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27 July 2023

Mr Daniel McCracken-Hewson
General Manager | Merger Investigations Branch
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000

By Email

Dear Mr McCracken-Hewson

Brookfield and MidOcean application for merger authorisation for proposed acquisition of Origin Energy – transparency letter

We refer to your letter of 19 July 2023 describing the lines of inquiry the ACCC is undertaking (*Transparency Letter*).

The Applicants' response to the Transparency Letter is provided in **Annexure A** to this letter.

The Applicants request that the information highlighted in Annexure A be excluded from the public register. A schedule of confidentiality claim justifications is enclosed.

A public version of Annexure A is also enclosed for the purposes of publication on the ACCC's register.

Yours sincerely



Fiona Crosbie

Chair
Allens



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ADOS 806082769v1 121124281 27.7.2023

Annexure A

Brookfield LP and MidOcean Energy acquisition of Origin Energy Limited

Response by the Applicants to the transparency letter dated 19 July 2023

Introduction

On 5 June 2023, Brookfield LP and MidOcean BidCo applied for merger authorisation in connection with their proposed acquisition of Origin Energy Limited (the **Application**). On 19 July 2023, the ACCC published a transparency letter (**Transparency Letter**). This document sets out the Applicants' response to the Transparency Letter. Unless otherwise stated, capitalised terms used in this response have the same meaning as in the Application.

Corporate structure of relevant entities

Brookfield asset management business and its business units

- 1 The ACCC requests the Applicants give the ACCC such additional information that the Applicants consider is relevant to the ACCC's determination, regarding:
- the extent to which there is common control, direction or influence across BAM's Renewable Power and Transition and Infrastructure business units and across BGTF/BEP and BIF IV and BSIP
 - the impact of BAM management of both the Renewable Power and Transition business unit and the Infrastructure business unit. We note that BAM ULC is directly financially incentivised to maximise the returns of each of its business units through its earning of carried interest
 - the extent to which competitively sensitive information may move between Brookfield funds and business units. We note that there appears to be at least some movement of personnel between BAM business units, including secondments of staff between AusNet and Brookfield. Additionally, we would expect that BAM would interact with the board members of all portfolio entities on an ongoing basis as part of monitoring their investments.

A The extent to which there is common control, direction or influence

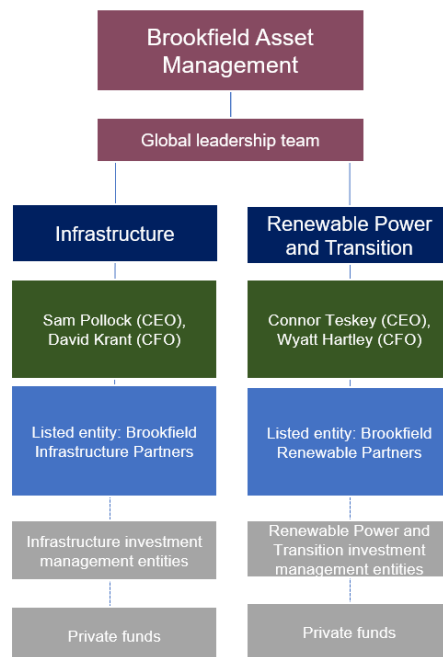
- 1.1 The ACCC has indicated that it wishes to test the extent to which Brookfield's ownership structures mitigate any potential competition concerns associated with vertical integration that could arise as a result of the Proposed Acquisition.

Separation of business units

- 1.2 The Brookfield Group, including BAM and the investment management business, is organised by business unit. This structure is illustrated in the figure below. Each of the Infrastructure business unit and Renewable Power and Transition business unit has:
- (a) its own CEO, CFO, management team and operating personnel dedicated to that business unit;
 - (b) a separate listed entity pursuant to which investors can obtain exposure to that business unit through public equity markets;
 - (c) private funds with mandates relevant to the business unit; and

Public Version

- (d) investment management entities (each of which is an affiliate of BAM) appointed to manage the business unit's interests in its private funds and portfolio companies.



- 1.3 In Australia there is practical and physical separation between the Infrastructure and Renewable Power and Transition business units. This is explained in sections 1.8.4 and 4.2 of the Application. In summary, the relevant business units are located on different floors of Brookfield's offices and have separate electronic drives. Brookfield implements additional confidentiality and other restrictions where required to meet contractual or regulatory obligations.
- 1.4 By way of example, the Brookfield Infrastructure business unit has a dedicated CEO and its own employees in Australia that work only on Infrastructure investments. Investments draw on capital from Brookfield's Infrastructure funds such as the BIF series (I to V) or BSIP. Personnel that work for the Brookfield Renewable Power and Transition business unit are not involved in Infrastructure investments, and are not able to draw on capital in Brookfield's Infrastructure funds, unless such funds are specifically raised to accommodate both Infrastructure investments and Renewable Power and Transition investments, such as the BIF series. In these cases, Infrastructure investments are managed exclusively by the Infrastructure business unit and Renewable Power and Transition investments are managed exclusively by the Renewable Power and Transition business unit. It is important to remember that the funds are simply a mechanism to connect investment capital with where capital deployment is required (ie, investments). The funds do not operate as single unified entities in their own right. For example, a BIF series fund such as BIF IV does not have a board that meets to consider or make decisions in respect of all fund investments. Fund investments are managed separately by the relevant business unit.
- 1.5 The overarching strategy and direction of each business unit is driven by its CEO. The management team in each jurisdiction is responsible for the day to day operation of that business unit.
- 1.6 There is only a small team of very senior executives who sit across all business units. In respect of BAM, there is a global CEO (Bruce Flatt), Chair (Mark Carney), CFO (Bahir Manios) as well as regional leadership such as a Regional Head of Asia Pacific (Stewart Upson). The global executive team of BAM, subject to approved policies and direction by the board, manages the business and affairs of BAM and oversees the execution of its strategic plan. In addition, the CEO

(Bruce Flatt) is responsible for (among other things): presenting to the Board for approval an annual strategic plan for BAM; presenting to the board for approval an annual assessment of senior management and succession plans; setting the direction for BAM's approach to environmental, social and governance within its corporate and asset management activities; and, together with the CFO, establishing and maintaining controls and procedures appropriate to ensure the accuracy and integrity of BAM's financial reporting and public disclosures. Stewart Upson's primary responsibility is to provide regional oversight of Brookfield's business units and large-scale transactions in Australia, New Zealand, China, Korea, Japan, Singapore and Hong Kong across each of its four main business groups - Infrastructure, Renewable Power, Private Equity and Real Estate. Stewart also oversees the Asia Pacific's regional functional groups (eg, Human Resources, Communications, Treasury etc.). Stewart is not generally involved in the day-to-day operation of portfolio companies. His role primarily involves providing strategic oversight and input into potential material acquisitions, divestments and other investment decisions, before they are presented to Brookfield's Investment Committee. In respect of the Proposed Acquisition, Stewart has been more involved than he typically would be due to its scale, the complexity of negotiations, and its high-profile and public nature (eg, by having involvement in discussions with the senior leadership team of Origin regarding the Proposed Acquisition).

Separation and management of investments

- 1.7 Each Brookfield investment sits within a specific business unit. Investments made through BGTF are managed by Renewable Power and Transition business unit, and infrastructure investments made through BIF IV and BSIP are managed by the Infrastructure business unit. The investment manager entities for funds are separate affiliates of BAM. The investment manager of BGTF is Brookfield Renewable Energy Group, LLC. This entity sits within the Brookfield Renewable Power and Transition business unit and the personnel performing this investment management function hold roles within that business unit. The executives who perform the role of investment management and oversight are employed within the relevant business unit. Infrastructure executives oversee Infrastructure investments and Renewable Power and Transition executives oversee Renewable Power and Transition investments, such as any investment made via BGTF. In each case the day-to-day management of portfolio companies is undertaken by the portfolio company management, reporting to the portfolio company's CEO. The input of Brookfield executives normally takes the form of board involvement. Each portfolio company has its own separate board, to whom the portfolio company CEO and management team reports. The portfolio company board provides strategic oversight of management and makes decisions in respect of any matter that exceeds the CEO's delegation. In respect of portfolio company board appointments, only infrastructure executives are appointed to infrastructure portfolio companies and only executives from the Renewable Power and Transition business unit are appointed to Renewable Power and Transition portfolio companies.
- 1.8 Investments made by each of Brookfield's funds are approved by an Investment Committee. There is an Investment Committee for each fund. There is some overlap in the individuals that sit on these Investment Committees. The principal role of each 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. The Investment Committees do not make decisions regarding the day-to-day management of managed funds or portfolio companies and will not make decisions regarding AusNet and Origin Energy Markets' business as usual activities. Day-to-day decision making authority is delegated to the management team of the relevant portfolio company. For example, as explained at paragraph 502 of the Application, the AusNet CEO has significant operational authority to take decisions on key business activities up to certain thresholds.

Limited common control, direction or influence across Brookfield's business units and funds

- 1.9 In summary, there is very limited common control, direction or influence across both Brookfield's Renewable Power and Transition and Infrastructure business units and their respective funds. Each of Brookfield's business units and their respective funds operate in two separate silos, with a separate CEO, management team, and investment management personnel.
- 1.10 There is a limited level of commonality at a very senior level, including some overlap between personnel that sit on one or more Investment Committees and senior executives who are appointed to oversee a particular region (eg, Stewart Upson, the CEO of Brookfield's Asia Pacific operations). These senior executives would have no involvement in day-to-day activities at either AusNet or Origin Energy Markets.
- 1.11 The only role of personnel that sit on an Investment Committee is to make the ultimate decision about whether or not to approve: (a) investments recommended by the relevant Brookfield managed funds that require additional capital to be provided by the relevant fund; and (b) divestments of portfolio companies owned by the relevant funds. The personnel that sit on an Investment Committee are not involved in any day-to-day business matters of Brookfield's business units, managed funds or its portfolio companies. The Investment Committee only ever meets when there is an investment or divestment decision to be made. That is, a decision that results in the expenditure or return of investment capital.
- 1.12 In relation to Stewart Upson's role as the CEO of Brookfield's Asia Pacific operations, as outlined above, his primary responsibility is to provide regional oversight of Brookfield's business units and large scale transactions across the business units. Stewart is not generally involved in the day-to-day operation of portfolio companies, his role primarily involves providing strategic oversight and input into potential material acquisitions, divestments, and other investment decisions, before they are presented to Brookfield's Investment Committee.
- 1.13 Finally, some personnel employed by BAM in support functions may provide services to more than one business unit. These include compliance, tax, treasury, finance, insurance, IT, HR, and technical. These personnel provide specialist services. They are not directly involved in day-to-day management of Brookfield's business units, managed funds or portfolio companies nor do they control, direct or influence the strategy of any of Brookfield's business units, managed funds or portfolio companies.

B Impact of BAM management of both the Renewable Power and Transition business unit and the Infrastructure business unit

- 1.14 As outlined in paragraphs 1.2 to 1.6 above, BAM is organised by business unit. An investment that sits within the Infrastructure business unit will be managed by an investment management team from the Infrastructure business unit and an investment that sits within Renewable Power and Transition business unit will be managed by an investment management team from the Renewable Power and Transition business unit.
- 1.15 **Confidential to Brookfield.**

C Movement of competitively sensitive information and personnel between Brookfield funds and business units

Movement of staff between business units

- 1.16 The ACCC would like to understand the movement of information between Brookfield funds and business units.
- 1.17 As outlined in sections 1.8.4 and 4.2 of the Application, each of Brookfield's funds sits within a specific business unit at Brookfield. Each business unit essentially operates independently on a

day-to-day basis, and is managed by personnel dedicated to that specific business unit. As detailed in paragraphs 1.2 and 1.3 above, each business unit also has its own CEO, and generally carries out its activities via dedicated investment management entities (which are affiliates of BAM). In Australia, the relevant business units are located on different floors of Brookfield's offices and have separate electronic drives. This creates practical and physical separation between the various Brookfield business units and their respective funds to prevent information from being shared between them.

- 1.18 In some circumstances personnel may transfer from one Brookfield business unit to another (for example, following a promotion) at which time that employee no longer has access to information from the business unit they previously worked within.

Secondments to portfolio companies

- 1.19 While Brookfield does, on occasion, second staff to portfolio companies, any secondments take place within the relevant business unit. Brookfield usually does not second personnel to portfolio companies outside of that person's business unit. For example, Brookfield would not second an employee from the Renewable Power and Transition business unit to a portfolio company managed by the Infrastructure business unit.

BAM management of portfolio companies and structural separation of competitively sensitive information

- 1.20 As explained above, the Brookfield Group including BAM and the investment management business is organised by business unit. Affiliates of BAM perform investment management roles on behalf of the funds. Like the structure of the Brookfield Group, a portfolio company that is owned by a fund in one business unit will also be managed by an affiliate of BAM and an investment management team that sits within that same business unit. This means that any interaction that BAM has with a portfolio company board member will be carried out by the relevant business unit. To illustrate:

- (a) Brookfield Infrastructure, through BSIP and BIP, holds a 45.4% interest in AusNet;
- (b) Brookfield Asset Management PIC Canada, L.P (**BAMPIC**), an affiliate of BAM, is the appointed investment manager for BSIP's investments;
- (c) BAMPIC and the relevant staff performing that role sit within the Infrastructure business unit;
- (d) the appointed directors to the board of AusNet Holdings are appointed by, and from, the Infrastructure business unit; and
- (e) any engagement between the investment manager and the board of AusNet Holdings is by personnel from the Infrastructure business unit.

- 1.21 Brookfield's portfolio companies are managed day-to-day at the portfolio company level by a board usually comprising management. For example, BAMPIC, as the appointed manager of Brookfield's interest in AusNet is able to appoint representatives to the AusNet Holdings board. AusNet Holdings approves the annual budget and business plan but delegates day-to-day management to the board of AusNet (which is comprised of management).

- 1.22 This structure means that information received by Brookfield's representatives relates to the setting of the budget and business plan and other information necessary to allow Brookfield to monitor its investment in a portfolio company. Brookfield does not receive detailed information about day-to-day operations and is not involved in business-as-usual decision making. This is explained in further detail at section 4.2 of the Application. For example, in relation to AusNet, Brookfield is only involved in portfolio company matters when a matter exceeds the AusNet CEO's delegated authority. To illustrate, in relation to connection applications, Brookfield is only

involved if the cost of establishing a connection would exceed the AusNet CEO's delegated authority. In that case, the decision to commit capital to the connection would be considered by the AusNet board. If AusNet is unable to fund the connection, the Brookfield nominee directors would seek Investment Committee approval for Brookfield's share of the capital required. Otherwise, the only team senior members of Brookfield will be involved in portfolio company matters is where a material issue has arisen (eg, a material dispute, an adverse deviation from a business place, adverse financial performance). In those circumstances, the issue will be reported to the regional CEO and potentially the business unit global CEO for strategic input.

- 1.23 Where information does flow from a portfolio company to Brookfield, that information is only received and accessible by personnel that sit within the relevant business unit responsible for managing Brookfield's interest in the portfolio company. For example, AusNet may provide certain information to personnel within Brookfield's Infrastructure business unit responsible for the managing BSIP's interest in AusNet. As noted above, the Infrastructure business unit is located on a different floor to the Renewable Power and Transition business unit in Brookfield's offices, and its information is stored on separate electronic drives. In practice, this means that personnel from the Renewable Power and Transition business unit are unable to access any information that has flowed from AusNet to the Brookfield Infrastructure business unit.
- 1.24 To provide additional comfort about the structural separation of competitively sensitive information as between Brookfield business units, Brookfield has offered to provide to the ACCC a section 87B undertaking by which Brookfield would commit to formally ring-fencing information flows between Brookfield's business units, AusNet and Origin Energy Markets.

Temasek

2 The ACCC requests the Applicants give the ACCC such additional information that the Applicants consider is relevant to the ACCC's determination regarding the extent to which Temasek would be able to facilitate the sharing of competitively sensitive information between Jemena and Origin Energy Markets.

- 2.1 The ACCC wishes to test the extent to which, if the Proposed Acquisition went ahead, Temasek's interests in both Jemena and Origin Energy Markets could raise competition issues associated with vertical integration. The ACCC has requested that the Applicants provide the ACCC with additional information regarding the extent to which Temasek would be able to facilitate the sharing of competitively sensitive information between Jemena and Origin Energy Markets.
- 2.2 The Applicants assume that the ACCC is concerned with whether Jemena would share competitively sensitive information with Origin Energy Markets that would provide Origin Energy Markets with a competitive advantage in the retail supply of electricity and gas (ie, leveraging any market power Jemena may have in a transmission or distribution market to lessen competition in a retail market). This is not possible for three key reasons:
- (a) we understand that Temasek is unlikely to receive any competitively sensitive information from Jemena that would be relevant to Origin Energy Markets;
 - (b) even if it did receive any competitively sensitive information from Jemena, no governance structures will be created through which Temasek might provide any such competitively sensitive information to Origin Energy Markets; and
 - (c) the above is reinforced by ring-fencing rules particularly in the case of electricity. Furthermore, Jemena's assets are regulated in such a way that information sharing would not provide any meaningful advantage to Origin Energy Markets and would not substantially lessen competition.

