25 January 2019

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Submitted online:
https://www.aph.gov.au/Parliamentary_Business/Committees/OnlineSubmission

Dear Secretariat

**Submission to Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 (the Bill).**

Stanwell Corporation Limited (Stanwell) welcomes the opportunity to make a submission on the Bill. Stanwell notes the accelerated timeframe for consultation and that a more considered and comprehensive consultation process with industry would have been appropriate given the nature of the proposed changes. Consumers are best represented when appropriate due diligence is applied, and this is simply not possible by a four week consultation process initiated only just prior to Christmas.

## About Stanwell

Stanwell was established in 1998 and owns and operates:

- two coal fired power stations, Stanwell and Tarong;
- three gas fired power stations, Swanbank 'E', Mackay Gas Turbine, and Mica Creek;
- four hydro-electric power stations, Kareeya, Barron Gorge, Kombooloomba, and Wivenhoe Small Hydro,

together with supporting coal, gas and water assets. Through its retail brand, Stanwell Energy, it sells electricity to large commercial and industrial customers in Queensland, New South Wales, Victoria and the Australian Capital Territory. It is a Government Owned Corporation, subject to the operation of the *Government Owned Corporations Act (1993)(Qld)*.

## Summary

This submission provides general comments on the nature and context of the Bill, as well as responses focused on specific aspects. Notably, Stanwell is concerned by the:

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- Lack of proven justification or need for the Bill given its intent is already largely captured in existing legislation and regulation.
- Fact that the Bill will add uncertainty and compliance costs without a clearly defined benefit for consumers, the consequence being additional costs which are likely to be passed through to consumers.
- Provisions which give the Australian Competition and Consumer Commission (ACCC) power to issue public warnings. This effectively amounts to a trial by media in circumstances where infringement has not actually been proven.
- Provisions for the Federal Treasurer to initiate contracting or divestiture orders constitute direct market intervention and creates additional sovereign risk, both of which are likely to deter investment and increase prices.
- In addition, for contracting orders, guidance must be provided as to how Treasurer might make a determination in the absence of a court finding or a binding admission of prohibited conduct.

Stanwell has not commented on the retail pricing mechanism in clause 153E of the Bill as it does not supply electricity to 'small customers' as defined, nor does it comment on the constitutionality of the Bill.

Any drafting suggestions in this submission are not to be taken as endorsement of the Bill either in concept or particular.

**No benefit from proposed legislation**

The National Electricity Market (NEM) operates for the exclusive benefit of consumers as defined by the national electricity objective to '*promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to…. price, quality, safety and security of supply…*'.

Additional regulation of the NEM and electricity markets in general must adhere to the following principles:

1. It is justified to the extent that it adds substantive protections to those already existing at law, and then only to the extent that it addresses a proven area of market failure;
2. It must not create a compliance burden that outweighs the consumer benefit of regulation; and
3. It must be sufficiently certain that it does not discourage investment in the sector.

Stanwell considers that the Bill fails each of these principles.

Many aspects of the Bill do not add any further benefit or accountabilities than already in place under the existing National Electricity Rules (NER), Consumer Competition Act (CCA) and the Corporations Act. For example, the substantive prohibitions proposed by the Bill are largely duplicative of the following provisions:

- NER 3.8.22A;

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- CCA Ss46 and 47; and
- Corporations Act (S1041A).

The only additional features the Bill introduces are greater costs associated with interpretation and compliance leading to further investment uncertainty, directly contravening the intent of the Bill. In particular, as the primary contracting and bidding conduct to which the legislation is directed is only applicable to scheduled generators, the Bill by implication favours resources which are less transparent and/or controllable. Stanwell considers this to be contrary to consumer interest.

**Publication of public warning**

One of a number of remedies proposed by the Bill is the ability to publish a public warning notice on the basis only of a 'reasonable belief' on the part of the ACCC as to the existence of the relevant conduct.

The proposed amendment effectively amounts to the inclusion of an express power to issue 'public' warning notices on the grounds of a *suspected* infringement, has no antecedent in the recommendations in the ACCC report. As far as Stanwell is aware, it is without parallel in any other part of Australian consumer law. It may also have the effect of creating market distortions.

Stanwell submits that the provisions, which effectively amount to 'trial by media' in circumstances where no infringing conduct has been established, should be deleted from the Bill.

**Contracting and divestiture orders**

The other troubling remedy proposed in the Bill is to establish the ability of the Federal Treasurer, acting directly, or through the commencement of court proceedings, to make or initiate contracting or divestiture orders. This constitutes direct and unpredictable federal intervention in the operation of the NEM, adds sovereign risk that will deter new investors, and is not a substitute for the proper elucidation (and if necessary prohibition) of the precise conduct which is said to increase the prices payable by consumers.

As with public warning notices, the ACCC can make a recommendation if it 'reasonably believes' that the business has engaged in 'prohibited conduct'. For 'contracting orders' the Treasurer must be 'satisfied' the conduct the subject of the recommendation is 'prohibited conduct'.

Stanwell requests guidance as to how the Treasurer might make that determination in the absence of a court finding or a binding admission to that effect. If these are the only bases on which the Treasurer may make a contracting order then in our view the legislation should expressly say so.

