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Business Council of Australia

24 January 2019

Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee

Inquiry into the provisions of Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

The Business Council welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee on the provisions of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 (Bill).

The Business Council does not support the Bill and urges the Government to withdraw it.

The Business Council supports lower electricity prices but this will not be achieved by ad hoc and extreme intervention in the electricity market which brings new risks, unintended consequences and has never worked before.

While we understand the need to prioritise affordability, greater intervention and more regulation – including forced divestment which even the ACCC has rejected – is not the answer. By exacerbating sovereign risk and interfering in market outcomes, the Bill will discourage investment and is unlikely to increase competition or reduce prices for consumers.

As the attached detailed submission outlines, the anti-competitive behaviour the Bill seeks to prohibit is already appropriately dealt with, and prohibited, under existing laws and rules that apply to the electricity market. Further, inquiry after inquiry into retail prices, wholesale bidding and conduct and contract market liquidity has not found any evidence of fraudulent or dishonest behaviour, nor acts of bad faith with the purpose of distorting or manipulating prices. Consequently, the Government's rationale behind developing this new intrusive legislative regime remains unclear and the policy case has not been made.

The remedies in the Bill are extreme and not only go well beyond what was recommended by the ACCC in its recent report but also exceed the bounds of legal protective norms.

The proposed introduction of these heavy-handed, intrusive remedies in the energy sector 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. Alarmingly, there have already been calls by some in the parliament to extend this legislation to other sectors, including the banks, superannuation and supermarkets.

There is no doubt the Bill will fundamentally alter the operation of Australia's existing competition law framework and its application to the electricity market. Despite the significant changes proposed, and the potential detrimental impact to legitimate commercial conduct and market operation, the Government has overseen a rushed drafting process. The Business Council puts on record our disappointment with the Government's inadequate consultation process, unreasonable timeframes and unprecedented disregard for industry's concerns.

Australia desperately needs policies in the energy sector that support investment in new large-scale generation and upgrading existing dispatchable generation assets. Both the reliability of the grid and reducing power prices depend on this investment. However, investment will only occur if there is policy stability in the energy sector, as uncertainty has a significant impact on the risk appetite of companies and investors. Unfortunately, this Bill is completely contrary to creating an attractive investment environment.

Indeed, new interventions into the market only serve to increase sovereign risk and discourage the new investment the sector urgently needs. Lower electricity prices will not be achieved through poorly targeted, extreme and incoherent intervention in the electricity market.

Please find attached our detailed submission that outlines the Business Council's policy, structural and technical concerns with the Bill.

Please contact us on 03 8664 2664 if you have any questions. Thank you for the opportunity to provide feedback.

Yours sincerely

Jennifer A. Westacott AO
Chief Executive

Attachment/s: Submission to the Senate Economics Legislation Committee inquiry into provisions of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

Business Council of Australia

SUBMISSION

Senate Economics Legislation Committee inquiry into provisions of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

January 2019

CONTENTS

ABOUT THIS SUBMISSION

The Business Council welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee on the provisions of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018.

KEY POINTS

The Business Council supports lower electricity prices but, as set out in our submission to the Treasury's 'Electricity Price Monitoring and Response Legislative Framework Consultation Paper' (***Consultation Paper***), we do not consider that this objective will be achieved through poorly targeted, extreme and incoherent intervention in the electricity market.

Therefore, the Business Council does not support the Bill and urges the Government to withdraw it.

In particular, the Business Council is concerned that the following policy, structural and technical issues are present.

- **Outcomes:** The Bill is unlikely to increase competition or cause price reductions for consumers. Rather, it is likely the Bill will deter participation in the sector, stifling much needed investment and resulting in poor outcomes for consumers.
- **Policy basis:** The prohibited conduct does not appear to address the problems sought to be solved. Each area of prohibited conduct is already the subject of existing or proposed regulation, which has been the subject of significant review and consultation. The Bill proposes duplicative and radically expansive regulation with no detailed policy support.
- **Unworkable:** As drafted, the proposed provisions of the Bill are ambiguous and will cause uncertainty in the market, potentially capturing legitimate commercial conduct. It will be almost impossible for industry participants to determine whether or not they are complying with the letter of the Bill, given how broadly it is cast.
- **Remedies regime:** The remedies exceed the bounds of legal protective norms and do not respond to the prohibited conduct they are supposed to address. Such extreme interventionist powers are not justified and are unlikely to achieve the desired outcomes.

