The Senate

Economics Legislation Committee

Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 [Provisions]

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Senate Economics Legislation Committee

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Table of Contents

Abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACL	Australian Consumer Law
AEC	Australian Energy Council
AEMA	Australian Energy Market Agreement
AER	Australian Energy Regulator
Ai Group	Australian Industry Group
BCA	Business Council of Australia
the bill	Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018
CCA	*Competition and Consumer Act 2010*
COAG	Council of Australian Governments
the committee	Senate Economics Legislation Committee
COSBOA	Council of Small Business Organisations Australia
ECA	Energy Consumers Australia
EM	Explanatory Memorandum
EPM Inquiry	Electricity Price Monitoring Inquiry
ESB	Energy Security Board
ETU	Electrical Trades Union of Australia
EUAA	Energy Users' Association of Australia
GOC	government owned corporation
HHI	Herfindahl-Hirschman Index
IPA	Institute of Public Affairs
MEA Group	Meridian Energy Australia Group
NEG	National Energy Guarantee
NEL	National Electricity Law
NEM	National Electricity Market
NER	National Electricity Rules
NT Government	Northern Territory Government
OECD	Organisation for Economic Cooperation and Development
QLS	Queensland Law Society

REPI	Retail Electricity Pricing Inquiry
Scrutiny Committee	Senate Standing Committee for the Scrutiny of Bills
WA Government	Western Australian Government
WEM	Wholesale Electricity Market

Chapter 1

Introduction

1.1 On 6 December 2018, the Senate referred the provisions of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 (the bill) to the Economics Legislation Committee (the committee) for inquiry and report by 18 March 2019.[1]

1.2 The bill amends the *Competition and Consumer Act 2010* (CCA) to define energy market misconduct and provide the Australian Competition and Consumer Commission (ACCC) with a graduated range of penalties and remedies for companies engaging in prohibited conduct in the retail, contract and wholesale electricity markets.

1.3 The bill also amends the CCA to provide additional information gathering powers to the Australian Energy Regulator (AER), bringing the AER's powers into line with comparable regulators, including the ACCC.

1.4 As summarised in the Explanatory Memorandum (EM), 'the current prohibitions and remedies available in the CCA are not well adapted to the somewhat unique issues that could arise in electricity retail, contract and wholesale markets',[2] and as such, the objective of the bill is twofold:

- Firstly, to ensure that electricity retail, contract and wholesale markets are operating competitively, efficiently and to the benefit of consumers; and
- Secondly, to ensure that consumers realise the benefits of reduced supply chain costs, resulting from more effective competition, policy reform and other factors.[3]

1.5 The bill forms part of a package of measures, announced by the government on 20 August 2018, to put downward pressure on electricity prices and ensure well-functioning electricity markets that deliver benefits for consumers and small businesses.[4]

1.6 The government's announcement followed the release of the ACCC's Final Report—*Restoring electricity affordability and Australia's Competitive Advantage*—for its Retail Electricity Pricing Inquiry (REPI) (discussed further below).[5]

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1 *Journals of the Senate*, No. 137, 6 December 2018, pp. 4478–4482.

2 *Explanatory Memorandum*, p. 86.

3 *Explanatory Memorandum*, p. 86.

4 The Hon. Scott Morrison MP, Treasurer, The Hon. Josh Frydenberg MP, Minister for the Environment and Energy, 'Driving power prices down', *Media Release*, 20 August 2018.

5 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018. The ACCC's Final Report is available online at: https://www.accc.gov.au/publications/restoring-electricity-affordability-australias-competitive-advantage (accessed 7 February 2019).

1.7 As noted by the then Treasurer, the Hon. Scott Morrison MP, according to the ACCC:

> …the National Energy Market [NEM] is not operating in the best interests of consumers, and reform is urgently needed.[6]

1.8 The government is progressing a number of the ACCC's recommendations and, as part of its package of energy market reforms, has tasked the ACCC with undertaking an ongoing Electricity Price Monitoring Inquiry (EPM Inquiry) across the NEM between 2018 and 2025.[7]

1.9 The measures contained in the bill implement the necessary legislative framework to allow the ACCC to respond to misconduct identified as part of the EPM Inquiry.[8]

Conduct of the inquiry

1.10 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting written submissions.

1.11 The committee received 33 submissions as well as additional information and answers to questions on notice, which are listed at Appendix 1.

1.12 The committee held two public hearings for the inquiry; in Sydney on 5 February 2019, and in Melbourne on 6 February 2019. The names of witnesses who appeared at the hearings can be found at Appendix 2.

1.13 References to the Committee Hansard are to the Proof Hansard and page numbers may vary between Proof and Official Transcripts.

1.14 The committee thanks all individuals and organisations who assisted with the inquiry, especially those who made written submissions and participated in the public hearings.

ACCC Retail Electricity Pricing Inquiry

1.15 On 27 March 2017, the then Treasurer directed the ACCC to hold an inquiry into the supply of retail electricity and the competitiveness of retail electricity prices in the NEM (the Retail Electricity Pricing Inquiry, or REPI). This inquiry was initiated in response to electricity affordability becoming a significant issue for Australian households and small businesses.[9]

1.16 The ACCC delivered the REPI Final Report to government on 29 June 2018, including 56 recommendations focused on increasing competition, lowering electricity

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6 The Hon. Scott Morrison MP, Treasurer, The Hon. Josh Frydenberg MP, Minister for the Environment and Energy, 'Driving power prices down', *Media Release*, 20 August 2018.

7 The National Energy Market (NEM) comprises South Australia, Victoria, Tasmania, NSW, ACT and Queensland.

8 *Explanatory Memorandum*, p. 5.

9 *Explanatory Memorandum*, p. 79.

costs, and improving experiences for consumers and businesses. The report was publicly released on 11 July 2018.

1.17 The REPI Final Report identified problems across the electricity supply chain, with key failures found in the retail, contract and wholesale markets. The problems identified broadly relate to the possibility of taking advantage of confused and disengaged consumers, contract market illiquidity, and conduct which undermines the effective operation of the wholesale market.[10]

1.18 The ACCC labelled the current situation as 'unacceptable and unsustainable', commenting that:

> Australia is facing its most challenging time in electricity markets. High prices and bills have placed enormous strain on household budgets and business viability.[11]

1.19 Indeed, the ACCC found that in the 10 years from 2007–08 to 2017–18, the average residential customer had experienced a real increase of 35 per cent in their electricity bills, with average residential electricity prices (expressed as cents per kilowatt hour) increasing by 56 per cent in real terms over the same period.[12] The ACCC also found that small businesses had experienced similar increases in the past decade.[13]

1.20 With regard to retail electricity markets, the ACCC found that retail electricity pricing structures are confusing to consumers, and discounting practices make it difficult for consumers to compare offers across the market. Electricity retailers' behaviour has led to poor consumer outcomes, with the ACCC finding that:

> Electricity retailers' discounting practices are a deliberate tactic to give the impression that an offer is significantly cheaper than other offers in the market when this is often not the case. This behaviour is confusing, at times misleading, and leads to poor consumer outcomes.[14]

1.21 The ACCC also identified concerns relating to price competition in the retail electricity market:

> Retailers' confusing discounting practices indicate a lack of effective competition…Discount offers are presently complex and difficult to compare, which enables retailers to compete less aggressively on price.[15]

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10 *Explanatory Memorandum*, p. 80.

11 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. iv.

12 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, pp. v–vi.

13 *Explanatory Memorandum*, p. 79.

14 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. 253, as cited in *Explanatory Memorandum*, p. 81.

15 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. 264, as cited in *Explanatory Memorandum*, p. 81.

1.22 As outlined in the EM, in the absence of effective competition, moderations in wholesale prices create an opportunity for retailers to profit at the expense of consumers by retaining supply chain cost savings, rather than passing those savings on to consumers.[16]

1.23 On the electricity contract market, the ACCC found that a lack of electricity contract liquidity, in part related to vertical integration between electricity generators and retailers (often referred to as gentailers),[17] has the potential to become a barrier to entry and expansion for electricity retailers who are not generators of electricity.[18] The ACCC noted that:

> In certain regions of the NEM, particularly South Australia, the level of liquidity and the advantages enjoyed by vertically integrated retailers make it difficult for new entrants and smaller retailers to compete effectively in the retail market.[19]

1.24 Further, the ACCC further found that:

> Without sufficient competitive pressure in wholesale and retail markets, these vertically integrated players may have the ability and incentive to withhold contracts from rival retailers, or to discriminate against them regarding price.[20]

1.25 The EM highlights that electricity financial contracts are important for effective risk management, as they allow a retailer to set a fixed rate over a specified period, and thereby hedge against the risk of spot market volatility.[21] A lack of liquidity in electricity contract markets limits the ability for new retailers to enter and compete in the market.[22]

1.26 Finally, with regard to the wholesale electricity market, the ACCC identified that there is a general lack of competition in wholesale electricity markets. Where behaviour limits competitive processes in wholesale electricity markets, increased prices flow through the supply chain to consumers.[23]

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16 *Explanatory Memorandum*, p. 81.

17 A 'gentailer' is a vertically integrated entity which operates in both the wholesale market (as a generator) and in the retail market (as a retailer). *Explanatory Memorandum*, p. 80.

18 *Explanatory Memorandum*, p. 83.

19 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. ix, as cited in *Explanatory Memorandum*, p. 83.

20 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. 114, as cited in *Explanatory Memorandum*, p. 83.

21 A spot market is commonly understood to be a market in which commodities or financial instruments are traded for immediate delivery. The price quoted for the acquisition and supply of the commodity or instrument is referred to as the 'spot' price. See *Explanatory Memorandum*, p. 24.

22 *Explanatory Memorandum*, p. 83.

23 *Explanatory Memorandum*, p. 84.

1.27 Recognising this, the ACCC reported that:

> This lack of competitive pressure is of concern to the ACCC, particularly given the critical need for a sufficient level of competition in [the wholesale] market to drive affordable electricity prices.[24]

1.28 In addition to the findings outlined above, the ACCC found that, in non-price regulated jurisdictions, 'the standing offer and standard retail contract are no longer fit for purpose'. Further, the ACCC identified that 'standing offer prices have often been set at a high level to enable retailers to advertise high headline discounts for market offers'.[25]

1.29 In light of these findings, the ACCC recommended that:

- In non-price regulated jurisdictions, the standing offer and standard retail contract should be abolished and replaced with a default market offer at or below the price set by the AER (Recommendation 30).
- If a retailer chooses to advertise using a headline discount claim it must calculate the discount from the reference bill amount published by the AER (Recommendation 32).[26]

Overview of the bill

1.30 The bill contains two schedules:

- Schedule 1 implements a comprehensive legislative framework consisting of new prohibitions and remedies tailored to conduct in electricity markets.[27]
- Schedule 2 provides the AER with the necessary powers required for its functions to set a default market offer and reference bill,[28] including information gathering powers, making necessary legislative instruments, and information sharing with government agencies.[29]

1.31 The measures in the bill only apply to the electricity sector, and are intended to complement the existing provisions of the CCA and the National Electricity Law.[30]

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24 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. 87, as cited in *Explanatory Memorandum*, p. 84.

25 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. 240.

26 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, pp. 252 and 266. Recommendations 49 and 50 of the ACCC's inquiry dealt with the extension of these recommendations to small businesses.

27 *Explanatory Memorandum*, p. 3.

28 The government has noted its intention to implement the default market offer and reference bill, to be set out by the AER each year, through separate legislation. See the Hon. Josh Frydenberg MP, Treasurer, *House of Representatives Hansard*, 5 December 2018, pp. 71–72.

29 *Explanatory Memorandum*, p. 4.

30 *Explanatory Memorandum*, p. 5.

1.32 The provisions in the bill apply nationwide, including to areas that are not connected to the NEM.[31]

1.33 The provisions in Schedule 1 apply between its commencement (on the day after the bill receives Royal Assent) and 31 December 2025. This ensures that the provisions in Schedule 1 run until the ACCC's EPM Inquiry has concluded.[32]

1.34 Schedule 2 commences the day the bill receives Royal Assent.[33]

Schedule 1—Prohibited conduct in the electricity market

1.35 Schedule 1 sets out the definition of prohibited conduct in relation to the retail, financial contract and wholesale electricity markets. Schedule 1 also sets out the graduated range of penalties and remedies that can be applied if the ACCC reasonably believes that a corporation has engaged in relevant prohibited conduct.