A Temasek is unlikely to receive any competitively sensitive information from Jemena

- 2.3 SP Group operates independently from Temasek. The Singapore Power Limited Board has 9 members, 7 of whom are independent. Temasek has appointed one representative to the Singapore Power Limited Board, who is the Chair of Singapore Power Limited Board (Ms Leong Wai Leng).
- 2.4 As a matter of long-standing governance policy, Temasek portfolio companies are guided and managed by their respective boards and management teams and Temasek does not direct the business decisions or operations of its portfolio companies, including SP Group and its subsidiaries. Temasek representatives on the boards of portfolio companies owe fiduciary duties to those companies.
- 2.5 SP Group has a 40% interest in Jemena (which in turn has a 50% interest in Evoenergy and a 34% interest in United Energy). Temasek does not have any representation on the board of Jemena. As indicated previously in the response from Temasek to the ACCC dated 30 June 2023 (RFI Response), SP Group, through Singapore Power International (SPI), **Confidential to Temasek**.
- 2.6 As a shareholder of SP Group, Temasek receives shareholder updates from SP Group for the purposes of tracking the performance of its investments. **Confidential to Temasek**.
- 2.7 As Temasek's interest in Jemena is indirect in nature, any shareholder updates provided to Temasek by SP Group relating to Jemena occurs on an infrequent basis. **Confidential to Temasek**. We understand Temasek is unlikely to receive any competitively sensitive information from Jemena that would be relevant to Origin Energy Markets.

B There will be no governance structures through which Temasek could disclose Jemena information to Origin

- 2.8 No governance structures will be created through which Temasek might share competitively sensitive information from Jemena with Origin Energy Markets.
- 2.9 **First**, as mentioned above, as a shareholder of SP Group, Temasek receives infrequent and limited information about Jemena.
- 2.10 **Second**, there will be no overlapping directors between SP Group and Brookfield LP that would facilitate information sharing. Temasek will have a right to appoint one director to the board of Brookfield LP. **Confidential to Temasek**.
- 2.11 In respect of matters pertaining to the shareholder's interests of Temasek, portfolio companies engage Temasek through shareholder channels. As a shareholder of SP Group, Temasek may receive information on major industry and business updates, strategy, and financials of Jemena as part of SP Group's regular shareholder updates. Temasek management personnel may from time to time, receive updates in relation to these investments, for the purpose of investment tracking and performance management. These personnel do not have strategic decision-making responsibilities for these portfolio interests. Consistent with its long-standing governance policy, Temasek portfolio companies are guided and managed by their respective boards and management teams, and Temasek does not direct the business decisions or operations of its portfolio companies.
- 2.12 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. Further, it is expected that the interaction with Origin Energy Markets will be primarily managed by Brookfield LP.
- 2.13 **Third**, the Origin Energy Markets business will be managed day-to-day at the portfolio company level. 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. This operating structure means that even though Temasek will appoint one director to the board of Brookfield LP, its involvement is limited to the setting of a yearly budget and business plan approvals and otherwise, the monitoring of its investment.

C Regulatory regime

Electricity distribution

2.14 The above is reinforced by the DRFG.

Clause 4.3.1 provides 'a DNSP must:

(a) keep ring-fenced information confidential; and

(b) only use ring-fenced information for the purpose for which it was acquired or generated.'

'ring-fenced information' means electricity information, acquired or generated by a DNSP in connection with its provision of direct control services, that is not already publicly available, and includes electricity information: that the DNSP derives from that information; or provided to the DNSP by or in relation to a customer or prospective customer of direct control services.'

'electricity information' means information about electricity networks, electricity customers or electricity services, other than: aggregated financial information; or other service performance information; that does not relate to an identifiable customer or class of customer.'

2.15 These rules would further prevent the disclosure of competitively sensitive information about Jemena's electricity distribution networks to Temasek or Origin Energy Markets (via Temasek).

2.16 Furthermore, Jemena's distribution assets in New South Wales, Victoria and the Australian Capital Territory are subject to full economic regulation under the National Electricity Rules (**NER**). As explained in further in Chapter 12 to the Application and in response to question 5 in relation to AusNet distribution, there is no ability for Jemena to engage in price or non-price discrimination against non-Origin retailers in any event.

Gas transmission and distribution

2.17 There is also no potential for discrimination arising from Jemena's gas transmission and distribution assets, given the regulation of these assets as described in chapter 12 of the Application

Applicable regulatory regimes

- 3 The ACCC requests the Applicants give the ACCC such additional information that the Applicants consider is relevant to the ACCC's determination, regarding:
- the extent to which non-compliance with the regulations (in particular, the non-discrimination regulations) is able to be detected despite the complexity of network operations and design, and the information asymmetries between the network service provider and the relevant regulatory body, and how such detection could be enhanced
 - the extent to which existing dispute resolution mechanisms prevent or resolve issues relating to non-compliance, and in particular discrimination, from occurring. The NER and the modified Victorian rules provide alternative dispute resolution mechanisms, however the ACCC notes that neither mechanism is ideal and could result in a jurisdiction "stand off".

A Extent to which AER can detect non-compliance

TRFG specifically updated to enhance AER oversight

- 3.1 The AER specifically considered its ability to detect non-compliance by TNSPs in the context of both complex transmission network operations and design and information asymmetries between TNSPs and the AER, in its most recent review of the TRFG¹ (*TRFG Review*). The TRFG Review culminated in the publication of the current TRFG on 1 March 2023. Significant reforms were made to the TRFG to ensure that the AER now has all the necessary tools to detect non-compliance.
- 3.2 A key finding of the TRFG Review was that the AER did not have sufficient oversight of TNSP behaviour because the then TRFG imposed only minimal compliance reporting obligations.² The AER observed that without robust compliance reporting, it was difficult for the AER to detect and investigate TNSP breaches of non-discrimination regulations – for example, to distinguish favourable treatment from 'normal' network investment or constraint management.³ The AER was concerned that, given the absence of mandatory compliance reporting, low level breaches of the TRFG could continue on an ongoing basis without a significant wholesale market price event to trigger an AER investigation.⁴
- 3.3 In order to address these issues and enable the AER to better detect non-compliance with the TRFG (including the non-discrimination regulations), the AER introduced a requirement in the TRFG for each TNSP to prepare and submit to the AER an annual TRFG compliance report.⁵ An equivalent mechanism has been successfully deployed by the AER in the distribution context through the DRFG.

¹ The AER's review of the TRFG was initiated in 2019 paused during COVID, and resumed in 2022. As part of the Review, the AER published a Discussion Paper on 15 November 2019, an Issues Paper on 31 May 2022, a draft guideline and explanatory statement on 4 November 2022, and a final guideline and explanatory statement on 1 March 2023.

² AER, Ring-fencing guideline (electricity transmission) – Discussion Paper – 15 November 2019, page 9.

³ AER, Ring-fencing guideline (electricity transmission) – Discussion Paper – 15 November 2019, page 31.

⁴ AER, Ring-fencing guideline (electricity transmission) – Discussion Paper – 15 November 2019, page 31.

⁵ TRFG, clause 6.2.1.

- 3.4 The new annual reporting mechanism strengthens the AER's ability to detect non-compliance in the following key ways:
- (a) the requirement to submit an annual report effectively mandates automatic and constant self-reporting, whereas the previous compliance reporting mechanism had to be specifically invoked by the AER (and had rarely been used);
 - (b) the annual report is subject to independent audit – specifically, the annual report must be accompanied by an assessment by a suitably qualified auditor of the TNSP's compliance with each provision of the TRFG;⁶
 - (c) the annual report may be published by the AER, providing third parties with visibility to raise a complaint;
 - (d) the AER provides a 'best practice manual' to ensure that the annual reports submitted by TNSPs are sufficiently detailed and rigorous; and
 - (e) the AER has successfully deployed an equivalent regime in the DRFG.
- 3.5 In addition to the annual report requirement, the TRFG also requires TNSPs to:
- (a) separately notify the AER in writing within 15 business days of becoming aware of a breach of its obligations under the TRFG (except in relation to this obligation itself and the production of the annual compliance report);⁷ and
 - (b) upon request by the AER, provide a written response to a complaint or concern the AER raises with the TNSP about its compliance with the TRFG.⁸

Higher prospect of detection and complaint in Victoria compared with other NEM jurisdictions

- 3.6 The prospect of detection and complaint to the AER is likely higher in Victoria than elsewhere in the NEM because of the role of AEMO. In relation to connections, for example, AEMO is a central participant in negotiations in relation to all new connections. If there was discriminatory treatment of a particular non-Origin generator by AusNet, this is likely to be highly apparent to AEMO, in particular because it has visibility over AusNet's treatment of all generators seeking connection. Both AEMO and the affected generator could complain to the AER if they perceived discrimination occurring.

How detection could be further enhanced

- 3.7 In undertaking the TRFG Review, the AER also specifically considered whether the TRFG should be updated to include additional mechanisms to enhance detection. For this purpose, the AER considered not only the approach taken in the DRFG but also the submissions received from stakeholders who suggested further measures.
- 3.8 For example, stakeholders suggested that the AER should develop a process for external parties to report breaches, and that the AER should be given enhanced investigative powers to allow it to forensically examine a TNSP business when reports of non-compliance are received.
- 3.9 However, the AER declined to adopt these additional measures on the basis that audited self-reporting of breaches is sufficient and strikes an appropriate balance between AER oversight and the costs of compliance for TNSPs.
- 3.10 The AER also pointed out that if external parties have concerns or complaints (which could arise through direct dealings with the relevant TNSP or through the annual reporting, as noted above), they already have the ability to request the AER to investigate these at any time.

⁶ AER, Ring-fencing guideline (electricity transmission) – Final Explanatory Statement – 1 March 2023, pages xi, 34, 55.

⁷ TRFG, clause 6.3.

⁸ TRFG, clause 6.4.

Context makes discrimination unlikely in any event

- 3.11 There is very limited ability for AusNet to discriminate against non-Origin generators in any event due to a combination of the regulatory regime (notably in relation to pricing, connection, renewal and maintenance information) and the role of AEMO in Victoria (particularly in relation to network planning, augmentation and connection).

B Extent to which dispute resolution mechanisms prevent or resolve non-compliance

AER has broad toolkit to prevent or resolve non-compliance

- 3.12 The AER can access information from a wide range of sources to monitor compliance and identify and investigate potential breaches of the TRFG. In addition to the enhanced annual reporting and audit framework introduced into the TRFG and described in detail above, the AER may also act on information from consumers, regulated businesses and other stakeholders; market data; and information requests and targeted reviews.⁹

- 3.13 In relation to enforcement where non-compliance is detected, the AER has a broad toolkit of measures it may use to ensure compliance with the TRFG and to respond to and address potential non-compliance, including:¹⁰

- (a) **Infringement Notices:** the AER can issue infringement notices where it considers that a breach of a civil penalty provision has been committed. Although the obligation to comply with the TRFG is not currently a civil penalty provision, the AER has stated that it intends to propose to the Energy Ministers that compliance with the TRFG be classified as a civil penalty provision under the NER – specifically, the AER intends to request that:
- (i) compliance with the transmission ring-fencing guidelines be added to the list of Tier 1 civil penalty provisions in the National Electricity Regulations; and
 - (ii) a note be added to the relevant NER clause 6A.21.1 identifying it as a civil penalty provision.¹¹

The AER expects its request will be accepted by the Energy Ministers given that in 2021 the Energy Ministers agreed a 'Decision Matrix and Concepts Table' specifically for the purposes of classifying civil penalty provisions.¹² The tool was used to classify, among other things, compliance with the DRFG as a Tier 1 civil penalty provision, meaning non-compliance with the DRFG attracts the highest financial penalty available. The rationale for this classification was that a breach of the DRFG would result in unacceptable market participant behaviour and may result in financial gain to the contravener. The AER considers that a breach of the TRFG similarly warrants a Tier 1 penalty.

- (b) **Court Enforceable Undertakings:** the AER can accept a court enforceable undertaking from a TNSP for alleged breaches of the NER, including the TRFG.¹³
- (c) **Civil Proceedings:** the AER can institute and conduct civil proceedings for alleged breaches of the NER, including the TRFG.¹⁴ The AER may seek declarations in relation to the breaches as well as a range of orders, including to undertake an action to cease or remedy the breach, implement a compliance program, perform community service or release a public notice. The AER can also apply for an injunction to restrain a party from engaging in the conduct or require action to be taken.

⁹ For further detail, please refer to paragraph 1100 of the Submission.

¹⁰ For further detail, please refer to paragraph 1101 of the Submission.

¹¹ AER, Ring-fencing guideline (electricity transmission) – Final Explanatory Statement – 1 March 2023, pages 63-64.

¹² Energy Ministers, *Decision Matrix for tiering classification of civil penalty provisions under the National Energy Laws – Final*, January 2021.

¹³ NEL s 59A.

¹⁴ NEL s 59.

AER toolkit is further augmented by dispute resolution mechanisms

- 3.14 In addition to complaining to the AER, an aggrieved market participant can invoke the dispute resolution mechanisms under the NER. The threat of arbitration may prevent discrimination in the first place or, if arbitration is necessary, remedy any discrimination.
- 3.15 In Victoria, two dispute resolution processes are available: a commercial arbitration regime (grandfathered in Victoria by amendments made to the NEM in 2017 which preserve Chapter 6A from version 109 of the NER), and a more prescriptive dispute resolution process set out in Chapter 8 of the NER. This means that in Victoria, disputes in relation to negotiated transmission services and prescribed transmission services may be dealt with through either Chapter 6A or Chapter 8, at the discretion of the parties.
- 3.16 The framework for commercial arbitration for disputes about terms and conditions of access for prescribed and negotiated transmission services in Victoria provides:¹⁵
- (a) on receiving notification of a transmission service access dispute, the AER must appoint a commercial arbitrator, having first requested that the parties to the dispute each nominate two persons for appointment as the commercial arbitrator;
 - (b) the arbitrator must conduct itself in accordance with the powers accorded to it under clause 6A.30.4 in relation to prescribed transmission services and negotiated transmission services;
 - (c) the commercial arbitrator may at any time terminate the proceedings without making a decision if it considers that:¹⁶
 - (i) the dispute is misconceived or lacking in substance;
 - (ii) the notification of the dispute to the AER was vexatious; or
 - (iii) the dispute has been notified prematurely or unreasonably.
 - (d) the arbitrator must determine the dispute as quickly as possible, and in any case within 30 business days after the dispute is referred to the commercial arbitrator;
 - (e) where the provider and the applicant reach an agreement (whether or not the matter is before a commercial arbitrator), the parties may execute a written agreement recording their resolution of that dispute;
 - (f) the commercial arbitrator must give its determination, together with reasons, to the provider, applicant and the AER for publication; and
 - (g) the agreement under paragraph (e) and determination under paragraph (f) are binding on the provider and the applicant. Failure to comply is a breach of the NER in respect of which the AER may take action in accordance with the NEL.
- 3.17 Part B of chapter 8 of the NER sets out the framework for dispute resolution and prescribes the disputes to which it applies, including disputes about the two proposed access arrangements or connection agreements of a connection applicant for connection and access to the declared transmission system.¹⁷ Under the chapter 8 framework:
- (a) AER must appoint a Dispute Resolution Adviser to perform a number of functions prescribed in Rule 8.2, including determining the most appropriate means for resolving the dispute by reference to specified principles, which include that the dispute resolution

¹⁵ Part K of version 109 of chapter 6A. For further detail, please refer to paragraph 47 of Annexure A to the Submission.

¹⁶ NER, clause 6A.30.5(d).

¹⁷ For further detail, please refer to paragraph 48 of Annexure A to the Submission.

