Gas Group pursuant to a binding sale and purchase agreement signed on 7 October 2022 by MidOcean Energy and Tokyo Gas. This transaction is not conditional upon, or related to, the Proposed Acquisition.
- 2.7. The Application was made pursuant to section 88(1) of the CCA. A merger authorisation provides protection from legal action under section 50 of the CCA, which otherwise prohibits acquisitions of shares or assets that would or would be likely to have the effect of substantially lessening competition in any market.
- 2.8. The Applicants sought authorisation of the Proposed Acquisition on their own behalf, and on behalf of the following classes of person:
- (a) any entity that is a related body corporate of Brookfield LP that acquires any part of the Origin Energy Markets business.
  - (b) any entity that is a related body corporate of MidOcean Energy, LLC that acquires any part of the Origin Integrated Gas Business.
- 2.9. The Applicants requested that the ACCC grant a single authorisation under section 88(5) of the CCA of the two interdependent acquisitions which, taken together, form the Proposed Acquisition.
- 2.10. The objective of this Undertaking is to address the concerns about the Proposed Acquisition raised by the ACCC in its Reasons for Determination in respect of the Application.

## Attachment C: MidOcean Undertaking

### 3. Commencement of this Undertaking

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This Undertaking comes into effect when:

- (a) this Undertaking is executed by the MidOcean Parties; and
- (b) this Undertaking so executed is accepted by the ACCC,

(the **Commencement Date**).

### 4. Cessation of Ongoing Obligation

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#### 4.1. Withdrawal

A MidOcean Party may request the withdrawal of this Undertaking pursuant to section 87B of the CCA at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

#### 4.2. Revocation

The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading. Such a revocation must be express and in writing.

#### 4.3. Waiver

The ACCC may, at any time, waive any of the obligations contained in this Undertaking. Such a waiver must be express and in writing.

#### 4.4. Extension

The ACCC may, at any time, extend the date by which any of the obligations in this Undertaking is to be satisfied. Such an extension must be express and in writing.

### 5. Waiver of rights to Walloons East Coast Gas Sensitive Information

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#### 5.1. Walloons East Coast Gas Sensitive Information

For the purposes of this Undertaking, **Walloons East Coast Gas Sensitive Information** means each of the following:

- (a) marketing plans and strategies of Walloons to the extent it relates to East Coast Gas Customers;
- (b) the terms of each individual gas supply contract under which Walloons sells gas to an East Coast Gas Customer, and the terms being negotiated for proposed individual gas supply contracts of that nature; and
- (c) the price at which gas is sold by Walloons to an individual East Coast Gas Customer (but not weighted average prices calculated over a period of at least 1 month or aggregated revenue) or negotiations about prices for future gas supply of that nature.

## Attachment C: MidOcean Undertaking

### 5.2. Undertaking to Provide Waiver to QGC and Walloons

MidOcean Energy undertakes that it will:

- (a) on or before the Control Date, provide a written waiver in favour of QGC and Walloons that for the term of this Undertaking it waives any rights it may have under the QCLNG Arrangements to obtain Walloons East Coast Gas Sensitive Information; and
- (b) on the date it is provided, provide the ACCC with a copy of the waiver provided in favour of QGC and Walloons in satisfaction of clause 5.2(a).

### 5.3. Deletion and Destruction

If MidOcean Energy becomes aware that, after the Control Date, it has received Walloons East Coast Gas Sensitive Information from QGC or Walloons (**Disclosed Sensitive Information**), it must:

- (a) within 5 Business Days notify QGC or Walloons (as applicable) of the Disclosed Sensitive Information MidOcean Energy has become aware of having received;
- (b) as soon as practicable and in any instance within 5 Business Days return, delete or destroy all records of the Disclosed Sensitive Information in MidOcean Energy's control or possession (and where the information is stored in an automatic electronic backup system, impose reasonable information access restrictions to prevent such information being accessed by any employees of MidOcean Energy or its Related Bodies Corporate who have roles or responsibilities in connection with Australia Pacific LNG's marketing activities to East Coast Gas Customers); and
- (c) not use the Disclosed Sensitive Information for any purpose.

## 6. Self-reporting

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6.1. Within 10 Business Days of MidOcean Energy receiving Disclosed Sensitive Information, MidOcean Energy must provide the ACCC with written notice (**Self Report**) including:

- (a) confirmation that it received Disclosed Sensitive Information;
- (b) details of the MidOcean Energy employee(s) that received Disclosed Sensitive Information; and
- (c) details of steps taken by MidOcean Energy to comply with its obligations under clause 5.3 to:
  - (i) return, delete or otherwise destroy the Disclosed Sensitive Information as soon as practicable; and
  - (ii) notify Walloons that it has returned, deleted or destroyed (as applicable) the Disclosed Sensitive Information.