Prohibited conduct

1.36 Schedule 1 sets out three kinds of new prohibited conduct in relation to the following areas of the electricity sector:

- retail prices;
- the electricity financial contract market; and
- the wholesale electricity market.[34]

1.37 The provisions in the bill are aimed at addressing potential anti-competitive conduct (called 'prohibited conduct') in the retail, contract and wholesale electricity markets which can be harmful to competition or lead to poor outcomes for electricity consumers. The EM notes that broadly, prohibited conduct relates to:

> …the possibility of taking advantage of small consumers, anti-competitive contracting behaviour, and conduct which undermines the effective operation of the wholesale market.[35]

1.38 As indicated, the bill creates three new electricity sector-specific prohibitions on certain conduct in electricity markets.

Retail electricity market

1.39 The first category of prohibited conduct created by the bill relates to the retail electricity market.

1.40 As outlined in the EM:

> Over time various factors, such as increased electricity generation capacity or more effective competition, could result in sustained decreases in supply

31 *Explanatory Memorandum*, p. 6.

32 *Explanatory Memorandum*, pp. 3 and 7.

33 *Explanatory Memorandum*, pp. 4 and 7.

34 *Explanatory Memorandum*, pp. 5–6.

35 *Explanatory Memorandum*, p. 11.

> chain costs for retailers. This prohibition is designed to ensure consumers see the benefit of supply chain cost savings, and that such savings are not retained by retailers to the detriment of their consumers.[36]

1.41 The bill sets out that a corporation engages in prohibited conduct if it:

- offers to supply, or actually supplies, electricity to 'small customers'; and
- fails to make reasonable adjustments to the price of those offers or supplies to reflect reductions in its underlying cost of procuring that electricity.[37]

1.42 It is not intended that electricity retailers be required to adjust their retail prices in response to short term fluctuations or small moderations in supply chain costs. Rather, prohibited conduct in relation to the retail electricity market is concerned with reductions in underlying costs that are both sustained and substantial.[38]

Electricity financial contract market

1.43 The second category of prohibited conduct created by the bill relates to the electricity financial contract market. It is aimed at ensuring that generators, including gentailers, do not unreasonably refuse to offer financial contracts for anti-competitive purposes.[39]

1.44 The EM notes that:

> In essence, electricity financial contracts allow parties to fix a price for electricity at a particular amount, or within a particular price band. In that way they give generators and retailers certainty about the future price of electricity. Creating certainty in this cost structure is important to allowing retailers to compete in the retail electricity market.
>
> A gentailer may be well-placed to ensure that its price risk is adequately managed. However, a retailer that does not have a generation arm relies on a liquid financial contract market for the availability of hedging arrangements. A gentailer could potentially use its position to restrict the availability of electricity financial contracts for the purpose of substantially lessening competition.[40]

1.45 The bill sets out three elements to test for prohibited conduct relating to electricity financial contract liquidity:

- First element—electricity generation;
- Second element—behaviour in relation to offering contracts; and
- Third element—purpose test.

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36 *Explanatory Memorandum*, p. 13.

37 *Explanatory Memorandum*, p. 13.

38 *Explanatory Memorandum*, p. 16.

39 *Explanatory Memorandum*, p. 21.

40 *Explanatory Memorandum*, p. 21.

1.46 The first element provides that only a corporation that generates electricity, either itself or within its corporate group, is subject to this limb. Thus, the corporation or a related body corporate must generate electricity.[41]

1.47 The second element describes the ways in which a corporation might engage in contract behaviour to limit competition. This element is intended to cover three possible means through which this might be done; specifically, where a corporation:

- has the ability to offer electricity financial contracts, but chooses not to do so;
- limits or restricts offers to enter into electricity financial contracts; and
- offers to enter into electricity financial contracts in a way that has, or on terms that have, the effect of limiting or restricting acceptance of those offers.[42]

1.48 The third element provides that the behaviour described in the second element must be engaged in by the corporation for the purpose of substantially lessening competition in any electricity market.[43]

Wholesale electricity market

1.49 The third category of prohibited conduct created by the bill relates to the wholesale market; specifically, to any spot market for the supply of electricity. This category seeks to prevent generators engaging in conduct which undermines the effective operation of the electricity spot market.[44]

1.50 The bill provides for two cases of prohibited conduct relating to electricity spot markets: a basic case and an aggravated case. Each case has two elements that must be present for the prohibition to apply:

- First element—spot market behaviour; and
- Second element—purpose of behaviour.[45]

1.51 The first element is the same for both the basic and aggravated cases. It describes the kinds of activities that a corporation could engage in that might result in prohibited conduct. They are that the corporation either:

- bids or offers to supply electricity on an electricity spot market; or
- fails to bid or offer to supply electricity on such a market.[46]

1.52 The second element looks at the character or purpose of the behaviour covered by the first element. It comprises two limbs that examine whether:

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41 *Explanatory Memorandum*, p. 22.

42 *Explanatory Memorandum*, p. 22.

43 *Explanatory Memorandum*, p. 23.

44 *Explanatory Memorandum*, p. 27.

45 *Explanatory Memorandum*, pp. 27–28.

46 *Explanatory Memorandum*, p. 27.

- the corporation has acted fraudulently, dishonestly or in bad faith in carrying out the behaviour; or
- the behaviour has been carried out for the purpose of distorting or manipulating prices in the electricity spot market.[47]

1.53 In the basic case, the prohibited conduct will be made out where either of these limbs is present. In the aggravated case, both limbs must be present for prohibited conduct to be made out.[48]

1.54 Where the basic case is met, an ACCC response, but not a Treasurer response, can be applied. However, where the aggravated case is met, a Treasurer response (that is, a contracting order or application to the Federal Court for a divestiture order) as well as an ACCC response, can be applied to remedy the conduct (discussed below).[49]

Penalties and remedies

1.55 Schedule 1 also sets out a graduated range of penalties and remedies that can apply if the ACCC reasonably believes that a person has engaged in prohibited conduct. The ACCC may:

- issue a public warning notice;[50]
- issue an infringement notice;
- accept a court-enforceable undertaking;
- apply to a court for an injunction; and
- apply to a court for a pecuniary penalty.[51]

Contracting order and divestiture provisions

1.56 Further to the penalties and remedies above, in the event that the ACCC reasonably believes that a person has engaged in certain prohibited conduct in relation to the electricity financial contract market or the wholesale electricity market (but not in relation to the retail market), the ACCC may recommend that the Treasurer make an order with contracting obligations that would require an electricity company to offer electricity financial contracts to third parties.[52]

1.57 If the ACCC reasonably believes that a person has engaged in certain prohibited conduct in relation to the wholesale electricity market (but not in relation to the retail or financial contract markets), then the ACCC may recommend that the

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47 *Explanatory Memorandum*, p. 28.

48 *Explanatory Memorandum*, p. 28.

49 *Explanatory Memorandum*, p. 27.

50 A corporation has 21 days to make representations to the ACCC regarding the prohibited conduct, the detriment identified, and whether it is in the public interest to publish the notice. See *Explanatory Memorandum*, p. 38.

51 *Explanatory Memorandum*, p. 6.

52 *Explanatory Memorandum*, p. 6.

Treasurer make an application to the Federal Court seeking an order directing the person to divest specified assets.[53]

1.58 The EM notes that it is the intention that the making of a contracting order by the Treasurer, or an application to the Federal Court for a divesture order, would only occur in respect of more serious contraventions, where such an action is proportional and targeted to the conduct.[54]

1.59 In respect of government owned corporations, the bill provides that a divestiture order would not prevent the relevant asset from being divested to another government owned corporation, provided that it is in genuine competition with the corporation subject to the divestiture order.[55]

1.60 In relation to a court ordered divestiture, the EM also notes that:

> A court ordered divestiture is intended to be used as a last resort in the most exceptional circumstances where other responses available to the ACCC and the Treasurer would not sufficiently address the alleged prohibited conduct.[56]

1.61 In making a contracting order, or in applying for a divestiture order, the Treasurer (and the Federal Court in the case of a divestiture order) must be satisfied that the order is a proportionate means of preventing the corporation that engaged in the prohibited conduct, or a related body corporate, from engaging in that kind of conduct in the future.[57]

1.62 In addition to requiring proportionality, the Treasurer, in considering whether to apply to the Federal Court for the divestiture order, must also be satisfied that the order meets the net public benefit test; that is, that the divestiture order will, or is likely to, result in a public benefit that would, or would be likely to, outweigh any public detriment.[58]

1.63 The bill provides that, to the extent that the operation of the provision in Division 5 (contracting orders) or Division 6 (electricity divestiture orders) of the bill:

> …would result in an acquisition of property from a person otherwise than on just terms within the meaning of section 51(xxxi) of the Constitution, the provision does not have any operation and the remainder of the CCA continues in operation.[59]

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53 *Explanatory Memorandum*, p. 6.

54 *Explanatory Memorandum*, p. 6.

55 *Explanatory Memorandum*, p. 58.

56 *Explanatory Memorandum*, p. 53.

57 *Explanatory Memorandum*, pp. 45 and 56.

58 *Explanatory Memorandum*, p. 56.

59 *Explanatory Memorandum*, pp. 51 and 60.

Prohibited conduct notices

1.64 The bill sets out the notice and recommendation procedures that must be followed before an order can be made in respect of a corporation or other body corporate. The prohibited conduct notice procedure is intended to ensure that a corporation that the ACCC reasonably believes has engaged in certain kinds of prohibited conduct is given the opportunity to respond and make representations in relation to the contents of the notice.[60]

1.65 The bill stipulates the contents that must be included in a prohibited conduct notice, including that the notice must state that the corporation identified may make representations in response to the prohibited conduct notice and specify the time that the corporation has to make the representations (ordinarily 45 days, unless the ACCC allows more time).[61]

Schedule 2—AER information gathering

1.66 As previously noted, in line with recommendations from the ACCC's REPI Final Report, Schedule 2 provides the AER with the necessary powers required for its functions to set a default market offer and reference bill.

1.67 Specifically, Schedule 2 amends the CCA to:

- confer new compulsory information gathering powers on the AER;
- allow the AER to share information with other agencies;
- clarify that regulations made for section 44AH(b) of the CCA may confer power on the AER to make disallowable or non-disallowable legislative instruments[62]; and
- allow an industry code regulating electricity retailers to incorporate any non-disallowable legislative instrument made by the AER as in force or existing from time to time.[63]

1.68 The EM notes the ACCC's recommendations relating to the setting of a default market offer and reference bill:

> …could be implemented through a mandatory industry code prescribed under regulations made for section 51AE(1) of the CCA, with associated functions (such as the determination of maximum default offer prices) conferred on the AER under regulations made for section 44AH(b). Schedule 2 gives the AER the information-gathering powers it requires to

60 *Explanatory Memorandum*, p. 62.

61 *Explanatory Memorandum*, pp. 63–64.

62 The default position is that legislative instruments made by the AER are non-disallowable. However, the proposed section 44AH(b) regulation conferring the instrument making power can provide that the instrument is disallowable. See *Explanatory Memorandum*, p. 26.

63 *Explanatory Memorandum*, p. 74.

> perform these associated functions and makes other technical amendments to facilitate the implementation of the recommendations in this way.[64]

Legislative scrutiny

1.69 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) commented on Schedule 2 of the bill in its *Scrutiny Digest 1 of 2019*.

1.70 Proposed subsection 44AAFB(1) makes it an offence for a person to fail to comply with a notice to produce documents or information given under proposed section 44AAFA. The offence carries a maximum penalty of imprisonment for two years or 100 penalty units. Proposed subsection 44AAFB(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if a person is not capable of complying with the notice. The Scrutiny Committee noted that, as such, 'this reverses the evidential burden of proof'.[65]

1.71 Proposed subsection 44AAFB(3) provides a further exception if the person can prove that, after a reasonable search, they are not aware of the documents specified in the notice and the person provides a written response to the notice, including a description of the scope and limitations of the search. The Scrutiny Committee noted, as such, 'this imposes a legal burden of proof on the defendant to prove that after a reasonable search, they are not aware of the documents'.[66]

1.72 The Scrutiny Committee further commented that:

> At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.[67]

1.73 Noting that the EM to the bill does not address this issue, the Scrutiny Committee requested the Treasurer's advice as to 'why it is proposed to use offence-specific defences (which reverse both the evidential and legal burden of proof)'.[68]

Financial impact

1.74 The EM states that the amendments in the bill will have no financial impact on Commonwealth expenditure or revenue, and a low compliance cost impact for businesses operating in electricity markets.[69]

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64 *Explanatory Memorandum*, p. 73.

