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Matter 82744345
By Email

Dear Mr McCracken Hewson

Brookfield and MidOcean application for merger authorisation for proposed acquisition of Origin Energy Limited

We refer to your letter dated 11 July 2023 requesting information from Origin Energy Limited (**Origin**) under section 90(6)(c) of the Competition and Consumer Act 2010 (**Act**). Pursuant to that request, Origin provides the following information:

- 1 As the Tribunal notes in *Applications by Telstra Corporation Ltd and TPG Telecom Ltd* (No 2) [2023] A CompT 2 at [145] the statutory preconditions for authorisation in s 90(7) are directed to the conduct that is the subject of the application for authorisation (see also [146], [147], [150] and [153]).
- 2 The Applicants have sought authorisation for the acquisition of Origin Energy Limited (**Origin**) comprising two interdependent acquisitions:
 - (a) the **Scheme Acquisition** being MidOcean Reef Bidco Pty Ltd's acquisition of 100% of the ordinary shares in Origin pursuant to a scheme of arrangement under the *Corporations Act 2001* (Cth); and
 - (b) the **On-Sale Acquisition** being EOS Aggregator (Bermuda) LP's (**Brookfield LP**) acquisition of the Origin Energy Markets business following the Scheme Acquisition.
- 3 That conduct is conduct to which s.50 applies:
 - (a) in respect of the Scheme Acquisition, being the acquisition of shares in the capital of a body corporate; and
 - (b) in respect of the On-Sale Acquisition, being the acquisition of assets of any person.

The application is therefore a merger authorisation within the meaning of s 4 of the CCA.

- 4 The public benefits claimed are all consequences of the combined effect of the acquisition of Origin by means of the two identified acquisitions, which is the conduct for which authorisation is sought. The public benefits have a "causal connection" with the Proposed Acquisition and are not merely "coincident" with the Proposed Acquisition.

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- 5 It is consistent with the Tribunal decision that the ACCC should have regard to all public benefits that are a consequence of the two acquisitions. The Tribunal recognised that "it was open to the applicants to have applied for authorisation to enter into and give effect to the Proposed Transaction agreements" (at [70] & [156]). That is precisely what the Applicants have done here.
- 6 The Decision does not alter the approach that should be taken in assessing when public benefits should be treated as a consequence of conduct. The ACCC should have regard to public benefits where there has been "established a causal relationship between the acquisition and the claimed benefit" (*QCMA*). The statutory assessment requires that the benefit or detriment be "such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect" (*Qantas Airways*).
- 7 In summary, the Tribunal's reasons suggest that public benefits should be assessed on a forward-looking basis applying a "future with or without" test. There must, however, also be a causal connection between the conduct for which authorisation is sought and any claimed public benefits arising from that conduct. Regard should not be had to the effects of other conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought. The same tests would be applied in assessing public detriments and impacts on competition.
- 8 The public benefits in the application flow directly from Brookfield LP's acquisition of Origin Energy Markets. They are a consequence of the Proposed Acquisition. None of them are merely coincident.

Yours sincerely

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