



17th November 2014

Competition Policy Review Secretariat  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Submitted via email: [contact@competitionpolicyreview.gov.au](mailto:contact@competitionpolicyreview.gov.au)

Dear Secretariat,

### **Competition Policy Review – Draft Report**

Alinta Energy (**Alinta**) welcomes the opportunity to make a submission in response to the Competition Policy Review Draft Report (**Draft Report**), released by the Competition Policy Review Taskforce. Alinta Energy understands this submission will act to inform the development of the Competition Policy Review Final Report.

Alinta is an active investor in the energy retail, wholesale and generation markets across Australia. Alinta has over 2500MW of generation facilities in Australia (and New Zealand), and a customer base of approximately 800,000 in Western Australia and across the National Electricity Market (**NEM**).

Whilst some aspects of the Draft Report require further consideration, Alinta welcomes the Competition Policy Review's assessment of outstanding issues and the contribution it will make in further developing Australia's competition policy landscape.

#### **Harmonisation of Energy Markets**

Alinta is broadly supportive of the suggestion put forward in the Draft Report that there may be benefits to the Western Australia (**WA**) and the Northern Territory energy markets in adopting the NEM legislative, institutional and market arrangements in their relevant jurisdictions. This would potentially reduce overall market operational and governance costs, promote greater regulatory consistency and remove unnecessary barriers to entry into other energy markets across Australia for retailers, i.e. through consistent licensing arrangements and alignment of prudential requirements within a consolidated market arrangement.

However, Alinta suggests that broader consideration of the appropriateness of adopting all the national arrangements is required given the differing characteristics of these markets. This is particularly the case for WA - given its unique demand characteristics, its isolation from other electricity markets and the current market structure with one dominant government owned market participant - which continue to warrant the adoption of a capacity mechanism. To this extent Alinta considers that any adoption of a national approach would need to incorporate a specific derogation for the wholesale market arrangements in WA; thereby ensuring a capacity mechanism (along with the necessary associated supporting processes) and an appropriate reliability criterion are maintained. This is because Alinta is of

the view that the NEM wholesale arrangements are not appropriate for WA and their adoption would create a significant supply risk for customers<sup>1</sup>.

The current Electricity Market Review being undertaken by the WA Government has involved broad consideration of whether the existing framework and arrangements remain appropriate, including the underlying wholesale market design and institutional arrangements. Specifically, its remit has included considering whether the NEM arrangements should be adopted which overlaps with the recommendation made by the Draft Report. To avoid any duplication of considerations and ensure inconsistent recommendations don't arise in the future, Alinta considers that the WA Government's review process is the most appropriate mechanism for consideration of whether WA should join the NEM at this time.

## **Competition Laws**

### **Section 46 Misuse of Market Power**

Alinta specifically supports the Draft Report's recommendations to amend the relevant provisions of section 46 to shift the focus away from conduct done for the purpose of harming individual competitors to conduct that has the purpose or effect of harming competition itself. This will better align the misuse of market power provisions with other principle prohibitions contained in Part IV of the CCA and will appropriately ensure that the ACCC's focus is on the overall impact to a market of any proscribed behaviour.

Alinta also shares the Draft Report's concern about the importance of ensuring that the proposed amendments to s46 as noted above do not inadvertently capture pro-competitive conduct. Accordingly, while Alinta considers that the inclusion of a defence is important to mitigate against over-capture, Alinta is concerned that as currently formulated, the proposed defence will not adequately protect businesses engaging in pro-competitive behaviour and in practice, will be excessively onerous on businesses to prove.

The difficulties with the defence as currently proposed principally arise in respect of the inherent ambiguity in the expression "*advancing the long-term interests of consumers*" as used in the second limb of the defence. Given this uncertainty and the practical difficulties it creates, Alinta suggests that the two limbs should be used as separate alternative tests and that the second limb be expressed as follows:

*the conduct would result, or be likely to result, in a benefit to the public that would, or is likely to, outweigh the detriment to the public constituted by the conduct.*

This revised limb overcomes the uncertainty by utilising the concept of "public benefit" which is a well-defined concept in competition law, has a body of jurisprudence to aid its interpretation and still takes into account the interests of consumers and society.

### **Other Competition Law Issues**

Alinta supports Draft Recommendation 19 extending the application of the CCA to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake an activity in trade or commerce. The extension of the application of the CCA recognises the potential harm to competition in the delivery of government services and projects should commercial activities of the Crown not be subject to the CCA.

---

<sup>1</sup> Specific details of Alinta's concerns with adopting an energy-only market design in WA are provided in Alinta's submission to the WA Government's current electricity market review available via the following link:  
[http://www.finance.wa.gov.au/cms/Public\\_Utility\\_Office/Electricity\\_Market\\_Review/Electricity\\_Market\\_Review.aspx](http://www.finance.wa.gov.au/cms/Public_Utility_Office/Electricity_Market_Review/Electricity_Market_Review.aspx)

Alinta agrees with the conclusion reached in the Draft Report that a specific prohibition on price discrimination need not be reintroduced into the CCA and that the development and use of a market based mechanism be encouraged. Alinta supports Draft Recommendation 26 and concur that the existing provisions of the CCA adequately address circumstances where price discrimination has an anticompetitive impact in a market.

### **National Access Regime**

Alinta Energy notes the Draft Report's Recommendation 38 that Part IIIA of the National Access Regime be amended to ensure that third-party access should only be mandated where it is in the public interest, and to this end several revised declaration criteria have been proposed.

Alinta Energy is broadly supportive of enabling third party access to monopoly infrastructure (under reasonable terms and conditions), as from an economic efficiency perspective increasing the ease of third party access will materially increase competition which will ultimately be to the benefit of consumers. Alinta notes that the proposed revised declaration criteria are largely consistent with this principle. However, Alinta has some concerns relating to the potential application of Criterion (f).

While Alinta recognises the arguments that Criterion (f) may be better established as an affirmative test which would in practise require the public interest to be promoted (as opposed to the existing test where access applications are assessed based on "not being contrary to the public interest") it is concerned that adopting this approach appears to be inconsistent with the review's broader intentions of increasing competition. Alinta understands that similar concerns that the existing threshold set under Criterion (f) is set unnecessarily high and therefore restricts competition have been raised previously. To this extent introducing an affirmative public interest test may only serve as a further obstacle for third parties who may be seeking access.

To summarise, Alinta Energy broadly welcomes the application of Part IIIA in regards to electricity infrastructure and does not consider its application would materially raise costs that would arise from the regulation of that infrastructure. However, in relation to Criterion (f) Alinta would urge the panel to give due consideration to the redrafting of Criterion (f) and the unintended consequences such drafting may have in weakening the ability for a third party to gain access to infrastructure.

### **Conclusion**

Alinta Energy believes the competition policy review provides an opportunity to build a strong platform for economic development and investment in Australian energy markets. As explored above, the competition policy review should give further consideration to:

- establishing a new defence under section 46 of the CCA; and
- ensuring that access to infrastructure is not unnecessarily inhibited, for example by the application of Criterion (f) of Part IIIA of the CCA as an affirmative test.

The review should also ensure that it does not overlap unnecessarily with other existing review processes, such as that being currently undertaken by the WA Government.



Alinta Energy looks forward to participating in the ongoing competition Review process. Should you have any queries in relation to this submission, please do not hesitate to contact Mr Anders Sangkuhl on, telephone, 02 9375 0962.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M Riches". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

**Michael Riches**

Executive Director, External Affairs and General Counsel