65 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2019*, p. 20.

66 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2019*, p. 20.

67 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2019*, p. 21.

68 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2019*, p. 21.

69 *Explanatory Memorandum*, pp. 3–4.

Compatibility with Human Rights

1.75 As required under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the government has assessed the bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The government considers that the bill is compatible.[70]

70 *Explanatory Memorandum*, p. 107.

Chapter 2

Views on the bill

2.1 This chapter summarises the views held by stakeholders on the provisions of the bill and its effects. The chapter is intended to provide an indicative, though not exhaustive, account of the issues examined during the committee's inquiry.

Need for measures to address anti-competitive conduct

2.2 A number of inquiry participants noted their support for a graduated series of remedies available to the Australian Competition and Consumer Commission (ACCC) to respond to anti-competitive conduct identified during the course of its Electricity Price Monitoring Inquiry.[1]

2.3 The Consumer Action Law Centre submitted that it supports the three new prohibitions in the bill which allow the ACCC to take action when monitoring demonstrates that retail, financial contracting or wholesale price outcomes are not aligned with those of a competitive market.[2]

2.4 The Australian Chamber of Commerce and Industry (ACCI) expressed a similar view, commenting that:

> We also support the inclusion of a series of graduated remedies for the ACCC to deal with energy market misconduct, ranging from a public warning notice, to an infringement notice with orders for rectification, to the application to the court for an injunction or pecuniary penalties. This allows the ACCC to measure their response to the seriousness of the offence when dealing with energy market misconduct.[3]

2.5 Likewise, the Council of Small Business Organisations Australia (COSBOA) commented that:

> [The electricity] market is now monopolistic in nature dominated by between one and three generators. As a result, customers, particularly small businesses, have footed the bill.
>
> Within this context, and in consideration of the findings of the 2018 ACCC *Electricity Supply and Prices Inquiry*, COSBOA believes that the Australian Government must be given a suite of measures of increasing severity that can be used to address problems in relation to observed anti-competitive operation of the national electricity market in Australia.[4]

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1 See, for example, Consumer Action Law Centre, *Submission 7*; Australian Chamber of Commerce and Industry, *Submission 27*; Mr Dylan McConnell, *Submission 28*.

2 Consumer Action Law Centre, *Submission 7*, p. 2.

3 Australian Chamber of Commerce and Industry, *Submission 27*, p. 1.

4 Council of Small Business Organisations Australia, *Submission 20*, p. 1.

2.6 Noting the recent negative commentary from industry representatives on the grounds that measures in the bill—in particular, the proposed court-ordered divestiture provisions—could increase sovereign risk, COSBOA submitted that:

> …the ACCC Inquiry and the severity of the economic hardship created by the electricity increases in recent years clearly point to serious and unprecedented market failures with far reaching economic consequences for all Australians.
>
> Given that electricity is a major input cost for Australian households and businesses, any failure by the Australian Government to intervene represents a far greater risk to the future economic well-being of all Australians than any potential small decrease in shareholder/superannuation returns for a few years.[5]

2.7 Energy Consumers Australia (ECA) reiterated the ACCC's findings that market concentration across the National Electricity Market (NEM) has increased in recent years, emphasising that '[p]resently, the three most significant generators account for more than 70 per cent of installed capacity and more than 80 per cent of dispatched energy in all NEM regions'.[6]

2.8 ECA contended that special measures are needed to restore trust and confidence in competition in the electricity market, commenting broadly that:

> When systemic problems emerge in markets, the community expects governments to act to remedy them. This expectation is particularly strong in markets for essential services such as energy.
>
> Importantly, the complexity of the problems in markets like energy are much wider than traditional Australian economic and competition policy.[7]

2.9 Mr Dylan McConnell, Graduate Researcher at the Climate and Energy College, University of Melbourne, asserted that '[t]here is clearly an issue with market concentration and market power in the National Electricity Market'.[8]

2.10 In support of this claim, Mr McConnell noted that, according to the Herfindahl-Hirschman Index (HHI), the metric traditionally used to assess market power, concentration in the NEM is high. Mr McConnell explained:

> The HHI index is presented as a number between 0 and 10,000 (with 10,000 representing a complete monopoly). In the 2018 'State of the energy market' report[9] [it] shows annual HHI trends for each of the four mainland

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5 Council of Small Business Organisations Australia, *Submission 20*, p. 2.

6 Energy Consumers Australia, *Submission 25*, p. 4.

7 Energy Consumers Australia, *Submission 25*, p. 3.

8 Mr Dylan McConnell, Climate & Energy College, University of Melbourne, *Submission 28*, p. 1.

9 Australian Energy Regulator, *State of the Energy Market 2018*, p. 127. Available at: https://www.aer.gov.au/publications/state-of-the-energy-market-reports/state-of-the-energy-market-2018

> states [Queensland, NSW, Victoria and South Australia] for the last five financial years. All regions are reported to have a HHI value above 2000, though there is considerable variation across the regions (with SA having the highest value). This is considered to be highly concentrated, both domestically and abroad.[10]

2.11 Further demonstrating that market concentration is high in Australian electricity markets, Mr McConnell presented the following comparisons:

- An HHI value of 2000 is used by the Australian Competition and Consumer Commission (ACCC) to flag competition concerns in their merger guidelines (which are not specific to the power sector).
- The UK's Office of Gas and Electricity Markets (OFGEM) regards an HHI exceeding 1000 as 'concentrated' and above 2000 as 'very concentrated'.
- The U.S Department of Justice considers markets to unconcentrated at below 1500, moderately concentrated at 1500–2500 and highly concentrated at 2500.[11]

2.12 Demonstrating the kind of anti-competitive conduct that the bill seeks to address, Mr McConnell provided the following example of re-bidding behaviour in the electricity wholesale market:

> There are two important bidding processes that occur on a daily basis. There is the initial bid that is placed at four o'clock in the morning. That sets up the price bands that a generator can offer their capacity into the market throughout the rest of the day. For the rest of that day, those price bands do not change but they are allowed to move capacity—megawatts—between those different price bands right up until dispatch. Within minutes of dispatch, they can rebid capacity. What we have seen in the past is, very close to dispatch periods, capacity being economically withdrawn. What I mean by that is the capacity is still available to the market but it is now available to the market at the market price cap of $14,500. That is not illegal by any stretch of the imagination and, in fact, some people would argue this transient market power is not a bad thing but there are definitely cases of this behaviour that are fairly problematic, I would say.[12]

2.13 Similarly, Energy Locals in its submission contended that the 'concentration in the energy market is well documented' and that the 'impacts of this concentration travel only a short distance before they hurt consumers'.[13] Seeking to illustrate this

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10 Mr Dylan McConnell, Climate & Energy College, University of Melbourne, *Submission 28*, pp. 2–3.

11 Mr Dylan McConnell, Climate & Energy College, University of Melbourne, *Submission 28*, p. 3.

12 Mr Dylan McConnell, Climate and Energy College, University of Melbourne, *Committee Hansard*, 6 February 2019, pp. 44–45.

13 Energy Locals, *Submission 31*, p. 1.

point, Energy Locals presented the following example of costs being passed on to consumers through limiting contract sales to retailers:

> When contract prices are high, as they were in Victoria in late calendar year 2018, generators can meet their business plan by selling fewer forward contracts to retailers. This quickly has a snowball effect, with less motivation by generators to sell contracts and the subsequent lack of liquidity putting further upward pressure on contract prices –the cycle then repeats. Retailers would be foolish to expose their business fully to spot prices and hence they will need to lock in forward contracts at these inflated prices. These increased costs naturally find their way into customer tariffs during price change events.[14]

Clarity of prohibited conduct provisions

2.14 A number of submitters and witnesses expressed concerns regarding the clarity of the prohibited conduct provisions in the bill. Broadly, inquiry participants contended that the drafting of these provisions is open to subjective interpretation that will create uncertainty for industry and regulators as well as potential difficulties with compliance.[15]

2.15 For example, AGL submitted that:

> The Bill creates prohibitions that are not framed by reference to clear, objectively determinable legal standards. Rather, the key operative provisions are drafted with reference to broad, vague and inadequately defined concepts. This is contrary to the rule of law.
>
> …
>
> This lack of clarity will create uncertainty for the industry, regulators, the Treasurer and the Courts as to how the law should apply. Each is likely to have a differing interpretation of the provisions.[16]

2.16 The Business Council of Australia (BCA) considered that the drafting of the prohibited conduct provisions in the bill 'will make it difficult for businesses to undertake their daily operations'. The BCA commented that:

> 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.[17]

2.17 Similarly, Alinta Energy observed that:

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14 Energy Locals, *Submission 31*, pp. 1–2.

15 See, for example, The Australian Industry Group, *Submission 4*; Western Australian Government, *Submission 24*; EnergyAustralia, *Submission 14*; Australian Energy Council, *Submission 19*; Queensland Law Society, *Submission 16*.

16 AGL, *Submission 18*, p. 11.

17 Business Council of Australia, *Submission 15*, p. 5.

> Policy certainty is critical to the efficient operation of the market, and to encourage innovation and competition to the benefit of consumers…Market participants need certainty & clarity around their compliance obligations, so that systems, policies and processes can be developed that ensure compliance. The subjective nature of elements of the proposed obligations will prevent this from occurring.[18]

2.18 Noting the different strategies and cost bases employed by industry participants, Allan Gray Australia suggested that what constitutes prohibited conduct will ultimately be decided by regulator discretion and court cases:

> The 11 examples provided [in the Explanatory Memorandum] relating to the retail market do not cover the different possible scenarios, which means that regulator discretion and court cases will likely decide what may be considered prohibited conduct.[19]

2.19 The Queensland Government took the view that uncertainty in the intended meaning of some of the provisions in the bill risks that they 'will operate in a manner that is not contemplated or intended by the legislation'. The Queensland Government further submitted this 'makes compliance difficult for market participants'.[20]

Risk of capturing legitimate commercial conduct

2.20 Some inquiry participants raised concerns that a lack of clarity around how prohibited conduct provisions in the bill are to be interpreted—particularly in relation to the electricity spot market—could risk capturing legitimate commercial conduct that is necessary for the efficient operation of the market.[21]

2.21 For instance, Origin Energy commented that:

> The new prohibitions would create uncertainty for market participants as it is not clear what additional behaviours (beyond those that are already prohibited under the current regulatory framework) they are looking to restrict. This is problematic if it constrains legitimate behaviour that is consistent with the efficient operation of the market.[22]

2.22 The BCA provided the following example pertaining to the proposed prohibited conduct provisions on the electricity spot market:

> 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

18 Alinta Energy, *Submission 17*, p. 3.

19 Allan Gray Australia, *Submission 3*, p. 2.

20 Queensland Government, *Submission 9*, p. 2.

21 See, for example, Business Council of Australia, *Submission 15*; CS Energy, *Submission 23*; ENGIE, *Submission 10*; EnergyAustralia, *Submission 14*.

22 Origin Energy, *Submission 12*, pp. 3–4.

> currently drafted, a generator could be in breach of the electricity spot market (basic case) prohibited conduct every time it bids.[23]

2.23 EnergyAustralia shared a similar view; submitting that the electricity spot market prohibition set out in the bill is inconsistent with market design. EnergyAustralia explained that:

> The NEM is designed to operate in such a way so that AEMO [Australian Energy Market Operator] can find the lowest cost way of meeting demand, so the grid can operate securely, from all the bids it receives from all generators. In this way the marginal megawatts needed to be dispatched will set the price in any region. It can be inferred that any bid is therefore influencing price; that is the very design and purpose of the market. Therefore, it will be difficult to differentiate between conduct that simply reflects a decision to make a bid or offer on the basis of forecast supply and demand balance and conduct that distorts or manipulates prices, leading to both enforcement and compliance difficulties in the future.[24]

2.24 The Australian Industry Group (Ai Group) noted the complex and unique design features of the NEM, and cautioned that:

> …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.[25]

Retail pricing provisions

2.25 Proposed section 153E of the bill defines prohibited conduct in the retail electricity market. Specifically, section 153E sets out that:

> A corporation contravenes this section if:
>
> 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 sustained and substantial reductions in its underlying cost of procuring electricity.[26]

23 Business Council of Australia, *Submission 15*, p. 6.

24 EnergyAustralia, *Submission 14*, p. 18. See also CS Energy, *Submission 23*, pp. 6–7.

25 The Australian Industry Group, *Submission 4*, p. 3.

26 Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018, proposed s. 153E.

