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Electricity price monitoring and response regime draft legislation

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AGL response to electricity price monitoring and response regime draft legislation

This submission contains AGL Energy Limited's (**AGL**) response to the exposure draft of the "*Treasury Laws Amendment (Electricity Price Monitoring) Bill 2018*" (**Draft Legislation**) provided to AGL on 16 November 2018.

AGL recognises the impact that sharp increases in energy prices are having on Australian consumers and businesses, as well as concerns about energy security and environmental sustainability. AGL understands and accepts the level of concern expressed in the Australian Competition and Consumer Commission's (**ACCC**) Retail Electricity Pricing Inquiry Final Report (June 2018) (**Final Report**) in respect of energy prices and the lack of transparency and comparability of energy offers faced by consumers.

However, AGL does not believe that the Draft Legislation provides an effective means of addressing those concerns, nor the root causes of increases in energy prices. The Draft Legislation risks establishing a framework of obligations that are so broad and ambiguous that energy companies will not be able to ascribe a sensible meaning to them. This will cause significant interruption to the normal commercial operation of energy businesses.

Indeed, **even if these new powers are never used**, the uncertainty created by the Draft Legislation will exacerbate the problem, by deterring efficient competitive conduct and creating significant additional investment risk, further chilling already low incentives to invest in much needed new generation capacity.

In summary, AGL submits that:

- **There are fundamental, overarching concerns with the Draft Legislation, including in respect of its practical application. AGL is of the view it will be impossible for energy companies to know how to comply**. The key operative provisions of the Draft Legislation are so broad and uncertain that it will be impossible for retailers and generators to operate with any confidence that they are complying with the law. The Draft Legislation appears contrary to the economic principles on which energy markets in Australia are designed to operate and gives the ACCC excessively interventionist and highly discretionary powers. For these reasons, the Draft Legislation will have unintended consequences that are against the public interest, including chilling investment in new generation capacity, increasing prices and may also reduce system reliability.

  The Treasurer's divestiture orders are disproportionate and punitive, and even the potential for their application will increase the risks of investing in generation capacity. While the Consultation Paper referred to divestiture being applied only "*as a last resort*", the Draft Legislation contains no such limitation.

  Given that the prohibitions will have immediate effect (with no transitional period) and the extreme remedies and penalties available, the Draft Legislation will cause significant disruption to electricity companies' businesses and to energy markets. The legislation is so broad and uncertain that it will effectively transfer the policy power to the ACCC, which will be left to determine the meaning of the provisions, without the discipline provided by merits review. Simply put, the rule-making and

enforcement effectively rests with the same entity. AGL submits that legal norms should reflect the will of the Parliament, and be capable of interpretation by the corporations subject to those norms.

- **Draft Legislation lacks procedural fairness and is contrary to the rule of law**. As currently drafted, the Draft Legislation permits the Treasurer to make an order that a private corporation divest its assets without a hearing. AGL understood from the Consultation Paper that the Treasurer's orders were intended to be subject to merits review, and AGL strongly supports this being reinstated in the legislation. AGL also submits that merits review should be available for the ACCC's notices and recommendations. The Draft Legislation should be amended to include additional protections to ensure procedural fairness, including express statutory rights to be provided with the ACCC's recommendations and to be heard by the Treasurer, and guaranteed minimum timeframes to do so.
- **Concerns with specific provisions.** AGL is deeply concerned with the provisions relating to:
  - bidding conduct with the purpose of 'distorting or manipulating price' (sections 153F and 153G) as the practical complexities of determining a line between legitimate participation in the energy only market and prohibited conduct are significant; and
  - the retail pricing prohibition (section 153D) which is determined by reference to retailers' "underlying costs".

  These provisions would be inherently uncertain and create an extremely difficult environment in which to undertake the daily operation of an energy business.
- **AGL repeats the submissions it made in response to the Consultation Paper on 8 November 2018.** The Draft Legislation only confirms the concerns AGL expressed in that submission.

AGL will work to provide Treasury with clear illustrative examples of the circumstances in which the application of the new prohibitions will create enormous uncertainty (particularly for vertically-integrated retailers), making it difficult or impossible to determine what is required to comply. This uncertainty will cause significant disruption to the normal commercial operations of electricity businesses.

