CLEARER GAS PRICES NEEDED

Our market needs a marker aligned to global pricing

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The Queensland Curtis Liquefied Natural Gas site in Gladstone. Australia is the world's largest exporter of natural gas

It may not grab the public's attention as much as its work tackling the dominance of Google and Facebook, but the ACCC's review of gas pricing, launched last week, can make a fundamental difference to the four million Australian homes that use gas and the local manufacturing jobs and industries that rely on natural gas.

The review is a vital element in the federal government's gas-fired recovery plans announced last September, which saw LNG gas exporters agree in January to make excess gas available to the domestic market.

The ACCC review of the "LNG netback price series" is likely to become the basis for the price range that export gas is offered at locally — thereby providing globally competitive pricing to the domestic gas market.

Australia has become the world's largest exporter of natural gas. The east coast of Australia exports three to four times more gas than it uses. But east coast gas prices have grown exponentially in the past few years and are now more than double those in Western Australia, where a domestic gas reservation policy is in place.

In a competitive market, Australian manufacturers, small businesses and households should be able to secure local gas at globally competitive pricing. Instead, today's domestic market is characterised by a limited number of suppliers offering gas at prices that are not transparent or globally competitive. The east coast has an abundance of gas and this is a strategic opportunity to grow our domestic economy, increase the number of people employed in highly skilled jobs and continue to position Australia as a diversified economy.

Conversely, an unreformed domestic gas market risks exporting jobs overseas and putting vital supply chains at risk.

To fix the east coast domestic gas market, greater transparency in both supply and pricing is needed, and the local market needs a price marker — a domestic reference price.

A domestic reference price will ensure a level playing field between gas producers and customers. The ACCC's work will be vital to price discovery and guidance for the gas offered at the Wallumbilla gas hub near Roma in Queensland, managed by the Australian Energy Market operator (AEMO).

The ACCC has done a great deal of work on export parity pricing and local gas production costs.

As the ACCC acknowledges, a review is timely given both the significant competition Australian LNG faces from the Middle East and the US (which now exports more than 40 per cent of its LNG to Asia) and their findings about gas supplier strategies in the east coast gas market.

The ACCC's export parity pricing work will form a critical element in a new gas industry code of conduct being developed by a united group of four industry associations, representing the breadth and depth of gas customers, and the Australian Petroleum Production & Exploration Association (APPEA), representing the oil and gas producers.

The process has been under way for nearly four months and gas customers — including us at Incitec Pivot — are patiently awaiting an outcome that can help deliver greater certainty for the manufacturing sector. This is crucial to determining the current and future industry investments in Australia. The code needs a pricing methodology that ensures fairness to local gas consumers through the principle that the profit per gigajoule of gas sold domestically does not exceed that achieved by selling overseas.

A domestic gas reference price is not about dictating a price, setting a floor, or a cap. As it implies, it would rise and fall with international gas markets.

The key will be transitioning the ACCC gas price series from a fortnightly calculation to a 24/7 market-based outcome linked to international price trends.

This would allow market buyers, users and traders to develop short and long-dated trading and hedging products as is normal throughout much of the world. The Australian market needs its own domestic gas marker aligned to existing global gas reference pricing, the most effective of which is Henry Hub, in Louisiana, USA.

Of course, the calculation needs to make the appropriate adjustments to translate this into the equivalent Australian price by accounting for LNG shipping costs and other local LNG capital and gas pipeline delivery costs.

Using Henry Hub-based pricing will ensure Australia competes based on international pricing, both in natural gas production and Australian manufacturing.

Australia's gas industry has nothing to fear from a local gas price better aligned to global price trends. The globally integrated LNG producers already use the Henry Hub to trade and balance their portfolios, much like many airlines buy, trade and hedge jet fuel against another US reference price, the West Texas Intermediate oil price.

The ACCC netback calculation can also be improved by considering the LNG cost structure, including longer-term capital costs. Both the LNG and the manufacturing industries are long-term, capital-intensive industries so the gas reference price should take that reality into account, not just short-term marginal costs as the current methodology does.

Local gas users shouldn't subsidise LNG capital or fixed costs they neither use nor need.

An internationally competitive domestic gas price is essential to building and positioning Australia's $100bn manufacturing sector for the future and securing the thousands of jobs that rely on gas.

It is the glue in the federal government's gas-fired recovery and will ensure Australian gas is offered at a fair price here at home. And it offers a Team Australia approach to ensuring a growing and prosperous country.

Jeanne Johns is managing director & CEO of Incitec Pivot, Australia's largest east coast gas user.