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regime should be simple, quick, inexpensive, observe the rules of natural justice, and place emphasis on conflict avoidance¹⁸;

- (b) each registered participant (defined to include connection applicants) and AEMO must each adopt and implement a dispute management system to govern the administration of disputes between them;
 - (c) a party may activate Stage 1 of the chapter 8 dispute resolution process by serving a referral notice on the other party through their respective dispute management systems within 60 days of the disputed conduct or decision, which triggers a requirement on the parties to follow certain steps and timeframes, including meeting within five business days to discuss the dispute;
 - (d) if the dispute is not resolved within 20 business days of the issue of the referral notice, the serving party may refer the matter to the dispute resolution adviser appointed by AER, which activates Stage 2 of the chapter 8 dispute resolution process and which requires the dispute resolution adviser to attempt to resolve the dispute, or if the parties do not agree to the adviser attempting to resolve the dispute, to refer the dispute to a dispute resolution panel established by the dispute resolution adviser; and
 - (e) a determination of the dispute resolution panel is binding on the parties. A registered participant must comply with a determination of the panel, and failure to do so is a breach of the NER in respect of which AER may take action in accordance with the NEL.
- 3.18 The availability of these dispute resolution mechanisms, each of which can be invoked by an aggrieved generator, entail time-limited processes, and culminate in a binding decision, holds the parties to account in their dealings with one another, including in negotiating connection applications in good faith, as required by the NER.¹⁹
- 3.19 It is conceivable that one party to a dispute might trigger one mechanism and another party to the dispute the other mechanism. We assume this is what the ACCC means by a 'jurisdiction stand-off'. In practice this seems unlikely. If it did occur Chapter 6A and Chapter 8 each confer broad powers on the initial decision-maker that could be used to address this situation. Specifically, the powers of the commercial arbitrator (including the power to terminate proceedings where it considers that the notification of the dispute was vexatious, premature or unreasonable) under Chapter 6A and the powers of the Dispute Resolution Adviser (including the power to determine the most appropriate alternative dispute resolution procedures) under Chapter 8, each described in more detail above, would enable the initial decision-maker to require the parties to pursue a decision pursuant to one mechanism only.

¹⁸ NER, clauses 8.2.5(c)(1) and 8.2.1(e).

¹⁹ For further detail, please refer to paragraphs 41-48 of Annexure A to the Submission.

Competition issues associated with vertical integration of electricity generation and transmission

Operation of AusNet's transmission network

4	<p>The ACCC requests the Applicants give the ACCC such additional information that is relevant to the ACCC’s determination, regarding:</p> <ul style="list-style-type: none"> • AusNet’s ability to favour or make the process easier for connection of Origin’s generators, or to delay or frustrate the process for Origin’s rivals. • AusNet’s ability to operate the transmission network in a way that would advantage current or future Origin generators. • Why Brookfield would not have, or would not act upon, the incentive to use AusNet’s monopoly position in transmission in Victoria to advantage Origin.
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A Ability to favour connection of Origin generators versus Origin's rivals – general comments

4.1 The Applicants acknowledge that the connection process can currently be time consuming, principally because of the need for AEMO to conduct detailed modelling in an environment where the energy system is in transition. The connection process will, however, be unaffected by the Proposed Acquisition. In particular, there is no potential for AusNet to discriminate against non-Origin generators in relation to connections, for 5 key reasons.

Connection Applications – Process in Victoria

4.2 **First**, AEMO is the principal TNSP involved in the connections process in Victoria. AEMO – rather than AusNet – manages the transmission connection process and is the main point of contact for a connection application to the transmission network. As the process necessitates a high degree of transparency, and is mainly driven by AEMO, AusNet does not have the ability to favour the connection of Origin's generators in place of Origin's rivals. Further information about the process and how it removes the ability to discriminate is set out below.

4.3 Part B of Chapter 5 of the NER regulates the technical and contractual aspects of connection to the transmission network and sets out the obligations on parties throughout the connection application process. Specifically, rule 5.3 sets out the process for establishing or modifying a connection, and while some of the procedural details are specifically disapplied in Victoria,²⁰ the stages of the connection application process can broadly be described as follows.

Stage	Connection Applicant's Role	AEMO's Role
Enquiry	Applicant submits a connection enquiry to AEMO to determine the information required to submit an application to connect.	AEMO receives enquiry and coordinates response and provides transmission network data (for example, technical studies, proposed connection program and connection options, and system strength assessment). AusNet's role is limited to the provision of information necessary to facilitate the processing of the connection enquiry. ²¹
Application	Applicant submits application to connect and required information (including performance standards) to AEMO, provides clarification	AEMO receives and reviews submitted data, including proposed performance standards, undertakes technical studies to assess the applicant's compliance with the proposed performance standards and network impact, coordinates performance standards negotiations, and

²⁰ NER, Clause 5.3B.
²¹ NER Clause 5.3.2(f).

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Stage	Connection Applicant's Role	AEMO's Role
	on the submitted data if requested, conducts or requests AEMO to conduct an Invitation to Tender (<i>ITT</i>) if required, and participates in the negotiation of performance standards.	<p>conducts an ITT, if required and requested by the applicant.</p> <p>AEMO determines if an augmentation is required for a connection and, if so, if the works required are contestable. If they are contestable, AEMO conducts a competitive tender for the construction of that augmentation (unless the generator wishes to assume responsibility for appointing the party to construct). As AEMO initiates these steps, AusNet's ability to discriminate is substantially removed.</p> <p>AusNet's role is limited to the provision of information necessary to facilitate the application stage.²²</p>
Contracts	The finalisation of the connection arrangements are dependent upon the applicant's acceptance of the connection offer and the execution of the relevant agreements between the connection applicant and the TNSP (and in Victoria, the additional contracts as between the applicant, AEMO, AusNet and / or a selected DTSO).	<p>AEMO prepares an Offer to Connect which consists of several contracts in executable form:</p> <ul style="list-style-type: none"> • the Use of System Agreement (UoSA) between AEMO and the new generator; • the Network Services Agreement (NSA) between AEMO and the incumbent DTSO (AusNet) (or, where the connection involves a contestable augmentation, the DTSO selected through the competitive tender process). The DTSO will also enter into a Connection Services Agreement (CSA), which covers the construction of connection assets and the connection service to be provided to the generator; and • the Project Construction and Coordination Deed (PCCD) between the generator, AEMO, AusNet and any third party constructing a contestable augmentation, depending on whether works are required. <p>An offer to connect must be made within the defined time frames set out in clause 5.3.6 of the NER. The offer must be fair and reasonable and consistent with the safe and reliable operation of the power system, and must not impose conditions on the applicant which are more onerous than those contemplated under clause 5.3.6(c). This obligation is a tier 3 civil penalty provision.</p> <p>AusNet must also use reasonable endeavours to provide the connection applicant with an offer to connect in accordance with the reasonable requirements of the connection applicant, including the location of the proposed connection point and the level and standard of power transfer capability that the network will provide.²³</p>
Construction	Applicant undertakes design work and construction,	AEMO reviews construction progress report, facilitates resolution of any technical issues, and receives

²² NER Clause 5.3.2(f).

²³ NER Clause 5.3.6(d).

Stage	Connection Applicant's Role	AEMO's Role
	updates and finalises data and forwards it to AEMO, and considers registration requirements.	updated data and other information from the applicant. Any augmentation will be designed and constructed by: <ul style="list-style-type: none"> • the selected DTSO – for the contestable portion of the augmentation. • the incumbent DTSO – for the non-contestable portion of the augmentation.
Completion	Applicant provides updated data, commissioning programs, test results and simulation models to AEMO, finalises registration application requirements, and proposes amended performance standards (if necessary).	AEMO reviews and approves commissioning plans, processes applications for registration, reviews performance at successive hold points.

4.4 In summary, AusNet therefore has a limited role in Victoria in relation to new connections as outlined above. To the extent that AusNet holds technical information that may be relevant to the connection process, it is required to share this information with AEMO and connection applicants on an open book basis. Further, AusNet is not otherwise privy to AEMO's decision making process and timeframe relating a new application. Consequently, AusNet does not have the ability to discriminately share information to provide the Origin with advantage in relation to connections.

Connection Application Process – AusNet obligations

4.5 **Second**, to the extent that AusNet is involved in the connection process, it is subject to detailed regulatory obligations that ensure it would not be able to discriminate against Origin's competitors in relation to connections. These obligations require AusNet:

- (a) to provide technical information necessary to facilitate the applicant's processing of a connection enquiry, to the extent that it holds such information: clause 5.3.2(f), NER. This obligation is a tier 3 civil penalty provision;
- (b) to make an offer to connect that is fair and reasonable and consistent with the safe and reliable operation of the power system: clause 5.3.6(c), NER. This obligation is a tier 3 civil penalty provision;
- (c) to use reasonable endeavours to provide the connection applicant with an offer to connect in accordance with the reasonable requirements of the connection applicant, including the location of the proposed connection point and the level and standard of power transfer capability that the network will provide: clause 5.3.6(d), NER;
- (d) not to discriminate between a related electricity service provider (eg, Origin) and a competitor (or potential competitor) of a related electricity service provider in connection with the provision of prescribed transmission services. Although prescribed transmission services do not include negotiated transmission services, including connection services that are provided to serve a generator, they do include connection services that are provided by a TNSP to another network service provider and so would include a service provided by AusNet to another TNSP providing contestable connection services: Electricity Transmission Ring Fencing Guidelines; and
- (e) to make an offer to connect that is fair and reasonable under AusNet's Transmission Licence: clause 5.5, NER.

Dispute Resolution

- 4.6 **Third**, negotiations in relation to negotiated transmission services are subject to bring a dispute resolution as discussed in response to question 3 above.

Transparency

- 4.7 **Fourth**, the close involvement of AEMO, the connecting generator and, potentially, another transmission network service provider providing contestable connections means there is a high degree of visibility over the process. Any attempt by AusNet to deliberately delay a connection is likely to be apparent relatively quickly and be acted on, particularly by the relevant affected connecting generator.

Separation between AusNet and Origin

- 4.8 **Fifth**, AusNet and Origin will remain separate companies, with separate management teams and separate owners (ie, separate Brookfield-managed funds, Brookfield business units and separate parties investing alongside the Brookfield funds). Brookfield does not receive detailed information about day-to-day operations of AusNet and is not involved in business-as-usual decision making. The proposed ring-fencing undertaking offered by the Applicants will reinforce this separation.
- 4.9 A combination of the above factors means that it would **not be possible for AusNet to discriminate against Origin's competitors when negotiating connections**. This is discussed further in paragraphs 1013 to 1024 of the Application and paragraphs 139 to 144 of Annexure A to the Application.
- 4.10 In addition, the Victorian Government is introducing a new planning and investment framework for transmission, whereby VicGrid, an independent government body, may become responsible for transmission planning and potentially procurement, taking over AEMO's role. While many aspects of the framework are yet to be finalised, the increasing role of Government in transmission planning and delivery is likely to further limit AusNet's role in relation to connections.
- 4.11 By extension, as generators will increasingly be connecting to renewable energy zones (**REZs**) where connections are coordinated at the planning stage (which will soon be coordinated by VicGrid), this is likely to limit AusNet's role in the process further. As REZ frameworks tend to involve the batching of connections, this will further limit any potential for AusNet to delay one generator at the expense of another.

B Ability to favour connection of Origin generators versus Origin's rivals – specific concerns

- 4.12 The Transparency Letter raised three possible ways in which AusNet might discriminate against Origin's generation rivals in relation to connections.

Covert delay

- 4.13 The ACCC is considering whether AusNet could covertly delay other generation projects connection and / or prioritise Origins project generation connections.
- 4.14 For the reasons discussed above, this would not be possible, including because:
- (a) AEMO is the principal TNSP with responsibility for connections. AEMO conducts modelling of connections, which is the most complex and time consuming stage of the connection process;
 - (b) AusNet's role in the connections process is governed by a regulatory regime which includes obligations in relation to connections;
 - (c) AEMO's role in relation to all connections and the close involvement of generators in connection negotiations means any meaningful discrimination is likely to be apparent and therefore capable of swift remedy;

- (d) the connections process is subject to a dispute resolution regime, involving binding arbitration; and
- (e) AusNet and Origin are separate companies, making such discrimination implausible.

4.15 This is discussed in further detail in paragraphs 1013 to 1024 of the Application.

4.16 Even if some covert delays were possible those delays could only be of short duration, given the regime described. On any view this could not result in a substantial lessening of competition in the wholesale electricity market.

Costs

4.17 The ACCC is considering whether AusNet might inflate the costs to Origin's generation rivals to connect to the network.

4.18 Again, this would not be possible, including because:

- (a) in Victoria, the contestability regime means that connection works costing more than 10 million dollars which are 'separable', are contestable. AEMO determines if works are contestable and can conduct a competitive tender to appoint a TNSP to construct the contestable works (unless the generator chooses to do so itself). Brookfield understands that connecting a new wind farm or solar farm will usually involve works determined by AEMO to be contestable with some non-contestable works also required. AusNet has no ability to discriminate in relation to the cost of contestable works; and
- (b) in relation to non-contestable works, the cost of these is negotiated in accordance with a regulated negotiated framework, including a dispute resolution regime involving binding arbitration as discussed above. The negotiation process would require AusNet to provide full disclosure in relation to its costs on an open book basis and demonstrate that the proposed rate of return is reasonable.

4.19 This is discussed in further detail in paragraphs 997 to 1012 of the Application.

4.20 Even if the ACCC's concern was correct it could only relate to the cost of non-contestable works which, by definition in Victoria, are unlikely to be material to the overall costs of new generation. Again, on any view this could not result in a substantial lessening of competition in the wholesale electricity market.

Information

4.21 The ACCC is considering whether AusNet might disclose information to Origin to give it an advantage over rivals in applying to connect. Again, this would not be possible for the following reasons.

4.22 **Information about connection opportunities is already made public by AEMO.** AusNet is unlikely to possess any insight that may give Origin a meaningful competitive advantage over other generators on future connection opportunities. As set out in the statement of Thomas Hallam dated 26 May 2023, key relevant information relating to future connection opportunities in the Victorian electricity transmission network is held and published by AEMO. Most relevantly, AEMO publishes:

- (a) the Integrated System Plan, which sets out a comprehensive roadmap for the NEM, including any future network investment;
- (b) the Victorian Annual Planning Report which considers the adequacy of the Victorian transmission network to meet its reliability and security requirements, and identifies development opportunities to address emerging network limitations;

- (c) NEM electricity demand forecasts which include operational consumption and maximum demand and, since 2016, minimum;
 - (d) Electricity Statement of Opportunities which contains an assessment of supply adequacy in the NEM over the next 10 years, highlighting opportunities for generation and demand-side investment; and
 - (e) NEM constraint reports which detail interconnector capacity and constraints in the transmission network.
- 4.23 It should also be borne in mind that renewables projects have a long lead time because of the need to identify sites, secure land tenure and obtain environmental and planning approvals. As a result, information relevant to connection location is unlikely to provide a prospective developer with a competitive advantage. Furthermore, information about connection costs is provided on an open book process pursuant to the negotiation process.
- 4.24 ***AusNet is subject to detailed regulatory obligations which prevent discriminatory information sharing.*** For reasons set out above, AusNet is unlikely to hold any information relevant to a connection process which a generator cannot obtain from AEMO directly. If AusNet were able to obtain additional insight through its involvement in the connection process, it is subject to detailed regulatory obligations which prevent discriminatory information sharing.
- 4.25 In so far as AusNet holds technical information that may be relevant to a new connection enquiry and AEMO notifies AusNet as the DTSO for a connection enquiry, AusNet is required, under rule 5.2.3(d) of the NER, to cooperate with AEMO to allow applications to be processed expeditiously and in accordance with rule 5.3 of the NER. This obligation is a tier 3 civil penalty provision. Failure to meet these obligations is easily detectable by AEMO (given it is responsible for processing all connection requests in Victoria, including both Origin and non-Origin generators). If AusNet is found to have engaged in discriminatory information sharing (including delay in responding to AEMO connection query relating to non-Origin generators), it will result in AusNet being liable for civil penalties under the NER.
- 4.26 In so far as AusNet becomes aware of new connection opportunities through AEMO-led connection process with a non-Origin generator, it is under regulatory obligations not to disclose this information to Origin. The NER requires that AusNet must use all reasonable endeavours to keep confidential any confidential information that comes into its possession or control or of which it becomes aware.²⁴ Confidential information is defined broadly under the NER and would cover any information that is provided to AusNet which is or has been provided under or in connection with the NER that is confidential or commercially sensitive. This therefore includes any information request from AEMO relating to new connection query and any information derived from such confidential information. It is a tier 1 civil penalty provision under the NEL if a TNSP fails to meet the following obligations:²⁵
- (a) not disclose confidential information to any person except as permitted by the NEL;²⁶
 - (b) only use or reproduce confidential information for the purpose for which it was disclosed, or another purpose contemplated by the NEL;²⁷ and
 - (c) not permit unauthorised persons to have access to confidential information.²⁸

²⁴ NER, cl 8.6.1.

²⁵ NEL, cl 6(1) and Sch 1. A breach of tier 1 civil penalty provisions attracts a maximum penalty of the greater of: (1) \$10 million; (2) three times the value of the benefit received; or (3) 10% of annual turnover in preceding 12 months, if court cannot determine benefit obtained from the breach.

²⁶ NER, cl 8.6.1(b)(1).

²⁷ NER, cl 8.6.1(b)(2).

²⁸ NER, cl 8.6.1(b)(3).