Finally, the consultation process has been entirely insufficient. AGL is alarmed by the "*extremely short*" timeframe permitted for comments on the Draft Legislation of **just 3 working days**, and the hurried consultation and drafting process more generally. The electricity market is a key pillar of the Australian economy and one of its most complex physical and financial systems. Changes of the magnitude proposed in the Draft Legislation demand careful deliberation and consultation. The industry has not been provided with any cogent policy reasons for the unusually short timeframe for stakeholder engagement on the Consultation Paper and Draft Legislation.

AGL also observes that the concerns raised during the consultation phase have not been addressed in the Draft Legislation. The Commonwealth is seeking to unilaterally and fundamentally alter Australian energy markets and introduce *de facto* retail price regulation without COAG consultation or agreement. Such an approach is contrary to the COAG agreements, and profoundly contrary to the public interest.

Treasury has circulated the Draft Legislation with a direction that it be treated as confidential, although AGL is unaware of any policy reason for that approach. Further, AGL understands that Treasury does not intend to publish any comments on the Draft Legislation, and has not yet published submissions on the Consultation Paper.

This legislation is of the highest importance to AGL, its shareholders and customers, Australian businesses and the Australian public. AGL will not make this submission public at this time, but makes no representation that it will continue to treat this submission as confidential. AGL will be discussing the Draft Legislation with stakeholders and will be making reference to the matters raised in this submission in those discussions.

If you would like to discuss AGL's submission, please contact me on egriggs@agl.com.au or 03 8633 6077.

Yours sincerely,

Beth Griggs
General Manager - Competition Regulation & Strategy

1. Executive summary

This submission contains AGL Energy Limited's (**AGL**) response to the exposure draft of the "*Treasury Laws Amendment (Electricity Price Monitoring) Bill 2018*" (**Draft Legislation**) provided to AGL on 16 November 2018. The Draft Legislation would amend the *Competition and Consumer Act 2010 (Cth)* (**CCA**) to introduce:

- four new prohibitions under sections 153D, 153E, 153F and 153G (**new prohibitions**); and
- new remedies for contraventions of these new prohibitions, which include contracting orders and divestiture orders issued by the Treasurer under Division 5 (**Treasurer's orders**).

The Draft Legislation follows the Australian Competition and Consumer Commission's (**ACCC**) Retail Electricity Pricing Inquiry Final Report (June 2018) (**Final Report**), and Treasury's *Electricity price monitoring and response legislative framework* Consultation Paper (23 October 2018) (**Consultation Paper**).

AGL emphasises that there is no prospect of it responding comprehensively to the Draft Legislation in the "*extremely short*" timeframe permitted of just 3 working days. Accordingly, AGL repeats the submissions it made in response to the Consultation Paper on 8 November 2018 – the Draft Legislation only confirms the concerns AGL expressed in that submission.

AGL has otherwise sought to focus on the most critical new issues raised by the Draft Legislation. In short, AGL is extremely concerned with the Draft Legislation:

- **AGL has fundamental concerns with the practical application of the Draft Legislation as it will be impossible for companies to comply**. The key operative provisions of the Draft Legislation are so broad and uncertain that it will be impossible for retailers and generators to comply. A number of elements of the Draft Legislation appear contrary to the basic economic principles of energy markets in Australia and gives the ACCC excessively interventionist and highly discretionary powers. For these reasons, the Draft Legislation will have unintended consequences and disrupt the efficient functioning of the electricity market, and on this basis would be against the public interest. There is a significant risk that the introduction of such legislation will deter further investment in new generation capacity, increase prices and potentially impact system reliability.

  The retail pricing prohibition (section 153D) will disincentivise efficient conduct to reduce costs. The Treasurer's divestiture orders are disproportionate and punitive, and even the potential for their application will deter much needed investment in generation capacity. In particular, AGL opposes the proposed divestiture remedy in the strongest possible terms. While the Consultation Paper referred to divestiture being applied only "*as a last resort*", the Draft Legislation contains no such limitation. The Draft Legislation is unnecessary given the existing regulatory framework, which ensures effective competition in the energy sector.