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**Prohibited Conduct - Electricity Financial Contract Liquidity**

Clause 153F of the Bill is redundant given the concerns raised are already reflected in existing legislation:

- S1041A – 1041C of the Corporations Act already contain prohibitions on the creation of an artificial price for trading in 'financial products';
- S46 of the CCA now prohibits conduct by a corporation which has a substantial degree of market power, from engaging in conduct that has the actual or likely effect of substantially lessening competition;
- S47 of the CCA prohibits 'vertical' supplies (including a refusal to supply) which have an anti-competitive purpose or effect in any relevant market.

It is difficult to identify the practical circumstances in which a breach relevant to this clause will occur which is not already covered by existing provisions. As a result, the inclusion of the provision exposes generators to operation of different provisions and in the case of bidding conduct, the oversight of separate regulators for the same prohibited conduct. This creates an additional compliance burden on generators that does not produce a proven benefit to consumers but a clear cost.

The Bill also fails to recognise how generators operate within the market, with generators typically establishing derivative trading policies well in advance of individual decisions to offer derivative cover. In many cases these are based on the intent that physical generation is available to meet commitments arising under derivatives. For example, this may include prohibiting contracting beyond the level which could be met after the loss of a generator's largest generating unit. In other cases a combination of factors may influence a generator's decision not to offer hedge capacity, including the creditworthiness of a particular counterparty.

While these factors are touched on to some extent in the Explanatory Memorandum, this is insufficient. In this context, generators will only be encouraged to be less conservative in their trading positions, (and therefore offer more capacity to the market) if they have unequivocal certainty that their trading decisions which took due consideration of the many factors that underpin a properly constructed trading policy were not exposed. This may include one or many of the following: the physical availability of the generator's plant, the extent of the generator's existing hedge commitments and the credit position of the counterparty.

Lastly, the Senate Committee should be aware that the business case for the establishment of some generators is largely dependent on their ability to sell a certain type of derivatives. The position of these generators needs to be taken into account so that they are not inadvertently caught by the legislation. For example, whole-of-meter offtake or foundation customer agreements as proposed by the Federal Government's *Underwriting New Generation Investment program* may restrict subsequent offers to sell financial contracts, or gas fired peaking plant may only sell $300 caps if certain price conditions are reached.

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## Prohibited Conduct – Spot Market

Spot market conduct has been the subject of various regulatory tests since the early 2000s, the most recent being the formulation for rebidding in the NER in 2016. The previous version of the test in the NER used the term 'good faith' and, proved (it is said[1]) unworkable.

The Bill, which also prohibits 'bad faith' bidding will, Stanwell expects, encounter the same difficulties as to enforcement.

The Bill creates two separate prohibitions on bids (and non-bids) which are:

a) made 'fraudulently, dishonestly, or in bad faith', or

b) 'for the purpose of distorting or manipulating prices' in a spot market.

If one element only of either a) or b) is made out, then the intention seems to be that this is a 'minor' offence. If both a) and b) are made out, then it is an 'aggravated' offence.

However, it is difficult to imagine a situation in which a bid made for the purpose of 'distorting or manipulating prices' is not also made 'fraudulently, dishonestly, or in bad faith'. This suggests that the two need to be clarified to allow independent application of the legislation to the basic case of prohibited behaviour versus the more serious offence set out in the aggravated case.

Regardless, Stanwell considers that any prohibited conduct in this context is already dealt with by the reformulated NER test, and argues that these provisions should exist in the appropriate regulatory frameworks and not legislation.

## Prohibited Conduct - Definitions

To create an efficient market, the Bill must use language that can be interpreted with some certainty. For example, the terms 'distorting or manipulating' are not defined in the Bill. The Explanatory Memorandum (EM) provides no real assistance in this respect.

The EM refers to the conduct as 'seeking to undermine the process by which market participants would reasonably expect prices to be determined in a market characterised by effective competition'. It then distinguishes between conduct which *'takes advantage'* of higher prices, and conduct that 'causes' higher prices *'by means that are not acceptable features of an electricity spot market*'.

In practice, it will always be difficult to distinguish between a bid that 'causes' or 'takes advantage' of higher prices.

Lastly, Stanwell has concerns about the practicality of some of the examples used in the EM. Most notably, Example 2.18 does not take into account situations where maintenance is contracted for a particular day, or where in the judgement of the generator, maintenance is necessary to meet anticipated needs on other days.

[1] For example RWE Supply & Trading submission to AEMC Options Paper, Bidding in Good Faith rule change request, 2015

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**Infringement notices**

Stanwell notes that there is provision that a party who pays an infringement notice is not, merely by that fact, taken to have admitted the infringement. Given the reputational consequences of the issue of a public warning notice, clause 153N should be amended by adding a subsection that clarifies that the mere acceptance of an infringement notice will not, of itself, constitute grounds for forming a 'reasonable belief' on the part of the ACCC.

Stanwell trusts that this submission has been constructive and is happy to answer any specific enquiries that the Committee may have. Please contact me on (07) 3228 4529 or Luke.VanBoeckel@stanwell.com.

Yours sincerely

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