- 4.27 In so far as AusNet acquired or generated information relevant to new connection opportunities from the provisions of prescribed electricity transmission services, the TRFG contain provisions that ensure that AusNet cannot provide Origin with first mover advantage by sharing this information when it is not also shared with all other generators.
- (a) The TRFG include requirements for equal provision of ring-fenced information.²⁹ Any information about electricity networks, electricity customers or electricity services AusNet acquired or generated through the provision of prescribed transmission services that is not already publicly available is considered ring-fenced information under the TRFG. AusNet therefore will not be able to share any information in a discriminatory way that may give Origin an unfair advantage over other market participants given that it is under an obligation to share any information it shares with Origin with competitors of Origin.
- (b) The TRFG also require AusNet to establish an information-sharing protocol that sets out how and when it will make information shared with a related electricity service provider available to others,³⁰ and establish, maintain and keep an information register about information that has been shared.³¹
- 4.28 Given the above, there is no basis on which it could be thought that AusNet would be able to share information with Origin of the type that was so competitively significant that that would lead to a substantial lessening of competition in the wholesale electricity market.

C Ability to operate the transmission network in a way that would advantage current or future Origin generators

- 4.29 The ACCC is considering AusNet's ability to operate the transmission network in a way that would advantage current or future Origin generators.
- 4.30 The 'operation' of a transmission network could encompass a number of functions, which are discussed in turn below.

Augmentation

- 4.31 In Victoria, AEMO, rather than Ausnet, is responsible for planning and procuring system augmentations.
- (a) As with other jurisdictions, AEMO has an overarching NEM-wide planning function that is principally discharged via the ISP, which assesses the future transmission network requirements and identifies priority transmission projects.
- (b) Under the Victorian arrangements, AEMO (and not AusNet) is responsible for coordinating and implementing transmission augmentations, including priority ISP transmission projects. AusNet, therefore, cannot use its role as network owner to augment the network in a way that would foreclose non-Origin generators, whether by investing in augmentations that advantage an Origin generator or by not investing in augmentations that would advantage a non-Origin generator.
- 4.32 This is discussed in further detail in paragraphs 1025 – 1040 of the Application, and paragraphs 19, 69 – 88 of Annexure A to the Application.

Maintenance and renewal

- 4.33 AusNet has no ability to discriminate in relation to maintenance and renewal on the Victorian transmission network so as to harm non-Origin generators or to favour Origin generation assets.

²⁹ TRFG, cl 4.2.3.

³⁰ TRFG, cl 4.2.3(d).

³¹ TRFG, cl 4.2.4. The transitional provisions in relation to version 4 of the TRFG mean that AusNet must comply with these obligations as soon as reasonably practicable and in any event, by no later than 1 March 2024.

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- (a) If AusNet failed to properly operate and maintain any part of the transmission network adequately, it would be in breach of numerous legal obligations, including under its licence, its obligations under the NER, as well as its safety obligations under the *Electricity Safety Act 1998* (Vic).
 - (b) AusNet's maintenance and renewal activities are subject to a high degree of transparency and regulation. AusNet must provide a renewal and operating proposal as part of its five yearly pricing proposal, to be approved by the AER and which is subject to AEMO oversight. AusNet works with AEMO to jointly identify and plan for required upgrades, replacements, refurbishments, or retirement of existing network assets. This joint process is reflected in AEMO's VAPR and, alongside this, in a detailed Asset Renewal Plan published by AusNet.
 - (c) Any failure by AusNet to properly maintain its transmission network would expose AusNet to damages under its connection agreements with generators, and penalties under the AER's STPIS, which forms part of AusNet's pricing determination.
 - (d) AusNet is required to comply with the TRFG, which includes the requirement not to discriminate in favour of affiliated entities, such as Origin. This includes the specific obligation to provide substantially the same quality, reliability and timeliness of service to a related electricity service provider and a competitor (or potential competitor) of the related electricity service provider.
 - (e) AEMO is closely involved in maintenance planning. Planned outages, including their timing and duration, must be notified and approved by AEMO and cannot proceed without AEMO approval. Generators are informed of planned outages before they proceed and can raise objections or queries with AusNet or AEMO. Unplanned outages can only be taken in limited circumstances (eg, in response to an emergency) and must also be notified to AEMO. In all cases, outages are published by AEMO and are highly visible to affected generators.
- 4.34 This is discussed in further detail in paragraphs 91 – 9, 1041 – 1073 of the Application, and paragraphs 89 – 106 of Annexure A to the Application.

Operations

- 4.35 As with other NEM jurisdictions, AEMO, as system operator, is responsible for the day-to-day operation of the NEM, including generator bidding and dispatch, as well as maintaining system security. AusNet does not have a role in determining the order of energy dispatch as this is a process managed by AEMO alone and, in most circumstances, is determined by a generator's offer price. To the extent that an out of pricing order dispatch decision is made, in order to ensure system stability, that decision is made by AEMO alone following a constraints procedure which is transparent to all registered NEM participants.
- 4.36 Further, in accordance with AEMO's Constraint Formulation Guidelines,³² AEMO determines generation schedules and regional prices in the NEM to find the optimal solution to maximise the value of trade, having regard to constraint equations that represent the physical restrictions necessary for secure and sustainable operation. AEMO is responsible for developing these constraint equations, using information provided by TNSPs relating to physical restrictions / limitations in the networks. Relevantly, any network information which AusNet provides to AEMO for use in constraint equations that will affect generation dispatch in the NEM is subject to AEMO's due diligence, to ensure that the information provided by AusNet (and other TNSPs) is reasonable.

³² AEMO, Constraint Formulation Guidelines, Version 12 <https://aemo.com.au/-/media/files/stakeholder_consultation/consultations/nem-consultations/2022/cfg-and-scvpf/final/constraint-formulation-guidelines-v12---final_.pdf?la=en>

D Brookfield would not have, or would not act upon, the incentive to use AusNet’s monopoly position in transmission in Victoria to advantage Origin

4.37 It is difficult to see how Brookfield would have the incentive to use AusNet’s position in transmission in Victoria to advantage Origin. While AusNet plays a supporting role in generator connections, Brookfield would not be incentivised to misuse this position.

- (a) Given the different equity pools that will be invested in AusNet and Origin, Brookfield would not have an incentive to behave in a manner that shifts value from AusNet to Origin, or vice versa. For example, the connection works for a new generator will earn a commercial return for AusNet. Further, seeking to advantage Origin’s assets could lead to sub-optimal network performance at an aggregate level, and potentially performance penalties for AusNet under the service target performance incentive scheme.
- (b) Slowing or preventing other generators from connecting to the transmission system would provide a negligible benefit to other Origin generators or connection applicants. Origin’s generation returns will be driven by much wider cost and price dynamics, rather than the commissioning dates for one or two competing generation projects. Short of a complete halt to competing new connections (which would be immediately detected) it is difficult to see what benefit AusNet could provide to Origin.
- (c) One potential area of influence could be the priority of access under the proposed transmission access reforms. However, given the wider TNSP structure in Victoria, it is likely that AusNet will have very little influence over these allocations, either because they will be performed by AEMO, or because they will be allocated as part of REZ developments that are being coordinated by VicGrid.

4.38 The Transparency Letter refers to the acquisition of TXU by SP Energy in 2004. That acquisition, and the ACCC decision, are both nearly 20 years old. There have been significant developments in the regulatory regime since that time, including the evolution of the Transmission Ring-Fencing Guidelines, and the role of AEMO in Victoria (for example in relation to contestability). The transaction would also have involved full vertical integration, unlike the Proposed Transaction where AusNet and Origin will remain separate companies.

Vertical integration of electricity distribution and retail

5 The ACCC requests the Applicants give the ACCC such additional information that is relevant to the ACCC’s determination, regarding:

- **specific regulatory measures that limit AusNet’s ability and incentive to engage in price and non-price discrimination.**

A AusNet has no ability or incentive to discriminate in relation to pricing

Distribution services

5.1 Distribution pricing in the NEM is subject to the AER’s regulatory framework. A DNSP’s distribution service may be categorised as either a direct control or negotiated.

- (a) **Direct control services:** Direct control services are the core services provided by electricity distributors and include both use of system and connection services. These services are comprised of 'standard control services' and 'alternative control services'. The pricing of all direct control services is subject to AER regulation. Every 5 years the AER makes a distribution pricing determination imposing controls over the prices of direct control services and approving a tariff structure statement proposed by the distributor. The distributor must comply with the approved tariff structure statement in setting annual prices in an annual pricing proposal that must also be approved by the AER.

- (b) **Negotiated distribution services:** These are services the AER accepts can fall outside price regulation and are rare. AusNet will have no negotiated distribution services in the 2021-2026 regulatory period. Where there are such services the prices for them must be negotiated in accordance with a regulated negotiation framework, including binding dispute resolution by the AER.

AER Distribution Determinations

- 5.2 The AER's yearly distribution determination imposes controls over the prices of Direct Control Services. The determination sets out the amount of revenue a DNSP may recover from its customers for a regulatory period and imposes controls over the prices of direct control services. These control mechanisms may include a schedule of fixed prices, caps on the prices of individual services, caps on revenue, tariff basket price control, revenue yield control, or a combination of the mechanisms.
- 5.3 In making a regulatory determination, the AER is required to apply the pricing principles set out in Section 7A of the NEL. One of the pillars which the AER must have regard to is economic efficiency. That is, the efficient provision of electricity network services, and efficient use of the distribution (or transmission) system with which an operator provides direct control network services, should be promoted.³³ The AER must also have regard to the economic costs and risks of the potential for under and over investment by a DNSP,³⁴ and the potential for any under or over utilisation of a distribution (or transmission) system with which a DNSP provides direct control network services.³⁵
- 5.4 Further, Chapter 6 of the NER prescribes in detail the rules for economic regulation of DNSPs, including the steps which the AER must follow in making a revenue determination.

Tariff Structure Statement and Annual Pricing Proposals

- 5.5 A DNSP must also submit to the AER a proposed tariff structure statement in relation to the direct control services it proposes to provide.³⁶ The proposed tariff structure statement must meet the requirements of Part I of Chapter 6. For example, the statement must include the tariff classes into which retail customers for direct control services will be divided, the structures for each proposed tariff, the policies the DNSP will apply for assigning retail customers to tariffs and the charging parameters for each tariff.
- 5.6 The tariff structure statement must also comply with the pricing principles set out in Rule 6.18.5, which sets out the 'network pricing objective': the tariffs that a DNSP charges in respect of direct control services to a retail customer should reflect the DNSP's efficient costs of providing those services to the retail customer.
- 5.7 Once the proposed tariff structure statement has been approved by AER, the DNSP must comply with the approved tariff structure statement in setting the prices it will charge for direct control services. A DNSP sets these prices through the annual pricing proposals, which it is required to provide to AER for approval, in advance of each year in a regulatory period. The pricing proposal sets out, among other things, the proposed tariffs for each tariff class specified in the tariff structure statement.

No ability to engage in price discrimination

- 5.8 The AER's role in making five yearly price determinations, approving a tariff structure statement and approving an annual pricing proposal by a distributor, removes any ability for AusNet to price discriminate in favour of Origin or its customers.

³³ NEL Clause 7A(3)

³⁴ NEL Clause 7A(6)

³⁵ NEL Clause 7A(7)

³⁶ NER Clause 6.8.2.

- 5.9 In addition, distribution ring-fencing guidelines require a distributor not to discriminate between a related electricity service provider (which would include Origin Energy Markets) and a competitor, or potential competitor, of a related electricity service provider in connection with the provision of direct control services. The non-discrimination obligation includes a requirement that a distributor in like circumstances deal with a related electricity service provider and a competitor (or potential competitor) of the related electricity service provider on substantially the same terms.³⁷
- 5.10 Any attempt to engage in price discrimination would not only breach the distribution ring fencing guidelines but would also be highly likely to be detected. In order for Origin to win market share from AusNet price discrimination, the price discrimination would need to be communicated to retail customers, making the breach of the ring-fencing guidelines immediately apparent.
- 5.11 The reasons why price discrimination would not be possible are discussed in more detail in section 9.2 (paragraphs 1145 to 1185) of the Application.
- 5.12 We note that a 'margin squeeze' would not be possible (in the sense of increasing distribution prices, but without price discrimination, so as to reduce margins for retailers) would also not be possible. This is for the simple reason that distribution prices for direct control services (ie, all relevant distribution services) are regulated by the AER through 5 yearly price determinations, approval of tariff structure statements and approval of annual pricing proposals.

B No ability or incentive to engage in non price discrimination

- 5.13 The Transparency Letter suggests that the ACCC is considering whether AusNet would have the ability and incentive to discriminate against Origin's retail competitors by:
- (a) preferencing Origin in expanding and improving distribution networks;
 - (b) selectively maintaining parts of the distribution network in a manner that would advantage Origin;
 - (c) favouring Origin over its rivals when responding to requests for connections or access;
 - (d) targeting Origin customers in the event load shedding is required; or
 - (e) sharing competitively sensitive information with Origin.
- 5.14 AusNet has no ability to engage in any of these types of non-price discrimination.

Augmentation

- 5.15 AusNet cannot preference Origin in expanding or improving the distribution network for a number of reasons including:
- (a) customers of various retailers are spread throughout the AusNet distribution network. If AusNet were to attempt to selectively augment or invest in electricity distribution capabilities in a particular part of its distribution network, there is no way this could benefit Origin customers without also benefitting non-Origin customers (and vice versa). In any event, retail electricity customers can easily switch between retailers, meaning that even if it were possible for AusNet to selectively invest in distribution capabilities in an attempt to assist Origin retail customers, there is no way to lock-in customers to realise financial benefits from such a strategy;
 - (b) AusNet's investments in the distribution network are subject to regulatory scrutiny and transparency through the distribution annual planning review, the distribution determination process and the RIT-D process; and
 - (c) AusNet has strong incentives to maintain reliability of supply and quality of supply as a result of an incentive scheme that forms part of the AER's price determination. AusNet

³⁷ Distribution Ring Fencing Guidelines, clause 4.1(c)(ii).

also has an incentive to meet the minimum service levels set out in the Electricity Distribution Code of Practice in connection with reliability. The failure to comply with the code of practice may require AusNet to make specified payments to retail customers.

Maintenance and outages

- 5.16 As discussed in relation to augmentation, AusNet does not have any ability to selectively maintain parts of its distribution network in a way that would advantage Origin by providing a better quality of service to Origin's retail customers compared to other retailers. This is because these customers are dispersed across the AusNet distribution network and it would not be possible to undertake targeted maintenance activities (or to fail to undertake maintenance activities) that would benefit only Origin's retail customers or penalise only non-Origin retail customers. Furthermore, AusNet is subject to regulation and regular audits in relation to its compliance with the *Electricity Safety Act* in Victoria. Failing to adequately maintain the network would involve very significant risks for AusNet and its officers, including both financial and reputational risks.
- 5.17 Similar observations can be made in relation to maintenance outages. It is not possible for AusNet to target an outage that would only affect non-Origin retail customers. Furthermore, there is considerable transparency around planned outages, such that any attempt to manufacture outages targeting non-Origin retail customers would be easily detected.

Connection and access

- 5.18 The prices of all types of distribution connection services are regulated as direct control services by the AER. Furthermore, AusNet is subject to the following specific timing obligations:
- (a) where a customer only requires energisation, AusNet is required to use best endeavours to energise the customer's supply address within 1 business day if a request is made by 3pm or within 2 business days if the request is made after 3pm;
 - (b) in relation to new connections involving minimal or no augmentation, AusNet is required to have a model standing offer to provide basic connection. The model standing offer must be approved by the AER and the offer to connect must be made within 10 business days; and
 - (c) for other types of connections, AusNet must comply with the negotiating framework set out in the NER, including the AER dispute resolutions processes under the NEL and Chapter 5A of the NER.
- 5.19 In addition, the distribution ring-fencing guidelines require a distributor not to discriminate between a related electricity service provider (which would include Origin) and a competitor, or potential competitor of a related electricity service provider in connection with the provision of direct control services, which would include each type of connection service.

Load shedding

- 5.20 There are two main types of load shedding:
- (a) automatic load shedding, where network equipment switches off to protect the network. There is clearly no ability to discriminate against non-Origin customers in relation to automatic load shedding; and
 - (b) manual load shedding, where AEMO directs a distributor to load shed if demand passes maximum supply levels. Where AEMO determines load shedding is required, it will work with the Victorian Government and seek advice from Victorian distribution networks, including AusNet, to determine the priority of load shedding across Victoria so as to minimise its impact. AusNet also seeks to rotate load shedding outages where possible to ensure that the same area is not impacted disproportionately and that the same area is

not impacted more than once. AEMO will instruct distribution networks, such as AusNet, to load shed in accordance with AEMO's determination.