  Given that the prohibitions will have immediate effect (with no transitional period) and the extreme remedies and penalties available, the Draft Legislation will cause significant disruption to electricity companies' businesses and energy markets. The legislation is so broad and uncertain that the ACCC will be left to bestow meaning, without the discipline provided by merits review. AGL submits that legal norms should reflect the will of the Parliament, and be capable of interpretation by the corporations subject to those norms.

- **The Draft Legislation lacks an appropriate level of procedural fairness and is contrary to the rule of law**. As currently drafted, the Draft Legislation permits the Treasurer to make an order that a private corporation divest its assets without a hearing. AGL had understood from the Consultation Paper that the Treasurer's orders would be subject to merits review. AGL strongly supports such provisions being reinstated into the Draft Legislation, and submits that merits review should also be available for the ACCC's notices and recommendations. The Draft Legislation must include additional protections to

ensure procedural fairness, including express statutory rights to be provided with the ACCC's recommendations and to be heard by the Treasurer, and guaranteed minimum timeframes to do so.

- **AGL has significant concerns with several specific provisions.** AGL is particularly concerned with the provisions in relation to:
  - bidding conduct with the purpose of 'distorting or manipulating price' (sections 153F and 153G) as the practical complexities of determining a line between legitimate participation in the energy only market and prohibited conduct are significant; and
  - the retail pricing prohibition (section 153D) which is determined by reference to retailers' "underlying costs".

  These provisions would be inherently uncertain and create an extremely difficult environment in which to undertake the daily operation of an energy business. The introduction of such provisions risks undermining the competitive outcomes intended by the National Electricity Market (**NEM**) and destroy already low investment incentives.
- **The consultation process has been entirely insufficient.** AGL and others have been afforded little time to respond to this complex Draft Legislation, and Treasury has had no regard for the significant concerns AGL raised during the consultation phase. The Commonwealth is seeking to unilaterally and fundamentally alter Australian energy markets and introduce *de facto* retail price regulation without COAG consultation or agreement. Such an approach is contrary to the COAG agreements, and profoundly contrary to the public interest.

2. Fundamental concerns with the practical application of the Draft Legislation

AGL has significant concerns with the broad and uncertain definition of several key terms in the Draft Legislation. It is believed that such ambiguity will create an environment in which it is genuinely challenging or impossible for retailers and generators to know if their day to day actions are in compliance with the law.

A number of elements of the Draft Legislation could reasonably capture a range of rational and appropriate commercial actions that a generator or retailer may take in the ordinary course of conducting their business. In these instances, the legislation is contrary to the basic economic principles of energy markets in Australia and is highly likely to have unintended consequences that disrupt the efficient functioning of the electricity market – impacting the outcomes for both participants and consumers.

Given the compressed timeframe for consultation, AGL has sought to focus on the most critical issues of ambiguity raised by the Draft Legislation and has attempted to outline at a high level the potential consequences of this legislation on the operations of AGL and other market participants. These include:

- **Section 153D retail pricing prohibition**. This prohibition is very broad – it applies to all retailers (whether vertically-integrated or not), for all electricity supplies and offers to supply to mass market customers (residential and small business). A retailer will contravene this prohibition if it fails to make "reasonable adjustments" to the price it supplies, or offers to supply, to reflect reductions in its "underlying cost of procuring electricity".

  Retailers' "underlying costs" are highly complex and variable across the industry, and extremely difficult to ascertain with confidence for vertically-integrated retailers in particular. Accordingly the Draft Legislation proposes an unworkable standard. To the extent further regulation of retail price is considered necessary (which is a matter already being considered by COAG and the AEMC), it should reference a requirement that retailers give due consideration to the movement in the range of costs a retailer operating in a competitive market might incur, with reference to observable market prices. Without such a standard, the prohibition will undermine the competitive outcomes intended by the NEM and destroy already low investment incentives. In particular, if the term "underlying costs" is interpreted to refer to actual costs (putting aside the difficulty in defining an undisputed view of the relevant definition of cost) then there will be little or no incentive for a retailer (whether vertically-integrated or not) to be efficient. Further, the requirement to pass through any revenue above "underlying costs" will leave a gentailer with no prospect of recovering the cost of their investment in generation, and no incentive to invest.

