Law Council
OF AUSTRALIA

Business Law Section

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Electricity Legislation Consultation
Structural Reform Group
The Treasury
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By email: Electricity.Legislation@treasury.gov.au

Dear Structural Reform Group

Electricity price monitoring and response draft legislation

1. The Competition & Consumer Committee of the Business Law Section of the Committee of Australia (the **Committee**) appreciates the opportunity to comment on the exposure draft of the *Treasury Laws Amendment (Electricity Price Monitoring) Bill 2018* (**Exposure Draft**).

2. This submission is divided into four sections, one for each of the Divisions in the Exposure Draft containing substantive provisions.

3. The Committee holds concerns about the Bill in its current form and details these issues below. The Committee does not believe that the Exposure Draft in its current form achieves the policy outcomes it is intending to achieve and may have serious unintended consequences. The Committee suggests that a longer timeframe is required to give consideration to the Exposure Draft. As the Committee has not had sufficient time to consider the detailed working of the Exposure Draft our comments are necessarily broad in nature.

A Division 2 – Prohibited Conduct

Retail Pricing

4. We identify three key issues relating to the detail and workability of the drafting in the Exposure Draft as it relates to 'Prohibited Conduct – retail pricing':

   a) first, the Exposure Draft does not currently make any provision for a remedy in the nature of a 'Treasurer-ordered – Default market offer as a price cap';

   b) secondly, the definition of prohibited conduct set out in section 153D is vague and subjective and does not reflect any established body of legal or economic principle; and

   c) thirdly, the remedy of divestment is by its nature highly unlikely to be a proportionate or effective remedy for this category of prohibited conduct.

No provision for default market offer to operate as a price cap

5. We note that the Treasury consultation paper on the electricity price monitoring and response legislative framework (**Consultation Paper**) stated that the range of enforcement remedies and responses that could be applied if the ACCC identified problems included, inter alia, converting the default market offer into a binding price cap (price cap remedy).

6. In its submission dated 9 November 2018, this Committee urged that specific price regulation in the retail electricity industry is a measure that should be embraced very cautiously due to the very high potential for unintended consequences. The Committee notes that the Exposure Draft does not contain any provision for a price cap remedy, however it is not clear if this is the outcome of a change of policy. In so far as it is not intended to proceed with this remedy, the Committee would

support that outcome. Alternatively, if it remains Government policy to introduce such a remedy, the current Exposure Draft does not give effect to that intention.

Definition of prohibited conduct – retail pricing is vague and subjective

7. Section 153D provides that a corporation contravenes this section if two elements are met:

   a) the corporation offers to supply electricity or supplies electricity to small customers; and

   b) the corporation fails to make reasonable adjustments to the price of those offers or to the price of those supplies to reflect reductions in its underlying cost of procuring electricity.

8. The Committee considers that the key definitional element in this definition – that a corporation has failed to 'make reasonable adjustments' to reflect reductions in its underlying costs of procuring electricity – is vague and subjective and is also 'unsymmetrical' in its design. In the Committee's view, the notion of 'reasonable adjustments' in this context is not a concept for which there is any established body of economic principle or legal precedent that would provide meaningful guidance as to the application of this concept.

9. As a general proposition, legislation prohibiting conduct should define that conduct in a manner that corporations subject to it are capable of determining with reasonable certainty conduct that is or is not likely to be prohibited by the conduct. The current definition used does not meet that standard and raises real questions of fairness and equity as a result.

10. In addition, the concept of 'reasonable adjustments' is not a definition that connotes any settled economic or legal meaning. It is entirely subjective. Typically, where legislation imposes price controls there is both a set of substantive principles enacted that must be applied to determine the relevant price and a set of procedural decision making processes which involve procedures for examining relevant evidence and determination by specialist economic bodies. For example, the accrual building block methodology as applied to regulated gas and electricity network businesses in Australia. As a result, electricity retailers setting prices in response to supply and demand conditions in the market which are critical to the long term functioning of markets, relevant corporations will instead have to make retail pricing decisions having regard to the vague and subjective 'reasonable adjustments' standard.