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INTRODUCTION

The Business Council of Australia welcomes the opportunity to make a submission to the Senate Economics Committee inquiry into the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 (***Bill***). The Bill would introduce three new electricity sector-specific prohibitions relating to retail pricing, financial contract market liquidity and conduct in wholesale spot markets into the *Competition and Consumer Act 2010* (Cth) (***CCA***).

The Business Council does not support the Bill and urges the Government to withdraw it.

If, contrary to the Business Council's position, there is a need for further legislation, the Business Council considers that the Government should work with industry and consumer groups to achieve a proportionate, effective and workable regulatory framework that is designed to solve the problems the Bill purports to address and does not give rise to unintended consequences.

Though the Business Council does not consider the Bill to be appropriate or workable as drafted, we note that, at a minimum, the following matters set out in our submission require consideration and a substantial response by Government.

1. OUTCOMES

The Explanatory Memorandum to the Bill states that the objectives of the Bill are to ensure that electricity retail, contract and wholesale markets are operating competitively, efficiently and to the benefit of consumers, and to ensure that consumers realise the benefits of reduced supply chain costs, resulting from more effective competition, policy reform and other factors.[1] The Business Council considers that the Bill is unlikely to achieve these objectives. Instead, it is more likely to inhibit competition and reduce consumer welfare in the electricity sector.

The Bill is likely to undermine the economic incentives that promote efficiency in the electricity market. In particular, the prospect of contracting orders and divestiture orders as remedies could damage investor confidence and deter future investment. These remedies of themselves could also result in higher prices for consumers. For example, this could occur in circumstances where a vertically-integrated business is required to contract more generation capacity than is viable, which would have flow on effects on retail pricing and thus consumers.

2. POLICY POSITION – DUPLICATION WITH EXISTING REGULATION AND UNJUSTIFIED EXPANSION

2.1 Retail price provisions

The Government is seeking to introduce the retail pricing prohibited conduct provisions (new section 153E of the CCA) in the same Bill that makes amendments to allow the Australian Energy Regulator (***AER***) to set a default market offer (new sections 51AE(3) and (4) and part

[1] *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018*, Explanatory Memorandum, p. 86.

7.23 and 7.24 of the Explanatory Memorandum). This is confusingly being attempted at the same time as the AER is separately looking at developing a default market offer.

The retail pricing prohibited conduct provisions and the default market offer are both seeking to address the same underlying issue of reducing costs to customers. It is unnecessary to pursue both of these approaches. Further industry consultation is being undertaken in relation to the default market offer, but until that consultation is complete it is premature to attempt to introduce the default market price through the Bill.

2.2 Financial contract market liquidity and wholesale spot market

There are existing prohibitions and remedies under the current legislative framework regulating the energy sector to deter corporations from engaging in the anti-competitive conduct the Bill seeks to prohibit in relation to financial contract liquidity and the wholesale spot market. The introduction of industry specific legislation would be unnecessary and duplicative.

The new section 153F of the *CCA* proposed by the Bill prohibits generators from unreasonably refusing to offer electricity financial contracts for the purpose of substantially lessening competition in any electricity market. This conduct is already effectively addressed by section 46 of the *CCA*. Section 46 of the *CCA* prohibits corporations with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition. Section 46 has previously been applied to conduct of this nature.[2]

Further, the ACCC recommended the introduction of market making obligations in South Australia (the only jurisdiction the ACCC identified as having an issue with financial market liquidity after its extensive consultation with industry). These obligations would require obligated entities to make offers to buy and sell financial contracts at regular intervals. The difference between market making obligations and the proposed contracting orders aimed at addressing anti-competitive conduct is that, under market making obligations, the obligated entities set the price they are willing to buy and sell and the obligations apply to the industry (or a subset of the industry) more generally, rather than individual businesses.