  AGL notes in this respect that there is no clear, certain or uncontroversial approach to 'underlying cost' available or capable of calculation, particularly for vertically-integrated retailers. Any approach, whether be it focussed on the levelized costs of generation in the NEM, short run marginal costs of particular generators or regions in the NEM, or on a myriad of other possible formulations of 'cost', will have inherent complexities in the calculation, and in the consequences of imposing this standard on the industry.

Further:

- This prohibition appears to assume a complete correlation between wholesale energy costs and consumer prices. However, a reduction in wholesale energy costs may be offset by changes to other components of the retail cost stack.[1]
- Retailers may also face conflicting obligations making compliance impossible, given the prescribed process and permitted timing (typically annually) for changes to standing offer rates under the NERL on which AGL's consumer market offers are based.

Finally, this prohibition does nothing to address the concern identified in the Consultation Paper – "*consumers' confusion about retail electricity offers*" and the difficulty of comparing offers. Rather, this prohibition seeks to replace consumer choice with market regulation, which is instead likely to distort incentives, increase regulatory burden, reduce competition and in the long run, increase prices.

- **Sections 153F and 153G – electricity spot market prohibitions**. These provisions apply to ordinary course conduct for generation businesses – both bidding and not bidding ("failing to bid") – and apply to all generation businesses, not just those that are able to exercise market power. Accordingly, all generators will need to rely on their "purpose" to avoid ordinary course and rational decisions from contravening sections 153F and 153G. However, the relevant purpose provisions are uncertain.
  - The phrase "fraudulently, dishonestly or in bad faith" is unclear, and the Draft Legislation provides no definition. Whatever the exact meaning, this section appears to be duplicative of NEL provisions, including the "Good Faith" bidding provisions.[2] The ACCC and AER will have similar enforcement responsibilities, creating regulatory duplication and the potential for differing compliance standards.
  - The phrase "distorting or manipulating" is similarly undefined and unclear, particularly given that every legitimate bid (or decision to not bid) impacts the relevant spot price.

  This prohibition will distort bidding incentives and undermine a fundamental premise of the energy-only NEM, which is that temporary high spot prices allow generators to recover sunk costs and signal the need for investment.

  The provision also creates significant uncertainty in the context of complex generator businesses – for example, is there a relevant "failure to bid" where a generator's plant is unavailable, whether for scheduled maintenance, unscheduled maintenance, or due to unexpected failure?

  The basic design and function of the NEM, employing an auction-based clearing mechanism, results in effectively all bids (or withheld bids) impacting the spot price in the market. The practical complexities of determining a line between legitimate participation in the energy only market and prohibited conduct are significant, for example:

  - How will the definition of "distorting or manipulating prices" be constrained to exclude the range of rational bidding strategies which purposefully or inadvertently change market prices?
  - How would a generator's true "opportunity cost" of committing scarce fuel resources (including water in the case of hydro) be assessed against the decision to preserve these assets for use at a later point?

    The practical issues associated with this proposed provision are immense.

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[1] Other significant and variable retail electricity cost components include regulatory, network, retail and environmental costs.

[2] For example, NEL Clause 3.8.22 and 3.8.22A creates a prohibition on submitting offers, bids and rebids that are false, misleading or are likely to mislead.

- **Sections 153E and 153GA – financial contracts prohibition and imputed purpose**. Any rational participant in financial contract markets will need to limit its offers to enter into electricity financial contracts – for example, where a gentailer's hedge book is full and it lacks the generation capacity to write new contracts. Accordingly, all gentailers will be required to rely on their "purpose" to avoid ordinary course and rational decisions from contravening section 153E.

  The relevant purpose can be imputed by inference, including the conduct of any other person.[3] This gives the ACCC significant discretion as to the matters and evidentiary standard that would be sufficient to establish the requisite "belief" of a corporation's anti-competitive purpose.

- **Section 153P – Prohibited conduct notices**. In order to trigger a Treasurer divestiture order, the ACCC must first issue a notice that it "reasonably believes" that there has been a contravention, that divestiture would be a "proportionate" response, and that divestiture would result in a net public benefit.[4]

  The standard of "reasonable belief" is not sufficiently high given the nature of the prohibitions and remedies, and creates significant regulatory uncertainty, particularly in the absence of merits review of the ACCC's belief and the basis for it. It is unclear to AGL whether the requirements of section 25D of the *Acts Interpretation Act 1901* (Cth) apply to the requirement that the ACCC "*explain the reasons why*" it holds its belief.

