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Committee Secretariat  
Senate Standing Committee on Economics  
Parliament House  
Canberra ACT 2600

Submitted electronically

### **Senate Economics Legislation Committee Inquiry into the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018**

Alinta Energy (**Alinta Energy**) welcomes the opportunity to provide a submission to the *Senate Economics Legislation Committee Inquiry into the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 (the Treasury Bill)*.

Alinta Energy is an active investor in energy markets across Australia with an owned and contracted generation portfolio of nearly 3,000MW, including 1,700MW of gas-fired generation facilities and 1,070MW of thermal generation facilities. Alinta Energy has in excess of 1.2 million electricity and gas customers nationwide, including more than 630,000 in east coast markets.

Broadly speaking, Alinta Energy approaches the proposed Treasury Bill from two perspectives. Firstly, whether there is any justification, in terms of economic efficiency or otherwise for introducing the proposed Treasury Bill, and secondly, the practical challenges associated with implementing the proposed framework and the corresponding impact this would have on market investment and risk.

#### **Prohibited Conduct – Spot Market**

Alinta Energy notes the Treasury Bill proposes an introduction of a prohibition on energy corporations "*acting fraudulently, dishonestly or in bad faith with the purpose of distorting or manipulating prices*" with an additional proposed test of "*with the purpose of distorting or manipulating prices*" (153G(b)). In Alinta Energy's view both the proposed prohibition and test are vague, and if implemented would increase the risk of distorting rational market-based decisions.

Alinta Energy is not aware of any evidence being provided which would warrant the introduction of such a prohibition at this time. Currently there are already prohibitions on making offers, bids or rebids that are false, misleading or likely to mislead within Chapter 3 of the National Electricity Rules (including clauses 3.8.22 and 3.8.22A). Similarly, in both the National Electricity Market (**NEM**) and the Western Australian Wholesale Electricity Market (**WEM**), there are several additional pre-existing prohibitions and rules preventing the



submission of bids that participants do not have a genuine intention of honouring or a reasonable basis for making such representations. It is also worth noting that compliance with these rules is subject to a detailed level of scrutiny by market regulators other bodies and any breaches attract significant civil penalties.

Given these pre-existing rules which stipulate participant behaviour, Alinta Energy considers it critically important to assess the proposed Treasury Bill against the National Electricity Objective and whether the proposal promotes economic efficiency and whether the proposal promotes or enhances outcomes relative to the status quo. Alinta Energy does not believe the proposed Treasury Bill provides material benefit to the market or consumers in terms of economic efficiency and has not been justified.

### **Prohibited Conduct - Contract liquidity**

Alinta Energy understands the objective of provision 153F is to construct a prohibition that an electricity generator must not withhold, limit or restrict the availability of electricity financial contracts with the purpose of substantially lessening competition in an electricity market.

Whilst some subtle differences may exist, it does not appear clear what problem this provision is attempting to solve, which is not already successfully covered under the prohibition against the misuse of market power under section 46 of the *Competition and Consumer Act 2010*. In addition, as a smaller market participant, Alinta Energy should *normally* have sympathy with proposals which assesses any generator or market participants impact on lessening competition in electricity markets.

In practice Alinta Energy is concerned that such an obligation would lead to further additional and unobtainable information obligations being placed on participants to assist regulator's understanding of a participant's position. These additional compliance burdens do not assist in the identification of 'issues' with perceived market power and would ultimately struggle to be successfully implemented in any practical sense.

The prospect of the ACCC recommending, and subsequently the Treasurer being required to order the sale of electricity market contracts as a result of a breach of this provision is complex and is fundamentally interventionist in nature. In practise, such an intervention may actually have the unintended effect of undermining market liquidity if counter parties to the effected participant anticipate the Treasurer is likely to soon intervene in the market, they may hold off contracting with the view to contact when the Treasurer forces contracts to be released. This provision also assumes the ACCC and Treasury are suitably equipped to perform the position of energy trader of last resort.

From a governance perspective, provision 153F also requires further consideration regarding administrative oversight. Alinta Energy would suggest that a merits review be included within the application of 153F as a means of providing appropriate checks on the provisions application.



It is Alinta Energy's view that the proposed prohibition does not improve market efficiency, is already covered under section 46 of the CCA market competition provisions, and therefore should not be progressed at this time.

### Prohibited conduct in the retail electricity market

Any attempt at re-regulation of pricing in the competitive energy market carries with it significant risks. Several of the proposed provisions and obligations as set out within in the Treasury Bill serve to further add to this risk. Alinta Energy remains strongly of the view that no substantial case has been identified or case made that warrants such an intervention at this point in time.

The introduction of the measures outlined in the Treasury Bill have the potential to introduce duplication of existing laws, including potential confusion around the enforcement body having jurisdiction over the relevant obligations. Given the similar powers of enforcement and obligations that rest with the Australian Energy Regulator (**AER**) & Australian Competition & Consumer Commission (**ACCC**)<sup>1</sup>.

Policy certainty is critical to the efficient operation of the market, and to encourage innovation and competition to the benefit of consumers. Nonetheless, some of the prohibited conduct clauses set out within in the Treasury Bill requires a prescribed level of subjective interpretation. Market participants need certainty & clarity around their compliance obligations, so that systems, policies and processes can be developed that ensure compliance. The subjective nature of elements of the proposed obligations will prevent this from occurring.