11. The Committee also notes that the proposed section 153D is not symmetrical in its proposed operation, in that it only mandates cost reductions if the underlying cost of procuring electricity has reduced. The design of the prohibition thereby proceeds on the assumption that *the starting price for each electricity retail at the time of commencement will be cost-reflective*. The Committee is not aware that any empirical study has been undertaken to determine if this is likely to be the case. For example, it could be the case that electricity retailers have recently (partly) absorbed increases in wholesale electricity prices and some of the network charges. When these input prices return to more normal levels, this provision, as drafted, would make it an offence not to reduce the retail prices. That would be unsymmetrical. Arguably, the appropriate and efficient outcome would be not to pass on that particular input cost reduction. If this rule stands, retailers will be less likely in future to absorb any input cost increases. Instead, as a result of this clause, they would immediately pass on all input cost increases. The effect of this prohibition would be to expose retail customers to volatility in wholesale electricity costs. The Committee notes that this would surely not be the intended outcome of enacting this provision.

Divestment unlikely to be a proportionate or effective remedy

12. As noted above, the proposed price cap remedy has not been included in the Exposure Draft. However, in the case where a 'gentailer' were to contravene section 153D the available remedies would include the Treasurer ordered divestiture remedy. The Committee's general comments on that proposed remedy are set out in section D below. In relation to its application as a remedy for contravention of section 153D the Committee is concerned that it is inherently unlikely that divestiture could ever be considered a proportionate remedy for a contravention of a prohibition involving a failure to make a 'reasonable adjustment' to a retail price. It would also, by definition, only ever be a remedy that would be available to 'gentailers' and not retailers that did not own or control generation assets notwithstanding that the prohibition relates to retail prices.

13. It is also entirely unclear and in principle appears very unlikely that the divestiture remedy would address the harm sought to be prevented ie electricity prices that are not cost reflective or are 'too high'. This is for the obvious reason that retail electricity prices are a function of prevailing supply and demand conditions in the retail electricity market and it would be extremely difficult to reliably predict that a particular divestment of this kind would have the result of reducing retail electricity prices to the intended degree.

Potential adverse economic consequences

14. The ACCC's electricity report highlighted the importance of competition in the retail sector to maintain downward pressure on costs and see the benefits of cost reductions passed through to consumers. The proposed prohibition in section 153D creates a significant regulatory obligation which will make it more difficult for Tier 2 and Tier 3 retailers to enter electricity markets and grow in the face of competition from larger incumbents. Ironically, the ACCC also reported on the importance of innovation, yet the proposed prohibition will demand much more uniformity in retail pricing methodologies. The idea that retailers will instead differentiate through non-price innovation, when each is required to price their retail products in a similar way, is optimistic. There is a risk that differentiation at the retail level will be driven by little more than the depths of a retailer's pockets. The Committee submits that consumers will realise far greater benefits from reforms that encourage, rather than impede, competition and innovation in electricity retail markets.

Other forms of prohibited conduct

15. The Committee considers that many of the issues relating to the retail pricing prohibition also arise with respect to the other forms of prohibition conduct set out in sections 153E, 153F and 153G, namely:

    a) the definitions of prohibited conduct contain vague and subjective concepts that are difficult for corporations to measure their conduct against; and

    b) the remedy of divestment is unlikely to be a proportionate or effective remedy for each category of prohibited conduct.

16. Without being exhaustive, and by way of example:

    (a) **Electricity financial contract liquidity:** section 153E is restricted to situations where a corporation acts in the proscribed manner with the purpose of substantially lessening competition. However, the Committee considers it problematic to prohibit corporations from not offering a contract or from imposing limits on the contracts it offers, particularly when the legislation does not specify to whom electricity financial contracts must be offered, and does not recognise the many legitimate factors that could limit a corporation's capacity to offer contracts and the terms of those contracts (including a corporation's well established right to trade with whomever it chooses, subject to existing competition laws).