2.26 Submitters and witnesses raised concerns that key elements of the retail pricing prohibitions in the bill, as currently drafted, are ill-defined and difficult to apply in practice.[27]

2.27 For example, EnergyAustralia commented that, 'as drafted, it is extremely difficult to determine whether or not retail pricing conduct would be prohibited', further submitting that 'all of the critical elements of the prohibition should be clearly and objectively defined in the bill itself'.[28]

2.28 Likewise, Origin Energy considered that, despite the numerous examples provided in the Explanatory Memorandum to the bill:

> …it is not entirely clear on what basis a determination of whether costs savings are being reflected in retail tariffs would be made, or what level of pass through would be deemed appropriate. Invariably this will be reliant on the subjective judgement of the regulator, with the implication being that any perceived failure to pass through cost savings in an 'acceptable' manner would result in a contravention of the prohibition.[29]

2.29 In particular, inquiry participants highlighted concerns regarding the new concept of a 'reasonable adjustment' to the price of offers or supplies, what factors and approach retailers should take into account in determining their 'underling cost of procuring electricity', and what constitutes a 'sustained and substantial reduction' in those costs (discussed below).

Reasonable adjustments

2.30 AGL described the concept of a reasonable adjustment as provided in section 153E of the bill as being 'inherently subjective and uncertain'. AGL further commented that:

> For example, the Bill provides no guidance on what level of price reduction is required for the adjustment to be 'reasonable', how and when the adjustment is to be made, what aspects of price in retail contracts must be adjusted, to which subset of customers, how an adjustment should be distributed as between different areas and as between 'offers' and 'supplies'.[30]

2.31 CS Energy put forward that view that the bill 'does not provide any guidance as to how a retailer determines what a "reasonable adjustment" is, or when (or how often) an adjustment should be made'.[31]

2.32 Similarly, the BCA submitted that:

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27 See, for example, Australian Energy Council, *Submission 19*; ENGIE, *Submission 10*; The Hon. Dr Craig Emerson, *Submission 1*.

28 EnergyAustralia, *Submission 14*, pp. 9 and 11.

29 Origin Energy, *Submission 12*, p. 2.

30 AGL, *Submission 18*, p. 15. See also EnergyAustralia, *Submission 14*, p. 11.

31 CS Energy, *Submission 23*, p. 4.

> …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.[32]

2.33 AGL also queried the time within which a retailer is required to make a reasonable adjustment to its prices in order to comply with the proposed provisions, noting that 'retailer tariff decisions are typically planned for several months in advance of the annual adjustment cycles'.[33]

Underlying cost of procuring electricity

2.34 The BCA noted the complexity in determining a corporation's 'underlying costs', and contended that the bill 'does not provide a clear or certain approach to its calculation'. The BCA further submitted that:

> 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.[34]

2.35 AGL also pointed to the complexity of retailers' underlying costs, commenting that '[a]ccordingly, the bill proposes to use an unworkable standard as one of the key criteria for liability'. AGL elaborated that:

> There is no certain or uncontroversial approach to calculating 'underlying cost', particularly for vertically-integrated retailers. Any approach will have inherent complexities in the calculation, whether be it focussed on the levelized costs of generation in the NEM, short run marginal costs of particular generators or regions in the NEM or long run costs, taking into account the need to recover very substantial capital investments in generation assets, or on a myriad of other possible formulations of 'cost'.[35]

2.36 Echoing this view, EnergyAustralia submitted that the bill 'does not reflect the way that electricity costs are factored into retail prices'. EnergyAustralia recommended that:

> …further analysis be done to confirm that 'the underlying costs of procuring electricity' is the correct reference point for the prohibited conduct and, if so, that further clarification be added to the Bill to define what is intended to be captured by the phrase.[36]

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32 Business Council of Australia, *Submission 15*, p. 5.

33 AGL, *Submission 18*, p. 15.

34 Business Council of Australia, *Submission 15*, p. 5.

35 AGL, *Submission 18*, p. 13.

36 EnergyAustralia, *Submission 14*, p. 11.

Sustained and substantial reductions

2.37 With regard to the concept of a 'sustained and substantial reduction' in the underlying cost of procuring electricity, AGL commented that:

> The uncertainty of these dual standards means that retailers will have significant difficulty determining whether the circumstances triggering a requirement to make a price adjustment have occurred. They will make compliance difficult, creating significant legal risk for retailers.[37]

2.38 Allan Gray Australia suggested that uncertainty with regard to prohibited conduct 'will be priced in by retailers one way or the other'. Allan Gray Australia illustrated this view with the following example:

> For example, if a retailer comes up with a way to procure energy more efficiently than others, through hedge contracts and PPAs, and this is sustainable, then must that retailer pass on their sustained decrease? None of the examples [in the Explanatory Memorandum] deal with this scenario explicitly. In our reading of this Bill, there has been a sustained and substantial decrease in their costs, so the retailer would have to pass on that decrease.[38]

Electricity spot market prohibition

2.39 Prohibited conduct in the electricity spot market is set out in proposed sections 153G (basic case) and 153H (aggravated case) of the bill. A corporations' conduct will contravene the basic case when it bids or offers (or fails to bid or offer) to supply electricity in relation to an electricity spot market, and when it does so:

> i) fraudulently, dishonestly or in bad faith; or
>
> ii) for the purpose of distorting or manipulating prices in that electricity spot market.[39]

2.40 A corporation will contravene the aggravated case when both of the elements above are made out.[40]

2.41 Stanwell noted that 'it is difficult to imagine a situation in which a bid is made for the "purpose of distorting or manipulating prices" is not also made "fraudulently, dishonestly or in bad faith"'. Stanwell submitted that:

> This suggests that the two need to be clarified to allow independent application of the legislation to the basic case of prohibited behaviour versus the more serious offence set out in the aggravated case.[41]

2.42 Alinta Energy also questioned the certainty of the purpose test under section 153G, and put forward the view that 'both the proposed prohibition and test are

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37 AGL, *Submission 18*, p. 15.

38 Allan Gray Australia, *Submission 3*, p. 2.

39 Proposed subsection 153G(b).

40 Proposed subsection 153H(b).

41 Stanwell, *Submission 22*, [p. 5].

vague, and if implemented would increase the risk of distorting rational market-based decisions'.[42]

2.43 Similarly, EnergyAustralia submitted that:

> Several key terms in sl53G and s153H of the Bill are not well defined or not defined at all which make interpretation and understanding the possible implication difficult.[43]

2.44 EnergyAustralia recommended that the terms 'fraudulently, dishonestly or in bad faith' and 'distorting or manipulating prices' be defined in the bill. Further, EnergyAustralia contended that:

> …the effect of the conduct on competition should also be taken into account, to ensure that enforcement action under this provision is directed towards conduct that actually has the effect of substantially lessening competition.[44]

Powers conferred on the ACCC and the Treasurer

2.45 A number of inquiry participants questioned whether the powers conferred on the ACCC and the Treasurer under the bill are appropriate, particularly in relation to contracting orders and divestiture provisions. Some submitters and witnesses took the view that giving the ACCC and the Treasurer discretion to determine whether or not a corporation has engaged in prohibited conduct will contribute to uncertainty with regard to how the provisions in the bill will be applied.[45]

2.46 For example, AGL submitted that:

> …the thresholds permitting the exercise of the new powers are low, as is the degree of evidentiary satisfaction a decision maker is required to meet in order to exercise their powers under the Bill. The result is to confer inherently discretionary and arbitrary powers on the ACCC and Treasurer, making the laws highly uncertain in their application.[46]

2.47 CS Energy commented that, typically, the enforcement powers available to the ACCC and the Treasurer under the bill 'would be reserved for a court and would only be exercised in circumstances where there has been clear, proven misconduct'.[47]

2.48 EnergyAustralia expressed a similar view, commenting that:

> The Bill introduces some of the most significant penalties available under the CCA [*Competition and Consumer Act 2010*]. Yet there is no requirement for allegations of prohibited conduct to be tested and proven in

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42 Alinta Energy, *Submission 17*, p. 1.

43 EnergyAustralia, *Submission 14*, p. 18.

44 EnergyAustralia, *Submission 14*, p. 18.

45 See, for example, AGL, *Submission 18*; EnergyAustralia, *Submission 14*; CS Energy, *Submission 23*.

46 AGL, *Submission 18*, p. 22.

47 CS Energy, *Submission 23*, p. 8.

> court (with due process and rules of evidence applying) before the Treasurer can make a contracting order, or before the ACCC can issue a public warning notice or an infringement notice or recommend a divestiture order be pursued.[48]

2.49 The Western Australian Government (WA Government) noted that, while the ACCC would be required to apply a public interest test before some of the powers in the bill are employed, the interpretation of the public interest would lie with the ACCC and the Commonwealth Treasurer. The WA Government contended that '[t]he State Government is better placed and better able to perform this role in Western Australia than the Commonwealth Government'.[49]

Reasonable belief

2.50 Some submitters and witnesses expressed concern regarding the evidentiary standard that must be met in order for the ACCC to pursue the graduated remedies to prohibited conduct under the bill. Specifically, a number of inquiry participants suggested that the ability for the ACCC to take action against a corporation on the basis of a 'reasonable belief' is too low of an evidentiary standard and could be misapplied.[50]

2.51 The AEC took the view that a 'reasonable belief' is a low standard that 'does not require the ACCC to prove that the prohibited conduct has occurred'. The AEC further commented that:

> There may be a genuine dispute about whether the prohibited conduct indeed occurred, and yet the ACCC may still have a "reasonable belief" to justify a recommendation for a contracting order.[51]

2.52 Likewise, ENGIE submitted that:

> The low standard of evidence needed in relation to prohibited conduct, notably regarding electricity contracts, creates a concern that it may be misapplied. The electricity contracts market is a very complicated and dynamic environment and the presumption that the regulator forming a 'reasonable belief' is grounds for action and that that action will be well conceived should be further investigated.[52]

2.53 Stanwell noted the ability for the ACCC, under the remedies proposed in the bill, to publish a public warning notice if it reasonably believes relevant prohibited conduct has occurred. Stanwell recommended that:

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48 EnergyAustralia, *Submission 14*, p. 19.

49 Western Australian Government, *Submission 24*, p. 6.

50 See, for example, AGL, *Submission 18*; Australian Energy Council, *Submission 19*; Business Council of Australia, *Submission 15*.

51 Australian Energy Council, *Submission 19*, p. 4.

52 ENGIE, *Submission 10*, p. 2.

> …the provisions [to issue a public warning notice], which effectively amount to 'trial by media' in circumstances where no infringing conduct has been established, should be deleted from the Bill.[53]

2.54 The BCA also opposed the standard of a 'reasonable belief' as it relates to the issuing of public warning notices under the bill and recommended that 'a higher standard that reasonable belief is warranted'.[54] The BCA summarised what it considers to be the potential ramifications of a public warning notice:

> 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.[55]

Contracting order provisions

2.55 This section summarises comments from inquiry participants relating to the contracting order provisions proposed in the bill. Broadly, some submitters and witnesses suggested that the proposed contracting order provisions constitute an unnecessary intervention that risks unintended consequences on the operation of the market.[56]

2.56 CS Energy expressed the view that the contracting order provisions in the bill are a 'significant over-reach by the Government into a corporation's commercial operations'. CS Energy suggested that these provisions may be built on a 'misunderstanding of how contracting decisions are made', noting that:

> While the [Explanatory Memorandum] refers to several matters the Treasurer may consider as relevant, it is silent on the following matters that are key to a generator's contracting position:
>
> - the underlying cost stack of the generator;
> - the risk policy of the generator; and
> - the prudential requirements of the generator.[57]

2.57 Similarly, AGL commented that the contracting order provisions 'are unnecessarily intrusive and risk substantially affecting private rights and agreements in the electricity market'. AGL continued that:

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53 Stanwell, *Submission 22*, [p. 3].

