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20 July 2023

Fiona Crosbie  
Chair  
Allens  
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Dear Ms Crosbie

**Re: Brookfield and MidOcean application for merger authorisation for proposed acquisition of Origin Energy - feedback on proposed undertaking**

The ACCC is considering the proposed undertaking offered by EOS Aggregator (Bermuda) LP (**Brookfield LP**) and Brookfield Asset Management ULC and its Australian subsidiary Brookfield Investment Management Australia (the **Proposed Undertaking**), and whether the Proposed Undertaking is likely to address concerns the ACCC may have in determining whether to grant authorisation for the proposed acquisition of Origin Energy Limited (**Origin**) by Brookfield LP and MidOcean Reef Bidco Pty Ltd (**MidOcean**) (Brookfield LP and MidOcean together the **Applicants**) (the **Proposed Acquisition**).

The Applicants submit that the Proposed Undertaking provides further comfort around the ring-fencing of AusNet and Origin Energy Markets, and the ring-fencing of Brookfield's interests in AusNet and Origin Energy Markets. A copy of the Proposed Undertaking is accessible on the ACCC [Merger authorisations register](#).

In response to its market inquiries letter of 9 June 2023, the ACCC received three written submissions and two oral submissions in respect of the Proposed Undertaking. The views expressed were, in summary that:

- The Proposed Undertaking, or any undertaking, would be insufficient to avoid a substantial lessening of competition.<sup>1</sup>
- The party supports the Proposed Acquisition, provided the Applicants undertake to build certain renewable generation and storage assets.<sup>2</sup>
- The ring-fencing commitments in the Proposed Undertaking would be impossible to achieve.<sup>3</sup>

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<sup>1</sup> [Submission to the ACCC, Syncline, 25 June 2023](#)

<sup>2</sup> [Submission to the ACCC, Ampol, 22 June 2023](#)

<sup>3</sup> [Submission to the ACCC, Roger Fyfe, 4 July 2023](#)

- The ring-fencing commitments in the Proposed Undertaking may not necessarily prevent Brookfield's ability to favour its related entities in relation to gas markets.<sup>4</sup>
- While supportive of appropriate ring fencing measures being used between the transmission/distribution and generation businesses owned by Brookfield, the party submitted that this can be achieved effectively through existing measures available to the ACCC.<sup>5</sup>

The ACCC did not receive any submissions in respect of the potential additional undertaking should Senex (or its shareholders Hancock Energy / POSCO) take an interest in MidOcean Energy in response to its market inquiries letter of 9 June 2023.

#### *ACCC consideration of the Proposed Undertaking*

The ACCC's preliminary view is that the Proposed Undertaking is unlikely to be capable of addressing potential concerns about the Proposed Acquisition's likely effect on competition, or in the exercise of weighing likely public detriment against likely public benefit.

In merger matters where the ACCC has competition concerns, the ACCC has generally only accepted information ring-fencing and personnel separation obligations in combination with other substantive undertaking commitments, for example, in respect of the divestiture of a business or assets. This is consistent with the ACCC's strong preference for structural undertakings over behavioural undertakings.<sup>6</sup> In limited circumstances, the ACCC has also accepted ring-fencing obligations in combination with other behavioural commitments such as for non-discrimination.

The ACCC has an overarching concern that the Proposed Undertaking commitments to ring-fence information flows between AusNet, Origin Energy Markets and Brookfield would not remove Brookfield's incentives to influence AusNet and therefore undermine the effectiveness of the Proposed Undertaking. Brookfield personnel do not need to be able to access or share confidential information to influence AusNet in a way to favour Origin Energy Markets.

The ACCC also understands that there are frequent interactions between AusNet and Brookfield personnel that go beyond Brookfield's role as a minority shareholder and its appointment of directors on the AusNet Board. The Proposed Undertaking does not address whether Brookfield personnel would be able to consider and/or be involved in any AusNet matters that may impact energy markets (and consequently impact Origin Energy Markets' rivals), and does not address the level of influence Brookfield has over AusNet.

In addition, the ACCC is concerned that the Proposed Undertaking signatories would have an ongoing incentive to circumvent any ring-fencing, personnel separation or other behavioural obligations and engage in conduct that may have a detrimental effect on competition.

Separate to the concerns outlined above regarding the effectiveness of the ring-fencing commitments, there are also several specific elements of the Proposed Undertaking that the ACCC is unlikely to find acceptable, including:

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<sup>4</sup> [Oral Submission, Grattan Institute, 3 July 2023.](#)

<sup>5</sup> [Oral Submission, Alinta Energy, 30 June 2023.](#)

<sup>6</sup> Page 59, Merger Guidelines 2008, updated 2017.

- provision for termination of the Proposed Undertaking without ACCC approval and conditioned on circumstances where the ACCC may still have concerns with the effect of the Proposed Acquisition.
- obligations for separation of directors and secretaries between AusNet and Origin Energy Markets that are narrow, unclear and do not address the potential for indirect and/or non-simultaneous involvement in the board and management decision-making of both entities.
- obligations for separation of employees and ring-fencing of information of AusNet and Origin Energy Markets that are narrow, unclear and do not address the potential for indirect and/or non-simultaneous access to ringfenced information in both entities.
- Brookfield ring-fencing requirements that are vague and that carve-out Brookfield senior management and a range of other persons.
- The absence of obligations regarding how the Proposed Undertaking would be implemented in practice.

The lines of inquiry the ACCC is undertaking to determine whether it is satisfied of the requirements of s 90(7) of *the Competition and Consumer Act 2010* are set out in the ACCC's transparency letter of 19 July 2023.

We propose placing this letter on the public register. This letter does not contain confidential information of third parties and the ACCC has sought to exclude confidential information of the Applicants. Please advise by **5pm, on 21 July 2023** if the Applicants consider that it does contain information that should not be published.

Yours sincerely



Suzie Copley  
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