    The wording in section 153E(b)(iii) provides another example of the uncertain scope of the prohibited conduct provisions. It applies where a corporation offers to enter into electricity financial contracts in a way that has, or on terms that have, the effect or likely effect of preventing, limiting or restricting acceptable of those offer - acceptance by whom? Is the condition established if a single offeree does not accept an offer, even if that non-acceptance is unreasonable?

    The intended target for the prohibition in section 153E appears to be large 'gentailers', but it is not difficult to see its possible use to prosecute small electricity retailers, given the subjectivity and lack of precision of the drafting. This would not be a desirable outcome as it could make retailing less competitive than would otherwise be the case. Further, as the conduct is already covered by section 46 of the CCA its inclusion can only be to impose the remedies outlined in the Exposure Draft, many of which are disproportionate to the harm as outlined below. The Committee submits that the remedies currently contained within the Competition and Consumer Act 2010 (Cth) (***CCA***) should be sufficient to address any anticompetitive harm.

(b) **Electricity spot market (basic case and aggravated case):** sections 153F and 153G apply where a corporation acts or fails to act in the proscribed manner 'for the purpose of distorting or manipulating prices in [an] electricity spot market'. However, the Exposure Draft does not define what it means by 'distorting or manipulating'.

In economic terms, distorting usually means that conduct has moved prices relative to some perfectly competitive ideal. If this is the intention, the prohibition may have the unintended consequence of capturing many bids into the NEM that are placed with strategic objectives in mind. Such bids are not of themselves anti-competitive: some corporations might bid their marginal costs but will expect to receive a higher price (necessary to recover their fixed costs) whilst others might bid very high prices expecting to be dispatched not very often but receiving high prices when they are dispatched.

The presence of government policies, in particular the Renewable Energy Target, in itself causes distortions to wholesale pricing (depending on how broadly distortion is defined). If, for example, electricity generators respond to the intended incentives of the Government's policies, there is the potential for them to be engaging in prohibited conduct, given the breadth and imprecision of these provisions.

The distinction between the "base case" and the "aggravated case" (the former applying to actions which are fraudulent, dishonest or in bad faith *or* are for the purpose of distorting or manipulating price and the latter to actions which contain both elements) is also unclear in practice.

B Division 3 – Public Warning Notices

17. The Committee does not consider it appropriate to introduce a power to issue public warning notices in the manner contemplated by Division 3 of the Exposure Draft.

"Reasonable belief" is an unworkable threshold for public warning notices

18. The test for whether the Australian Competition & Consumer Commission (**Commission**) can issue a draft or final public warning notice relies on the Commission forming a "reasonable belief" that each of the following matters arise:

    a) the corporation has engaged (or is engaging) in prohibited conduct;

    b) one or more persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct; and

    c) it is in the public interest to issue the notice.

19. In relation to the first criterion, the basis upon which the Commission would be able to form a reasonable belief is unclear, given the uncertain and imprecise nature of the prohibited conduct provisions as discussed above. For example:

    a) In the case of section 153D (retail pricing), on what basis is the Commission to form a "reasonable belief" that a corporation is (or has failed) to make "reasonable adjustments" to its pricing offers? As noted above, the Exposure Draft offers no guidance on what constitutes a "reasonable adjustment", or the basis upon which a reduction in the "underlying cost of procuring electricity" is to be measured.

    b) In the case of section 153E (financial contracts), on what basis is the Commission to form a "reasonable belief" that the corporation has engaged in the relevant conduct for the purpose of substantially lessening competition in any electricity market? The determination of a corporation's subjective purpose is a complex question that can only be answered by examination of all the relevant circumstances.[1] In the Committee's view, the application of section 153GA does nothing to simplify this assessment (or an assessment of purpose relevant for sections 153F or 153G), but contains another gloss on the legislation.