Confidential information

- 5.21 The NER requires that AusNet must use all reasonable endeavours to keep confidential any confidential information that comes into its possession or control or of which it becomes aware.³⁸ Confidential information is defined broadly under the NER. It is a tier 1 civil penalty provision under the NEL if AusNet fails to meet the following obligations:³⁹
- (a) not disclose confidential information to any person except as permitted by the NEL;⁴⁰
 - (b) only use or reproduce confidential information for the purpose for which it was disclosed, or another purpose contemplated by the NEL;⁴¹ and
 - (c) not permit unauthorised persons to have access to confidential information.⁴²
- 5.22 The DRFG also impose obligations in relation to the treatment of certain confidential information and requires AusNet to:
- (a) keep Ring-fenced Information confidential.⁴³ This covers a wide range of information about electricity networks, electricity customers or electricity services acquired by AusNet in connection with the provision of Direct Control Services that is not already publicly available; and
 - (b) only use Ring-fenced Information for the purpose for which it was acquired or generated.⁴⁴

Obligations to provide equal access to information to both Origin and non-Origin retailers

- 5.23 AusNet is required to ensure the information it provides in relation to regulated distribution services to Origin is available to any other party by:⁴⁵
- (a) establishing an information sharing protocol that sets out how and when it will make equal information available to other electricity services providers;⁴⁶ and
 - (b) establishing, maintaining and keeping an information register about information that has been shared.⁴⁷ This register also documents the kind of information requested by an electricity service provider and describes the kind of information requested in sufficient detail that allows other legal entities to make an informed decision about whether they wish to request the same information. To the extent that a request for information of the same kind listed on the information register is made, the DRFG require that AusNet must comply with that request.
- 5.24 Non price discrimination is discussed in sections 9.3 to 9.7 (paragraphs 1186 to 1265 of the Application). In considering the above, it should also be borne in mind that AusNet owns only one of five Victorian distribution networks.

³⁸ NER, cl 8.6.1.

³⁹ NEL, cl 6(1) and Schedule 1. A breach of tier 1 civil penalty provisions attracts a maximum penalty of the greater of: (1) \$10,000,000; (2) three times the value of the benefit received; or (3) 10% of annual turnover in preceding 12 months, if court cannot determine benefit obtained from the breach.

⁴⁰ NER, cl 8.6.1(b)(1).

⁴¹ NER, cl 8.6.1(b)(1).

⁴² NER, cl 8.6.1(b)(3).

⁴³ DRFG, cl 4.3.1(a).

⁴⁴ DRFG, cl 4.3.1(b).

⁴⁵ DRFG, cl 4.3.3.

⁴⁶ DRFG, cl 4.3.3(d).

⁴⁷ DRFG, cl 4.3.4.

Vertical integration of electricity retail and smart meter services

- 6 The ACCC requests the Applicants give the ACCC such additional information that they consider is relevant to the ACCC's determination, regarding:
- the types of metering data collected by a metering data provider and whether there is any scope for Origin to access or obtain the data collected by Intellihub that does not belong to its retail customers
 - where the metering data is delivered to after it is collected from the customer and whether this data can be accessed by Intellihub's staff
 - what information is retained by the metering data provider once a customer switches retailers or smart meters, and for how long
 - Origin's plans or incentives to exclusively contract with Intellihub for its remaining volume of smart meters, or alternatively, to conduct a competitive tender process for its remaining allocation of smart meters after completion of the Proposed Acquisition
 - in the event Origin exclusively uses Intellihub for its smart meter rollout after completion of the Proposed Acquisition, whether the remaining uncontracted volume of smart meters from other retailers is sufficient to offset the loss of Origin's retail customer base and enable other smart meter providers to reach a sufficient scale to compete with Intellihub.

A Smart Metering Data

Types of metering data collected by Intellihub

- 6.1 Intellihub has access to limited information in its role as Metering Coordinator, Metering Provider and Metering Data Provider. The end customer information that Intellihub is provided by the energy retailer is typically process related, or consists of information that Intellihub is required to collect in accordance with Chapter 7 of the National Electricity Rules (*NER*).⁴⁸ This includes:
- (a) **service order data:** information provided to Intellihub in its capacity as Metering Coordinator and Metering Provider to facilitate the installation of a smart meter. This includes:
- (i) the end customer's name, address and contact details, and whether the customer has any special needs (for example, a life support customer);
 - (ii) the date that the smart meter installation must be completed by (where applicable); and
 - (iii) the identity of the energy retailer.
- (b) **NMI standing data:** information required to be collected and disseminated by Metering Data Providers to certain specified persons in accordance with clause 7.10.3 of the NER. 'NMI Standing Data' is defined in the NER and includes (among other things):
- (i) the National Meter Identifier (*NMI*) and street address of the relevant connection point;
 - (ii) the identity of the local network service provider or the embedded network manager;
 - (iii) the applicable network tariff and distribution loss factor applicable to the relevant connection point. Metering Data Providers **do not** receive any end customer

⁴⁸ National Electricity Rules, <<https://energy-rules.aemc.gov.au/ner/347/38482#7>>.

pricing information (ie, the retail price the energy retailer charges the end customer); and

- (iv) other categories of data that may be set out by AEMO in the Market Settlement and Transfer Solution Procedures from time to time.
- (c) **metering data:** 'Metering Data' includes various types of consumption data (collected in 5 minute trading intervals) which must be stored by a Metering Data Provider in accordance with clause 7.10.5 of the NER, and disseminated to certain specified persons in accordance with clause 7.10.3 of the NER.
- (d) **off-market data:** data which Metering Data Providers elect to collate and store, generally related to their various value-added offerings (for example, instantaneous streaming data which retailers may provide to end customers to view their energy consumption in real time). Metering Data Providers are not obligated under the NER to collate and store this data.

Where smart meter data is delivered after collection

- 6.2 Metering Data Providers are required to collate and provide 'metering data' and 'NMI standing data' to the Market Settlement and Transfer Solutions (**MSATS**) system, which is maintained and administered by AEMO: under clause 7.10 of the NER.
- 6.3 'NMI Standing Data' is transferred to the MSATS system on installation of the smart meter. This data is largely static in nature, but may be amended from time to time. 'Metering Data' is transferred to the MSATS system on a daily basis (comprising data collected by the Metering Data Provider for each smart meter on the previous day). The process of transferring this data is in accordance with AEMO Procedures. AEMO conducts audits to ensure compliance to these Procedures on a regular basis.
- 6.4 Separate to the MSATS system maintained and administered by AEMO, Metering Data Providers are required under the NER to retain 'Metering Data' and 'NMI Standing Data' in their own databases.

Retention of smart meter data

- 6.5 Under clause 7.10.2 of the NER, Metering Data Providers must store 'Metering Data' in their own databases online in an accessible format for at least 13 months and, subsequently, either online or offline in an accessible format for a period of not less than 7 years.
- 6.6 Metering Data Providers must also retain 'NMI Standing Data' for the same period.

Access to smart meter data

- 6.7 Clause 7.11.1(2) of the NER imposes an obligation on AEMO to limit access to the data stored by Metering Data providers on MSATS to only those categories of persons set out in clause 7.15.5 of the NER). Clause 7.15.5(c) of the NER sets out an exhaustive list of persons authorised to access data stored on MSATS:
 - (a) the energy retailer that has a financial interest in the metering installation or the energy measured by that metering installation;
 - (b) the appointed Metering Coordinator, or a person who was previously appointed as the Metering Coordinator, as required under the NER;
 - (c) the appointed Metering Provider;
 - (d) the appointed Metering Data Provider, or a person who was previously appointed as the Metering Data Provider, as required under the NER;

- (e) in relation to a metering installation at a connection point for a market generating unit in a regulated stand-alone power system, the appointed Metering Data Provider, or a person who was previously appointed as the Metering Data Provider, as required under the NER;
 - (f) AEMO and its authorised agents;
 - (g) a person who is authorised to access or receive that data in accordance with the Consumer Data Right provisions; and
 - (h) in relation to a metering installation at a child connection point, an Embedded Network Manager.
- 6.8 Energy retailers (including Origin) therefore cannot access any data stored on MSATS unless approved by AEMO. Similarly, Metering Data Providers, Metering Coordinators and Metering Providers cannot access data unless they are permitted to do so by AEMO.
- 6.9 Similarly, as explained in paragraph 6.3 above, Intellihub is required to retain 'Metering Data' in its own metering data services database. Clause 7.10.1(8) of the NER requires Metering Data Providers to protect the 'Metering Data' from third party access, and limit access in accordance with the rules in the NER (ie, to the persons listed above). If a third party requests access to the 'Metering Data' in Intellihub's database, Intellihub will only approve that request if the person is entitled to view the data in accordance with the NER. Intellihub is legally not permitted to share any 'Metering Data' with an energy retailer that does not have an end relationship with that customer (including Origin). Intellihub is also not legally permitted to share the 'Metering Data' with any of its shareholders or subsidiaries (as permission to access the 'Metering Data' is limited to the Metering Coordinator itself, or the Metering Provider or Metering Data Provider).
- 6.10 Even within Intellihub, there are strict internal protocols in place that limit the Intellihub personnel that can access this data. Only Intellihub employees that hold operational roles, and need access to the data in order to perform their functions, are able to access the data. Any requests for access to this data must be lodged with Intellihub's IT team which only approves requests for operational team members where appropriate. Only authorised employees within Intellihub have access to the database. No persons at shareholder or executive level (including within PEP and/or Brookfield) have access to this data. This would contravene Intellihub's internal policies, as well as the relevant clauses in the NER.
- 6.11 In addition, it is worth reiterating that Intellihub's customer contracts with various energy retailers contain provisions that would prevent Intellihub providing a retailer's commercially sensitive information to Origin. Aside from being bound by privacy laws, the contracts commonly contain a confidentiality clause requiring a retailer's confidential information to be kept confidential by Intellihub.

B Origin's plans or incentives to exclusively contract with Intellihub

- 6.12 We understand Origin will respond directly to the ACCC on this point.

C Remaining uncontracted smart meters

- 6.13 It is estimated that, if a 100% penetration rate is to be achieved by 2030 across the NEM (excluding Victoria), approximately ~8.3 million smart meters will need to be installed in the mass market customer segment. Intellihub's internal estimate suggests that Origin is forecasted to have approximately **Confidential to Intellihub** mass market customers across the NEM by 2030.
- 6.14 With the current smart meter rollout sitting at approximately 30% across the NEM (excluding Victoria), approximately 2.4 million smart meters have been deployed in the mass market to date. This leaves ~5.9 million contestable smart meters to still be installed to 2030. It is estimated that approximately 50% of this volume has already been contracted to smart meter providers. For example, Origin has contracted a minimum of **Confidential to Origin and Intellihub** smart

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meters to Intellihub which will continue to be installed through to **Confidential to Origin and Intellihub**.

- 6.15 This leaves approximately 3 million uncontracted and contestable smart meters to 2030. Based on Intellihub's internal estimate, Origin's currently uncontracted and contestable smart meter volumes account for approximately **Confidential to Origin and Intellihub** of this.
- 6.16 These volumes (ie, the 3 million uncontracted and contestable smart meters including Origin volumes) will be hotly contested. Energy retailers typically hold tenders to award mass market smart meter deployment contracts, with smart meter providers – of which there are no fewer than 6 other independent suppliers in Australia (as outlined below) – competing vigorously to win volumes. The infrequent and periodic nature of competition, with competitive tenders structured to produce high levels of competition involving multiple metering service providers, and with sophisticated buyers (being the electricity retailers) which possess high levels of countervailing power, mean that Intellihub is not guaranteed to win any of these volumes.
- 6.17 Intellihub is just one of a number of capable providers of smart meters and related services. There are a number of other suppliers of smart meters and related services to energy retailers for deployment across the mass market including **Intellihub, Vector, Spotless, Yurika, PlusES, Metropolis** and **others**. A summary of Intellihub's three largest competitors is provided below.
- (a) **Vector**: Vector has installed more than 2 million advanced meters across both Australia and New Zealand, with 528,000 advanced meters installed in Australia as at 31 December 2022.⁴⁹ Vector cites its customers as some of Australia and New Zealand's 'leading electricity and gas retailers',⁵⁰ with services offered for both residential and small business customers.
- (b) **Yurika**: Yurika has installed more than 500,000 meters across the NEM for residential, commercial and industrial customers.⁵¹ Yurika cites long-standing partnerships with customers including Coles, Wesfarmers, McDonald's, the South Australian government, and Boral, as well as recently entered metering service agreements with a number of energy retailers including Ergon Retail, Telstra, Next Business Energy, and Iberdrola.⁵²
- (c) **PLUS ES**: By 2022, PLUS ES had installed more than 1 million meters across the NEM,⁵³ and works in partnership with utilities providers to collect, store and deliver data services for more than 2.5 million meters.⁵⁴ PLUS ES cites its customers as 'Australia's leading energy retailers, brokers and consultants', as well as direct commercial customers including utilities, embedded network operators and infrastructure owners.⁵⁵
- 6.18 It is clear that Vector, Yurika and PLUS ES (in addition to Intellihub) have all reached sufficient scale to compete effectively in Australia – even without taking into account any of the ~3 million smart meters contracted, but not yet installed **or** the ~3 million smart meters that remain uncontracted and uninstalled to 2030 (which figure includes Origin's volumes). In addition, other smaller Metering Providers (ie, Spotless, Metropolis and others) are continuing to gain scale and impose an effective competitive constraint on the larger Metering Providers.
- 6.19 Looking specifically at Origin's uncontracted contestable volumes, it is also important to note that Intellihub is not currently the exclusive supplier of mass market Metering Coordinator services to

⁴⁹ Vector, *Market release – Vector announces solid half year results* (21 February 2023) p 6 <<https://blob-static.vector.co.nz/blob/vector/media/news-articles/04-vct-vector-announces-solid-half-year-results.pdf>>.

⁵⁰ Vector Metering, *Metering solutions for a new energy future* <<https://vectormetering.com/au/>>.

⁵¹ Yurika, *Our approach* <<https://www.yurika.com.au/our-approach/>>.

⁵² Energy Queensland, *Annual Report 2021-22* (19 August 2022) <https://www.energyq.com.au/_data/assets/pdf_file/0019/1030834/EQL-Annual-Report-2021-22_DIGITAL.pdf>.

⁵³ PLUS ES, *PLUS ES installs one millionth meter two years ahead of schedule* <<https://pluses.com.au/plus-es-installs-one-millionth-meter-two-years-ahead-of-schedule/>>.

⁵⁴ PLUS ES, *PLUS ES Utility Services* <<https://pluses.com.au/utility-services/>>.

⁵⁵ PLUS ES, *Metering* <<https://pluses.com.au/metering/>>.

Origin, and there is no indication that Origin will make Intellihub its exclusive supplier going forward. Origin has always maintained a panel of providers. Origin has acquired smart meters and related services from Vector since 2016 and continues to use Vector.

- 6.20 In any event, even if Origin did contract all of its remaining contestable volumes to 2030 to Intellihub, this would not result in any substantial lessening of competition in the mass market for the following reasons:
- (a) as discussed above, **Vector, Yurika and PLUS ES** (in addition to Intellihub) have all reached sufficient scale to compete in Australia, even if they are not awarded any further Origin, or indeed other retailer, volumes;
 - (b) even excluding Origin, there are approximately **Confidential to Intellihub** uncontracted smart meters that will need to be installed by 2030. This is more than sufficient to enable smaller smart meter providers to reach a sufficient scale to compete with Intellihub, Yurika, Plus ES and Vector; and
 - (c) given the expected increase in electrification across the mass market customer segment, it is also expected that there is also likely to be an increase in the ratio of smart meters per mass market customer. It is likely that the number of contestable smart meters deployed in the mass market segment between now to 2030 will exceed ~5.9 million meters. This means that there is likely to be a larger quantity of uncontracted and contestable smart meters available in the market.
- 6.21 This is in addition to the fact that the industry already exhibits a number of highly competitive characteristics, eg, large number of suppliers, competitive tenders, countervailing buyer power, etc.

D Bundled solutions

- 6.22 We understand that the ACCC is also testing whether the deployment of Intellihub smart meters as part of a bundled offering with Origin's retail electricity plans, solar panel plans and/or other behind the meter services, would disadvantage smaller retailers. It should be borne in mind that Intellihub provides smart meters to retailers which then provide retail services to their customers. Intellihub does not contract directly with end customers. As a result, the question of bundling smart meters with Origin as a result of the Proposed Acquisition does not arise. Intellihub will continue to deal with all retailers on a non-exclusive basis.
- 6.23 In addition, it is worth noting that all of Intellihub's retailer agreements reflect the 'energy retailer-agnostic' nature of the industry and are structured to facilitate customer switching between retailers. Intellihub is highly incentivised to ensure that its assets can churn across retailer contracts to manage the risk of meter displacement.