  AGL submits that the requirements of section 25D should apply, and that this should be made express for all notices, recommendations and orders given throughout the Draft Legislation.

- **153ZM – Treasurer may make divestiture order**. The Treasurer is required to publish notice of a divestiture order, including the day by which the asset disposal must be made.[5] With the forced sale end date public, a corporation is unlikely to have any prospect of obtaining fair market value for the divested assets.

- **Extension of ACCC's section 155 powers**. The Draft Legislation provides that the ACCC's section 155 powers will be available if the ACCC has "*reason to believe that a person is capable of furnishing information, producing documents or giving evidence*" relevant to a Treasurer's order.[6] The effect of this provision is that the ACCC will be able to exercise its section 155 powers not only to investigate a possible contravention of a Treasurer's order, but possibly also to monitor compliance.

  (The ACCC's section 155 powers will also be available to investigate potential contraventions of the new prohibitions.)

[3] Draft Legislation, section 153GA.
[4] Draft Legislation, Section 153P.
[5] Draft Legislation, Section 153ZM(2)(e), (3)(b) and (7).
[6] Draft Legislation, Part 2, Section 11. See CCA, sections 155(1) and (2).

3. Overarching concerns with the Draft Legislation

AGL has the following overarching concerns with the Draft Legislation.

- **The key operative provisions are drafted with reference to broad, vague and ill-defined concepts, and are therefore inherently uncertain. Retailers and generators will be unable to attribute meaning to those provisions with confidence, making *ex ante* compliance impossible.**

  The manner in which the key operative provisions of the Draft Legislation (in particular, the new prohibitions) are expressed is so broad and open to differing interpretations such that no retailer or generator operating in Australia[7] will be able to determine what they need to do to comply with the legislation. Section 2 discusses a number of specific examples.

  In these circumstances, it is entirely inappropriate for the Draft Legislation to only be given meaning by the ACCC through guidelines. Legislation should express the will of the Parliament. It should not be left to the ACCC to determine the fundamental meaning of the Draft Legislation and its practical effect when applied.

- **The Draft Legislation is contrary to the basic economic principles of energy markets in Australia, and will have unintended consequences that are against the public interest.**

  The Draft Legislation is likely to undermine the economic incentives towards productive, allocative and dynamic efficiency that the NEM seeks to establish. In particular, AGL notes that section 153D makes no reference to competitive concepts such as "effectively competitive market prices", which would be necessary to preserve retail competition. (Section 153D is discussed further in Section 2.)

  If the Draft Legislation is applied, its effect will be to penalise more efficient businesses and to significantly reduce vertically-integrated businesses' ability to recover the long-term costs of their generation investments, which will have an unprecedented impact on the proper functioning of the market. This will subvert the premise of the market as an energy-only market, and will significantly reduce incentives to invest in new generation capacity or to remain vertically-integrated, which is an economically efficient market structure to reduce the risks inherent in Australia's electricity markets. The long-term result is likely to be higher costs of generation, and higher electricity prices to consumers.

- **Draft Legislation gives the ACCC excessive influence and interventionist powers over retail pricing and investment in the Australian energy industry.** The retail price prohibition (section 153D) seeks to circumvent and abrogate the States' jurisdictional power over retail prices. The States are currently consulting on the introduction of a default retail price, and have requested that the AEMC advise them on the effect such regulation would have on competition. The Draft Legislation would render such consultation redundant, and will give the ACCC significant control over retail price setting.

  The Draft Legislation also proposes to give the ACCC the ability to recommend that the Treasurer implement 'remedies' (which appear to be more in the nature of penalties) without any recourse to a court. Given the broad and uncertain terms of the Draft Legislation, the ACCC will have significant discretion over how these provisions are interpreted and applied. This discretion gives the ACCC a concerning degree of influence over the operation of the energy market, and therefore a level of control over the investment environment in each jurisdiction.

[7] AGL notes that the Draft Legislation is not limited to the NEM – see Section 4 below.

