The Australian Industry Group
Level 2, 441 St Kilda Road
Melbourne VIC 3004
PO Box 7622
Melbourne VIC 3004
Australia
ABN 76 369 958 788

24 January 2019

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Parkes ACT 2600

By email: seniorclerk.committees.sen@aph.gov.au

Dear Sir/Madam

Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

The Australian Industry Group (Ai Group) is making this short submission regarding the above Bill for an Act to amend the *Competition and Consumer Act 2010 (*Cth*)*(CCA).

Ai Group's members comprise businesses of all sizes across Australia. While some of our members are involved in energy supply, the vast majority are energy users. They have a strong interest in ensuring the supply of affordable, reliable and clean energy, including through a predictable regulatory environment that fosters investment.

Ai Group maintains the views set out in its submission to the consultation paper, regarding the Commonwealth's proposals to implement legislation regarding a price monitoring and response regime for the electricity sector. In that submission we stated a strong preference for market mechanisms and predictable energy policy to encourage efficient investment in the energy sector and help to lower electricity prices. Whilst we acknowledged the need for some additional provisions in the CCA to target specific conduct in the sector, we stated that disproportionate intervention in the electricity market would have an adverse impact on sustainable and effective investment in the electricity sector, thereby harming the long-term interests of energy consumers.

The Bill sets out:

- three additional prohibitions regarding conduct in the electricity supply chain, regarding retail pricing, financial contracts and the wholesale spot market; and
- a range of remedies from public warning notices issued by the Australian Competition & Consumer Commission (ACCC), to orders for businesses to enter into financial contracts, to orders requiring businesses to divest specified assets.

We question the need for these additional prohibitions in the CCA given their vagueness and the comprehensive range of existing legislative prohibitions to address any misuse of market power (section 46), exclusive dealing (section 47) and misleading and deceptive conduct (section 18 of Australian Consumer Law).

The retail element creates complex new concepts that would be difficult to establish either way, including what the 'underlying cost of procuring electricity' is and whether a downward movement in that cost is 'sustained and substantial'.

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The financial market element prohibits a failure to act (rather than an affirmative action) which would lead to interminable disputes about the practical ability of an entity to offer financial contracts, and combines this with equally arguable intentionality.

The wholesale element potentially prohibits any sort of activity in the spot market if done with the wrong intent.

In short, these proposed provisions add nothing but difficult concepts to the existing state of competition law.

We also question the need to introduce the additional remedies since the CCA provides the ACCC with wide ranging and appropriate compliance and enforcement powers. In particular, we oppose the proposals for divestiture orders and contracting orders. Any perceived benefits from these remedies need to be considered against a background of on-going uncertainty and policy failure in the energy sector and its impact on financially sustainable future investment, and the poor precedent that would be set for the wider economy.

Ai Group believes that the adoption of key recommendations from the ACCC's retail pricing inquiry final report[1], the ACCC's ongoing monitoring of electricity retail, contract and wholesale markets from 2018 to 2025, together with the existing provisions in the CCA for anti-competitive conduct, are the right response to competition issues in the National Electricity Market (NEM).[2] We further believe that the adoption of the recommendations in the ACCC's report will help address the supply side and demand side inefficiencies in electricity markets, improve transparency and information asymmetries and lead to lower prices for electricity consumers. The relevant recommendations include:

- Recommendation 7 – the introduction of market making obligations in South Australia to boost hedge market activity
- Recommendation 21 – Mechanism for wholesale demand response
- Recommendation 23 – Allowing distributors to develop off-grid supply arrangements for existing customers or new connections
- Recommendation 30 – Default market offer to be set by AER to replace standard offering and standard retail contract
- Recommendation 31 – Adoption of a consumer data rights framework
- Recommendation 32 – Adoption of AER default market offer as a reference point for all advertised discounts
- Recommendation 34 – Establishing a mandatory code of conduct for energy comparator websites
- Recommendation 40 – Retail price monitoring/reporting monitoring should be strengthened and appropriately funded to ensure greater transparency in the market.
- Recommendations 40, 42, 44, 45, 46, 47, 48 – COAG Energy Council's role

In addition, the COAG Energy Council agreed in December 2018 to the implementation of a Retailer Reliability Obligation which will involve, if and when triggered, a Market Liquidity Obligation (MLO) requiring at least two large integrated retailers in each NEM region to offer

[1] Australian Competition & Consumer Commission, *Restoring electricity affordability and Australia's competitive advantage, Retail Electricity Pricing Inquiry – Final Report*, June 2018
[2] While the separate Western and Northern markets are also important, most current energy user concern relates to developments in the NEM.