This method may, following appropriate consultation, be more palatable to the energy industry and more effective in addressing structural market issues than the proposed contracting orders which, as currently drafted, are highly problematic. Indeed, the industry is already looking to address this through a voluntary market making tender which is being conducted by the ASX. This scheme is intended to operate in all NEM jurisdictions.

The new sections 153G and 153H of the *CCA* proposed by the Bill prohibit corporations from bidding or offering (or failing to bid or offer) to supply electricity in relation to an electricity spot market where the corporation does so fraudulently, dishonestly or in bad faith and / or for the purpose of distorting or manipulating prices in the electricity spot market. Existing provisions under the National Electricity Rules (***NER***) and the *CCA* already provide regulators with the power to monitor and take action against such conduct. For example:

- the *NER*, which were comprehensively reviewed in 2014 – 2015, contain strict requirements governing offers and bids in the wholesale market. Clause 3.8.22A of

[2] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Limited* 167 CLR 177

the *NER* provides that a generator or market participant must not make a dispatch offer, dispatch bid or rebid that is false, misleading or likely to mislead. This would capture conduct relating to fraudulent, dishonest or bad faith wholesale bids;

- section 46 of the *CCA* prevents corporations from acting fraudulently, dishonestly or in bad faith with the purpose of distorting or manipulating prices where this conduct has the purpose, effect or likely effect of substantially lessening competition;
- section 21 of the *Australian Consumer Law* prevents corporations from engaging in unconscionable conduct when dealing with other businesses or its customers. This could capture conduct that is fraudulent, dishonest or in bad faith, with the purpose of distorting or manipulating prices in the electricity spot market;
- section 18 of the *Australian Consumer Law* prevents persons from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive, which may also capture fraudulent, dishonest or bad faith bids or offers in the electricity spot market.

The anti-competitive conduct which the Bill seeks to address is effectively regulated under the existing legislative regime. The existing regime also provides sufficient mechanisms to deter and remedy the anti-competitive behaviour dealt with under the Bill. Breaches of the *CCA* and *NER* attract a range of penalties. Accordingly, the introduction of industry specific legislation would be unwarranted. Rather, it could create significant regulatory complexities and inconsistencies within the existing framework.

3. PROHIBITED CONDUCT PROVISIONS ARE UNWORKABLE IN PRACTICE

3.1 Lack of clarity will make compliance impossible

Retailers and generators require significantly more certainty over what constitutes prohibited conduct. As currently drafted, the language of the prohibited conduct provisions is so vague as to make compliance with, and enforcement of, those provisions impossible.

The uncertainty inherent in the provisions of the Bill will make it difficult for businesses to undertake their daily operations. For example, the new section 153E of the *CCA* proposed by the Bill requires a corporation to make reasonable adjustments to its retail prices to reflect sustained and substantial reductions in its 'underlying cost' of procuring electricity. Determining a corporation's 'underlying costs' is a complex process. The Bill does not provide a clear or certain approach to its calculation. As currently drafted, a retailer could breach these provisions if it used any savings it made from procuring electricity to offset increases in costs in other aspects of the business.

Further, the retail pricing prohibited conduct provision lacks a temporal aspect making it unclear when the 'reasonable adjustment' is required to be made. The nature of retail pricing is such that changes in the 'underlying cost of procuring electricity' may not be felt by the retailer for a number of years due to hedging and other arrangements retailers have entered into in order to procure that electricity. It is unclear whether a retailer would be in breach of these provisions in this scenario or not. The imposition of such a vague standard has the potential to undermine competitive outcomes, increase regulatory burden, and further reduce incentives to invest.

The ambiguity continues with, as an example, the phrase 'electricity market' in the electricity financial contract liquidity prohibited conduct clause. Electricity Market is defined broadly and it is not clear whether this clause will be triggered if a generator's contracting behaviour lessens competition in its local electricity market or in the broader NEM market.

The detail provided in the explanatory memorandum, while helpful to understand the Government's intent for each of these provisions, does not dispel the concerns of retailers and generators given the broad and vague nature of the language in the legislation itself.