Horizontal overlap in wholesale gas market

- 7 The ACCC requests the Applicants give the ACCC such additional information that they consider is relevant to the ACCC's determination, regarding:
- MidOcean's ability to facilitate information sharing across gas producers that supply gas into the domestic market, particularly in relation to APLNG and QCLNG
 - the information from APLNG that Senex would have access to as a minority owner of MidOcean, in particular in regard to pricing in the domestic market
 - in relation to QCLNG, whether MidOcean will:
 - continue to sell all its gas to Walloons
 - have visibility over prices or volumes of gas sold to the domestic market
 - receive any information from Walloons in relation to domestic marketing or supply arrangements.

A MidOcean's ability to facilitate information sharing across gas producers that supply gas into the domestic market, particularly in relation to APLNG and QCLNG

7.1 The ACCC has indicated that it wishes to test the extent to which MidOcean Energy's interests in both APLNG and QCLNG would be able to facilitate the sharing of competitively sensitive information between gas producers that supply gas into the domestic market.

Distinct East coast and Western Australia gas markets

7.2 The Applicants note that there is no single Australian 'domestic gas market'. Rather, there is a separate:

- (a) East coast gas market (as analysed in the ACCC's East Coast gas market inquiry report, covering Northern Territory, Queensland, New South Wales, Victoria, South Australia and Tasmania); and
- (b) West Australian gas market.

7.3 That is the case because:

- (a) East coast gas producers cannot supply West Australian customers, as the East coast gas market pipeline network is not connected to Western Australia; and
- (b) there are fundamentally different supply and demand dynamics in the East coast and Western Australian markets, with the result that there is no price correlation between these distinct geographic markets as:
 - (i) in Western Australia there is a domestic gas reservation policy generally resulting in 15% of all gas production of LNG facilities being required to be supplied domestically and a more limited commercial and industrial customer gas demand; and
 - (ii) in the East coast gas market, there is no domestic reservation (other than an Australian market supply condition which applies to a small number of newer tenements granted in Queensland) such that some producers can switch between supply to domestic customers and supply for processing into LNG, coupled with a much higher commercial and industrial customer gas demand.

Western Australian gas market

7.4 As a consequence of the distinct geographic markets, the fact that MidOcean Energy will hold a number of minority interests in Western Australian LNG projects by virtue of the Tokyo Gas acquisition is not relevant to, and will not facilitate information sharing, in relation to the East

coast gas market. Even information on the cost of gas production in the Western Australia projects is not relevant to the East coast gas market, as the cost profile of Western Australian offshore gas production is fundamentally different to the onshore coal seam gas production of the other Australian projects that MidOcean Energy will be investing in.

- 7.5 It also does not result in any change in the potential for information sharing, or potential for any lessening of competition, in the Western Australia gas market as each of those interests was already held by Tokyo Gas.

East coast gas market

- 7.6 In relation to the East coast gas market, MidOcean Energy's interests in both APLNG and QCLNG will not facilitate the sharing of competitively sensitive information. That is because:
- (a) MidOcean Energy will only hold a minority and non-controlling interest in each of APLNG (25.01%) and QCLNG (1.25%). As noted in the Application, these interests do not confer on MidOcean Energy any rights to be appointed project operator or marketing services provider for APLNG or QCLNG **Confidential to MidOcean Energy**. This means that MidOcean Energy will not undertake the day-to-day:
 - (i) operation of the APLNG and QCLNG upstream gas tenements;
 - (ii) production or output of domestic gas from those upstream gas tenements;
 - (iii) marketing of domestic gas produced by APLNG or QCLNG; or
 - (iv) negotiation of Gas Sale Agreements for APLNG or QCLNG.
 - (b) MidOcean Energy would not be able to facilitate information sharing across gas producers in any way that may impact the price or supply of gas into the domestic market as:
 - (i) In respect of APLNG, **Confidential to MidOcean Energy**. While MidOcean will have a role in approving at an APLNG board level material new gas sales agreements, it will not be involved in the day to day negotiation of domestic gas pricing; and
 - (ii) In respect of QCLNG, MidOcean will not receive any competitively sensitive information regarding domestic gas sales. Under the Joint Operating Agreements (**JOAs**) Tokyo Gas receives **Confidential to MidOcean Energy**.

MidOcean Energy confirms that the QCLNG joint venture arrangements are not being varied or amended in connection with MidOcean Energy's acquisition of Tokyo Gas' participating interest, such that MidOcean will have access to no competitively sensitive information in relation to QCLNG's domestic sales which MidOcean will receive minimal information about QCLNG's sales in future.
- 7.7 Accordingly, MidOcean will receive no meaningful commercially sensitive information in relation to QCLNG's domestic gas sales, such that it has nothing it could share with APLNG. To the extent that MidOcean receives some commercially sensitive information despite not being responsible for day to day marketing (for example where material sales contracts are, following negotiations by the marketing services provider, brought to the APLNG board for approval), MidOcean will not be involved at all in QCLNG's marketing endeavours through Walloons, such that it has no forum through the QCLNG joint venture and marketing arrangements in which to share any such APLNG information.
- 7.8 In addition, MidOcean Energy will be subject to strict confidentiality obligations under the JOAs and shareholders agreements for both APLNG and QCLNG, with serious consequences under those JOAs and shareholders agreement for default. Given that the vast majority of revenue and

profit from these LNG businesses is through LNG sales not East coast gas sales, MidOcean Energy will have no economic incentive to engage in sharing of competitively sensitive information in relation to domestic gas in contravention of the joint venture arrangements which has the potential to jeopardise and remove its ability to hold such interests.

- 7.9 MidOcean Energy will also not have any incentive to facilitate the sharing of competitively sensitive information in relation to supply of gas into the domestic market. MidOcean Energy, LLC is an LNG company formed and managed by EIG to build a diversified, resilient, cost and carbon competitive LNG portfolio. Engaging in conduct such as facilitating the sharing of competitively sensitive information would create a material risk to MidOcean Energy, LLC's investment thesis and reputation when pursuing future LNG opportunities.
- 7.10 Finally, the current regulatory environment acts as a material constraint on MidOcean Energy facilitating information sharing across gas producers in any way that would result in any lessening of competition in the East Coast wholesale gas market. In particular:
- (a) The ACCC's ongoing inquiry into the supply and demand for wholesale gas in Australia involves heavy scrutiny of the market on a quarterly basis. Through the inquiry, the ACCC is able to monitor all domestic sales made by APLNG and QCLNG, and has a strong ability to detect / monitor any concerning correlation in pricing that does not appear to be as a result of selling at market; and
 - (b) the finalised mandatory gas code of conduct provides further regulation around how covered suppliers make gas offers (including pricing needing to be specified in such offers) and provide limits on when they can be withdrawn, which will effectively mean that the decision on pricing will be made at the point of offer (by the marketer for the relevant joint venture) rather than at the point of final approval.

B Confidential to MidOcean Energy

7.11 Confidential to MidOcean Energy.

7.12 Confidential to MidOcean Energy:

Confidential to MidOcean Energy

- (a) Confidential to MidOcean Energy.
- (b) Confidential to MidOcean Energy.
- (c) Confidential to MidOcean Energy.

Confidential to MidOcean Energy

7.13 Confidential to MidOcean Energy.

7.14 Confidential to MidOcean Energy:

- (a) Confidential to MidOcean Energy;
- (b) Confidential to MidOcean Energy; and
- (c) Confidential to MidOcean Energy.

7.15 Confidential to MidOcean Energy.

Confidential to MidOcean Energy

7.16 Confidential to MidOcean Energy.

7.17 Confidential to MidOcean Energy⁵⁶ Confidential to MidOcean Energy.

⁵⁶ Confidential to MidOcean Energy

Confidential to MidOcean Energy

7.18 **Confidential to MidOcean Energy.**

7.19 **Confidential to MidOcean Energy**⁵⁷ **Confidential to MidOcean Energy**⁵⁸ **Confidential to MidOcean Energy**⁵⁹ **Confidential to MidOcean Energy**⁶⁰ **Confidential to MidOcean Energy**⁶¹ **Confidential to MidOcean Energy.**

C In relation to QCLNG, whether MidOcean will (i) continue to sell all its gas to Walloons, (ii) have visibility overprices or volumes of gas sold to the domestic market; or (iii) have any information from Walloons in relation to domestic marketing or supply arrangements

7.20 MidOcean Energy's agreement to acquire Tokyo Gas' 1.25% interest in QCLNG will not result in any variations to the underlying JOAs or shareholders arrangements governing the QCLNG joint venture, or its Gas Sale Agreement with Walloons.

7.21 On completion, MidOcean Energy will simply step into Tokyo Gas' participating interest of 1.25% of the JOAs, and thereby continue to sell all of the gas attributable to its participating interest in QCLNG to Walloons and not have any access to information on individual gas contracts or negotiations.

7.22 As noted in the Application, pursuant to gas sales agreements, gas is aggregated from each of Shell, CNOOC and Tokyo Gas (as participants in the upstream tenements) and sold to a single buyer, being Walloons Coal Seam Gas Company (Walloons). The buyer is controlled by Shell who has a 75% interest in Walloons, with CNOOC having the remaining 25%. The buyer is then responsible for marketing and sales of gas to end customers, including in respect of domestic gas. Critically Tokyo Gas has no interest in Walloons. As a result, Tokyo Gas is (and MidOcean Energy will not be) not involved in the marketing and sale of gas to end customers and does not have visibility over pricing to those customers, or the individual volumes they receive.

Confidential to MidOcean Energy: Prices are calculated monthly and in proportion to the volume supplied by each operator.

7.23 **Confidential to MidOcean Energy: The parties have verification procedures in place for pricing calculations. Confidential to MidOcean Energy.**

⁵⁷ **Confidential to MidOcean Energy**

⁵⁸ **Confidential to MidOcean Energy**

⁵⁹ **Confidential to MidOcean Energy**

⁶⁰ **Confidential to MidOcean Energy**

⁶¹ **Confidential to MidOcean Energy**

Public benefits

Renewable generation build-out of Origin

- | | |
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| 8 | <p>The ACCC requests the Applicants give the ACCC such additional information that they consider is relevant to the ACCC's determination, regarding:</p> <ul style="list-style-type: none">• The commercial incentives for Brookfield LP to undertake the accelerated renewable generation build-out as claimed in the Application, and the corporate governance mechanisms that constrain Brookfield from departing from its claimed investment strategy.• Additional evidence that Brookfield is better placed than Origin to achieve the additional 10GW of renewable generation by 2033, including the expertise and procurement capabilities of Brookfield that would give it a relative advantage to Origin |
|----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

A Summary of counterfactual

- 8.1 The ACCC continues to test what will occur without the Proposed Acquisition in terms of renewable generation build-out by Brookfield, Origin and third parties.
- 8.2 Brookfield submits that the 10 GW (less whatever capacity Brookfield may have been able to develop by 2033 on a standalone basis, which is highly uncertain), is a public benefit that will result from the Proposed Acquisition. Chapter 3 of the Application sets out, in detail, the future with and without the Proposed Acquisition for each of Brookfield and Origin, as well as other market participants.
- Brookfield**
- 8.3 Absent the Proposed Acquisition, Brookfield has a goal of developing renewables and storage in Australia as an alternative to the Proposed Acquisition. This goal is, however, subject to a number of uncertainties and challenges.
- 8.4 Like most other renewables generators, Brookfield will seek to fund its renewables development pipeline via a combination of equity and project finance debt. **Confidential to Brookfield: Brookfield's challenges in Australia when assessing single asset opportunities.**
- 8.5 Absent the Proposed Acquisition, BGTF as a global fund has made no commitment to invest funds in Australia. The transition to net zero is a global challenge. BGTF will invest wherever in the world it can make the most attractive returns and deliver the best contribution to the transition to net zero. Any possible renewables project in Australia competes with other opportunities across the globe for BGTF capital.
- 8.6 As a result, it is highly uncertain what renewable capacity, if any, Brookfield Renewable will have built in Australia by 2033 absent the Proposed Acquisition.
- 8.7 Since introducing a team in Australia, Brookfield has an aspiration to develop 5 GW of renewables and storage in Australia in the medium term. It is important to note that there is no specific plan to achieve this build-out and no performance incentives are attached to achieving it.
- 8.8 At this stage, Brookfield has one project in development which would, if it proceeds, see up to 315 MW of generation and 105 MW of storage built by around 2028. Brookfield Renewable hopes that absent the Proposed Acquisition it would have achieved more than this by 2033, but it is not possible with any degree of confidence to predict what might actually be achieved.
- 8.9 The Proposed Acquisition will significantly improve the forward economics assessment when Brookfield's Investment Committee considers each new project, because any PPA uncertainty that would otherwise be required as part of the projects' development, is removed. This

significantly increases the likelihood that projects will be approved and, if approved, would increase the speed with which they are able to be developed.

Origin

- 8.10 Absent the Proposed Acquisition, Origin is likely to continue to operate its business in accordance with its existing strategy and business plan. In relation to new renewables development, Brookfield estimates that Origin would develop 4 GW of new renewable capacity by 2033. While Origin is also currently exploring offshore wind opportunities, this is at a very early stage.
- 8.11 In relation to Origin's renewable PPA strategy, entering into renewable PPAs and accessing third party capital are likely to form a component of Origin's target of investing in 2,332 MW of new generation renewable and storage by 2030. The particular mix of direct investment and accessing third party capital through PPAs is not set and will be driven by factors such as the quality of Origin-owned sites, the time-to-develop Origin-owned sites, the pricing of PPA offers and the timing of when PPA volumes may be available.
- 8.12 Beyond its plans for new renewable development, primarily to transition Eraring, Origin will continue to meet its short electricity position in the same way it does currently, ie, largely through swap and cap contracts and pool purchases.

Third parties

- 8.13 The Proposed Acquisition is unlikely to have any adverse impact on other renewables developers, including those seeking to enter into PPAs. This is consistent with the submissions to the ACCC made by a number of third parties.⁶²
- 8.14 In the counterfactual, Brookfield's best estimate is that Origin would enter into PPAs providing approximately 3 GW of renewable generation and storage by 2033 (75% of what Brookfield estimates would be approximately 4 GW of renewable and storage that Brookfield would develop absent the Proposed Acquisition). Brookfield's base plan is to have Origin Energy Markets build up to 14 GW of new renewable generation and storage *itself*, potentially displacing the 3 GW that would be built by third parties for Origin pursuant to a PPA. We note however:
- (a) Brookfield would be open to considering a PPA with a third party if such a PPA provided a more attractive return to Brookfield than building that capacity itself.
 - (b) Overall demand for new renewable generation is very high. AEMO estimates that the existing 16 GW of variable renewable energy (at utility scale) will need to treble by 2030, and then doubling that capacity by 2040, and again by 2050⁶³ to achieve Australia's Paris agreement commitments. Origin Energy Markets represents only approximately 18.77% of electricity demand in the NEM.⁶⁴ A range of other retailers, including AGL and Energy Australia, and industrial and commercial customers, are all seeking to build or enter into PPAs to support the building of renewables. There are a large number of companies developing renewable generation and storage in Australia.
 - (c) The Proposed Acquisition will remove both demand (Origin Energy Markets' approximately 3 GW) and supply (Brookfield's uncertain potential future supply of

⁶² For example, see ANZ submission, section 2 <<https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20ANZ%20-%202023.06.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf>>; Alinta submission, paragraphs 13 and 15 <<https://www.accc.gov.au/system/files/public-registers/documents/Alinta%20Record%20of%20oral%20submission%20-%2030.06.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf>>.

⁶³ AEMO, 2022 Integrated System Plan – For the National electricity Market (June 2022), page 39 <<https://aemo.com.au/-/media/files/major-publications/isp/2022/2022-integrated-system-plan-isp.pdf?la=en>> (**AEMO 2022 ISP**)

⁶⁴ Origin load of 35.5 TWh (FY22), *Origin Energy Annual Report 2022*, page 29; And total NEM load 189.1 TWh (FY22), Australian Energy Regulator, *Annual electricity consumption – NEM*, <<https://www.aer.gov.au/wholesale-markets/wholesale-statistics/annual-electricity-consumption-nem>>.

renewables), meaning it is uncertain what overall impact on the supply and demand of PPAs the Proposed Acquisition would have.