Of particular concern is clause 153E(b) and the assertion of the ease in which retailers can pass on "sustained decreases" in costs. Notwithstanding the lack of clarity on what constitutes a "sustained" decrease, the ability of retailers to make multiple adjustments (which is inferred by the obligation) is limited due to legislative, market and product structure constraints.

In effect this would make both compliance with and enforcement of the obligation extremely difficult to achieve. Currently, retailers make annual changes to prices for customers within the terms and conditions of their contracts. In doing so, pricing is determined by a combination of backward-looking and forward-looking analysis of retailer costs.

By creating an obligation for out of cycle price reductions if "sustained decreases" take place, such a proposal will have a direct impact on retailer's risk management strategies, likely requiring retailers to price in a "risk premium" into their price setting. On balance, such an outcome is unlikely to place downwards pressure on electricity prices nor be in the long-term interests of consumers.

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<sup>1</sup> This point is explained in further detail in below sections.



Further there is little recognition or acknowledgement within the explanatory memorandum of a prudent retailers use of the forward contract market in building a position over time through the strategic setting of mass market price (that furthers competition and innovation), and how this would be impacted by the proposal under the Treasury bill.

### **Compliance Governance and Information Gathering Powers (Schedule 2)**

Alinta Energy considers that the proposal for the ACCC to be the enforcement body for the proposed legislative framework requires further consideration, given the similar powers that are currently governed and enforced by the AER. The efficiency of this proposal should be further considered.

If progressed in the proposed format of the ACCC as the lead regulator, a host of practical issues may arise including the risk of "double jeopardy", whereby a market participant may face simultaneous enforcement actions on the same single instance of market behaviour but with multiple regulatory bodies.

In addition, Alinta notes the Treasury Bill confers new AER information gathering powers in schedule 2 which have not previously undergone consultation. Specifically, schedule 2 provides the AER with the power to calculate and publish the value of the Default Market Offer. In addition, Treasury will have the ability to enforce the offering of Default Market Offers to consumers in certain states, without any corresponding independent oversight from State bodies.

Presently, the AER utilises its information gathering functions only where they relate to pre-existing tasks and responsibilities that have been conferred through the National Electricity Laws. The expansion of the AER's role and responsibilities as envisaged through schedule 2 requires careful consideration in conjunction with industry consultation.

Absent thorough consultation, Alinta is of the view that the proposed Treasury Bill risks becoming detrimental to the efficient operation of governance arrangements within the NEM and may act to raise risk and compliance costs for participants and regulators. Alinta Energy would encourage consideration of this point in the Committee's analysis.

### **Impact on Non-NEM Jurisdictions**

Alinta Energy understands that the provisions contained within the Treasury Bill apply nationwide, including to areas that are not connected to the NEM. For example, paragraph 153E(a) provides that the retail pricing prohibition applies to electricity retailers that sell, or offer to sell, electricity to 'small customers' (residential or small business consumers). This implies that the Western Australia's WEM is covered under reforms proposed within the Treasury Bill.

However, In Alinta Energy's view non-NEM jurisdictions, such as Western Australia have fundamentally unique market structure, market rules and overall governance and regulation. As such, the reforms proposed within this Treasury Bill cannot be applied within non-NEM jurisdictions on a like for like basis.



Alinta Energy is of the view that the impacts of these obligations on the WEM must be fully understood and consulted on before any adoption or implementation can take place.

### Remedies and Penalties

Alinta Energy notes that the Treasury Bill contains a number of remedies for breaches of prohibited conduct including:

- issue a public warning notice;
- issue an infringement notice;
- accept a court enforceable undertaking from the corporation;
- a court ordered divestiture of assets.
- apply to a court for an injunction; and
- apply to a court for a pecuniary penalty up to the greatest value of the following:
  - \$10,000,000 AUD;
  - if the Court can determine the total value of the benefits that have been obtained attributable to the conduct – 3 times that value; and
  - if the Court cannot determine the total value of the benefits that have been obtained – 10 per cent of the annual turnover of the body corporate during the 12 months prior to the conduct occurring.

In Alinta Energy's view it is important to ensure appropriate enforcement mechanisms exist to support the long-term viability and robustness of the NEM. Where there are clearly identified deficiencies in existing regulatory arrangements or evident market failures, Alinta is supportive of targeted reforms to address such problems.

In the first stage of consultation, stakeholders clearly requested that if regulators suspected a higher frequency of contraventions evidence should be explicitly presented that systemic prohibited conduct breaches are occurring. However, in what is the second round of consultation, no evidence has been provided that existing enforcement arrangements are ineffective. As noted above, the prohibited conduct outlined within the Treasury Bill is already prohibited in both the NEM and WEM, with substantial financial penalties already present for breaches.

As such, Alinta Energy remains firmly of the view that the existing market incentives which drive behaviour and compliance within Australian Energy markets are robust as evidenced by the limited number of breaches to date. In the limited circumstances where there have been breaches; existing enforcement powers have been more than adequate in ensuring appropriate enforcement of the National Energy Laws.

To significantly change the existing arrangements at this time is unwarranted and unjustified. As such, the reforms proposed within the Treasury Bill should not be supported.



## Conclusion

Alinta Energy does not believe the case has been made to justify the proposed Treasury Bill and would encourage the Committee to consider the issues raised above. The proposed legislative changes are significant and should be thoroughly investigated to ensure unintended outcomes are avoided.

Please contact Mr Anders Sangkuhl via email: [REDACTED]  
[REDACTED] if you have any queries in relation to this submission.

Yours sincerely,

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