54 Business Council of Australia, *Submission 15*, p. 8.

55 Business Council of Australia, *Submission 15*, p. 7. See also AGL, *Submission 18*, p. 23.

56 See, for example, Stanwell, *Submission 22*; The Australian Industry Group, *Submission 4*; Alinta Energy, *Submission 17*; Business Council of Australia, *Submission 15*; Australian Energy Council, *Submission 19*.

57 CS Energy, *Submission 23*, p. 5.

> Even the threat of a contracting order risks affecting the freedom with which private parties should be afforded (and indeed, should be protected) during the bargaining process. This has the potential to negatively affect electricity prices and deter new market entrants—chilling both investment and competition in the market.[58]

2.58 AGL elaborated on this point, noting what it foresees as the potential consequences of a contracting order for vertically-integrated retailers:

> Such an order would likely reduce efficiency for vertically-integrated retailers. Requiring a vertically-integrated retailer to supply a minimum volume of hedge contracts has the potential to materially reduce that business' ability to hedge efficiently and to operate and maintain its generation assets efficiently. Such an order would reduce the business' ability to cost-effectively manage pool price risk associated with its own retail customers. This is likely to result in increasing the costs of a vertically-integrated retailer to serve its own customer base.[59]

2.59 EnergyAustralia considered that giving the Treasurer the right dictate the terms of a contracting order could negatively intervene in complex trading operations. In particular, EnergyAustralia reasoned that:

> Generation businesses could be forced to go short into a market and incur significant financial losses as the result of a contracting order. Publishing contracting orders may also have significant impact on the ability of the corporation to trade in the market.[60]

2.60 The BCA also commented on the ability of the Treasurer to dictate the terms of a contracting order, and expressed concern 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'.[61] The BCA explained that:

> 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.[62]

Court-ordered divestiture provisions

2.61 A number of inquiry participants noted their opposition to the proposed court-ordered divestiture provisions in the bill. Generally, submitters and witnesses

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58 AGL, *Submission 18*, pp. 24–25.

59 AGL, *Submission 18*, p. 25.

60 EnergyAustralia, *Submission 14*, p. 20.

61 Business Council of Australia, *Submission 15*, p. 9.

62 Business Council of Australia, *Submission 15*, p. 9.

contended that court-ordered divestiture is an inappropriate remedy to the conduct prohibited under the bill that may have unforeseen implications on the market.[63]

2.62 The BCA noted its concern regarding the proposed court-ordered divestiture remedy, submitting that '[a] divestiture order is extreme and unlikely to ever be a proportionate response to the prohibited conduct'.[64] The BCA further commented that:

> 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.[65]

2.63 That view was echoed by AGL, who contended that '[d]ivestiture is likely to be disproportionate, punitive in nature and will produce a number of unintended consequences'. AGL submitted that:

> Rather than addressing a demonstrated market failure, given the operational and economic reality of how the NEM functions, the divestiture power is likely to be punitive. It will not address concerns raised with the current operation of the electricity market. Instead, it is likely to increase risks and costs borne by market participants, due to rising costs of capital, all of which is likely to exacerbate, rather than ameliorate those issues.[66]

2.64 The AEC disagreed with arguments that the proposed court-ordered divestiture remedy in the bill is similar to powers under other Australian laws. Explaining this view, the AEC submitted that:

> …the proposed divestiture powers:
>
> - do not require a connection between the assets to be divested and the prohibited conduct in response to which the divestiture is ordered;
> - do not require proof that the prohibited conduct had an adverse effect on a relevant market; and
> - consequently, the proposed divestiture powers are not necessarily targeted towards restoring a status quo that prevailed in a relevant market before the prohibited conduct occurred.[67]

2.65 Professor Ian Harper, Dean and Director, Melbourne Business School, noted that in the Final Report of the *Competition Policy Review*, released in March 2015, divestiture powers were deemed undesirable:

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63 See, for example, Business Council of Australia, *Submission 15*; AGL, *Submission 18*; Origin Energy, *Submission 12*.

64 Business Council of Australia, *Submission 15*, p. 9.

65 Business Council of Australia, *Submission 15*, p. 10.

66 AGL, *Submission 18*, p. 27.

67 Australian Energy Council, *Submission 19*, p. 6. See also Business Council of Australia, *Submission 15*, p. 10.

> …because they are unpredictable in their impact and may even be counterproductive if the segregated entities prove to be commercially unviable, potentially leaving the market less competitive after forced divestiture than it was beforehand.[68]

2.66 Professor Harper submitted that the proposed divestiture provisions in the bill 'are neither necessary nor desirable'. Professor Harper further contended that section 46 of the CCA, as amended following the *Competition Policy Review*, provides the ACCC with 'sufficient power to prosecute the misuse of market power by energy providers should it be suspected without the need to resort to forced divestiture' (discussed further below).[69]

2.67 The Hon. Dr Craig Emerson cautioned that the court-ordered divestiture provisions in the bill 'create obvious precedents for other industries'. Dr Emerson took the view that the amendments could inevitably 'be extended to petrol, supermarkets, agriculture and, in time, to all sectors of the Australian economy'.[70]

2.68 Ai Group shared a similar view, commenting that:

> 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.[71]

2.69 Mr McConnell suggested that concerns around the proportionality of the proposed remedies, particularly the divestiture provisions, could be addressed through incorporation of supportive guidance in the bill over matters relevant to the Federal Court's consideration of proportionality.[72]

2.70 Energy Locals expressed a different point of view with regard to the divestiture provisions in the bill. In particular, Energy Locals noted the graduated range of remedies proposed and, as such, the unlikelihood of court-ordered divestiture being required as a response to prohibited conduct:

> We note that much of the attention relating to the proposed bill has focused on the divestment orders that can be enforced. However, the proposed bill includes gradually more severe consequences as energy company behaviour worsens or as warnings are not heeded. We believe the likelihood of an energy company failing to adjust its behaviour either in advance of

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68 Professor Ian Harper, Melbourne Business School, *Submission 29*, p. 2.

69 Professor Ian Harper, Melbourne Business School, *Submission 29*, p. 2.

70 The Hon. Dr Craig Emerson, *Submission 1*, p. 4.

71 The Australian Industry Group, *Submission 4*, p. 3. See also Western Australian Government, *Submission 24*, p. 6; Origin Energy, *Submission 12*, p. 4.

72 Mr Dylan McConnell, Climate & Energy College, University of Melbourne, *Submission 28*, p. 4. See also Mr Dylan McConnell, Climate & Energy College, University of Melbourne, *Committee Hansard*, 6 February 2019, p. 51.

> potential enforcement action or in response to early enforcement action to be very low. Therefore, the use of divestment powers is, in our opinion, an unlikely outcome but a very useful consequence to help companies feel more eager to do the right thing. We also note that the bill requires the federal court to independently handle any divestment process and that it must prove such a move is in the best interests of customers.[73]

Constitutional considerations

2.71 Proposed section 153ZC of the bill provides that, to the extent that the operation of the provision in Division 5 (contracting orders) or Division 6 (electricity divestiture orders) would result in an acquisition of property from a person otherwise than on just terms within the meaning of section 51(xxxi) of the Constitution, the provision has no effect.[74]

2.72 Some inquiry participants highlighted concerns that, despite the inclusion of proposed section 153ZC, the contracting order and court-ordered divestiture provisions in the bill could be challenged on Constitutional grounds.[75]

2.73 For example, Origin Energy expressed the view that, in allowing the Treasurer to make a contracting order as a remedy to relevant prohibited conduct, the bill 'will undermine the separation of judicial and executive powers'. Origin Energy reasoned that:

> Under the [*Competition and Consumer Act 2010*] it is the courts that make a finding of a contravention, whereas under the approach set out in the Bill, the Treasurer, based on advice from the ACCC ascertains whether a firm has contravened the prohibition, and the subsequent nature of the contracting order. A court is only able to determine whether a business has failed to comply with the order, and not whether the order itself is justified. This would essentially remove a vital check and balance that is an important feature of the current regulatory arrangements.[76]

2.74 Similarly, AGL suggested that the bill may impermissibly confer non-judicial power on the Federal Court. While the Federal Court is empowered under the bill to make orders requiring compliance with a contracting order made by the Treasurer,[77] AGL submitted that:

> [It] is precluded from determining for itself whether the corporation has actually engaged in the prohibited conduct which is a necessary precondition to the exercise of the Treasurer's powers to make a contracting order. This effectively usurps the Court's traditional functions under Chapter III of the Constitution and renders it into little more than a 'rubber

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73 Energy Locals, *Submission 31*, p. 3.

74 Proposed section 153ZC.

75 See, for example, EnergyAustralia, *Submission 14*; AGL, *Submission 18*; Origin Energy, *Submission 12*.

76 Origin Energy, *Submission 12*, p. 4. See also AGL, *Submission 18*, p. 18.

77 Proposed subsection 153Z(3).

> stamp' for the decisions made by the Treasurer regarding the existence and extent of prohibited conduct and the appropriate remedies for that conduct.[78]

2.75 AGL noted similar concerns in relation to the court-ordered divestiture provisions in the bill:

> It is at least possible that this provision has the effect of impermissibly depriving the Court of its exclusive function under Chapter III of being the primary finder of fact, and instead requires the Court to make an assessment of whether there has been prohibited conduct based solely on the description of the conduct identified and established by the Treasurer and 'identified' in the Treasurer's recommendation…[79]

2.76 EnergyAustralia considered that, while section 153ZC of the bill 'purports to address this potential breach of the Constitution':

> …[it] does not answer the Constitutional problem as a matter of principle and is unlikely to answer it as a matter of law: the legislation either complies with the Constitution or does not.[80]

Procedural fairness

2.77 As outlined in Chapter 1, the bill seeks to enact a graduated series of penalties and remedies. The procedural fairness of these proposed penalties and remedies was raised as a matter of concern by some submitters and witnesses.[81]

2.78 AGL submitted that the divestiture and contracting order process proposed by the bill lacks protections for procedural fairness. Specifically, AGL expressed the view that the bill does not allow sufficient time 'to respond to an ACCC notice and no minimum time to respond to an ACCC recommendation before the Treasurer makes an order', further commenting that:

> The Bill provides just 45 days for a corporation to respond to an ACCC prohibited conduct notice. At any time thereafter, the ACCC may issue a prohibited conduct recommendation to the Treasurer (and has 45 days to do so), and the Treasurer may then make the recommended order at any time (and has 45 days to do so). Accordingly, a corporation has just 45 days to respond to the ACCC's 'reasonable belief' of the contravention and its proposed remedies before an order may be imposed. A corporation is guaranteed no opportunity or minimum time to respond to the ACCC's prohibited conduct recommendation, nor to make representations to the Treasurer.[82]

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78 AGL, *Submission 18*, pp. 18–19.

79 AGL, *Submission 18*, p. 19.

80 EnergyAustralia, *Submission 14*, p. 25.

81 See, for example, AGL, *Submission 18*; EnergyAustralia, *Submission 14*; Business Council of Australia, *Submission 15*.

82 AGL, *Submission 18*, p. 29. See also EnergyAustralia, *Submission 14*, p. 20.

2.79 EnergyAustralia questioned the procedural fairness of the timeframe allowed for a corporation to respond to a draft public warning notice, submitting that:

> The timeframe for a corporation to respond to a draft public warning notice is 21 days. Given the complexity of the allegations that a notice would likely contain this timeframe is unreasonably short. The Commission should also be required to take time to review and respond to the corporation's response before issuing the notice.[83]

2.80 In support of that view, the BCA noted that:

> …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.[84]

Mechanisms for review

2.81 In addition to that outlined above, some inquiry participants expressed concern that there are insufficient review mechanisms available under the bill with regard to decisions made by the ACCC or the Treasurer.[85]

2.82 For example, with regard to the contracting order provisions in the bill, the AEC noted that there is no merits review of the Treasurer's decision available to a corporation that is subject to such an order. The AEC elaborated that:

> …to obtain successful judicial review of such an administrative order, a high standard must be reached: an applicant must show that the Treasurer's order is irrational or illogical, or suffered from some defect in process. The substance of the order is not a matter for the court's consideration on a judicial review application or an enforcement application under s.153Z.[86]

2.83 Noting similar concerns, EnergyAustralia recommended that:

> …the Bill be revised to include an express right to full merits review before a court (e.g. Australian Competition Tribunal) for all decisions of the ACCC and/or Treasurer.[87]

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83 EnergyAustralia, *Submission 14*, p. 19.