Challenges in Australia

- 8.15 The ACCC is continuing to consider the challenges which Origin, Brookfield and other market participants face in engaging in a renewables build-out, and how that may impact timing of build-out: paragraph 41 of the Transparency Letter. These challenges exist irrespective of the Proposed Acquisition and are not exacerbated by it. This is consistent with the submissions to the ACCC made by a number of third parties.⁶⁵
- 8.16 One key challenge in developing renewables in Australia is finding an offtaker willing to sign a long term PPA for the project offtake. A long term PPA will underwrite the project revenues and is typically both a requirement of project finance lenders and a strong preference for equity investors in making a final investment decision.
- 8.17 One particular challenge is the delay between pricing negotiations and contracting (more specifically the time when a customer gets the production from the project). It is common for a renewables developer to have a discussion with a potential C&I offtaker now but, depending on the stage of the project by the time the project is ready to take a final investment decision (and contract can be executed for the future delivery of electricity) or the project comes online, considerable time has passed. During that time, the C&I customer's needs might have changed, the cost of the build-out might have increased (or decreased), pricing might (or might not) have changed, etc. All of these factors affect the viability of the PPA, and also potentially impact on the underwritten rate of return for the project.
- 8.18 The challenges in securing a PPA have been recognised as a market failure by both State and Commonwealth governments and has resulted in a variety of regulatory responses.
- 8.19 A further challenge is transmission network connections. The green build-out plan was developed through work done by Brookfield to understand how much capacity Origin would need to service a **Confidential to Brookfield: 33 - 36** TWh electricity load in 2033. Brookfield determined that around 14 GW would be required by 2033 and then considered whether or not there were enough viable projects in the market to meet this build out plan, and critically, whether those projects would come online by 2033. A number of projects that could potentially form part of the green build-out plan were considered, including on the basis of their location and the likelihood of them proceeding. Brookfield has therefore undertaken an exercise to satisfy itself that the green build-out plan is possible based on the **current** market. As such, the impact of any current challenges in building renewable generation projects like delays in transmission network connections, approval processes and social licence issues, etc. have already been factored into the total build-out figure for the green build-out plan, although the specific projects that will ultimately form part of the plan will depend on available opportunities, market developments, etc.

B Commercial incentives and corporate governance mechanisms constraining departure from renewable generation build-out

- 8.20 The ACCC requests additional information regarding the commercial incentives for Brookfield LP to undertake the accelerated renewable generation build-out as claimed in the Application, and

⁶⁵ For example, see ANZ submission, section 3 <<https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20ANZ%20-%202023.06.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf>>; Alinta submission, paragraphs 13 and 15 <<https://www.accc.gov.au/system/files/public-registers/documents/Alinta%20record%20of%20oral%20submission%20-%2030.06.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf>>; Grattan Institute submission, paragraphs 14-15 <<https://www.accc.gov.au/system/files/public-registers/documents/Grattan%20Institute%20record%20of%20oral%20submission%20-%2003.07.23%20-%20PR%20-%20MA1000024%20Brookfield%20Origin.pdf>>

the corporate governance mechanisms that constrain Brookfield from departing from its claimed investment strategy: page 11 of the Transparency Letter.

- 8.21 It is in Brookfield's financial interest to make the investment of \$20-\$30 billion by 2033 to achieve the material decarbonisation of Origin Energy Markets: see section 6.10(h) of the Application.
- 8.22 With respect to Brookfield's commercial incentives:
- (a) BGTF has the dual objective of targeting both attractive financial returns and generating a measurable positive environmental impact. BGTF is targeting a gross, levered internal rate of return (*equity IRR*) of **Confidential to Brookfield** (or a net equity IRR of **Confidential to Brookfield**) by the end of the fund's life, including in respect of the Proposed Acquisition and all other investments made by BGTF. Brookfield's Investment Committee documents for the Proposed Acquisition illustrate a base case return of **Confidential to Brookfield**%, which is only achievable if the green build-out plan is executed. The returns also contemplate a component from the sale of the Origin Energy Markets business at the end of the investment horizon (which accounts for a significant proportion of the total return) such that the size of that component depends on the investment in the green build-out – the greater the build-out, the higher the return. Refer to paragraphs 865 and 866 of the Application for further details;
 - (b) Brookfield is incentivised to deliver returns above the **Confidential to Brookfield**% hurdle rate because BAM, as an asset manager, is financially incentivised to maximise returns. BAM earns a 'carried interest' or 'carry' in the fund as an incentive, comprising **Confidential to Brookfield**% of any profit over and above that which delivers the investors an **Confidential to Brookfield**% internal rate of return. Refer to paragraphs 896 and 870 for further details;
 - (c) BGTF is a closed-end fund with an expected operating term of 12 years (with the option for two one-year extensions), at which point BGTF will exit the investments the fund has made, including Origin Energy Markets, and return capital to investors. This incentivises Brookfield to execute the 'green build-out' plan for Origin Energy Markets in a timely manner. Refer to paragraph 867 of the Application for further details; and
 - (d) achieving the targeted returns for BGTF is critical to Brookfield's success in fundraising for future funds. Refer to paragraph 871 for further details.
- 8.23 In addition, Brookfield is subject to corporate governance mechanisms which constrain it from departing from the green build-out plan under the Proposed Acquisition:
- (a) Brookfield will be constrained by the BGTF fund mandate, a significant aspect of which involves ensuring all investments align, and continue to align, with the 4A criteria. One of these criteria is 'additionality', which means that BGTF capital must meaningfully advance the environmental outcomes over and above the status quo. If Brookfield departs from the green build-out plan, there will be no additionality. This would jeopardise the success of BGTF in meeting its investment mandate, as well as the success of any future fundraising activities, and as such, Brookfield's reputation. Refer to paragraphs 767 – 769 of the Application for further details;
 - (b) BGTF's co-underwriters, Temasek and GIC will also hold Brookfield accountable to the green build-out plan. Temasek and GIC's investments are being made on the same basis as BGTF, having relied on the same capex spend plan. As such, all members of the BGTF Consortium are invested in execution of the green build-out plan. Refer to paragraph 862 of the Application for further details; and
 - (c) in addition, as co-underwriters with interests of 9.9% and 22.5% in the Origin Energy Markets business respectively, Temasek and GIC will obtain certain governance rights,

including in respect of any deviation by greater than 10% from the aggregate operating expenditure or aggregate capital expenditure budgeted in the applicable financial year, which includes the spend for the green build-out plan. Refer to paragraphs 872 – 873 of the Application for further details.

How changes in market conditions may impact the build-out and returns

- 8.24 In considering the Proposed Acquisition, Brookfield considered the impact that a change in a number of variables would have on its investment in Origin Energy Markets.
- 8.25 In particular, Brookfield has considered the impact on the green build-out plan of forward power prices declining to a point where it becomes uneconomic to develop renewable projects. In this scenario, it is estimated that the total cumulative renewable capacity developed by 2033 would **Confidential to Brookfield**. However, this scenario is merely theoretical. It is extremely unlikely to eventuate and to the extent it did, it would impact all investments in renewables (not just those of Brookfield).
- 8.26 Further, as noted at slide 17 of Annexure 1.14 to the Application, Brookfield has run various market sensitivities with respect to its base case return for the Proposed Acquisition, being **Confidential to Brookfield**%. This slide shows that Brookfield's investment will be able to withstand a decrease in any one value driver listed (on its own), as the return would not fall below the equity IRR of the broader fund (ie, **Confidential to Brookfield**%). While it is theoretically possible for a number of different value drivers to decrease over the life of Brookfield's investment, there would need to be a significant decrease before the green build-out plan would be jeopardised. In addition, slide 98 of Annexure 1.15 of the Application shows the impact on Brookfield's returns in six different scenarios, in respect of which only one scenario would fail to meet the broader fund IRR.
- 8.27 Given Brookfield's forecast equity IRR in a number of different market scenarios remains robust (with the exception of certain unlikely scenarios), it is highly probable that the green build-out plan, or at least a significant proportion of it, will be executed despite material changes in market conditions which, if manifested, would jeopardise Australia's transition to net zero.

C Evidence that Brookfield is better placed than Origin to build the additional 10 GW of renewable generation

- 8.28 The ACCC has requested additional evidence on why Brookfield is better placed than Origin to achieve the additional 10GW of renewable generation by 2033, including the expertise and procurement capabilities that give Brookfield a relative advantage to Origin.
- 8.29 The BGTF Consortium considers it is uniquely placed to deliver on its 'green build-out' plan for Origin Energy Markets for the following key reasons: (i) access to capital, (ii) capital structure, (iii) funding strategy, (iv) longer term horizons for investment, (v) renewables expertise, and (vi) centralised global procurement capabilities. Each of these is addressed in detail in section 6.10 of the Application and summarised below.
- 8.30 **Access to capital:** Access to capital for a listed company like Origin is subject to a number of constraints, particularly in the context of renewable development.
- (a) **First**, capital raising from shareholders may be dilutive for existing shareholders or not possible if the proposed investment is not attractive or immediately accretive to the company's earnings and therefore to existing shareholders.
- (b) **Second**, Origin's shareholders have an expectation of ongoing cash returns in the form of dividends and other forms of capital management such as buybacks, rather than investing all excess cashflow into new developments. As noted below, there have been specific examples of participants in the equity market indicating a preference for returns

of cash to shareholders ahead of significant investment in renewable development utilising Origin's balance sheet.

- (c) **Third**, funding a project through debt may be possible but will be constrained by the business' capital structure, particularly for long-dated asset development which requires significant upfront capital. Investment at the scale Brookfield proposes will require a combination of equity funding, reduced cash distributions to shareholders or alternatively, partnering with third party capital providers.
 - (d) **Finally**, co-investing with others is possible but will be less efficient than sole funding because of the need to achieve alignment with a capital partner especially when the approach to partnering is on a project-by-project basis, and can delay investment or increase risk.
- 8.31 In contrast, the BGTF Consortium has ready access to capital to deploy as part of Australia's energy transition. As noted above, the BGTF Consortium's business plan for Origin Energy Markets contemplates between \$20 to \$30 billion of investment during the next decade to construct up to 14 GW of new large-scale renewable generation and storage facilities in Australia.
- 8.32 **Capital structure:** The 'green build-out' plan will require an investment of \$20 to \$30 billion investment in new generation and storage projects. The BGTF Consortium intends to fund this through a combination of reinvesting a proportion of cash that is available for distribution from the Origin Energy Market's business, third party debt, and capital recycling.
- 8.33 Brookfield estimates that the additional shareholder equity necessary to fund the green build-out plan is approximately \$8 billion (in 2023 dollars). The BGTF Consortium's analysis suggests that the business is self-funding and they will use the capital that is generated by Origin Energy Market's core business and proceeds from the partial sell down of assets. Where there are years that have lower cash flows and require the investors to contribute capital (eg, **Confidential to Brookfield**), the BGTF Consortium will do so.
- 8.34 The BGTF Consortium expects that the Origin Energy Markets business will generate substantial cashflow each year in the region of approximately **Confidential to Brookfield**. The BGTF Consortium intends to retain the majority of this cash within Origin Energy Markets rather than paying it out as dividends, as would currently occur with Origin as a publicly listed company. There will be a period between when the Proposed Acquisition completes and when the first equity investment in new renewables generation construction is required, allowing Origin Energy Markets to build up a reserve of capital from its cashflow.
- 8.35 The BGTF Consortium expects to use Origin Energy Markets' reserve of capital to fund an interest of each individual project in the 'green build-out' pipeline. This would represent the equity component of the investment. The balance of the investment will be funded by third party debt. The structure where Origin Energy Markets is in effect the offtaker from each project, combined with Brookfield's renewables expertise, means that the process of raising third party debt is more streamlined.
- 8.36 Once a project has been constructed and de-risked, the BGTF Consortium intends to sell down an interest in the project to a third party. Many investors are unwilling or unable to take construction risk and so cannot invest in a renewables project during the construction stage. Those investors can, however, invest in renewables once construction is complete. Brookfield expects that when it sells down an interest, having completed the development and removed the associated risks, it will be able to achieve a price premium above construction cost. The capital from the sale of that interest to a third party at a premium will then be recycled into further equity investment in further renewable projects.

- 8.37 In essence, the BGTF Consortium's focus on earning a return over a 10 year investment horizon and its ability to invest profits in renewable projects is one key to its ability to fund the 'green build-out' plan. Brookfield's renewables construction experience and willingness to take development and construction risk provides a further lever that will assist funding the 'green build-out' plan. Neither of these would be possible for Origin absent the Proposed Acquisition.
- 8.38 **Longer time horizon for investments:** As a listed company Origin's shareholders expect a level and frequency of dividend, usually once or twice per year. As such, when public companies consider investment opportunities, they are somewhat limited to pursuing investments with shorter time horizons so that returns can be delivered to shareholders within the expected dividend windows. This significantly limits the ability to invest available cash flow in energy transition projects, which tend to have longer investment horizons.
- 8.39 By contrast, BGTF, its co-underwriters and co-investors do not seek short term dividends but rather focus on total return and compounded value. Investors in BGTF do not expect regular dividends and commit their capital for a minimum period of 10 years, and possibly longer if extension options are exercised.⁶⁶ Investors in BGTF are effectively only concerned with a return at the end of the commitment period. As such, the BGTF Consortium is in a position where it can facilitate renewable energy projects in Australia with a longer investment horizon through access to substantial long-term capital, provided returns are generated over that timeframe.
- 8.40 **Renewables expertise:** The ACCC is referred to Annexure B to the Application which sets out, in detail, Brookfield's global experience across a number of areas including wind, solar, storage, etc.
- 8.41 **Centralised global procurement capabilities:** The BGTF Consortium will draw on Brookfield's global centralised procurement capabilities and its strong, strategic relationships with Tier-1 wind, solar, hydro and storage suppliers to deliver on the development and operation of renewable development in a timely and cost-efficient manner. This is particularly beneficial for Australia where infrastructure projects tend to take longer and cost more than initially expected.⁶⁷ Such procurement capabilities operate above the portfolio company level to support Brookfield's local or region specific renewable projects and operations. Brookfield has developed these strong relationships with its renewable operating assets and ~126 GW global renewables pipeline. Origin, as a standalone business, is a smaller player in the global market with less access to procurement supply chains.
- 8.42 Brookfield benefits from procurement scale advantage. It does not negotiate inputs on a per company, per project, or even per region basis. Brookfield negotiates on behalf of all existing and pipeline projects within the Brookfield group (solar, wind, batteries, EPC, etc). Brookfield is not immune to supply chain disruptions, but its strong relationships with suppliers means it feels them less.
- 8.43 Brookfield's global relationships with key suppliers have delivered a range of benefits for its renewables projects including volume discounts, resilience, security of supply, access to competitive, long-term O&M terms and growth origination, responsive after-market support post fulfilment of the supply contract, as well as improved quality control. Particularly in respect of price, **Confidential to Brookfield: benefits that Brookfield can achieve through its approach to global procurement.**

⁶⁶ Brookfield, Amended and Restated Private Placement Memorandum (November 2021), page 6 (**Annexure 21.4** to the Application).

⁶⁷ Frank Calabria, *Delivering the biggest infrastructure challenge in a century* (22 November 2022) Origin Energy <<https://www.originenergy.com.au/about/investors-media/delivering-the-biggest-infrastructure-challenge-in-a-century/>> (**Annexure 9** to the Application); Frank Calabria, *Examining the impact of the energy transition on customers* (7 June 2022) Origin Energy <<https://www.originenergy.com.au/about/investors-media/examining-the-impact-of-the-energy-transition-on-customers/>> (**Annexure 16** to the Application).

Energy prices and grid stability

- 9 The ACCC requests the Applicants give the ACCC such additional information that they consider is relevant to the ACCC's determination, regarding:
- Brookfield's proposed investment in firming projects through Origin that it would undertake using proven technology at a meaningful scale that Origin (absent the Proposed Acquisition) or a third party developer could not or would not undertake.

A Brookfield's proposed investment in firming projects through Origin using proven technology

- 9.1 At paragraph 44 of the Transparency Letter, the ACCC requested further information on Brookfield's proposed investment in firming projects through Origin using proven technology at a meaningful scale that would not take place absent the Proposed Acquisition.
- 9.2 Under the green build-out plan, the BGTF Consortium intends to develop up to 14 GW of renewable generation and storage capacity by 2033. Of this 14 GW, between 4 – 5 GW is expected to come from new utility scale storage.
- 9.3 Brookfield's proposed storage projects that will form part of the green build-out plan under the Proposed Acquisition include:
- Confidential to Brookfield**
- As these projects will form part of the green build-out plan, Brookfield has committed to completing them. Refer to paragraph 303 of the Application for further details.
- 9.4 As noted at paragraphs 307 – 308 of the Application, Brookfield is also considering renewable energy projects (including storage) across Queensland, New South Wales, Victoria and South Australia if the Proposed Acquisition proceeds.
- 9.5 In respect of the projects listed in paragraph 9.3 above that will form part of the green build-out plan, as noted in paragraph 368 of the Application, the Mortlake battery and Darling Downs Battery remain 'under consideration' by Origin while the Shoalhaven hydro pump expansion in New South Wales is subject to Origin re-testing pricing at a later date when economic and market factors may have changed. Brookfield has however committed to completing these projects.
- 9.6 The firming projects that Brookfield will undertake through Origin may not necessarily be projects that Origin (absent the Proposed Acquisition) or a third party developer could not or would not undertake. However, there are a number of reasons why Brookfield is likely to be better placed than Origin (absent the Proposed Acquisition) or a third party developer to complete such projects in a more timely and cost-efficient manner, as set out below.
- (a) **First**, Brookfield has extensive experience in developing battery storage globally. For example, as noted in Annexure B of the Application, Brookfield entered into an agreement with Cambridge Power, a battery energy storage developer, to support the build out of one of the largest battery energy storage systems (**BESS**) in the UK. In addition, by Q2 2023 Brookfield will have taken four utility-scale battery storage projects totalling 50 MW / 100 MWh AC co-located with existing Brookfield hydro facilities in the northeast of the US to their commercial operating date (**COD**). The first of these projects reached COD in 2021. Brookfield also has plans to continue constructing battery storage projects globally.
- (b) **Second**, as noted at paragraph 100 of the statement of Luke Edwards, Managing Director and Head of Renewable Power and Transition – Australia at Brookfield dated 5 June 2023, Brookfield is exploring long-term, strategic partnerships to facilitate further competitiveness in the supply of inputs to battery storage projects and security of supply

for those inputs. In particular, Brookfield is exploring relationships with a range of suppliers of long duration storage technologies. Through these relationships, Brookfield will be better placed to secure inputs for storage projects on more favourable terms.