Let's have a sensible debate about disclosure protections

FRANK CASTIGLIA

A little over a month ago, the Treasurer announced that temporary measures put in place by a determination instrument in May 2020 to relax provisions in relation to continuous disclosure would become permanent by enacting legislation.

In his press release he stated that the objectives of this legislation were "so companies and their officers will only be liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with knowledge, recklessness or negligence. This will discourage opportunistic class actions under our continuous disclosure laws.

"The bill also makes clear that companies and their officers are not liable for misleading and deceptive conduct in circumstances where the continuous disclosure obligations have been contravened unless the requisite 'fault' element is also proven.

"These changes strike the right balance between ensuring shareholders and the market are appropriately informed while also allowing companies to more confidently make forecasts of future earnings or provide guidance updates without facing the undue risk of class actions."

Directors breathed a collective sigh of relief. The AICD cheered the news. CFOs dreamed of reduced directors and officers insurance premiums. Class action litigation funders and lawyers were despondent. Investor groups began agitating, declaring that this took away fundamental investor protections.

This rallying cry was embraced by the Labor Party, which refused to pass the legislation enacting the continuation of these protections. The existing protections expire on Monday. After Monday, companies and their directors will no longer have the benefit of these protections and will be subject to the old continuous disclosure laws that applied before May last year.

Unfortunately, most of this battle has been fought based on press releases rather than the legislation itself. So it's helpful to clarify what actually was proposed, the implications of those protections not being enacted and what reforms could be put in place in the future to achieve the Treasurer's stated objectives.

The May 2020 changes to continuous disclosure obligations under the Corporations Act were welcomed by listed companies and their boards. The changes were intended to provide some protection to companies and directors from potential civil claims for breach of continuous disclosure obligations. These changes, coupled with some further protections from class actions involving litigation funders, did provide some comfort.

These temporary continuous disclosure changes were largely replicated in the proposed legislation and focused on when information is materially price-sensitive and must be disclosed.

The legislation would have permanently changed the standard from an objective measure to a more subjective analysis, so that rather than information being materially price-sensitive, if a reasonable person would expect the information to have a material effect on the price or value of securities, directors could have made a more subjective judgment about this, unless they knew or were reckless or negligent as to whether the information was materially price-sensitive.

After Monday the more objective reasonable person standard applies again, so there is no need to prove any fault element that directors knew the information was materially price-sensitive and should have been disclosed or that they were reckless or negligent.

So companies and directors will need to take a more rigorous and objectively focused approach to decisions about continuous disclosure as they face a higher risk of potential civil claims. These kinds of decisions remain difficult given the uncertainty of the COVID-impacted business environment, particularly when the fiscal impact of JobKeeper ceasing remains unclear.

The May 2020 changes really only provided protection in relation to decisions not to disclose information under the continuous disclosure regime. These changes were criticised for leaving companies and directors exposed to claims for misleading or deceptive conduct for making disclosures. They were also exposed to claims like those made in the Myer case: that by failing to update the market as required by the continuous disclosure rules, Myer had misled or deceived the market.

The Treasurer's recent press release referred to tackling misleading and deceptive conduct issues. However, the legislation as drafted was convoluted and didn't achieve this. It only really provided that a failure to disclose, in circumstances where there wasn't knowledge, recklessness or negligence, would not of itself be misleading or deceptive conduct. This would have covered claims like those made in the Myer case.

However, the proposed changes would not have protected a company or its directors if the company actually did provide guidance or made disclosures to the market which turned out to be inaccurate. Such inaccurate disclosures would still have exposed companies and directors to potential liability if they were misleading or deceptive or, in the case of guidance or other forward-looking statements, if there wasn't a reasonable basis for making them.

Contrary to the Treasurer's press release, the changes wouldn't have allowed "companies to more confidently make forecasts of future earnings or provide guidance updates without facing the undue risk of class actions". Yet concerns about the perceived loss of investor protection in relation to misleading and deceptive conduct seemed to be at the heart of some of the more strident criticism of the proposed legislation.

Since the Myer case, many listed companies have upped their game and enhanced their continuous disclosure processes, and boards have escalated continuous disclosure issues to be a key item considered at board meetings.

ASX's revamped Guidance Note 8 provided pragmatic guidance for companies to deal with their continuous disclosure obligations, particularly in relation to providing guidance and avoiding earnings surprises and disclosures regarding the impact of COVID.