3.2 Commercial conduct which is not anti-competitive may be prohibited

The prohibited conduct provisions attempt to address anti-competitive behaviour that the Government has not shown to be an issue and that would not occur in a competitive market in any event. Moreover, these provisions go further and may catch commercial conduct that does not have any anti-competitive features. This cannot be the intention of the Government.

For example, all bids or offers to supply electricity into the spot market will impact the spot price in some way. That is the nature of a market. It does not follow that those bids or offers are anti-competitive. However, as currently drafted, a generator could be in breach of the electricity spot market (basic case) prohibited conduct every time it bids.

Further, there are a number of legitimate reasons why a generator is not offering financial contracts at any given time. These include the prevailing market price compared to a generator's costs, the generator's risk strategy or the nature of the generation. These reasons may have the objective appearance of being for the purpose of lessening competition where in reality they are part of a legitimate commercial strategy or are in response to market conditions. However, an inference could be drawn from that behaviour that the generator is acting in an anti-competitive fashion and be found to have contravened the prohibited conduct provision. This is particularly concerning when the question of anti-competitive conduct is informed by the operation of proposed s 153J.

If the Government is truly concerned with addressing anti-competitive behaviour in the electricity sector that is not already caught by the *CCA* then the Business Council suggests that the Government first look at the underlying cause of that anti-competitive behaviour to determine whether changes can be made to the market as a whole to improve competitiveness rather than targeting individual participants who are behaving in a commercial manner and in response to the market conditions.

4. REMEDIES

4.1 The intention problem

Proposed ss 153G and s 153H incorporates, with some variation, an intention element requiring that the corporation has engaged in the prohibited conduct fraudulently, dishonestly or in bad faith. The Business Council strongly opposes the ability of the ACCC to implicitly determine whether or not fraud has occurred in circumstances where it need only hold a reasonable belief before issuing notices or recommending remedies to the Treasurer.

Fraud is a very serious allegation which should require proper proof, not merely a 'reasonable belief'. The notion that the ACCC could, on a low threshold of reasonable belief, decide that fraud had occurred, or alternatively that a corporation was acting in bad faith or dishonestly, goes against established principle and may have significant unintended consequences.

This issue is compounded by the fact that the ACCC may never have to put its case before an independent court for impartial determination according to law. This would lead to an invidious position where corporations are accused of acting fraudulently, made the subject of punitive notices or remedies and have little recourse to the courts to test the correctness of the ACCC's initial determination.

4.2 Public warning notices

The Business Council's concern with the public warning notice is founded on both technical and principled grounds. First, given the potential reputational and share price impact of a public warning notice, the test of reasonable belief is inadequately low and subjective. This is particularly so where "reasonable belief" is read in conjunction with s 153J, which provides "even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference". In effect, the ACCC will have to satisfy itself that it holds a reasonable belief of the occurrence of prohibited conduct and it may do so where the purpose (if it is alleged that the conduct was for the purpose of substantially lessening competition or manipulating prices) is only discernible as an inference from the conduct.

It is clear that a corporation named in a public warning notice is likely to suffer from reputational damage. Other impacts could be: a potential a drop in the valuation of its share price and legal action taken against it by persons whom the ACCC considers have suffered a detriment. Given the potential ramifications of the notice, the Business Council considers that the ACCC should be required to satisfy itself at a higher standard commensurate with the gravity of the public warning notice.

Second, the period of 21 days, during which the corporation may make representations to the ACCC, is insufficient time to understand the ACCC's reasons and respond to the notice appropriately. No provision has been made in s 153M for a response from the ACCC once the corporation has made the representations on the draft notice. This may have the effect of denying procedural fairness to the corporation which will not receive information as to why the representations have been rejected and on what basis that determination has been made. The time for representations is also short having regard to the prospect that the ACCC may issue a notice relying on past and not continuing conduct. If the conduct has occurred previously, but is not occurring when the draft notice is issued, there is no obvious reason to limit the time for responses to three weeks. The Business Council considers that a public warning notice should only be issued in very limited circumstances, the Bill as drafted does not deal with this issue.