6.2. MidOcean Energy must comply with any direction of the ACCC in relation to matters arising from the Self Report within 10 Business Days after being so directed (or such other period as is agree in writing with the ACCC).

## Attachment C: MidOcean Undertaking

- 6.3. For the avoidance of doubt, it will not be a breach of this Undertaking if:
- (a) an employee of MidOcean Energy receives Walloons East Coast Gas Sensitive Information, provided that the MidOcean Energy complies with its obligations under clause 5.3 and clause 6.1(a);
  - (b) MidOcean Energy receives payments from Walloons for gas supplied to Walloons where the price is calculated by, among other things, reference to weighted average prices or aggregated revenue received from East Coast Gas Customers for the period relevant to the payment (typically a month);
  - (c) MidOcean Energy exercises a right to audit the calculation of payments from Walloons or receives an adjustment to its payments from Walloons for gas supplied to Walloons based on the outcome of such an audit, where the auditor (but not MidOcean Energy) has access to Walloons East Coast Gas Sensitive Information; or
  - (d) MidOcean Energy receives a document in which any Walloons East Coast Gas Sensitive Information has been redacted or individual East Coast Gas Customer pricing has been aggregated.

### **7. Notification of key dates and ACCC requests for information**

- 7.1. The MidOcean Parties must notify the ACCC in writing of:
- (a) the anticipated date of the Control Date, at least 5 Business Days before that date; and
  - (b) the occurrence of the Control Date, within 1 Business Day of that date.
- 7.2. The ACCC may direct the MidOcean Parties in respect of their compliance with this Undertaking to, and the MidOcean Parties must:
- (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
  - (b) produce documents and materials to the ACCC within the MidOcean Parties' custody, power or control in the time and in the form requested by the ACCC; and/or
  - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 7.3. Any direction made by the ACCC under clause 7.2 will be notified to the MidOcean Parties, in accordance with clause 13.213.2.
- 7.4. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 7 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 7.5. Nothing in this clause 7 requires the provision of information or documents in respect of which the MidOcean Parties have a claim of legal professional or other privilege.



## Attachment C: MidOcean Undertaking

### **8. Disclosure of this Undertaking**

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The MidOcean Parties acknowledge that the ACCC may:

- (a) make this Undertaking publicly available;
- (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
- (c) from time to time publicly refer to this Undertaking.

### **9. Obligation to procure**

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Where the performance of an obligation under this Undertaking requires a Related Body Corporate of the MidOcean Parties to take or refrain from taking some action, the MidOcean Parties will procure that Related Body Corporate to take or refrain from taking that action.

### **10. No Derogation**

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- 10.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by a MidOcean Party of any term of this Undertaking.
- 10.2. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the CCA for penalties or other remedies in the event that a MidOcean Party does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the CCA for penalties or other remedies.

### **11. Change of Control**

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In the event that a Change of Control is reasonably expected to occur, the MidOcean Parties must:

- (a) notify the ACCC of this expectation as soon as practicable; and
- (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on the MidOcean Parties pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified the MidOcean Parties in writing that a section 87B undertaking under this clause is not required.

### **12. Costs**

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- 12.1. The MidOcean Parties must pay all of its own costs incurred in relation to this Undertaking.

## Attachment C: MidOcean Undertaking

### 13. Notices

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#### Giving Notices

- 13.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: [mergers@accc.gov.au](mailto:mergers@accc.gov.au)  
Attention: Executive General Manager  
Mergers, Exemptions & Digital Division

**With a copy sent to:**

Email address: [mergersru@accc.gov.au](mailto:mergersru@accc.gov.au)  
Attention: Director, Remedies Unit  
Policy, Coordination & Remedies Branch  
Mergers, Exemptions & Digital Division

- 13.2. Any notice or communication to the MidOcean Parties pursuant to this Undertaking must be sent to:

Name: **[Redacted – Confidential]**

**[Redacted – Confidential]**

Address: **[Redacted – Confidential]**

Email address: **[Redacted – Confidential];**

**[Redacted – Confidential];**

with a copy to: **[Redacted – Confidential]**

Phone number: **[Redacted – Confidential]**

Attention: **[Redacted – Confidential]**

**With a copy sent to:**

Name: **[Redacted – Confidential]**

Address: **[Redacted – Confidential]**

Email address: **[Redacted – Confidential]**

Phone number: **[Redacted – Confidential]**

Attention: **[Redacted – Confidential]**

- 13.3. If sent by post, notices are taken to be received 3 Business Days after posting (or 7 Business Days after posting if sent to or from a place outside Australia).
- 13.4. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

#### Change of contact details

## **Attachment C: MidOcean Undertaking**

- 13.5. The MidOcean Parties must notify the ACCC of a change to its contact details within 3 Business Days.
- 13.6. Any notice or communication will be sent to the most recently advised contact details and subject to clauses 13.3 and 13.4, will be taken to be received.