[1] See, e.g., *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529; *ACCC v Cement Australia* [2013] FCA 909

c) In the case of section 153F or section 153G (electricity spot markets), as with section 153E, on what basis is the Commission to form a "reasonable belief" a corporation's conduct was fraudulent, dishonest or bad faith, or its purpose was for the distortion or manipulation of prices?

20. In the Committee's view, the complexity of the factual and legal questions that must be answered before a corporation's liability for prohibited conduct under the Exposure Draft can be ascertained render it inappropriate for the prohibitions in Division 2 to be subject to the ability to issue a public warning notice in the manner contemplated by Division 3.

Public warning notices are not appropriate for the matters relevant to prohibited conduct

21. The Committee notes that the Commission does not have the power to issue public warning notices in respect of any provision in Part IV of the CCA which are provisions in the CCA which rely on many of the same concepts as the prohibited conduct.

22. To the contrary, the only existing powers for the Commission to issue a public warning notice are confined to provisions within the Australian Consumer Law (**ACL**) and Part IVB of the CCA (Industry Codes).[2] The limited utility of public warning notices and the reticence of the Commission to rely on its existing powers is evidenced by the fact that the Commission has published only five such notices in the past eight years.[3]

23. Further to this, the Committee considers that the object of a public warning notice power, and the context in which a public warning notice may be an appropriate remedy, are quite specific and limited. As the *Public Warning Notices Guide* developed by the State and Commonwealth authorities responsible for the enforcement of the ACL points out,[4] a public warning notice provides ACL regulators "*with a compliance tool that may be used to prevent or reduce the opportunity for consumer detriment by alerting consumers to the alleged conduct.*"

24. The *Public Warning Notices Guide* further states:

> *Issuing a public warning notice to alert the public to conduct which may contravene the ACL may be appropriate when there is* ***an imminent or ongoing risk of consumer detriment****. Relevant to a decision to exercise the public warning notice power is the* ***balance between the likely impact on the relevant person or business, against the known or likely risk of consumer detriment and the need to act in a timely manner****.*[5]

25. In the context of each form of prohibited conduct in the Exposure Draft, it is highly unlikely that a Public Warning Notice could substantially mitigate any risk of consumer detriment, for the following reasons:

a) In the case of section 153D, the prohibited conduct involves a failure to pass on cost reductions to ***existing*** small customers. Even if the Commission *could* form a reasonable belief about the existence of this conduct (which is doubtful), a public warning notice would not prevent any potential loss for the corporation's existing small customers from that failure to do so.

b) In the case of each of sections 153E, 153F and 153G, given the nature of the electricity financial contracting and electricity spot markets respectively, it appears highly unlikely that a detriment identified by the Commission (as required by sections 153J(1)(b) and 153K(1)(b)) in relation to these forms of conduct could be mitigated by the release of a public warning notice.

26. Given the very real prospect that a public warning notice issued against a corporation for any form of the prohibited conduct would have adverse consequences for that corporation's business and commercial reputation, the Committee considers it very unlikely that the balancing exercise referred to in the *Public Warning Notices Guide* could reasonably lead to a decision that

[2] See ACL section 223 and CCA section 51ADA.
[3] See http://registers.accc.gov.au/content/index.phtml/itemId/943316.
[4] *Public Warning Notices Guide* (ACL Regulators, 2012). Available at: https://www.commerce.wa.gov.au/sites/default/files/atoms/files/aclpublicwarningnoticesguide.pdf
[5] Ibid, at [2], p 5

publication of a public warning notice was an appropriate or in the public interest. As a consequence, Committee does not support retaining these powers in the Exposure Draft.

Suggested amendments if public warning notice powers are to be introduced

27. In the event that the Government determines that it is necessary and appropriate for these powers to be introduced, the Committee recommends that the Exposure Draft be amended so that:

- the threshold for issuing a draft public warning notice under section 153J and a public warning notice under section 153K is that the Commission has "reasonable grounds to believe" that the conditions set out in those sections are satisfied;
- the substantive provision of section 153J make it clear that the notice issued to the corporate is a draft (currently, this is only referred to in the section heading);
- the Commission is required to consider any representations made by the corporation as contemplated by section 153J(d)(i) prior to issuing a public warning notice under section 153K; and
- the Commission is required to provide the corporation with the final public warning notice at least 7 days prior to issuing a public warning notice under section 153K.

