

Libs will be judge, jury and executioner on power

David Uren, Associate Editor, Economics, 11:00PM November 28, 2018

There have been surprising twists and turns as successive governments grope towards a coherent energy policy, but surely none as bewildering as a Coalition leadership deciding the solution is to give the Treasurer unfettered powers to force the break-up of private corporations, dictate their prices and order them to enter contracts against their will.

It is a remedy that shouts sovereign risk to any business contemplating an investment in our energy sector.

Obviously there has been insufficient investment in reliable power generation and that need will grow as coal-fired plants reach retirement age. The perpetual flux over climate policy leaves energy companies with no assurance that an investment using any kind of fossil fuel would generate a sustainable return. And the proposed penalty regime will entrench the investment drought.

The draft legislation expected to be taken to the Coalition partyroom next Tuesday and introduced to parliament the next day is the “big stick” that Scott Morrison has been vowing to wield against the energy companies from the moment he won the prime ministership.

It is truly draconian. It loosely defines several forms of prohibited actions and gives the Treasurer the power to impose massive penalties, simply on the advice of the Australian Competition & Consumer Commission. There is no recourse to the courts. It is extraordinary to grant an elected politician such unilateral power over the operation and structure of a private business under the guise of competition policy.

The draft legislation creates three offences: failing to make “reasonable adjustments” to the retail price when there is a fall in the “underlying cost of procuring electricity”; refusing to offer electricity supply contracts to rivals; and attempting to manipulate prices in the spot market. The draft law gives companies no clarity over what behaviour might fall foul of these provisions.

There is then a graduated set of penalties for breaches, starting with a warning from the ACCC before moving to infringement notices and then to the bazooka of orders delivered by the Treasurer.

The Treasurer can direct an electricity company to enter into contracts to sell power, dictating a minimum number of megawatt hours and the price. The Treasurer can also order the divestiture of assets or securities, provided this “is likely to result in a benefit to the public”.

Divestiture powers have been considered and rejected by every review of Australia’s competition policy. Although the ACCC can order divestiture of assets if it concludes a takeover would result in a substantial lessening of competition, this is an unwinding of a transaction. Divestiture has never been a remedy under the abuse of market power provisions of consumer law for splitting a company that has expanded organically.

The 2015 Harper competition policy review said that although reducing the size of a firm may limit its ability to misuse its market power, divestiture would probably have broader effects on a firm’s efficiency, potentially harming consumers.

Divested parts of the business may prove unviable. The existing financial penalties were sufficient, it concluded.

The ACCC review of the electricity industry also rejected divestiture, saying it was an “extreme” measure and there were better means of strengthening competition. The ACCC had concerns about concentration of ownership in the electricity industry but did not find there had been abuse of market power. Although the US anti-trust law includes a divestiture provision, it has not been used since 1982. Like other nations with such powers, it is court-ordered, not the province of an elected official.

The proposed legislation raises two constitutional questions. The Constitution holds that the commonwealth must offer “just terms” when forcing the sale of a property. The draft legislation acknowledges this risk but essentially leaves it up to the High Court to decide on individual cases.

Under the separation of powers, the Constitution also says judicial power may be exercised only by the courts. Although that power is not closely defined, ordering punishment for what is held by the ACCC to be prohibited behaviour should be the act of a judge, not a politician.

Energy firms are justifiably alarmed about the absence of any court process. An allegation of improper conduct may be made by the ACCC, with no right of appeal, and then the Treasurer is granted the discretion to punish the business on the basis of those unproven claims.

Although Energy Minister Angus Taylor claims that these powers would be used only as a last resort, he cannot bind future governments once the powers are legislated.

The essence of elected officials is that they exercise political judgment. This is repeatedly seen in the conduct of treasurers over foreign investment, which is the only remotely analogous power. Decisions by Morrison to block the Chinese takeover for the Kidman cattle empire, and by Joe Hockey to block the US bid for GrainCorp were overtly political. Would the Treasurer force AGL to divest its Liddell coal-fired power station?

Today it is energy that is in the eye of the political storm but tomorrow it could be banking, petrol retailing, supermarkets, toll roads or the media.

Granting an elected official such arbitrary power over the structure, contracting and pricing of a business is an attack on the rights of investors. As the Business Council of Australia put it in its submission to Treasury, it “sets a dangerous precedent for other sectors of the economy and threatens our economic attractiveness by sending a signal to the world that investing in Australia comes with considerable risks”.

Politics lies at the heart of the government’s motivation for advancing these extreme measures. Having jettisoned the Turnbull government’s national energy guarantee, it is determined to be able to show lower electricity prices before next year’s election and is making a nuclear threat to the energy industry to get them.

It is consistent with increasing vilification of big business for political effect.

Liberal backbenchers at next week’s party meeting should ask how the proposed legislation squares with Liberal Party principles. They avow a belief in free enterprise and declare that the party stands for minimising interference in private-sector initiative because “businesses and individuals — not government — are the true creators of wealth and employment”.