84 Business Council of Australia, *Submission 15*, p. 7.

85 See, for example, AGL, *Submission 18*; Australian Energy Council, *Submission 19*; EnergyAustralia, *Submission 14*.

86 Australian Energy Council, *Submission 19*, p. 4.

87 EnergyAustralia, *Submission 14*, p. 20.

Existing regulation

2.84 A number of submitters and witnesses took the view that the electricity market is already sufficiently regulated by existing legislative regimes; in particular, by existing provisions under the *Competition and Consumer Act 2010* (CCA), the National Electricity Law (NEL), National Electricity Rules (NER), and the *Corporations Act 2001*. Inquiry participants suggested that these existing regulatory regimes—particularly as they apply to the financial contract and wholesale electricity markets—effectively deter and remedy the anti-competitive conduct that the bill seeks to address.[88]

2.85 For instance, AGL submitted that it 'considers that the conduct sought to be addressed by the bill is already comprehensively dealt with by the existing regime and that the new prohibitions are therefore unnecessary'.[89] Further, AGL commented that compliance with existing legislative regimes is effectively enforced by the ACCC and Australian Energy Regulator (AER), elaborating that:

> Given this comprehensive coverage of harmful and disruptive anti-competitive conduct, the only additional scope of the new prohibitions is to capture conduct that does not harm the competitive process. Accordingly, the new prohibitions—which seek to capture conduct that harms the competitive process—are unnecessary.[90]

2.86 The BCA expressed a similar view, submitting that:

> 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.[91]

2.87 EnergyAustralia concluded that, should the ACCC identify misconduct during the course of its Electricity Price Monitoring Inquiry, 'existing prohibitions and remedies in both the CCA and energy regulation are better equipped to respond to such behaviour'.[92]

2.88 In relation to the electricity financial contracts market, EnergyAustralia pointed to the misuse of market power provisions in the CCA. Energy Australia noted that:

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88 See, for example, AGL, *Submission 18*; Origin Energy, *Submission 12*; Stanwell, *Submission 22*; Business Council of Australia, *Submission 15*; CS Energy, *Submission 23*.

89 AGL, *Submission 18*, p. 31.

90 AGL, *Submission 18*, p. 31.

91 Business Council of Australia, Submission 15, p. 5.

92 EnergyAustralia, *Submission 14*, p. 3.

> While section 46 carries an additional limb that requires a court to find that the corporation has a substantial degree of market power, it is unlikely that a corporation without substantial market power could substantially lessen competition by withholding contracts.[93]

2.89 Similarly, Stanwell suggested that it is difficult to identify circumstances in which a contravention of the contract market provisions in the bill would not already be covered by existing regulation. Stanwell expressed concern that:

> As a result, the inclusion of the provision exposes generators to operation of different provisions and in the case of bidding conduct, the oversight of separate regulators for the same prohibited conduct. This creates an additional compliance burden on generators that does not produce a proven benefit to consumers but a clear cost.[94]

2.90 With regard to the wholesale electricity market, Origin Energy pointed to existing regulatory frameworks that prohibit misleading or deceptive behaviour. Origin Energy explained that:

> The Australian Consumer Law (ACL) and CCA respectively prohibit misleading or deceptive behaviour and firms that have substantial market power cannot engage in conduct that would substantially lessen competition. The National Electricity Rules (NER) also require generators to submit bids into the market that are not false or misleading, and each generator must submit a verifiable reason for any rebids and keep a record that is reviewable by the AER.[95]

2.91 Professor Harper shared the view that the 'powers already available to the ACCC under the CCA are sufficient to prosecute the misuse of market power by energy companies'. Professor Harper continued that 'singling out the energy sector for special treatment distorts the CCA by introducing provisions that over-reach and potentially lessen rather than promote competitive conduct'.[96]

Investment and consumer outcomes

2.92 Many industry stakeholders expressed concern that the bill—in particular, the contracting order and court-ordered divestiture provisions—will, if passed, have a detrimental effect on perceived sovereign and regulatory risk, and consequently deter investment in the Australian energy market. Further, a number of submitters and

93 EnergyAustralia, *Submission 14*, pp. 16–17. See also Origin Energy, *Submission 12*, p. 3; Australian Energy Council, *Submission 19*, p. 4; Business Council of Australia, *Submission 15*, p. 4.

94 Stanwell, *Submission 22*, [p. 4].

95 Origin Energy, *Submission 12*, p. 3. See also Alinta Energy, *Submission 17*, pp. 1–2.

96 Professor Ian Harper, Melbourne Business School, *Submission 29*, p. 3.

witnesses raised concerns that such an outcome could result in an upward pressure on electricity prices.[97]

2.93 For example, Origin Energy commented that it 'believes ambiguous nature of the proposed prohibitions, coupled with the severity of potential penalties, will further elevate investors' perceptions of sovereign risk and regulatory uncertainty in the Australian electricity sector'. Origin continued that this 'will ultimately lead to lower investment and higher costs for our customers'.[98]

2.94 General Electric shared this view, noting its concern that the measures in the bill have the potential to 'stifle the uptake of technology and innovation'. Highlighting the court-ordered divestiture provisions in the bill, General Electric contended that, given the risk such measures present in terms of future investment in the electricity sector, they require further consideration and consultation.[99]

2.95 Meridian Energy Australia Group (MEA Group) sought to explain how regulatory uncertainty may lead to lower investment in the Australian energy sector, submitting that:

> Anyone undertaking an energy investment must consider the possibility that any action it takes in this complex market may be determined by the ACCC, the Treasurer and/or a court to constitute prohibited conduct with the potential consequence of forced divestment or other regulatory action. These consequences could occur notwithstanding, the investor acted in good faith on their own interpretation of this complex situation. The only prudent response that an investor can take to this increased uncertainty is to increase the required return from any such investment with this leading to higher prices and or delayed investment, placing reliability at risk.[100]

2.96 The Energy Users' Association of Australia (EUAA) observed that, in order for investors to have confidence in investment decisions, they 'require clear, stable and predictable rules'. The EUAA took the view that '[t]his legislation will only lead to increased investment uncertainty and prices'.[101]

2.97 Energy Networks Australia summarised that:

> Threatening energy businesses with divestment creates sovereign risk and is likely to further unsettle investor confidence. 87 per cent of participants in the *Australian Infrastructure Investment Report 2018* said the Australian energy sector is 'full of uncertainty' right now, with political and regulatory aspects of highest concern. This uncertainty creates risk and means that

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97 See, for example, AGL, *Submission 18*; EnergyAustralia, *Submission 14*; The Australian Industry Group, *Submission 4*; Queensland Government, *Submission 9*; The Hon. Dr Craig Emerson, *Submission 1*; Meridian Energy Australia Group, *Submission 11*; ATCO, *Submission 30*.

98 Origin Energy, *Submission 12*, p. 4.

99 General Electric, *Submission 26*, p. 2.

100 Meridian Energy Australia Group, *Submission 11*, p. 2.

101 Energy Users' Association of Australia, *Submission 8*, pp. 1–2.

> investors will require a higher return on their investment if they are to invest in the market. The increased risk is not beneficial to the energy sector nor to customers.[102]

2.98 Similarly, the AEC expressed the view that:

> The mere presence of a divestment power is likely to increase the risk rating of Australia as an economy, particularly in the early years when it is unclear to observers and market participants how the ACCC and Government will utilise their new powers.[103]

2.99 Professor Harper contended that, by singling out the energy industry, the bill will distort 'the even-handed application of the CCA across the economy'. Professor Harper considered the potential impact of this on investment, commenting that:

> Anti-competitive conduct should be the focus of the CCA wherever it arises and the Act should not discriminate among sectors of the economy in this respect. To do so distorts investment decisions, promoting inefficiency and ultimately harming the interests of consumers.[104]

2.100 ENGIE was concerned that the bill would add to the compliance burden faced by energy companies, and considered it likely that increased compliance costs would be transferred to consumers.[105]

2.101 Likewise, the Electrical Trades Union of Australia (ETU) submitted that:

> The new regulatory environment imposed by the proposed Bill will undoubtably [sic] come at the expense of consumers…[T]he additional compliance and monitoring teams required to be employed to provide advice and guidance to energy entities in how to comply with such poorly drafted legislation will be an immediate overhead added to every day electricity bills.[106]

Other matters raised

2.102 Other matters raised during the course of the inquiry included consideration of the bill's application in non-NEM jurisdictions and concerns regarding the potential for privatisation of government owned corporations (GOCs).

Consideration of non-NEM jurisdictions

2.103 The provisions in the bill apply nationwide, including to areas that are not connected to the NEM, such as Western Australia's Wholesale Electricity Market

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102 Energy Networks Australia, *Submission 13*, p. 2.

103 Australian Energy Council, *Submission 19*, p. 8.

104 Professor Ian Harper, Melbourne Business School, *Submission 29*, p. 2.

105 ENGIE, *Submission 10*, p. 3.

106 Electrical Trades Union of Australia, *Submission 5*, p. 2.

(WEM). Some inquiry participants expressed the view that the proposed measures in the bill cannot be applied within non-NEM jurisdictions on a like-for-like basis.[107]

2.104 Alinta Energy took the view that 'non-NEM jurisdictions, such as Western Australia have [a] fundamentally unique market structure, market rules and overall governance and regulation'. Alinta Energy proposed that:

> …the impacts of [the bill's] obligations on the WEM must be fully understood and consulted on before any adoption or implementation can take place.[108]

2.105 The WA Government agreed with this view, commenting that:

> …the proposed reforms appear to have been developed in contemplation of particular circumstances of the electricity industry in eastern Australia, without due regard to the circumstances and impact on Western Australia's energy sector. Although not designed or intended to apply in Western Australia, implementation of the proposed reforms through this Bill would almost certainly have unintended adverse consequences in Western Australia.[109]

2.106 ATCO also commented on the application of the measures proposed in the bill in Western Australia, expressing concern that there may be unintended consequences for WEM participants and consumers. ATCO submitted that:

> …there is no indication that there has been consideration of whether any of issues or behaviours of misconduct exist in Western Australia which would require intervention to result in divestment, nor has the potential impact of the proposed amendments for Western Australia been taken into account.[110]

2.107 Similarly, the Northern Territory Government (NT Government) contended that the provisions in the bill have been drafted for the NEM—a large, interconnected and mature market with several hundred participants. The NT Government argued that:

> The Northern Territory electricity supply industry does not share these characteristics, and the potential application of the provisions contained in the Bill to the Northern Territory creates significant uncertainty.[111]

2.108 The NT Government considered that the prohibitions and remedies proposed in the bill are neither necessary nor appropriate in the context of the Northern Territory's electricity supply industry. Summarising this view, the NT Government submitted that:

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107 See, for example, Alinta Energy, *Submission 17*; Western Australian Government, *Submission 24*.

108 Alinta Energy, *Submission 17*, p. 5.

109 Western Australian Government, *Submission 24*, p. 2.

110 ATCO, *Submission 30*, p. 1.

111 Northern Territory Government, *Submission 32*, p. 1.

> In the context of the Territory's electricity supply industry, where the Territory government manages the performance of the dominant generator and retailer, sets regulated retail prices for small to medium-sized customers and is undertaking a program of electricity market reforms to reduce the cost of supplying electricity, the prohibitions and remedies in the Bill, if exercised, would supplant the role that the Territory Government plays in the Territory electricity supply industry.
>
> If the Bill is enacted, there would be no reasonable basis for the Commonwealth Government to exercise the prohibitions and remedies in the Territory as the non-interconnected nature of the Territory's electricity systems means that the market arrangements in the Territory have no implications for electricity consumers in other jurisdictions.[112]

Divestiture of Government Owned Corporations

2.109 As noted in Chapter 1, in respect of government owned corporations, the bill provides that a divestiture order would not prevent the relevant asset from being divested to another government owned corporation, provided that it is in genuine competition with the corporation subject to the divestiture order.[113]

2.110 While cognisant of the above exception, some inquiry participants expressed concern that about how it would apply in practice and, further, whether the bill creates pathways for the privatisation of public assets.[114]

2.111 Dr Emerson, for example, commented that:

> …a divestiture order would allow a government-owned corporation to dispose of assets to another government-owned corporation, but only if they are not an associated entity and if they are genuinely in competition with each other.
>
> Unless these specific conditions are met, the bill therefore requires that a forced divestiture of a government-owned electricity generator must be to a private corporation, effectively requiring the privatisation of electricity generators.[115]

2.112 The Queensland Government considered that there remains uncertainty as to how the court-ordered divestiture provisions in the bill would be practically applied to Queensland Government owned corporations (GOCs) and GOC subsidiaries. Further, the Queensland Government submitted that, '[g]iven these uncertainties, there remains a significant risk that the Bill creates pathways for the privatisation of public assets which would be unacceptable to the Queensland Government'.[116]

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112 Northern Territory Government, *Submission 32*, p. 3.