Third, it is difficult to accurately identify what purpose a public warning notice would serve when considered by reference to the prohibited conduct it seeks to warn of. Subject to the Business Council's general view that the prohibited conduct provisions all suffer from ambiguous language, overly broad drafting and are inherently difficult in the context of the electricity market to comply with, it is difficult to see why the public would be sufficiently interested in the conduct covered by ss 153F, 153G and 153H. These are prohibited conduct provisions that are ostensibly aimed at curing anticompetitive distortions in the market. These provisions are not targeted at conduct that the public necessarily and obviously has an interest in being warned about as consumers of electricity. They are not, for example, serving the same public policy purpose as public safety warnings about product defects that may be issued under section 129 of the Australian Consumer Law.

Finally, without further information, such as how the public warning notice is to be brought to the attention of the public, it may be the case that the issuing of a warning has a market impact but does not break through to the consciousness of consumers. This renders the exercise potentially punitive with little discernible public benefit, defeating the principal purpose of the public warning system.

4.3 Infringement notices

The Business Council is concerned that a corporation may be subjected to both an infringement notice and a public warning notice simultaneously for having engaged in any of the prohibited conduct in the Bill. In the worst case, contravention of proposed s 153F could lead to a public warning notice, an infringement notice (leading to the imposition of a pecuniary penalty), and a prohibited conduct notice stating that a contracting order should be made. Similarly, contravention of s 153H could lead to the ACCC issuing all three notices available to it under the Bill and seeking either a contracting order from the Treasurer, or a court approved divestiture order or both a contracting order and a divestiture order. This highlights a general problem with the Bill outside the infringement notices provision. The Bill fails to give due regard to avoiding multiple forms of punishment for the same contravention and does not follow through with the suggestion in the Explanatory Memorandum that the penalties regime– with respect to s 153 F (to a lesser extent) and 153H - is graduated.[3]

The Business Council notes that there is a disconnect between the "reasonable grounds" standard required by s 60L of the CCA, and the "reasonable belief" standard required for other remedies and notices in the Bill. The Business Council's recommendation is that a higher standard than reasonable belief is warranted.

Finally, the Business Council notes that an infringement notice cannot be issued under s 60L(3)(a) of the CCA if more than 12 months have passed since the alleged contravention. This appropriately targets recent conduct in a way which other notice provisions of the Bill notably do not.

4.4 Prohibited conduct notices and the exclusion of proper judicial oversight

The remedies that flow from a prohibited conduct notice are essentially punitive and are directly connected to unproven allegations of prohibited conduct made by the ACCC. Based only on a reasonable belief held by the ACCC, a corporation which is identified in the notice will be required to respond in 45 days to the recommendations the ACCC has made to the Treasurer. The burden of proof is effectively reversed, with the corporation having to make representations as to why the ACCC is incorrect or its recommendations to the Treasurer are inappropriate. There is no opportunity for the corporation to have the allegations tested in the ordinary way through an independent and impartial judiciary. This is a fundamental and unnecessary limitation of the right to have allegations of contraventions of law put to the corporation and to then have those allegations properly tested and determined by a court.

[3] *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018*, Explanatory Memorandum, p. 6.

Because the prohibited conduct notice need only state why a contracting order or divestiture order is a proportionate means of preventing the corporation from the alleged contravening conduct in the future, it is unclear whether the notice need state with any precision the terms of the contracting order or the proposed assets and securities which a divestiture order would apply to. This is likely to lead to uncertainty and could potentially result in a situation where an unproven allegation results in a corporation being compelled into entering into an uncommercial contract or divesting certain property which is unconnected to the alleged prohibited conduct. The fact that there is no necessary connection between the specific conduct and the possible suite of remedies is a fundamental issue in the Bill.

The Business Council is also concerned that the remedies appear to be aimed at punishing the (alleged) intention of the corporation and not curing the alleged distortion in the market. If the purpose is to punish for intention then such conduct should be limited to financial penalties, which are already provided for in the CCA and NER.

These issues are compounded by the fact that the ACCC, and not the Courts, will be able to determine how to interpret the ambiguous and uncertain provisions of the Bill. Absent a basis for seeking judicial review, corporations could be subjected to a prohibited conduct notice recommending a contracting order or a divestiture, or both, which will have a direct impact on the corporation's rights and the market without any recourse to judicial consideration of the appropriateness, merit and correctness of the recommendation. The Business Council's position is that this is likely to lead to market disruption and uncertainty with no obvious benefit to be achieved through the proposed mechanisms.