C Division 4 – Procedure before Treasurer's Order

28. The Committee considers that its comments in relation to the requirement for the Commission to form a "reasonable belief" in relation to the decision to issue a draft or final public warning notice pursuant to Division 3 of the Exposure Draft are equally applicable to the requirements for the Commission to make the same assessment as part of the procedures specified in sections 153P and 153R of Division 4.

Timeframes are too short

29. From a procedural perspective, the Committee has serious concerns regarding the process by which the prohibited conduct notice provisions in Division 4 of the Exposure Draft are structured.

30. Most importantly, the stated statutory timeframe of 45 days in section 153P(3) is a very short period for a corporation to respond to the matters set out in a prohibited conduct notice. The matters contemplated by such a notice are likely to require a corporation to closely examine its commercial operations and gather detailed information to be able to respond to the Commission's contentions and recommendations, as is contemplated in section 153P(2)(f).

31. By way of example, it is highly likely that a corporation will need to undertake an extensive internal information gathering exercise and seek expert advice in order to demonstrate the corporation's:

- underlying cost of procuring electricity (if the prohibited conduct is that described in section 153D);
- electricity financial contracting history and decision-making processes, as well as the purposes for which it has acted or failed to act (if the prohibited conduct is that described in section 153E); and
- evidence of the manner in which it has bid electricity generation assets for dispatch into an electricity spot market, as well as the circumstances in which It has acted or failed to act (if the prohibited conduct is that described in sections 153F or G).

32. As such, the time period of 45 days may be significantly shorter than appropriate for a corporation to gather the appropriate materials and develop a detailed response to the allegations and recommendations set out in a prohibited conduct notice.

33. As a technical matter in relation to the timing provisions, the reference in section 153QA(3)(b) to section 153Q(4) should be changed to section 153Q(3).

Procedural fairness issues

34. As with the proposed public warning notice provisions, it is unclear as to what (if any) regard the Commission must have to representations provided by a corporation in response to a prohibited conduct notice. There is no statutory requirement for the Commission to consider the representations provided by the corporation.

35. Further, in accordance with section 153R(1), the threshold for the Commission to make a prohibited conduct recommendation is identical to the test for the Commission to issue a public warning notice – being the Commission forming a "reasonable belief" – which gives rise to the same concerns identified by the Committee in section B in relation to public warning notices. Further, it must have a reasonable belief that the order would be a 'proportionate means' to prevent the conduct. Again, this concept is vague and unknown in competition law.

36. The Committee is particularly concerned that sections 153R(3) and 153R(5) specifically permit the Commission to provide different recommendations, or identify a different corporation, in a prohibited conduct recommendation to those specified to the corporation in the corresponding prohibited conduct notice under section 153P. In the Committee's view, procedural fairness cannot be achieved in circumstances where:

- the Commission can provide the Treasurer with a recommendation that includes recommendations which the corporation has not had any opportunity to respond to; and
- where the prohibited conduct recommendation includes a recommendation for a divestiture order but the prohibited conduct notice did not, the corporation has not had any opportunity to respond to the reasons for which the Commission considers the requirements in relation to divestiture orders (as set out in section 153R(2)(e)(ii)) are met.

37. In addition, the Commission is not currently required to provide a copy of any prohibited conduct recommendation to the corporation to which it applies. As a procedural matter, particularly given the Commission's ability to vary or revoke a prohibited conduct recommendation, a copy of the recommendation should be provided to the corporation, and a procedure be implemented to allow it to respond to any matter contained in the recommendation that was not included in the prohibited conduct notice, prior to the prohibited conduct recommendation being provided to the Treasurer.