113 Proposed subsection 153ZB(3).

114 See, for example, the Hon. Dr Craig Emerson, *Submission 1*; Queensland Government, *Submission 9*.

115 The Hon. Dr Craig Emerson, *Submission 1*, p. 2–3.

116 Queensland Government, *Submission 9*, p. 3.

2.113 The Queensland Government submitted that it is unclear as to whether the exception for GOCs in the bill would apply to subsidiaries of Queensland GOCs, such as Ergon Energy and Energex. The Queensland Government continued that:

> Due to the uncertainty around this term and how it would apply in the Queensland context, there is a risk that a Divestiture Order which targets public assets owned by a subsidiary of a Queensland GOC, could be required to privatise these assets.[117]

Comments on Schedule 2

2.114 As noted in Chapter 1, in line with recommendations from the ACCC's *Retail Electricity Pricing Inquiry*, Schedule 2 provides the AER with the necessary powers—including facilitating the making of disallowable or non-disallowable legislative instruments—required for its functions to set a default market offer and reference bill.

Scope for review

2.115 Some inquiry participants expressed concern that, except where expressly provided for by regulation, legislative instruments made under the powers conferred by the bill would not be subject to disallowance.[118]

2.116 For example, AGL submitted that:

> Unlike an administrative decision, a legislative instrument applies with the force of legislation and is not amenable to merits review or traditional judicial review, save on very limited grounds.
>
> …
>
> This means that a decision made by the AER by way of legislative instrument pursuant to the power proposed to be conferred by the Bill will be (i) binding; (ii) not subject to disallowance by Parliament; and (iii) subject to very limited challenge or judicial review by a Court.[119]

2.117 EnergyAustralia commented that the legislative instrument making powers in the bill 'could give the AER unfettered power over energy retailers without the appropriate scrutiny of Parliament'.[120]

States' jurisdictional powers

2.118 Some inquiry participants also raised concerns that the powers conferred on the AER by the bill may represent an intrusion on states and territories' existing responsibilities to regulate electricity prices in price regulated jurisdictions.[121]

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117 Queensland Government, *Submission 9*, pp. 3–4.

118 See, for example, AGL, *Submission 18*; EnergyAustralia, *Submission 14*; Australian Energy Council, *Submission 19*; Western Australian Government, *Submission 24*.

119 AGL, *Submission 18*, p. 21.

120 EnergyAustralia, *Submission 14*, pp. 24–25.

121 See, for example, EnergyAustralia, *Submission 14*; Queensland Government, *Submission 9*; Western Australian Government, *Submission 24*.

2.119 The WA Government expressed the view that:

> The extent of the powers proposed for the AER (as contemplated by the Explanatory Memorandum) represents a substantial and unnecessary encroachment by the Commonwealth Government on what has to date been understood as a legislative prerogative of the States (regulation of electricity pricing) and is contrary to the spirit and intent of the Australian Energy Market Agreement.[122]

2.120 Similarly, the Queensland Government contended that the bill raises a potential conflict with price regulated regions in the state, commenting that:

> The Bill applies nation-wide, including areas that are not connected to the National Electricity Market. This would capture price regulated regions in Queensland where the Minister and Queensland Competition Authority (QCA) make price determinations.[123]

Committee view

2.121 The Australian energy market is not acting in the best interests of consumers. In recent years, energy costs have claimed an increasing share of Australian household budgets. Businesses are also suffering, with many struggling to absorb persistent price increases.

2.122 The ACCC's Retail Electricity Pricing Inquiry (REPI) identified problems across the electricity supply chain—in the retail, financial contract and wholesale markets. Indeed, the ACCC called the current situation 'unacceptable and unsustainable' and noted that energy retailers 'have also played a major role in poor outcomes for consumers'.[124]

2.123 The Australian Government is seeking to address these problems in order to strengthen competition and put downward pressure on electricity prices. The government welcomed the ACCC's report and has already taken action to implement a number of its recommendations. The government has also directed the ACCC to monitor and report on retail prices and margins, wholesale bids and conduct, and contract market liquidity in the National Electricity Market at least six-monthly until 2025. The bill is intended to support the ACCC's inquiry with appropriate remedies to address instances of market misconduct.

2.124 While the ACCC did not identify specific instances of market misconduct during the course of its Inquiry, it did recommend the introduction of market manipulation rules to prevent participant behaviour that is fraudulent, dishonest,

122 Western Australian Government, *Submission 24*, p. 4.

123 Queensland Government, *Submission 9*, p. 6.

124 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, pp. iv–v.

misleading or in bad faith, or that is undertaken with the intent of distorting or manipulating prices (including reported prices).[125] The ACCC also noted that:

> Any market manipulation rule would need to be supported by stronger information, investigation and enforcement powers for the AER. As noted in the Preliminary Report, an investigation of market manipulation requires the assessment of the bidding conduct (and the reasons for bidding behaviour) of specific individuals within a generation business. It is therefore important that the AER can access relevant information to make this assessment.[126]

2.125 Given the potential for serious detriment to consumers, the committee considers it prudent for the government to empower the ACCC and the AER to monitor retail, financial contract and wholesale energy markets to identify and, if necessary, to address anti-competitive conduct and market manipulation.

2.126 The committee notes that the ACCC did identify significant issues with regard to vertical integration and the potential for market manipulation. In particular, the committee points to the ACCC's concern that the combination of vertical integration and market concentration:

> …reduces the likelihood that vertical integration is enhancing competition in these markets. Vertical integration reduces contract market activity, which makes it harder for other retailers to manage their wholesale price risk. The lack of liquidity in contract markets has the potential to become a barrier to entry and expansion for retailers in the NEM (and is already operating as such a barrier in South Australia).[127]

2.127 The committee also reiterates evidence received from Mr McConnell that there is presently a clear issue with market concentration and market power in the NEM, with metrics demonstrating high levels of concentration by both domestic and international standards.[128]

2.128 The committee notes concerns raised by stakeholders regarding the clarity of concepts proposed in the bill, in particular, those that set out what constitutes prohibited conduct in relation to retail pricing and the electricity spot market. However, the committee highlights that many of these concepts have established legal meaning and/or were drawn from existing market law;[129] as such, the committee suggests that these concerns are overstated. Further, the committee notes that

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125 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, pp. 96–97

126 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, pp. 97–98.

127 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, June 2018, p. 131.

128 Mr Dylan McConnell, Climate & Energy College, University of Melbourne, *Submission 28*, pp. 2–3.

129 Mr Hamish McDonald, Treasury, *Committee Hansard*, 6 February 2019, pp. 65–66.

opposition to the prohibited conduct provisions proposed in the bill throughout this inquiry has come principally from parties with a vested interest in electricity markets.

2.129 The committee acknowledges stakeholder concerns regarding the severity of the contracting and court-ordered divestiture powers proposed by the bill, as well as the risks that such regulatory powers present with regard to investor confidence in the sector. The committee does not seek to dispel these concerns as illegitimate. Indeed, the committee recognises that contracting and divestiture orders are measures that the government would hope it never has cause to use.

2.130 The committee stresses that these remedies—in particular, court-ordered divestiture—would only be sought as a remedy of last resort in response to the most egregious forms of misconduct. Further, the committee reiterates that the remedies proposed in the bill are graduated and, in circumstances where the ACCC did identify evidence of misconduct, a corporation would be given opportunity to respond and address the conduct in question. Moreover, as clearly stated by Mr Hamish McDonald of Treasury:

> The legislation is designed to prohibit behaviour that you wouldn't expect to be occurring in a well-functioning market. The legislation also provides for a strong process and decision-making framework around any remedies.[130]

2.131 The committee rejects the assertion from multiple stakeholders that this legislation represents an unprecedented government intervention into the market. Similar or equivalent legislative powers have operated for many years in other jurisdictions, including in the United Kingdom, the United States, and the European Union.

2.132 While some stakeholders raised concerns in relation to Schedule 2, the committee notes that the bill does not seek to implement a default market offer or reference bill. These important reforms recommended by the ACCC are being implemented by the government through other legislation. While the bill does not enact these reforms, it does support their implementation by enhancing the quality of information available to the AER, improving its ability to make appropriate decisions and accurately report in the future. The bill does not preclude the government from undertaking further consultation, including with relevant Council of Australian Governments (COAG) members and industry, on the design and implementation of these mechanisms. The committee agrees with the comments from the Grattan Institute on this matter:

> The case for these mechanisms, the design of the default offer and reference bill, and other related recommendations by the ACCC regarding the retail market are not the subject of the Bill. The Bill proposes that these recommendations could be implemented through a mandatory industry code.[131]

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130 Mr Hamish McDonald, Treasury, *Committee Hansard*, 6 February 2019, p. 66.

131 Grattan Institute, *Submission 2*, p. 8. See also Mr James O'Toole, Department of the Environment and Energy, *Committee Hansard*, 6 February 2019, p. 69.

2.133 In summary, the committee is confident that the legislative framework set out in the bill reflects consumer expectations of acceptable conduct across the electricity market. The committee agrees with the sentiment expressed by COSBOA in its submission to this inquiry that:

> …it is astonishing that Australians, who are living in a country with the most abundant energy resources in the world, are now paying the highest prices in the world for electricity.[132]

2.134 The government has an obligation to Australian households and small businesses to ensure that the electricity sector operates in a well-functioning, competitive market. A robust regulatory framework that provides powerful disincentives to engage in anti-competitive conduct, as contained in this bill, is one important element of the government's efforts to lower energy prices for the benefit of consumers.

Recommendation 1

2.135 The committee recommends that the bill be passed.

Senator Jane Hume
Chair

132 Council of Small Business Organisations Australia, *Submission 20*, p. 2.

Dissenting report from Labor Senators

1.1 Labor Senators oppose this bill. It is unprecedented legislation that cuts across decades of work to harmonise competition policy across the economy. It is also likely that this legislation will drive down investment in the energy sector and drive up electricity prices. Furthermore, the bill claims to address market misconduct when there is very little evidence to support the scale of intervention set out in this bill. Finally, the policy development process for this bill has been rushed, a sign that this bill is more about politics than good policy.

1.2 There are a myriad of problems with this bill. Labor Senators will confine the comments to a narrower set of concerns, set out below:

(a) Rushed policy development process.

(b) Government abandonment of the NEG.

(c) Stakeholder calls for the integration of climate and energy policy.

(d) This legislation does not seek to address a considerable number of recommendations in the ACCC report.

(e) The bill will likely drive down investment and drive up electricity prices.

(f) Privatisation.

(g) Deterioration of Federal-State relations.

(h) Constitutionality.

(i) Duplicative nature of the legislation, the difficulty of complying with the legislation, procedural fairness and court determinations.

(j) Unprecedented divestment powers.

(k) Schedule 2—AER Powers added with no prior consultation.

Rushed policy development process

1.3 Stakeholders from across the spectrum criticised the rushed nature of the policy development process and the limited ability for stakeholders to make contributions to the draft legislation. As stated by the Business Council of Australia (BCA):

> 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.[1]

1.4 Origin Energy set out that consultation on the bill had been limited to days and weeks, compared to other reforms that typically take well over a year:

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1 Mr Adam Boyton, Chief Economist, Business Council of Australia, *Committee Hansard*, 6 February 2019, pp. 13–14.

Senator KETTER: Take us through the details of the consultation process involving your company and the preparation of this bill.

Mr Calabria: I will also take on notice the specific dates. Following a high-level consultation paper, the first draft legislation came out. That was the first thing that came out, and we made a submission to that high-level paper. My recollection is that there were a couple of weeks; it was about a two-week process followed by the first draft of the legislation, which we were given three days to responded to. Then the second draft of the legislation was released into parliament on the same day we would have received it or, if not, we would have got it immediately prior. That second draft was accompanied by a 100-plus page explanatory memorandum, and it had substantially changed at that point. So it was a very short and inadequate process of consultation.

Senator KETTER: How does that compare with other consultation processes you've been involved with?