### **14. Defined terms and interpretation**

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#### **Definitions in the Dictionary**

- 14.1. A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
  - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

#### **Interpretation**

- 14.2. Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

## Attachment C: MidOcean Undertaking

Executed as an Undertaking

Executed by **MidOcean Energy Holdings Pty Ltd** (ACN 662 741 415) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director	Signature of a director/company secretary
Name of director (print)	Name of director/company secretary (print)
Date	Date

## Attachment C: MidOcean Undertaking

Executed by **MidOcean Energy Parent Pty Ltd** (ACN 666 688 786) pursuant to section 127(1) of the *Corporations Act 2001* by:

Signature of director	Signature of a director/company secretary
Name of director (print)	Name of director/company secretary (print)
Date	Date

## Attachment C: MidOcean Undertaking

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

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Date

and signed on behalf of the Commission:

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Chair

---

Date

## Attachment C: MidOcean Undertaking

### Schedule 1 – Dictionary and interpretation

#### 1. Dictionary

---

**ACCC** means the Australian Competition and Consumer Commission.

**Application** has the meaning given to it in clause 2.4 of this Undertaking.

**BGTF** means the Brookfield Global Transition Fund.

**Brookfield LP** means Eos Aggregator (Bermuda) L.P.

**Business Day** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**CCA** means the *Competition and Consumer Act 2010* (Cth).

**Change of Control** means:

- (a) the assignment or other transfer of the legal or beneficial ownership of some or all of MidOcean Energy's interest in QCLNG to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- (b) the sale or transfer of any assets necessary, or which may be necessary, to enable the MidOcean Parties to continue to comply with this Undertaking in its entirety.

**Commencement Date** has the meaning given to it in clause 3 of this Undertaking.

**Control Date** means the later of the date of completion of the Proposed Acquisition, or the date of completion of MidOcean Energy's acquisition of minority interests in the Gorgon, Pluto, Ichthys and QCLNG projects from the Tokyo Gas Group.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Disclosed Sensitive Information** has the meaning given in clause 5.3 of this Undertaking.

**East Coast Gas Customer** means a purchaser or potential purchaser of natural gas (which has not undergone liquefaction to produce LNG) at a delivery point connected to the pipeline network in Queensland, New South Wales, Victoria, Tasmania, South Australia or the Australian Capital Territory or Northern Territory.

**MidOcean BidCo** means MidOcean Reef Bidco Pty Ltd.

**MidOcean Energy** means MidOcean Energy Holdings Pty. Ltd.

**MidOcean HoldCo** means MidOcean Energy Parent Pty. Ltd.

**MidOcean Parties** has the meaning given to it in clause 1 of this Undertaking.

**On-Sale Acquisition** has the meaning given to it in clause 2.5(b) of this Undertaking.

**Origin** means Origin Energy Limited and its Related Bodies Corporate.

**Origin Energy Markets** means Origin Subsidiaries and assets that do not comprise the Origin Integrated Gas Business and that will not be owned by MidOcean BidCo following the Proposed Acquisition.

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**Origin Integrated Gas Business** means the upstream gas assets of Origin that will be acquired by MidOcean BidCo pursuant to the Proposed Acquisition, and include the Origin interests in Australia Pacific LNG.

**Proposed Acquisition** has the meaning given to it in clause 2.5 of this Undertaking.

**Public Mergers Register** means the ACCC's public register of merger clearances, available at [www.accc.gov.au](http://www.accc.gov.au).

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://www.accc.gov.au).

**QCLNG** means the Queensland Curtis LNG project.

**QGC** means QGC Pty Limited (currently a wholly owned subsidiary of Shell), the operator of the QCLNG.

**QCLNG Arrangements** means:

- (a) **[Redacted – Confidential]**;
- (b) gas sales agreements under which participants in QCLNG sell gas to Walloons; and
- (c) joint operating agreements under which participants in QCLNG own petroleum tenements and produce gas for liquefaction and export and/or sales to East Coast Gas Customers.

**Reasons for Determination** means the ACCC's reasons for determination in respect of the Application.

**Related Bodies Corporate** has the meaning given to it by section 50 of the *Corporations Act 2001* (Cth).

**Scheme Acquisition** has the meaning given to it in clause 2.5(a) of this Undertaking.

**Self Report** has the meaning given to it in clause 6.1 of this Undertaking.

**Undertaking** is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the CCA.

**Walloons** means Walloons Coal Seam Gas Pty Ltd, 75% owned by QGC.

**Walloons East Coast Gas Sensitive Information** has the meaning given to it in clause 5.1 of this Undertaking.

## 2. Interpretation

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In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;



## Attachment C: MidOcean Undertaking

- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
  - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and

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- (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, the MidOcean Parties will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
  - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.