Publication of no Treasurer action notice should not occur

38. The Committee has significant concerns regarding the requirement for the Commission to publish a no Treasurer action notice in section 153T(3). In the Committee's view, the publication of such a notice could have a materially detrimental impact on a corporation's business, in circumstances where:

- the content of notice is not prescribed by statute;
- the notice may contain commercially confidential or sensitive material;
- the context for the notice (including the corporation's representations) are not also made public, which could give a misleading impression about the corporation's behaviour;
- the statutory requirement for the Commission's "reasonable belief" about prohibited conduct is not an appropriately high threshold for the Commission to be entitled to publicly disclose its beliefs; and
- the outcome of the Commission's consideration is that no action is appropriate.

39. In light of the above, the Committee sees no public benefit or reasonable basis for the publication of a no Treasurer action notice in any circumstances.

Suggested amendments to Division 4

40. In the event that the Government determines that it is appropriate for Division 5 to be retained, the Committee recommends that the Exposure Draft be amended so that:

- the timeframe in section 153P(3) be increased to 90 days;
- the threshold for issuing a prohibited conduct notice under section 153P and a prohibited conduct recommendation under section 153R is that the Commission has "reasonable grounds to believe" that the conditions set out in those sections are satisfied;
- the Commission is required to provide a copy of any prohibited conduct recommendation to the corporation prior to it being provided to the Treasurer, and the corporation is able to make representations to the Commission in relation to any recommendation not set out in the prohibited conduct notice within 90 days of receipt of the recommendation;
- the Commission is required to consider any representations made by the corporation as contemplated by section 153P(2(f) prior to giving the Treasurer a prohibited conduct recommendation under section 153Q. This requirement should also apply to any representations made by the corporation in relation to any recommendation not set out in the prohibited conduct notice (as per the Committee's suggested amendment above); and
- the requirement for the Commission to publish a no Treasurer action notice in section 153T(3) and a variation or revocation of that notice in section 153U(7) is removed.

D Division 5 – Treasurer's Orders

41. The provisions in Division 5 of the Bill are concerned with Treasurer's Orders; that is, orders that the Treasurer can make upon receipt of a prohibited conduct recommendation from the Commission.

42. Broadly, a Treasurer's Order may require a corporation (which, in practical terms, must either be an electricity generator or retailer) to:

(a) offer to enter into electricity financial contracts;

(b) divest itself of certain shares or assets; or

(c) if divestment is not possible, comply with certain specified conditions.

43. It is proposed that these orders can be made by the Treasurer on the recommendation of the Commission. The role of the courts would be limited to:

(a) enforcement of a Treasurer's Order if it is not obeyed; and

(b) judicial review of decision makers.

44. The Committee notes that the Exposure Draft does not contain any mechanism by which a Treasurer's Order can be reviewed on its merits. The Consultation Paper suggested that 'merits review and judicial review would be available for the Treasurer's determination'. It is not clear if this is a change in policy of the government.[6] The Committee is strongly of the view that if the Treasurer has the power to order divestiture there should be a right of merits review to the Australian Competition Tribunal.

45. The Committee's comments on this Division fall into two categories:

(a) issues relating to the constitutional validity of the provisions in Division 5; and

(b) issues relating to the scope and content of Division 5.

Issues relating to the constitutional validity of the provisions in Division 5

[6] Consultation Paper, p 7.

46. The Committee is concerned that there are real questions about whether the powers in Division 5 of the Exposure Draft are consistent with the limitations imposed by the Australian Constitution. These issues fall into two categories:

(a) acquisition of property through an administrative decision; and

(b) interference with the functions of the States.

Acquisition of property through an administrative decision

47. As the Government is well aware, section 51(xxxi) of the Constitution provides that the Parliament may make laws for the acquisition of property on just terms.