The ACCC's Final Report did not recommend the "extreme measure" of a forced divestiture power, and ACCC Chairman Rod Sims has publicly stated that he does not support such a power: "… *my personal view is that divestment is probably not the best way to deal with energy prices…*"[8]

- **Prohibitions are unnecessary given the current legislative framework**. AGL does not believe that there are any deficiencies in the current legislative framework regulating the electricity sector that warrant the intervention contemplated by the Draft Legislation.

  The fundamental premise of the new prohibitions is that the prohibited conduct causes market harm. That type of conduct is already prohibited under the CCA. In particular, CCA section 46 prohibits the misuse of market power with the purpose of substantially lessening competition, and CCA section 45 prohibits contracts, arrangements, understandings or concerted practices among competitors with the purpose of substantially lessening competition (without the requirement for market power). Given this comprehensive coverage of harmful anti-competitive conduct, the only additional scope of the new prohibitions is to capture conduct that does not harm the competitive process. Accordingly, the new prohibitions are unnecessary.

  Further, section 46 has recently been expanded to cover conduct causing anti-competitive "effects", which remains untested. "Good faith" bidding rules introduced into the National Electricity Rules (**NER**) in 2016 on their face adequately address concerns regarding fraudulent, dishonest or bad faith wholesale bids (and the AER has not commenced any enforcement proceedings under these amended rules).

  Accordingly, an effective legal framework for ensuring competitive behaviour by electricity market participants is already in place. The sector is already heavily regulated,[9] and further sector-specific regulation is unwarranted.

- **Given the above, AGL continues to be of the view that the proposed Treasurer's orders are disproportionate and will deter investment.**

  In particular, AGL opposes the proposed divestiture remedy in the strongest possible terms. While the Consultation Paper referred to divestiture being applied only "*as a last resort*", the Draft Legislation contains no such limitation.

  Providing the Treasurer with the ability to exercise such an interventionist power will distort the proper functioning of the market, particularly given the lack of procedural fairness afforded in the process (see Section 4 below). AGL considers that divestiture is unlikely to ever be a proportionate response to the conduct described in the Draft Legislation. Rather, divestiture is likely to be disproportionate and punitive in nature.

  Given the significant uncertainty of these prohibitions, the lack of procedural fairness, and the disproportionate and punitive nature of these remedies, their existence – even if they are never used – will significantly reduce investment incentives in the electricity sector, particularly investment in new large-scale generation capacity.

[8] See AGL's submission on the Consultation Paper of 8 November 2018, p13-14; Radio National, 31 Oct 2018 – Fran Kelly interviews Rod Sims.
[9] Including under the National Electricity Law (**NEL**), NER and National Energy Retail Law (**NERL**).

4. Draft Legislation is contrary to the Rule of Law and lacks appropriate procedural fairness

AGL considers that the Draft Legislation is contrary to the rule of law and lacks the appropriate level of procedural fairness, in at least the following aspects.

- **No merits review**. Despite the Consultation Paper indicating that "*merits review and judicial review would be available for the Treasurer's determinations*", there is no provision in the Draft Legislation that makes merits review expressly available.

  This confirms AGL's concerns that there will be minimal oversight of the Treasurer's decisions (as well as the ACCC's decisions and recommendations). Those decisions will not be subject to disallowance by the Federal Parliament.[10] The Treasurer's orders can be imposed without any Court finding that a corporation has contravened the new prohibitions.

  AGL submits that, at a minimum, the Treasurer's orders must be subject to merits review. The protections afforded by merits review are essential.

  AGL further submits that there should be no limitation on the scope and application of that merits review. In order for the process to be in any way tenable, the ACCC's notices and recommendations would also need to be subject to merits review.

- **No express judicial review**. Despite the Consultation Paper indicating that "*merits review and judicial review would be available for the Treasurer's determinations*", there is no provision in the Draft Legislation that makes judicial review expressly available. The Draft Legislation should expressly provide that the ACCC's recommendations and the Treasurer's orders are judicially reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).

- **Gravity of recommendations and orders.** In any event, judicial review of itself is insufficient given the gravity of the decisions being made and the nature of the decision-making process. First, the ACCC's recommendation is only premised on it having a "reasonable belief". Second, the Treasurer's power is only conditioned on he or she being "satisfied" of various matters, including contravention of the new prohibitions. The magnitude of the intervention permissible under this legislation requires the assessment to be correct, not just based on a "reasonable belief"' or the "satisfaction" of a Minister. Judicial review only assesses whether the power was validly exercised. It does not involve a review of whether the decision-maker made the correct or preferable decision.

