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21 June 2002

Secretary  
Trade Practices Act Review  
C/- Department of the Treasury  
Langton Crescent  
PARKES ACT 2600

E-mail: [TPAreview@treasury.gov.au](mailto:TPAreview@treasury.gov.au)

Dear Secretary

### **Review of the Competition Provisions of the Trade Practices Act 1974**

Duke Energy International (DEI) welcomes the opportunity to contribute to the Review of the Competition Provisions of the Trade Practices Act 1974.

DEI strongly supports the broad objectives of the Trade Practices Act (TPA), recognising that it is the competition which the Act is seeking to foster that promotes innovation and ensures constant pressure to keep prices efficient. However, DEI is concerned with the effectiveness and impact of certain provisions of the TPA, as well as the manner, in certain circumstances, in which it is administered by the Australian Competition and Consumer Commission (ACCC).

At the broadest level, DEI is concerned at the magnitude of regulation applied to Australian industry. DEI is firmly of the view that the Government's focus should be on promoting market forces in a relatively unconstrained manner with the fall back to more intrusive regulatory interference limited to those circumstances of market failure or, where it can be clearly demonstrated that a firm's behaviour is incompatible with competitive outcomes. It needs to be recognised that there is significant negative impact associated with regulations that inhibit business and impose unnecessary restrictions on firms' ability to compete.

#### **Accountability**

As a result of the implementation of national competition policy the ACCC was given a range of new roles and responsibilities. DEI notes that this approach resulted in an aggregation of regulatory responsibilities (as opposed to having a number of separate regulatory agencies) which is in contrast to traditional international practice. As a consequence, the ACCC is at the centre of competition policy and consumer protection and has become a very powerful regulatory body.

However, this growth in power and legislative reach has not been accompanied by an increase in accountability by the ACCC. DEI notes that the Business Council of Australia,

the Australian Chamber of Commerce and Industry and a range of small and large businesses have expressed concern at the limited checks and balances faced by the ACCC. DEI shares this concern and is of the view that some form of standing public review process or forum be implemented to oversee the operations of the ACCC. Such forum could be a standing board or committee comprised of industry, government and consumer representatives to oversee ACCC operations and actions and have the ability to summon the ACCC to appear before it and respond to questions on a regular or ad hoc basis. This “committee” could be facilitated and empowered by amendment to the TPA.

Related to the issue of accountability is the manner in which the ACCC administers its functions under the TPA. In particular, DEI has significant concerns with the apparent media focused approach to the ACCC’s enforcement functions. Businesses expend significant time and effort to develop and maintain their good name. However, it would seem that the ACCC is more than willing to make public allegations regarding these businesses well before any substantiated evidence has been obtained. DEI agrees that the ACCC can, and in fact should, identify businesses that have been found to have breached the TPA. However, DEI has significant concern with the ACCC publicising investigations before starting court proceedings. Clearly, such public allegations are damaging to the business in question, both to reputation and share value, and DEI believes, go well beyond any rightful application of the ACCC’s powers.

#### **Section 46 – Abuse of Market Power**

The Review Panel is likely to receive submissions supporting increased power for the ACCC to regulate business through the introduction of an “effects” test. That is, for the purpose of demonstrating anti-competitive behaviour, the ACCC would only need to demonstrate that the effect of a firm’s actions had harmed another. This compares with the current obligation on the ACCC to show that there had been no reasonable commercial purpose in the actions taken by a firm. That is, rather than having the purpose test, such that the intent has to be established, some submissions will be seeking an effects test, where it would only be necessary to demonstrate that harm has been done to another firm.

An effects based test has been considered on five occasions since 1989 during various reviews of the TPA and rejected on each. This is not surprising given the potential adverse impact on competition that could occur should a regulatory authority be given the power to prosecute a firm for merely competing against another (and hence causing “harm”). The effects test could potentially inhibit robust competitive action, increase nervousness of corporate decision making in an already stressed environment, potentially protects current inefficient business from more efficient competition and effectively reverses the onus of proof in pursuing market power cases. DEI urges the review committee to reject arguments supporting an effects test in recognition of the potential damage to competition that the adoption of such a test would cause.

#### **Section 50 - Mergers and Acquisitions**

The legislative arrangements with respect to proscribing mergers and acquisition in Australia have been through significant changes over the last 30 years. The most recent, in 1993, stemmed from the Senate Standing Committee on Legal and Constitutional Affairs which considered the merger provisions of the Act. DEI notes that despite limited analytical evidence as to desirability of a change to the test, together with differences of opinion and a split of the Committee, it was recommended that the test in s50 be altered. As a result, the TPA was amended in 1993 to prohibit acquisitions and mergers which resulted in a substantial lessening of competition. Prior to this, the test was one of

whether the effect (or likely effect) of the merger or acquisition would be such that a corporation would achieve a position of dominance or control in the market place.

Since that time, there has been much argument that the current test has obstructed mergers and takeovers unnecessarily. DEI agrees with that view. DEI believes the current test results in significant uncertainty as to the view the ACCC will adopt with respect to a proposed merger or acquisition. Due to this uncertainty, a firm seeking to undertake a merger or acquisition may be advised to approach the ACCC for its initial position on the issue. However, in many, if not most instances, doing so is likely to be incompatible with tight commercial timeframes or corporate confidentiality.

DEI also considers that the current test inhibits firms from gaining the critical mass necessary to compete globally in certain product markets.

DEI notes that the task of anticipating competitive behaviour (a necessary task under the current lessening of competition test) following a merger is extremely difficult. On the other hand, if a merger gives rise to a dominant firm, then competition is almost certainly going to suffer. DEI accepts that determining whether a firm will become dominant is not a simple process, however, it can be done with a greater degree of certainty than making judgements on the future dynamics of markets in order to determine whether a merger would substantially lessen competition.

DEI notes that Professor Warren Pengilley of Newcastle University, a former Commissioner of the Trade Practices Commission, has also stated that, were the previous test of market dominance restored, it would provide greater certainty than the current test and is well suited to the era of globalisation.

In light of the above, DEI urges the review Committee to consider the reintroduction of the market dominance test.

DEI will continue to closely monitor the progress of the review Committee and would welcome the opportunity to clarify any of the issues raised in this submission. As such, please do not hesitate to contact me on (07) 3334 5897.

Yours sincerely

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**Senior Regulatory Analyst**