Law Council
OF AUSTRALIA

Business Law Section

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Electricity Legislation Consultation
Structural Reform Group
The Treasury
Langton Crescent
PARKES ACT 2600

By email: Electricity.Legislation@treasury.gov.au

Dear Structural Reform Group

Electricity price monitoring and response legislative framework consultation paper

1. The Competition & Consumer Committee of the Business Law Section of the Committee of Australia (the **Committee**) appreciates the opportunity to consult on the Electricity Price Monitoring and Response Legislative Framework. The Committee recognises the significant community concerns about electricity pricing that the proposals seek to address. However, the Committee respectfully submits that a longer consultation period would be preferable to address the significant proposals outlined in the consultation paper, that have far reaching implications for Australian competition policy. A more meaningful timeframe for constructive comments is more likely to lead to effective and workable reforms with less risk of unintended consequences. Given the time constraints, the Committee has only expressed broad policy views on a few of the key proposals.

2. The Committee would appreciate the opportunity to comment on any draft legislation.

A Treasurer-ordered divestiture order

Background

3. Currently, divestments to address competition concerns in Australia only occur in a structural context relating to merger matters. This may occur where the ACCC effectively accepts a court enforceable undertaking voluntarily provided by a merger party to divest parts of its business or the target business in order to address competition concerns raised by the ACCC and receive ACCC clearance.

4. The ACCC and third parties also have the ability to seek divestiture orders from a court where a merger is declared by the court to have breached section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**). However, the seeking of such orders is extremely rare, with there being only one case in which the court found it had the power to make a divestiture order in the past 30 years.[1] This is due to the

[1] *Trade Practices Commission v Australian Meat Holdings Pty Ltd* (1988) 83 ALR 299 in which Wilcox J considered the court had the power to make a divestiture order, but preferred that an undertaking to divest be provided.

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complexity and difficulties associated with 'unscrambling the eggs' of a completed merger and the uncertain competition effects and detriment to consumers that may result.

5. Previous reviews of Australia's competition laws and policy have considered whether a power to require divestiture by a firm should be extended to the prohibition against the misuse of market power. Each of the Harper Review, Hilmer Review, Dawson Review and Economics Legislation Committee concluded that a specific divestiture remedy should not be introduced due to the highly interventionist nature of the remedy, and the significant and unforeseen ramifications it could potentially have on the market.

6. While regulators in other jurisdictions have divestment powers, they are limited and rarely used. For example, in the United Kingdom, the Competition and Market Authority has the power to conduct market investigations into whether there are features of a market that restrict, distort or prevent competition, and require market participants to take specified remedial action, including divestiture, to address any adverse effects on competition. Market investigations are run in two phases over an 18 month period and involve extensive stakeholder engagement.

7. The Committee has repeatedly expressed concerns about the possible introduction of a divestiture power as a remedy for any form of prohibited conduct under the CCA, and maintains its position that the potential advantages for creating such a power would not outweigh the likely disadvantages. The Committee retains the position it took in its submission to the Australian Government Competition Policy Review that:

> "[t]o confer a power on the ACCC, or another body, to require the divestiture of assets would permit, in the Committee's opinion, an unwarranted interference with the operation of the relevant markets."[2]

Potential adverse economic consequences

8. The Committee reinforces its concern that divestiture orders could have wider economic and competitive impacts by creating less efficient businesses that are against the interests of consumers, as raised in its submission to the Australian Government Competition Policy Review:

> ".. the Committee urges the Review Panel to be cautious about suggestions that a divestment remedy or break up orders be introduced in Australia. The issues involved are complex, with unpredictable economic and competitive impact and practical implications for enforcement …there is a significant risk of creating two or more less efficient businesses ..."[3]

9. In particular, the Committee notes that a divestiture order could result in significant economic harm through the loss of economies of scale, which could cause detriment to consumers, for example, in the form of higher prices. It could also involve divestiture of a part of a business that cannot be a competitive operation itself. This could have large repercussions on innocent third parties, such as shareholders / investors, employees and communities. There is very little if any historical evidence

[2] Law Council of Australia Business Law Section, *Submission to the Australian Government Competition Policy Review,* 27 June 2014, https://www.lawcouncil.asn.au/resources/submissions/australian-government-competition-policy-review, p. 90.
[3] Ibid, p. 39.

of interventions of this kind in other jurisdictions having achieved significant benefits for the long term interests of consumers.