  Further, given the limited time for the ACCC's and Treasurer's decision-making (see below), there may be insufficient time for a judicial review application to be heard and determined by a court. While an injunction may be sought, those orders are discretionary and accordingly uncertain. The express provisions that provide for ADJR Act review should also provide for sufficient time in which that may occur.

- **Insufficient time to respond to ACCC notice, and no minimum time to respond to ACCC recommendation or before Treasurer makes order**. The Draft Legislation provides just 45 days for a corporation to respond to an ACCC prohibited conduct notice.[11] At any time thereafter, the ACCC may

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[10] The Draft Legislation expressly provides that the ACCC's notices and recommendations are not legislative instruments and accordingly not subject to disallowance. See Draft Legislation, Sections 153J(3), 153K(4), 153P(6), 153Q(5), 153R(6), 153S(7), 153T(4), 153U(11). While the Draft Legislation is not express, it is clear as a matter of statutory interpretation that the Treasurer's orders are not subject to disallowance.

[11] See Draft Legislation, Section 153P. The ACCC may allow a later day (Section 153P(3)) or vary the notice (Section 153Q), but there are no provisions dealing with extensions to this period nor the factors or standards relevant to any ACCC decision to allow a later day or vary a notice.

issue a prohibited conduct recommendation to the Treasurer (and has 45 days to do so),[12] and the Treasurer may then make the recommended order at any time (and has 45 days to do so).

Accordingly, a corporation is guaranteed **just 45 days** to respond to the ACCC's "reasonable belief" of the contravention and its proposed remedies (which may include divestiture) before an order is imposed. A corporation is guaranteed **no opportunity or minimum time** to respond to the ACCC's prohibited conduct recommendation, nor to make representations to the Treasurer.

The timeframes for this process lack any semblance of adequate procedural fairness and are contrary to the rule of law. The Draft Legislation permits an order to be made divesting a private corporation of its assets without a hearing.

- **Corporation not guaranteed notice of the conduct and information before Treasurer, nor the recommended remedies.** The Draft Legislation contains no provision requiring the corporation to receive a copy of the ACCC's prohibited conduct recommendation to the Treasurer. Accordingly, the corporation will have no certainty that it will be provided the information before the relevant decision-maker (the Treasurer) about the alleged conduct, nor the remedies proposed (and by extension, the range of decisions that the Treasurer might make), nor the reasons and factual matters supporting each aspect of the ACCC's recommendation.

  Further, section 153R(3) expressly contemplates the ACCC changing its proposed remedy/ies as between a notice to the corporation and its recommendation to the Treasurer. In those circumstances, the corporation would be afforded no notice at all of the proposed remedy/ies and no guaranteed opportunity or minimum time to respond to that remedy and the factual matters said to support it (see above).

  The Draft Legislation does not contemplate the Treasurer seeking any further information to support his or her final decision or requirement to give the affected corporation an opportunity to be heard. As noted above, none of these decisions are reviewable on the merits as currently drafted. This is an extraordinary position given the nature of the prohibitions and the remedies available. The process is opaque and contrary to the rule of law.

- **Penalties excessive, given uncertainty of new prohibitions**. The new prohibitions will be subject to the CCA civil penalty regime with maximum fines of $10 million, 10% turnover or 3 times the benefit. This same penalty regime applies to deliberate anti-competitive conduct, including (for example) non-criminal cartel conduct. Yet, the new prohibitions could be triggered by actions that lack any anti-competitive intent – for example, a failure to sufficiently reduce the price of electricity following a reduction in wholesale costs,[13] or a single "bad faith" failure to bid 1MW of available capacity that has no material impact on spot prices.[14]

  Further, section 153L increases the applicable penalty for an infringement notice by a factor of 10, to 600 penalty units (currently $126,000). Such infringement notices are in practice difficult to challenge, particularly where the threat of an even more onerous remedy remains. In this context, these penalties are excessive.