48. This provision of the Constitution was considered in *WSGAL Pty Ltd v Trade Practices Commission & Ors* [1994] FCA 1079. This was a decision of the Full Court of the Federal Court, in which a challenge was brought to the validity of section 81 of the *Trade Practices Act 1974*, which provided for the Federal Court to make orders for the divestiture of shares or assets acquired in contravention of section 50 of the Act. Section 81 remains in force in the CCA today.

49. In *WSGAL*, the Full Court rejected an argument that section 81 was a law for the acquisition of property without just terms. In the words of Lockhart J:

> *'Section 81 is just as much a law outside the scope of paragraph (xxxi) as is a law with respect to taxation, fines or pecuniary penalties payable for criminal offences, forfeiture to the Crown of prohibited imports and the vesting of property of bankrupts in the Official Trustee in Bankruptcy. In one sense they all involve the notion of acquisition of property, but not acquisition of property in the composite sense to which s. 51(xxxi) is directed. The presence in s. 81(1A) of the provision that the shares or assets are deemed not to have been disposed of by the vendor and that the vendor is obliged to refund to the acquirer moneys paid to the vendor in respect of the acquisition, does not infuse the acquisition with a quid pro quo. The essential elements of s. 51(xxxi) on the one hand and of ss. 50 and 81 on the other are fundamentally different*'.[7]

50. A Treasurer's Order has similarities, in that it would provide a remedy in a case where the owner of an asset has contravened prohibitions contained in the CCA. There are, however, significant differences between the operation of section 81 and a Treasurer's Order.

51. Firstly, section 81 operates only to reverse the harm resulting directly from an acquisition made in violation of section 50 of the CCA. The nexus between the 'prohibited conduct' specified in a Treasurer's Order and the remedy itself is less clear; the only requirement being that the order is judged to be a *'proportionate means of preventing the relevant corporation, or any related body corporate of the corporation, from engaging in that kind of prohibited conduct in the future*'.[8] Just as the remedy is not limited to the unlawful conduct, the person upon whom the remedy may be imposed is not confined to the wrongdoer.

52. The power to make a contracting order highlights this risk. An order under proposed section 153ZG can do more than simply provide redress for a specific breach of proposed section 153E. If the Treasurer considers that it would be a proportionate means of preventing such conduct in the future, the Treasurer can make orders to specify the capacity that must be offered in contract markets, as well as the nature and price terms to be offered to the market.[9]

53. The effect of such an order is to conscript the generating capacity of the corporation and require it to be offered to the contract market on terms set by the Commonwealth. Such an order goes much further than penalising or redressing a breach of the law, and calls into question whether this might not, in fact, be a law for the acquisition of property. While the Committee notes that a provision of Division 5 is not intended to have any effect to the extent that it provides for an acquisition of property other than on just terms, such a provision could render much of Division 5

[7] [1994] FCA 1079 at [36].
[8] Proposed sections 153ZG(f) and 153ZL(f).
[9] Proposed section 153ZH.

invalid.[10] The proposed legislation should not be introduced without further consideration to ensure that a Treasurer's Order is consistent with section 51(xxxi).

54. Secondly, the power in section 81 is exercisable only by a court, and only after a finding by the court that section 50 has been contravened. For this reason, the Full Court in *WSGAL* rejected a challenge to the validity of section 81 on the basis that the court was being asked to exercise something other than judicial power.

55. A Treasurer's Order has similarities with an order that might be made by a court under section 81. In particular:

- it is predicated on a finding that a corporation has engaged (or is engaging) in prohibited conduct; and
- it is to be made only as a measure to prevent such conduct occurring in the future (in this respect it is similar to an injunction that a court might grant under section 80 of the CCA to restrain a misuse of market power).

56. However, while these are features which might support the view that the provisions in Division 5 of the Exposure Draft are not laws for the acquisition of property, these are also indicia suggesting that the Treasurer is being vested with powers that can in fact be exercised only by the Federal Court.

57. The Committee submits that if this legislation is to be introduced, it should provide for a prohibited conduct order to be made only by the Federal Court, and only upon the Court being satisfied, to the requisite standard, that a corporation has engaged in prohibited conduct and that the remedy is appropriate. In the alternative, the power could be vested in the Australian Competition Tribunal.