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financial contracts. Ai Group supports both the MLO and ACCC Recommendation 7 as neutral, clear and appropriate responses to existing and potential future limitations on the liquidity of contract markets. By contrast the approach in the Bill, prohibiting a failure to offer contracts under certain circumstances and intention states, is vague and unpredictable. It is excessively broad while likely being difficult to use in practice.

Given the complexity and unique design features of the NEM, it is imperative to design a competition framework which does not unduly interfere with efficient risk management structures or distort market clearing mechanisms and responses. In particular, it is essential to avoid penalizing participants in the electricity supply chain for legitimate commercial and operational activities, which ensure the financial viability of their operations.

We do not support the provisions in the Bill which would create a power to require a corporate entity to divest some or all of its assets. The ACCC's pricing inquiry final report referred to the divestiture of privately owned assets as an 'extreme' measure and specifically refused to recommend this step.[3] Similarly, the Harper Competition Policy Review recommended in 2015 against creating a new power of divestiture as a response to misuse of market power in any sector of the economy.[4] We believe that the divestiture element of this Bill would undermine the National Electricity Objective as stated in the *National Electricity Law*, which is to '*promote efficient investment in and efficient operation and use of electricity services for the long-term interests of consumers of electricity'*. The threat of divestiture or involuntary restructuring presents further deep uncertainty for an electricity sector that needs to invest to meet energy users' needs and is already struggling with an opaque and chaotic policy landscape.

There is currently a strong wave of investment in renewable energy, initially inspired by the national Renewable Energy Target (RET) but now also supported by a tight generation market and the emerging corporate power purchase agreement (CPPA) market. However, ongoing uncertainty over national energy and climate policy has greatly exacerbated the underlying uncertainty of investment in a market undergoing fundamental changes to technology and business models. This uncertainty has deepened following the abandonment of the National Energy Guarantee (NEG) Emissions Obligation. There are greater threats to reliability over time and we are falling short of our economy-wide emissions reduction goals. In other words, we are failing on all elements of the 'energy trilemma' identified by the Finkel Review, despite the considerable progress underway on energy market and policy reforms in recent years. Investment beyond the RET is thus likely to be lower and slower than it should be if there is no improvement in this policy uncertainty.

Ai Group strongly believes that given the existing level of uncertainty in the energy sector, further measures to force business entities to restructure or divest some or all of their assets, risks having a materially detrimental impact on their existing commercial operations and investment strategies. These risks apply to all private participants in the generation sector, not just large incumbents. More generally, creating a power to break up energy businesses would set a poor precedent for disproportionate government intervention in the wider economy. It will raise deep reservations among domestic and international institutional investors regarding investment in Australia, including in the infrastructure sector.

We note that previous legislative amendments to the CCA have followed a comprehensive and rigorous consultative process, notably in relation to the relatively recent Harper Review.

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[3] Australian Competition & Consumer Commission, *Restoring electricity affordability and Australia's competitive advantage, Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. 90
[4] Harper et al, *Competition Policy Review: Final Report* (March 2015) p. 347

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The ACCC, AER and AEMC all follow a lengthy consultative process in relation to their determinations and recommendations. Given the magnitude and far reaching implications of this Bill, whose key proposals are contrary to the outcomes of those processes, we are deeply concerned about the limited time frame for public consultation and stakeholder engagement.

Should you wish to discuss the matters raised in this letter, please contact our adviser Tennant Reed on [redacted]

Sincerely yours,

Innes Willox
Chief Executive