10. The Harper Review conducted an extensive review into whether a divestiture order was necessary to deter a firm from misusing its market power and to compensate parties harmed by such unlawful conduct. In the final report, the Harper Review ultimately recommended against the introduction of a divestiture power, noting that:

> ".. divestiture is likely to have broader impacts on the firm's general efficiency. Such changes could also have negative flow-on effects to consumer welfare. It is also possible that divested parts of a business might be unviable."[4]

11. The Harper Review did note that it was open to Parliament to legislate to bring about the breaking up of a firm or redesigning of an industry, but stated that such action would be 'rare and exceptional'.[5]

Ineffective remedy to address prohibited conduct

12. The Committee reinforces its concern that a specific divestiture remedy would not be effective in addressing prohibited conduct, as expressed in its submission to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014:

> "…a divestiture order involves … in the absence of a clear and direct nexus between the contravention and the assets to be divested, the divestiture not appropriately addressing the [contravening] conduct …"[6]

13. The Dawson Report acknowledged that divestiture may be appropriate in the context of mergers that lead to a substantially lessening of competition, but noted that divestiture was inappropriate as a remedy for other forms of anti-competitive conduct, such as the misuse of market power. This is because 'there is no clear nexus between the assets to be divested and the contravening conduct'.[7] For example, it is difficult to see how a divesture order would target, or address the consumer harm that would result from an electricity retailer charging prices higher than the default market offer (retail prices - proposed option A). As stated in the Dawson Report, the Committee notes that the use of a divestiture remedy to preclude a corporation from engaging in prohibited conduct would be 'difficult at best and arbitrary at worst.'[8]

14. In addition, divestments are intended to address structural problems within a market and not as a punishment for specific conduct. The Committee notes that it would be disproportionate for the ACCC to recommend to the Treasurer to make a divestment order where a company engages in prohibited conduct, particularly given that the effect of a divestiture order would be unrelated to the nature of the specific conduct.

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[4] Harper et al, *Competition Policy Review – Final Report*, 2015, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf, p. 346.
[5] Ibid, p. 347.
[6] Law Council of Australia, *Submission to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014,* 30 June 2014, https://www.lawcouncil.asn.au/resources/submissions/competition-and-consumer-amendment--misuse-of-market-power--bill-2014, p. 4.
[7] Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, http://tpareview.treasury.gov.au/content/report.asp, p. 162.
[8] Ibid.

Practical difficulties

15. Furthermore, implementing a divestiture remedy would be difficult, as it would require ongoing supervision. The Committee refers to its submission to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014:

> "… a divestiture order involves…imposing on-going, supervising behavioural orders on the firm(s) involved, which are necessary to give effect to the divestiture order (such as orders in relation to how the divested businesses may deal with one another and/or their former parent)."[9]

16. In addition, there are many legal and practical difficulties associated with administering a divestiture remedy. The Committee refers to its submission to the Australian Government Competition Policy Review:

> "Apart from the potential harmful effects of requiring a reduction in market share, there would be considerable legal and practical difficulties in the administration of a divestiture power … The relevant order would need to be quite specific in requiring the divestiture of particular assets. However, such a process is likely to be very arbitrary in its selection of assets, and very uncertain as to its actual effects on market share, let alone market power."[10]

17. To prevent unintended consequences flowing from a divestiture, comprehensive modelling by the ACCC or Treasury would be required. This would involve a thorough understanding of the existing market structure and the potential impact a structural remedy will have on the market, as well as other stakeholders. This process is difficult, expensive and would lack timeliness. Given the grave impact of a divestiture order, the process may also involve a lengthy appeals process.[11]

Existing remedies under the CCA are preferable and more likely to be effective

18. The Committee considers that the range of remedies currently available under the CCA are preferable and more likely to be effective in deterring a firm from engaging in prohibited conduct, and to protect and compensate parties that have been harmed by prohibited conduct.

19. A similar point was raised by the ACCC in June 2018, in its Retail Electricity Pricing Inquiry – Final Report. In the report, the ACCC recommended against the implementation of a divestiture mechanism:

> "Requiring the divestiture of privately owned assets is an extreme measure to take in any market, including the electricity market.
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> While the way in which concentration has developed in the wholesale market is clearly contributing to current high prices, the ACCC considers that the other recommendations made in this report will, if implemented, be a better means to restore competition to a level which serves consumers well.