58. The Committee also notes that the lack of judicial oversight in the making of a Treasurer's Order may impact upon private investment in Australia's energy industry, on the basis that investors would not have the security of knowing that the adverse consequences of prohibited conduct under the CCA would only flow if the relevant regulator can prove a breach, to the requisite standard, before an impartial court. This safeguard, a crucial component of Australia's legal system, does not feature in the regime for making a Treasurer's Order.

Interference with the property of the States

59. In Queensland, Tasmania and Western Australia, substantial parts of the electricity generation sector are owned by each respective State through various state-owned corporations.[11]

60. The Australian Constitution places limits on the ability of the Commonwealth Parliament to enact laws that curtail the capacity of the States to function as governments.[12] While the application of this doctrine has often involved matters of judgment and degree, the proposed legislation would, on its face, give the Treasurer the power to make an order curtailing the ability of the States to own and operate property for the purpose of supplying electricity to their residents, or regulating the manner in which a State must employ its property for that purpose.

61. The Committee sees a risk that such a law may violate the protections conferred on the States by the Australian Constitution.

Issues relating to the scope of Division 5

62. The Committee makes some further observations below.

Breadth of the relevant powers

[10] Proposed section 153ZC.
[11] In South Australia, certain generation assets have been privatised by way of long term lease to private operators, but ultimate ownership remains with the State.
[12] For example see *Melbourne Corporation v Commonwealth* [1947] HCA 26; *Austin v Commonwealth* [2003] FCA 3; *Clarke v Commissioner of Taxation* [2009] HCA 33.

63. A Treasurer's Order cannot be made with respect to conduct by a corporation under section 153F (spot market – basic case); yet it is proposed that such an order could be made with respect to conduct under section 153D (retail pricing). There is no obvious reason why a retailer should be exposed to the threat of a contracting order or divestment order because it has failed to make reasonable adjustments to retail prices to reflect underlying costs. How, for example would a contracting order ensure that a retailer adjusts its retail prices in the future? What assets would a retailer divest to ensure future compliance? It is not enough to say that the grounds for making a Treasurer's Order are unlikely to exist in such a case. The remedies proposed under a Treasurer's Order are extreme. No business should be exposed to such a threat unless there is a clear case to do so.

64. Each remedy should be confined to the specific mischief it is designed to address. Specifically:

- a contracting order should only be available where the prohibited conduct involves a breach of proposed section 153E (ie. failing to offer financial contracts);
- a divestiture order or divestiture conditions order should be available only with respect to a breach of proposed section 153G (spot market – aggravated case).

Exposing the electricity industry to substantial risks

65. As noted above, the Treasurer could make a contracting order to specify the capacity that must be offered by a corporation in the financial contract market, as well as the nature and price terms to be offered.[13] Yet what is the responsibility of the Treasurer if those orders result in the corporation suffering financial loss, even insolvency? The share price impact alone of such a measure could be significant.

66. A generator subject to such an order would be dependent on the Treasurer to have sufficient insight (and foresight) to frame contract terms that would guard against this risk. Such a law, even if valid, would expose a generator to enormous financial risk should the Treasurer intervene in the manner contemplated by the Bill.

67. Courts have historically been reluctant to grant mandatory injunctions that require parties to deal with others on specified terms, even in cases where a breach has been found, in part because of the difficulties in ensuring that such orders prohibit only conduct that is illegal, without interfering with normal and legitimate business activities.[14] The Committee submits that similar caution is required in framing legislation to provide for government intervention in the electricity market.

[13] Proposed section 153ZH.
[14] See, for example, *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* [1978] FCA 27; *Re Eastern Express Pty Ltd v General Newspapers Pty Ltd & Ors* [1992] FCA 138; *Robert Hicks Pty Ltd (trading as Auto Fashions Australia) v Melway Publishing Pty Ltd* [1998] FCA 1379;