The relaxation of continuous disclosure obligations assisted in creating an environment where companies and boards had more comfort in making decisions about continuous disclosure and complying with their obligations, and it seems sensible to extend that regime permanently.

At this stage, the proposed legislation has not been passed and may therefore be up for consideration again later in the year, perhaps in August. Hopefully there will be a sensible debate.

Consideration should be given to similar protections for information that is disclosed, so misleading or deceptive provisions don't apply to disclosures made in good faith, unless the company or its directors knew or were reckless or negligent in relation to the accuracy of the information.

Frank Castiglia is a partner at Baker McKenzie.

Roadmap leads nowhere without a carbon price

ALAN SCHWARTZ

With the European parliament backing a carbon border tax on imports from countries such as Australia, the US re-entering the Paris Agreement, and our big trading partners committed to net zero by mid-century, it is both timely and essential to review the centrepiece of the Australian government's climate policy: the Technology Investment Roadmap.

The Roadmap is the predictable result of two "no go" zones imposed by the government on its Ministerial Reference Panel: no price on carbon, and no support for solar and wind power, which the government equates with coal and oil as proven technologies.

Deprived of these essential levers, the panel's recommendations establish stretch goals for five priority low-emission technologies — clean hydrogen, energy storage, low-carbon steel and aluminium, carbon capture and storage, and soil carbon.

The government also promises to "influence and co-invest with the private sector and other levels of government and encourage a supportive enabling environment".

In his foreword, Energy and Emissions Reduction Minister Angus Taylor cites the Newcomen steam engine, the Haber-Bosch process and the agricultural Green Revolution as examples of overcoming great challenges through technological progress: "That's why the government's emissions reduction strategy is focused on technology, not taxes."

Taylor's focus is an alluring sleight of hand. Each of the innovations he cites was a response to market incentives: more power and more agricultural productivity made their users richer the day they were implemented, because there was strong demand for power and food.

But if CO_2 pollution is free, there is little demand for low-carbon innovation. Technological progress in Australia will be agnostic on carbon — technological innovations that increase carbon emissions are just as likely as those that reduce them. Ironically all three of the technologies that the minister cited in his foreword have materially contributed to global warming.

Innovation responds to incentives. Why does Taylor expect businesses to invest specifically in low-carbon innovations when fossil fuels are heavily subsidised and emitting carbon is free? A price on carbon will unleash our individual and collective creativity in unimaginable and extraordinary ways. This is the magic of decentralised action in a well-functioning marketplace.

The political mandate accepted by the panel forced it to recommend a range of unproven and immature technology projects that are to be bureaucratically led and government-funded. It's the very opposite of a market-led solution because there is no incentive for companies to create or adopt technologies that reduce rather than increase emissions.

The triumph of marketing spin over substance is evident in the (non) details of the Roadmap. It does not explain how the government decided which technologies to target. It sets no time frames — other than reaching net zero emissions "as soon as possible" — and has no provision for independent assessment of outcomes. As part of an innovation policy the Roadmap is satisfactory; as a response to the immediate threat of global warming it is hopelessly inadequate.

As a citizen, father, grandfather and businessman, I want my vote, my love, and my profit to be aligned. With a price on carbon I will be able to invest profitably in low-carbon innovations and technologies while contributing to a safe and hospitable planet for future generations. Why is this so hard?

Unavoidably, we return to the political stalemate. Blind to the global momentum supporting a price on carbon, too many of our politicians and business leaders are trapped in a parochial squabble.

I believe that Australian businesses can contribute in two important ways.

First, we must persuade politicians that a carbon price supporting a market-led response is pro-business and no more controversial than the introduction of tolls on our roads, levies at our garbage dumps and co-payments for pharmaceuticals.

These times call for moral courage and steadfast resistance against the ascendancy of short-term, narrow or private interests

Second, we must encourage them to generously fund programs to support those who will be harmed by this transition. Unlike the US — which abandoned millions of manufacturing workers — Australians do not equate solidarity and care with socialism.

And finally, a word to the seven eminent Australians who accepted a brief that explicitly precluded a price on carbon.

You may say that politics is the art of the possible, and that if a carbon price is out of the question, one should do the best one can without it. But stretch goals for a few promising technologies and a commitment from government to "influence and co-invest with the private sector" are not good enough.

We are living in dangerous times for our civilisation. These times call for moral courage and steadfast resistance against the ascendancy of short-term, narrow or private interests.

Those who have lent their good name to the centrepiece of our government's response to climate change should now explicitly and publicly also add their names to public calls for a price on carbon, and point out that without one, the Roadmap will lead nowhere.

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