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[9] Law Council of Australia, *Submission to the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014,* 30 June 2014, https://www.lawcouncil.asn.au/resources/submissions/competition-and-consumer-amendment--misuse-of-market-power--bill-2014, p. 4.

[10] Law Council of Australia Business Law Section, *Submission to the Australian Government Competition Policy Review,* 27 June 2014, https://www.lawcouncil.asn.au/resources/submissions/australian-government-competition-policy-review, p. 90.

[11] See Senate Economics Legislation Committee, *Competition and Consumer Amendment (Misuse of Market Power) Bill 2014*, February 2015, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Competition_Bill_2014/Report, p. 17-18.

> For these reasons, other than the unique circumstances in Queensland … the ACCC does not believe it would be appropriate to intervene to unwind the way in which the market has evolved across the NEM."[12]

B Industry-specific legislation

Background

20. The Committee submits that industry-specific legislation is not required in the energy sector, as existing laws and regulations are preferable and sufficient in addressing the concerns raised in the consultation paper.

21. The Committee considers that introducing industry-specific legislation would be duplicative and unnecessary. The energy sector is already effectively regulated under the CCA, which applies to all industries. The issues that may arise from having industry-specific legislation that overlaps with the CCA is demonstrated by the difficulties experienced with reconciling the telecommunications-specific anti-competitive conduct laws contained in Part XIB of the CCA, and section 46 of the CCA.

22. In addition, the Committee notes that the introduction of industry-specific legislation is unlikely to be effective in addressing the Government's concerns. This is evident by the repeal of the price signalling provisions under the CCA in November 2017, which applied only to the banking industry. The price signalling provisions were never litigated, and were considered ineffective, complex and an additional compliance burden for businesses.[13] In its final report, the Harper Review noted that there was no policy rationale for the price signalling laws to apply only to the banking sector. As a result, the price signalling provisions were replaced by a general prohibition against concerted practices. The Committee submits that the existing prohibitions in the CCA, which apply to all industries, are more equipped to address the concerns raised in the consultation paper.

Wholesale bids and conduct

23. The Committee considers that the unconscionable conduct provisions and misuse of market power provisions, as currently drafted, provide preferable and sufficient mechanisms to protect businesses and consumers, and an industry-specific prohibition is not required.

24. Section 21 of the *Australian Consumer Law* already prohibits companies from engaging in unconscionable conduct, when dealing with other businesses or their customers. Unconscionable conduct means conduct that is so harsh it goes against good conscience. This could encompass conduct that is fraudulent, dishonest or in bad faith with the purpose of distorting or manipulating prices.

25. Section 46 of the CCA already prohibits companies with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market. This may capture firms that act fraudulently,

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[12] Australian Competition and Consumer Commission, *Restoring Electricity Affordability and Australia's Competitive Advantage – Retail Electricity Pricing Inquiry – Final Report*, June 2018, https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_0.pdf, p 89.

[13] Harper et al, *Competition Policy Review – Final Report*, 2015, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf, p. 378.

dishonestly or in bad faith with the purpose of distorting or manipulating prices, particularly where it is directed at another competitor.

Contract liquidity

26. It is preferable that the type of conduct contemplated by the proposed contract liquidity provision be dealt with under section 46 of the CCA, which has long had application to conduct of this kind. In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Limited* 167 CLR 177, BHP was held to have misused its market power by refusing to supply its competitor in the downstream rural fencing market, Queensland Wire, with access to a key input, Y-bar steel. Although the law has changed since, it is likely that the outcome would be the same.

Retail prices

27. While the Committee understands the community concerns around retail electricity prices, specific price regulation in the retail electricity industry is something that in the Committee's view is a measure that should be embraced very cautiously due to the very high potential for unintended consequences. In particular, retail price regulation has the obvious potential to reduce the economic incentives for the very investments in capacity that are the primary and best longer term mechanisms for putting downward pressure on retail electricity prices. Retail price caps can also tend to dampen natural market-driven price competition by acting as a benchmark price around which retailers target their offers rather than making offers based on their own marginal costs. In the Committee's view, retail price regulation is a 'last resort' policy response, which has the serious potential to cause unintended and counter-productive long term effects that are not necessarily in the long term interests of consumers.

28. Specifically in respect of divestiture, the Committee submits that imposing a remedy of this kind in an effort to address excessive pricing would be extreme and disproportionate to the nature of the conduct and would not necessarily have any mitigating effect on pricing, as the likely outcome of the sanction on market prices would be highly uncertain.

Yours sincerely

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