4.5 Unacceptable government interference

The contracting orders the government is entitled to make under new section 153X of the CCA coupled with the broad and vague prohibited conduct provisions essentially allow the Government to intervene dramatically in the operations of a business, with the direct consequence that legitimate commercial objects will be impossible to pursue. This is a significant departure from the ordinary role that Government plays in a free market.

Furthermore, the language of the legislation is so broad that it gives the Treasurer substantial power in relation to the type of offer the generator is required to make. Section 153X allows the Treasurer to set the type, manner, price and time period of an offer. The financial contracts that generators decide to offer and enter into are part of a complex risk management strategy adopted by a business in order to best manage its exposure to the spot market and its own commercial objectives. The terms of these contracts are usually determined by highly specialised trading teams within a business and require, amongst many other things, consideration of the forecast spot price. The Business Council is concerned that, given the complexity of the electricity market, the Treasurer may not be able to easily access the knowledge and expertise that is required to make commercial contracts for the market.

4.6 Divestiture orders are disproportionate and excessive

The Business Council is profoundly concerned by this proposed remedy. A divestiture order is extreme and unlikely to ever be a proportionate response to the prohibited conduct. The highly interventionist remedy could have significant and unforeseen ramifications on the market. It could create less efficient businesses through the loss of economies of scale and result in relevant businesses becoming unviable. This may lead to fewer competitors, which could in turn result in higher prices for consumers. Whilst the proposed legislation requires the Treasurer to weigh the public benefit of a divestiture order against the public detriment of a divestiture order, the issues involved are complex and the long term economic, competitive and practical impact of such an order would be unpredictable.

Even if the divestiture remedies are never used, the ability for the Treasurer to exercise such intrusive powers could significantly reduce investment incentives in the electricity sector, particularly investment in new large-scale generation capacity, by undermining business confidence. It may also reduce the economic attractiveness of the sector by sending a message that investing in Australia is accompanied by considerable risk. This could distort the proper functioning of the electricity market and deter efficient competitive conduct.

The introduction of a specific divestiture remedy to address competition issues, such as the prohibition against misuse of market power under the *CCA*, has been considered extensively by previous reviews of Australia's competition laws. This includes the Harper Review, Hilmer Review, Dawson Review and the 2014 Senate Economics Legislation Committee Inquiry. In each instance, a specific divestiture remedy has been considered inappropriate to address the conduct of concern. Most recently, in the ACCC's *Retail Electricity Pricing Inquiry Final Report*, the ACCC recommended against the use of divestiture as a mechanism for reducing market concentration. The ACCC regarded divestiture to be an 'extreme measure',[4] and considered that its other recommendations would sufficiently address the conduct in issue.

Although regulators in some jurisdictions hold divestment powers, these powers are very confined and rarely used. For example, in the United Kingdom, the Competition and Market Authority has the power to order divestment to address any adverse effects on competition exposed in its market investigations. However, these market investigations involve an extensive process run over an 18-month period, and widespread stakeholder engagement. Divestiture remedies are also available for abuse of dominance cases in the United States and Canada, and in a limited capacity in the European Union. Council Regulation 1/2003 states that structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. To date divestiture powers have only been exercised by consent in the US and have not been exercised at all in Canada and the European Union.

The Business Council notes that a divesture remedy would be ineffective in addressing the conduct prohibited under the Bill. The purpose of a divestiture remedy is to address structural problems in a market. Currently, the ACCC and third parties have the power to seek divestiture orders from the Court to unwind a merger that substantially lessens competition in a market. In those circumstances, a divestiture remedy may be appropriate to prevent further market concentration. However, there is no apparent nexus between the conduct prohibited under the new section 153H of the *CCA* proposed by the Bill and the inherent nature of a divestiture order. The divestiture order would not address or remedy the consumer harm that would result from fraudulent, dishonest or bad faith wholesale bids carried out for the purpose of distorting or manipulating prices in the electricity spot market.

[4] ACCC, *Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. 89.