- (c) **Third**, as noted in section 6.10(e) of the Application, Brookfield has global centralised procurement capabilities and strong, strategic relationships with Tier-1 wind, solar, hydro and storage suppliers to deliver on the development and operation of renewable development in a timely and cost-efficient manner. Brookfield's global relationships with key suppliers have delivered a range of benefits for its renewables projects globally including volume discounts, resilience, security of supply, access to competitive, long-term O&M terms and growth origination, responsive after-market support post fulfilment of the supply contract, as well as improved quality control.
- (d) **Fourth**, the development of battery storage in particular will be a challenge for at least Origin. As noted at paragraph 51 of the statement of Anthony Lucas, Executive General Manager, Future Energy and Technology at Origin dated 2 June 2023, once the Eraring power station is decommissioned, sufficient replacement capacity will be needed, including storage capacity. Mr Lucas further notes in relation to some of the challenges with investing in renewables and cleaner energy:

[79] ... *It is important for a company involved in generation and retail, such as Origin, to be able to combine a portfolio of renewable generation and high value firming capacity. These assets are financed at very low returns reflecting stable cash flows and the assets are often very highly geared. The Origin balance sheet is characterised by commodity risk (e.g. oil price, gas price, and coal price). Consequently, Origin's gearing is lower to hold a buffer to adverse commodity exposures. Origin on its own would not be competitive given its balance sheet composition and so would have to partner with a funds provider, but this gives rise to the challenges [identified above]. Brookfield ownership would provide direct access to funds, bringing the capital to deploy into that investment in renewable assets.*

[80] *As regards battery storage projects in particular, because of Brookfield's advantages of global scale and footprint, and due to its track-record of battery storage investments to date, I consider that Brookfield is likely to have a faster roll out plan than Origin, which would lead to more rapid deployment...*

B Insulation of Australian energy prices

- 9.7 As noted at paragraphs 43 and 44 of the Transparency Letter, the ACCC is considering the extent to which reduced retail energy price volatility and insulation of Australian energy prices from overseas price shocks are public benefits that are likely to result from the Proposed Acquisition.
- 9.8 As noted in section 6.11(b) of the Application, the green build-out plan will put downward pressure on consumer and small business energy prices by contributing significant renewable generation and storage capacity to the NEM over the next decade. In addition to reducing Australia's reliance on international commodity markets, this displaces more expensive generators, thereby lowering wholesale electricity prices. A reduction in wholesale prices has a significant and direct impact on retail prices for consumers and small businesses.⁶⁸
- 9.9 Further, the prices of gas and coal on the east coast are linked to the international prices for such commodities (in the case of gas, subject to a price cap in some circumstances). This means that the price of gas to consumers is also directly linked to the international price. In addition, because the principal forms of energy generation are currently coal and gas and the cost of these

⁶⁸ AER, *Default market offer prices 2023-24: Final determination* (25 May 2023), page 3 <https://www.aer.gov.au/system/files/AER%20-%20Draft%20determination%20-%20Default%20market%20offer%20prices%202023-24%20-%2015%20March%202023_1.pdf>

commodities form part of the marginal cost for such generators, the international price of coal and gas directly affects electricity prices.

9.10 The Reliability Panel AEMC notes in its 2022 Annual Market Performance Review that:⁶⁹

Internationally coupled fuel markets expose Australia's electricity generation sector to high levels of price volatility, associated with geo-political event risk.

...

The development of a large LNG export industry has coupled Australian and international gas markets in a way that makes uncertainty in input fuel costs associated with international factors a driver of domestic average electricity market prices.

9.11 Commenting on this link between Australian electricity prices and international gas prices, Tim Buckley, Director of Climate Energy Finance, notes:⁷⁰

The only solution to permanently lower power prices and alleviate associated cost of living pressures is to decouple our economy from polluting, inflationary fossil fuels and accelerate the transition to cheap, clean firmed renewable energy.

9.12 Accordingly, Australia's transition to firmed renewables will provide the opportunity to 'decouple' Australian electricity prices from the volatile international prices of gas and coal.

9.13 As noted at paragraph 44 of the Transparency Letter, the ACCC is testing the extent to which Australian energy prices may be insulated from overseas price shocks under the Proposed Acquisition in circumstances where 'the cost of renewables infrastructure is heavily affected by overseas commodity shocks, inflation and production shocks in the overseas countries producing components'.

9.14 The cost of constructing new renewables generation and storage is partially linked to the costs of acquiring component parts for such generation and storage in international markets. Once new generation and storage is installed, however, the capital costs involved are sunk and would not be taken into account by generators bidding in the NEM. Because the marginal costs of renewable generation are close to zero, the prices bid by renewable generators are likely to be very low regardless of capital costs incurred in construction. Overtime, this will place downward pressure on electricity prices.

9.15 Refer to paragraphs 895 – 896 of the Application for further details.

⁶⁹ Reliability Panel AEMC, *Final Report – 2022 Annual Market Performance Review* (30 March 2023), pages 10 and 44 <<https://www.aemc.gov.au/sites/default/files/2023-03/2022%20Annual%20Market%20Performance%20Review%20%28Clean%29.pdf>>

⁷⁰ Renew Economy, *Latest hike could be power price peak – as long as we decouple from inflationary fossil fuels* (26 May 2023) <<https://reneweconomy.com.au/latest-hike-could-be-power-price-peak-as-long-as-we-decouple-from-inflationary-fossil-fuels/>>

Other public benefits

- 10** The ACCC requests the Applicants give the ACCC such additional information that they consider is relevant to the ACCC's determination, regarding:
- why hydrogen technologies are particularly critical to Origin's transition to greater use of renewables
 - to the extent that the development of hydrogen technologies succeeds and is important to Origin's transition, why Origin could not access such technologies itself
 - which sectors would experience employment and third party business creation if the Proposed Acquisition goes ahead, and quantifying the magnitude of any such benefit
 - why the Proposed Acquisition would generate employment and third-party business creation above and beyond any increase in employment or third party business that would occur through Australian green transition, absent the Proposed Acquisition.

10.1 In paragraph 45 of the ACCC's Transparency Letter, the ACCC outlines that it is continuing to test:

- (a) first, the role of hydrogen technologies in Origin's transition;
- (b) second, the impact of the Proposed Acquisition on employment or job creation; and
- (c) third, how the Proposed Acquisition may accelerate behind the meter solutions.

Each of these is addressed in turn below.

A Hydrogen technologies

10.2 Green hydrogen is an emerging technology in the renewables sector, particularly in hard-to-abate industries. Origin expects that green hydrogen will play a key role in the future global energy mix and considers this technology (and others, like offshore wind) relevant to Origin's medium to longer term transition goals.

10.3 Origin's Future Fuels business is pursuing opportunities in hydrogen produced by renewable powered processes. This includes a proposed hydrogen production facility in collaboration with Orica, to be located in the Hunter Valley region of NSW. The proposed facility would produce hydrogen for manufacturing and mobility applications. Origin has also completed a feasibility investigation of an export scale green hydrogen and ammonia project in the Bell Bay industrial precinct in northern Tasmania.

10.4 Hydrogen is, however, currently uneconomic as a fuel and hydrogen projects rely to a significant extent on government subsidies. In addition to needing government support, hydrogen projects require investment by an energy knowledgeable counterparty and large project skills. Most projects in Australia are generally in the trial phase.

10.5 It is particularly hard for Origin to invest in these types of technologies at a commercially viable scale as a public company due to the return profile of investing in these technologies at this stage. As a private company, however, Brookfield has access to more capital and a longer-term investment focus.

10.6 Brookfield dedicates resources to tracking new renewable technologies. Once these technologies are proven and commercially viable, Brookfield has capital available to immediately invest. By way of example, in the US last year, Brookfield invested in biofuels and three carbon capture businesses. These are not large scale projects, but Brookfield is providing the scaling capital to help them grow. Brookfield also has a global pipeline of close to 2 GW of early stage hydrogen opportunities. All necessary early stage approvals have been obtained so that, when the

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technology becomes commercially viable, Brookfield will be in a position to immediately introduce this technology into its portfolio.

- 10.7 Brookfield ownership of Origin could alter Origin's approach to these technologies and enable it to accelerate its involvement in investigating and investing in these technologies. Origin will have greater opportunities to invest in new and proven technologies at a commercially viable scale. It will be able to draw on Brookfield's expansive market reach and involvement in a diverse range of projects focused on scaling new renewable technologies.
- 10.8 Given Brookfield's global expertise, economies of scale, and investment in new technologies, Australia is likely to see earlier and more cost-efficient access to these technologies than it might absent the Proposed Acquisition.

B Job creation

- 10.9 Research commissioned by the Clean Energy Council and undertaken by the UTS Institute for Sustainable Futures 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. It is not disputed that Australia's transition to renewables will result in job creation.
- 10.10 The Proposed Acquisition, however, accounts for an additional 10 GW build-out over and above any counterfactual scenario. The projects comprising this 10 GW will generate both direct and indirect job creation which would not occur absent the Proposed Acquisition.
- 10.11 Brookfield is unable to estimate the number of jobs that will be created as a result of the Proposed Acquisition, but it is not necessary for this figure to be quantified in order for it to be accepted that the Proposed Acquisition **will inevitably** result in job creation in a number of ways:
- (a) The BGTF Consortium will need to employ a team of people to carry out each project under its 'green build-out plan.
 - (b) The BGTF Consortium will partner with third parties in respect of certain aspects of the projects, as well as in ancillary industries in the supply chain.
 - (c) The BGTF Consortium has ambitions to support a local manufacturing industry that will contribute to manufacturing components and parts for renewables development in Australia, particularly solar, wind and batteries.
- 10.12 The 'green build-out' plan means there is a high likelihood of the Proposed Acquisition being net positive in terms of job creation in Australia than absent it.

C Behind the meter solutions

- 10.13 The development and acceleration of behind the meter solutions as a result of the Proposed Acquisition is addressed in detail in section 6.12(a) of the Application, as well as in the witness statements of Luke Edwards and Anthony Lucas.⁷¹

Additional information relevant to the ACCC's determination in respect of public benefits

11 Reduced emissions

- 11.1 It is increasingly clear that Australia will not achieve its renewables targets, including reducing emissions, for 2030 or 2050 unless something changes. Even since the Application was lodged on 5 June 2023, a number of important statements have been made highlighting the challenges for Australia in meeting its 2030 goals and the need for significant new investment, as summarised below.

⁷¹ See section 7.1 of Luke Edwards witness statement dated 5 June 2023; see paragraph 71 of Anthony Lucas witness statement dated 2 June 2023.

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- (a) In a speech delivered in June 2023, the CEO of AEMO, Daniel Westerman, warned that investments in renewable energy are *'not happening fast enough'* despite there being a *'strong pipeline of potential future generation projects proposed for the National Electricity Market'*.⁷² He added that *'recent data from the Clean Energy Council is concerning. It shows there have been no new financial commitments on large-scale renewable generation projects in Q1 this year.'* While *'[o]ne quarter doesn't make a trend ... investment decisions are an important leading indicator for our energy transition.'*
- (b) This assessment of the energy transition happening too slowly is reiterated by research performed by Dr Dylan McConnell, a senior research associate at the University of New South Wales. While 8.5 TWh of new renewable energy from solar and wind was added to the NEM between June 2022 and June 2023, Dr McConnell assessed this to be only about half the annual rate required in order to reach the 82% renewable energy by 2030 target (16 TWh). Dr McConnell considers that *'[e]very year we are not hitting those targets it makes the next year harder', and that '[t]here needs to be some kind of policy action or response to make sure that we do hit them because the way we are going we are not going to.'*⁷³
- (c) Prominent energy industry leaders share this view, including the former CEO of Snowy Hydro, Paul Broad, and the former chairwoman of the Energy Security Board and current director of AGL Energy, Dr Kerry Schott.⁷⁴
- 11.2 Origin has implemented both short and medium term targets intended to facilitate its longer term ambition of reaching net zero by 2050 in respect of direct and indirect greenhouse gas emissions, referred to as 'Scope 1', 'Scope 2' and 'Scope 3' emissions.⁷⁵ In the shorter term, by 2030, Origin has targeted a 40% reduction in Scope 1, 2 and 3 equity emissions intensity and a 20 million tonne reduction in absolute Scope 1, 2 and 3 equity emissions relative to the FY2019 baseline.
- 11.3 Brookfield has set much higher targets to reduce the Origin Energy Markets' emissions in line with the SBTi utility guidance and its 1.5 degree Celsius power sector pathway. Brookfield intends for the Origin Energy Market business, under BGTF Consortium ownership, to:
- (a) Achieve net zero across all business segments by 2050; and
- (b) By 2030:
- (i) reduce carbon intensity for Scope 1 and Scope 2 emissions (generation and electricity consumption) by ~71% from 0.80 MtCO₂e / TWh in 2022;
- (ii) reduce carbon intensity Scope 1 and Scope 3 emissions (all retail electricity) by ~69% from 0.61 MtCO₂e / TWh in 2022; and
- (iii) reduce absolute material Scope 3 (categories 3 and 11) emissions by ~42% (or ~8.6 MtCO₂e) from 20.47 MtCO₂e in 2022.
- 11.4 The BGTF Consortium will provide the capital and expertise to:
- (a) **Safely decommission Eraring:** to ensure the safe and timely decommissioning of Eraring, significantly reducing Scope 1 emissions;

⁷² Daniel Westerman, 'AEMO CEO Speech at Australian Energy Week', *Australian Energy Market Operator* (20 June 2023) <<https://aemo.com.au/newsroom/news-updates/aemo-ceo-speech-at-australian-energy-week>>.

⁷³ Ben Potter, 'The Renewables Boom Is Happening at Only Half the Pace Needed', *Australian Financial Review* (4 July 2023) <<https://www.afr.com/policy/energy-and-climate/nem-s-solar-wind-surge-still-only-half-rate-needed-20230703-p5dld9>>.

⁷⁴ Angela Macdonald-Smith and Mark Ludlow, 'Meeting 2030 Energy Targets Close to "Impossible"', *Australian Financial Review* (10 July 2023) <<https://www.afr.com/companies/energy/meeting-2030-energy-targets-close-to-impossible-20230704-p5dlmm>>.

⁷⁵ Note 'Scope 1 emissions' are from activities at a facility level, also known as direct emissions; 'Scope 2 emissions' are from the indirect consumption of an energy commodity which produces emissions, also known as indirect emissions; 'Scope 3 emissions' are from indirect emissions other than Scope 2 emissions, 'Scope 3 – Category 3' emissions are from fuel and energy related activities and includes electricity purchases from the NEM and 'Scope 3 – Category 11' emissions are from the use of sold products and includes downstream consumption of natural gas and LPG.

- (b) **Replace Origin's purchases in the wholesale market that come predominantly from fossil fuels:** by executing on the development of up to 14 GW of renewable energy (including ~4.3 GW of large-scale storage) over a 10 year investment period to eliminate Origin Energy Markets' reliance on a carbon-intensive grid, thereby reducing Scope 3 – category 3 emissions; and
 - (c) **Reduce emissions by finding replacement sources of energy for LPG and natural gas customers:** by implementing initiatives to convert natural gas and LPG customers to clean sources of energy (eg, electricity and renewable natural gas).
- 11.5 The Proposed Acquisition will result in a material reduction in Origin's emissions by 2030 - and reductions on a much more significant scale than Origin was intending to do (or able to do) by itself.
- 11.6 In circumstances where it is estimated that Australia will not meet its 2030 Paris-aligned emission reduction targets, the Proposed Acquisition provides a material contribution to meeting Australia's 2030 target.