- **No transitional period**. The prohibitions and penalties will apply immediately on royal assent, and to current conduct that continues to occur after that date.[15] This affords almost no time for AGL or other market participants to review the legislation as passed, obtain advice on its interpretation, effect and interaction with the NEL, NER, NERL and other applicable laws and regulations (which AGL anticipates will be subject to significant uncertainty), review their policies and procedures, and implement the

[12] Draft Legislation, Section 153QA.
[13] Draft Legislation, Section 153D.
[14] Draft Legislation, Section 153F.
[15] Draft Legislation, Section 2 (Commencement) and Section 13 (Application).

required changes. AGL anticipates inconsistencies between the new prohibitions and other CCA prohibitions.

AGL's business and its operating environment is highly complex. The Draft Legislation will require profound changes to AGL's business that will require careful consideration and more time to implement than the Draft Legislation allows.

- **Over-broad application, including beyond the NEM**. The Draft Legislation is not limited to the NEM, but applies to any markets (i) "*in relation to the supply of electricity*" and (ii) "*for electricity financial contracts*", being any contract where "*rights … are derived from or relate to the price of electricity on an electricity spot market*".[16]

  The effect of these definitions is that the Draft Legislation prohibitions are likely to apply to electricity markets other than the NEM. It is not clear to AGL why the Draft Legislation is intended to have application beyond the NEM.

  Further, the over-broad definition of "electricity financial contract" means that the financial contract liquidity prohibition[17] will likely apply beyond contracts between gentailers and non-vertically integrated retailers – for example, to contracts with large customers, hedge contracts between two generators or gentailers, OTC trades with financial counterparties, power purchase agreements, outage and weather-linked contracts with insurance companies and electricity futures.

[16] Where the market operator is not a party to the contract.
[17] Draft Legislation, Sections 153E.

5. Insufficient consultation

Treasury permitted just 12 working days (11 taking the Melbourne Cup holiday into account) for comment on the Consultation Paper.[18]

The Draft Legislation was released just 7 working days later, which indicates to AGL that little or no account was taken of the significant concerns expressed by various stakeholders. Neither AGL's nor other respondents' submissions on the Consultation Paper have yet been made public.

Treasury has now permitted **just 3 working days** to comment on the Draft Legislation, and has stated upfront that it is "*unable to extend the consultation period*". Such a short period is both highly unusual, and entirely insufficient for AGL and others to meaningfully comment on draft legislation of such importance and complexity. Neither Treasury nor the Government have provided any cogent policy reasons for the unusually short timeframe for stakeholder engagement on the Consultation Paper and Draft Legislation.

Further, the Draft Legislation indicates to AGL that the Commonwealth is seeking to unilaterally legislate to fundamentally change the electricity market without COAG consultation or agreement. This is contrary to the COAG agreements, and to decades of cooperative and iterative changes to Australia's electricity sector by agreement between the States and Commonwealth, in consultation with the industry and regulators. In particular, the Australian Energy Market Agreement (**AEMA**) unequivocally provides that amendments to energy policy and governance should only be made in consultation with COAG,[19] and that the AER (not the ACCC) should be responsible for the regulation of retail energy markets.[20]

On this basis alone, the Commonwealth's actions are profoundly against the public interest. Indeed, the Commonwealth has itself previously criticised the States for seeking to take unilateral action that would affect energy markets (in the context of renewable energy targets).[21]

AGL is extremely concerned with the deficiencies of this consultation process, particularly given the gravity of the amendments proposed.

The introduction of such complex provisions and interventionist enforcement provisions, which are contemplated to be exercised by the ACCC and the Treasurer (not a court, and without recourse to merits review), should only be considered in the context of comprehensive and careful consultation. In AGL's view, the Draft Legislation is being progressed in a manner that is completely inappropriate given the fundamental impact it will have on the operation of the energy industry, ongoing investment in new generation capacity and the Australian economy as a whole.

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[18] Although AGL understands that Treasury accepted submissions for approximately a week after that date.
[19] See AEMA, sections 4.1, 4.3, 6.6 and 6.7.
[20] See AEMA, sections 5.1(b) and 9.1(e).
[21] For example, see https://www.afr.com/news/politics/victorian-clean-energy-target-could-shut-yallourn-says-josh-frydenberg-20180115-h0idwf.