Mr Calabria: If we go back to the last review that's been undertaken, the ACCC review was a process that took well in excess of 12 months of ongoing submissions and dialogue between the ACCC and organisations, so it was orders of magnitude less in time and the process was certainly not anywhere near as thorough. I should be clear, we certainly had conversations with the energy minister and I had conversations with the Treasurer on the way through, but, as it relates to having the experts engaging in the drafting of legislation and understanding the workings of that, it was a very short process indeed.[2]

1.5 The Energy Security Board (ESB) indicated that it only saw this legislation when it was introduced into the Parliament:

Senator KETTER: When it comes to orderly development of policy, I'm interested in your views about this bill, how it was put together, the degree of consultation that occurred and the ability for participants to contribute to the outcome. How does the development of this legislation compare to what you might describe as typical or normal development which is commensurate with the significance of this sector?

Dr Schott: It was developed very rapidly, as is well known, and the consultation that occurred on the bill was limited to a small group of participants. That's all I know about it.

…

Senator KETTER: So you saw the draft at the same time as other stakeholders.

Dr Schott: At the same time that it was publically available.

Senator KETTER: And since that time are you telling me that you haven't had the opportunity to provide feedback on that?

2 Mr Frank Calabria, Chief Executive Officer, Origin Energy, *Committee Hansard*, 5 February 2019, p. 31.

> **Dr Schott:** Yes. While I've certainly had the opportunity to provide feedback, it hasn't been asked for, and I haven't given it. I should clarify that I'm speaking for the Energy Security Board. The market bodies themselves, as separate institutions, may have been involved earlier in consultation.[3]

1.6 Even the government's own Office of Best Practice Regulation found that the process was rushed:

> In particular, the consultation process was not broad-based, and was rushed.[4]

Government abandonment of the National Energy Guarantee

1.7 Stakeholders were very disappointed that the government had walked away from the National Energy Guarantee (NEG) and instead were promoting this legislation as a key plank in their energy policy.

1.8 The Australian Chamber of Commerce and Industry (ACCI) set out that:

> We were the last business organisation of the major business organisations to be convinced of the value of the NEG. We came over the line strongly, and we still believe that that mechanism was the best mechanism—with the addition of most of the ACCC's recommendations. To have a strong NEG—that's still our position.[5]

1.9 The BCA and the Australian Industry Group (Ai Group) concurred:

> **Mr Boyton:** The Business Council was on record as supporting the NEG quite strongly.
>
> **Mr Reed:** Ai Group also supports the NEG. We are glad that the reliability component of the NEG was agreed by the federal government and the states and territories in December last year. The emissions reduction component of it remains, we think, the best option for a stable, durable, credible approach to integrating emissions and energy policy.[6]

1.10 The Energy Users' Association of Australia (EUAA) agreed that the government's abandoning of the NEG did not help to lower power prices:

> **Senator KETTER:** Let's be blunt about it, Mr Richards: isn't the government's intransigence on the NEG costing your members money?

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3 Dr Kerry Schott AO, Chair, Energy Security Board, *Committee Hansard*, 5 February 2019, pp. 6 and 8.

4 Office of Best Practice Regulation, *Regulation Impact Statement – Second-Pass Final Assessment – Prohibiting Energy Market Misconduct*, 4 December 2018, https://ris.pmc.gov.au/sites/default/files/posts/2018/12/6_obpr_assessment_letter_pdf.pdf (accessed 15 March 2019).

5 Ms Jenny Lambert, Acting Director, Economics and Industry Policy, Australian Chamber of Commerce and Industry, *Committee Hansard*, 6 February 2019, p. 19.

6 *Committee Hansard*, 6 February 2019, pp. 19–20.

Mr Richards: We were very disappointed that the NEG went down, very disappointed.

Senator KETTER: But it's costing your members money though, isn't it?

Mr Richards: It's certainly not helping to lower prices, the current situation, no.[7]

Stakeholder calls for the integration of climate and energy policy

1.11 The ESB acknowledged that this bill fails to address a key concern in the electricity sector currently, which is the integration of climate and energy policy:

Senator McALLISTER: Thanks. I wanted to come back to the heart of the challenge for electricity system transformation. Dr Schott, in your opening statement you indicated that the purpose of the ESB originally was to implement the findings and the recommendations of the Finkel review. There was one very important recommendation from Dr Finkel that related to creating some integrated mechanism to deal with climate and energy policy and the way that those two policy settings work together. It's fair to say that that challenge has not yet been resolved—that's correct?

Dr Schott: Yes.

Senator McALLISTER: One consequence of that is a level of uncertainty in the investment environment for new generation capacity?

Dr Schott: Yes, that's correct.

Senator McALLISTER: That's kind of a standing and background concern which this legislation doesn't address?

Dr Schott: No.[8]

1.12 Ai Group also indicated that uncertainty in both energy and climate policy had detrimental impacts on investment in this sector:

So there are many answers to these challenges—from new generation, demand response, more gas, more competition for the flexible role that gas plays in the electricity system. Fundamentally, all of these solutions require new investment and reinvestment on the supply and the demand sides of the electricity system. I think you probably heard this figure yesterday but the CSIRO and the Energy Networks Association's *Electricity network transformation roadmap* estimates that Australia will need a cumulative total of more than $400 billion of investment in inflation-adjusted terms in centralised generation, as well as a lot of investment in decentralised and other parts of the system, over the years to 2050, and, after a very tumultuous decade of energy and climate policy, we desperately need to

7 Mr Andrew Richards, Chief Executive Officer, Energy Users' Association of Australia, *Committee Hansard*, 6 February 2019, p. 55.

8 Dr Kerry Schott AO, Chair, Energy Security Board, *Committee Hansard*, 5 February 2019, p. 9.

> rebuild a stable investment environment if we're going to get the investment we need when we need it.[9]

This legislation does not seek to address a considerable number of recommendations in the ACCC report

1.13 Fifty-six recommendations were set out in the ACCC report *Restoring electricity affordability & Australia's competitive advantage*. Almost all stakeholders supported the implementation of these recommendations. The committee, however, heard considerable evidence that this legislation is not a genuine effort to implement these recommendations. The evidence received is that this legislation aims to implement at most five recommendations and could be considered a bizarre 'insurance policy' for misconduct which might occur in the future, against a backdrop of very limited evidence of misconduct historically.

1.14 Energy Consumers Australia (ECA) stated that only a few recommendations were picked up on:

> **Senator KETTER:** How many of the ACCC's 56 recommendations are picked up by this bill, do you think?
>
> **Ms Gallagher:** A number enable the interventions around the market offer. There are probably about four or five that I could point to, Senator. If you would like me to take them on notice, I'm happy to respond in that way. But you can go to their recommendations around spot market monitoring. Again, the bill is not only about investment; it is also about price monitoring. If you look at transparency in price monitoring, I think you can draw a direct line between a number of recommendations.[10]

1.15 The Grattan Institute indicated that this bill might only pick up two major recommendations from the report:

> **Senator McALLISTER:** Mr Wood, can I just clarify that. That's quite helpful analysis, but it refers to the ACCC measures, and in fact the very odd thing is that this bill does not contain measures recommended by the ACCC; it contains a whole range of other measures for which there is no analysis, merely the analysis in the explanatory memorandum. That's correct, isn't it?
>
> **Mr Wood:** I tend to agree with that. That's why I said the best we can say is that, if you link at least two of the three misconducts in this bill to the relevant pieces in the ACCC, the best one can do is to identify that level of saving which is relatively small.[11]

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9 Mr Tennant Reed, Principal National Adviser, Public Policy, Australian Industry Group, *Committee Hansard*, 6 February 2019, p. 13.

10 Ms Lynne Gallagher, Director, Research, Energy Consumers Australia, *Committee Hansard*, 5 February 2019, p. 52.

11 Mr Tony Wood, Energy Program Director, Grattan Institute, *Committee Hansard*, 6 February 2019, p. 5.

1.16 EnergyAustralia indicated that by the government pursuing this legislation, it was leaving most of the savings linked to the ACCC still on the table:

> **Senator KETTER:** How many of those government decisions that led to the 70 per cent of the ACCC's savings are to be found in this bill?
>
> **Ms Tanna:** None.[12]

1.17 Finally, ECA argued that the bill was trying to provide additional protection or insurance in terms of energy prices, despite the considerable problems in the electricity sector already being well understood with little action by the government to address them:

> **Senator KETTER:** Isn't that essentially saying that this bill doesn't address the current issues that are besetting the industry in terms of the impact on electricity prices like policy uncertainty, other investment in networks and other things which we canvassed today—that this bill doesn't address any of those underlying issues?
>
> **Ms Gallagher:** What I am saying is that there are 56 recommendations, including Rod Sims's recommendation on the NEG—and we can go to emissions and the integration of climate policy—and what we've also got is plus one. Not one of those 56 recommendations will of itself deliver the 20 to 25 per cent reduction in the package that Rod Sims has promised. But, in our view, this is another insurance or protection policy that secures those benefits into the future.[13]

1.18 In terms of the evidence base for misconduct in this sector, both the ESB and the Institute of Public Affairs (IPA) believe that there is a limited evidence base for misconduct in this sector. The ESB commented that:

> **Senator KETTER:** …you haven't mentioned anything to do with market misconduct, which is what the government would suggest is the single biggest issue that this legislation is framed to address. Is that correct?
>
> **Dr Schott:** I haven't mentioned it because I think the two major drivers were the two matters that I've mentioned. I think the government would recognise that also.[14]

1.19 The IPA told the committee that:

> …the evidentiary basis supporting the proposed interventions are relatively weak. Both the explanatory memorandum and accompanying regulation impact statement failed to provide any direct evidence to support the claims underpinning the proposed interventions. For example, it is variously claimed that energy retailers are engaging in behaviour which is harmful to

12 Ms Catherine Tanna, Managing Director, EnergyAustralia, *Committee Hansard*, 6 February 2019, p. 31.

13 Ms Lynne Gallagher, Director, Research, Energy Consumers Australia, *Committee Hansard*, 5 February 2019, pp. 51–52.

14 Dr Kerry Schott AO, Chair, Energy Security Board, *Committee Hansard*, 5 February 2019, p. 5.

> consumers. It can result in consumers being confused about pricing arrangements and are generally anti-competitive. However, there's no direct evidence to support these claims; they're only hypothetical examples.[15]

1.20 There is also no conclusive evidence that misconduct in this sector is any greater than in other parts of the economy.

The bill will likely drive down investment and drive up electricity prices

1.21 Stakeholders from across the sector expressed concerns that the bill would impede new investment in the energy sector, in an environment where there is currently underinvestment. Many stakeholders expect that this lack of investment would then drive up electricity prices in the longer term.

1.22 The ESB expressed concerns that the legislation might lower investment in the sector, not increase it:

> It just seems to me that the instruments in this legislation run the risk of having consequences which undermine your ability to achieve those objectives. To the extent that this legislation, for instance, makes it difficult to attract new investment and fund new investment in the capacity that the power system needs—that's one example—that may not be the most useful thing.
>
> …
>
> The reality is that we deal in uncertainties and risks all the time. I think I, and perhaps Dr Schott, have been fairly clear that there is a significant risk that this legislation could affect the ability or willingness of people to invest in the sector, not just because of this legislation but because of other things. One of the things the system really needs at the moment is new investment in the capacity the system needs, the sort of capacity that could assist with the transition that's going on at the moment.[16]

1.23 The Hon. Dr Craig Emerson expressed concerns that while the legalisation might decrease electricity prices temporarily, the end result of this bill would be higher electricity prices:

> The final point I'd make is: it may be considered that this is a bill that could be effective in the short term in reducing electricity prices. That's obviously what the government is saying—that the big-stick legislation will force electricity prices down. I don't know the effect of that if it were introduced in the next three or four months, but I do know, based on this analysis and a review of the bill, that it certainly would force electricity prices up in the

15 Mr Daniel Wild, Director of Economics, The Institute of Public Affairs, *Committee Hansard*, 6 February 2019, p. 2.

16 Mr John Pierce AO, Chairman of the Australian Energy Market Commission, Energy Security Board, *Committee Hansard*, 5 February 2019, pp. 3 and 10.

> future, simply because there'll be less investment, less innovation and less competition in the sector.[17]

1.24 AGL expect that this bill would degrade the investment environment and hinder energy affordability:

> But while progress is being made this bill risks deterring investment, exerting upward pressure on prices and impacting system security. It will degrade the investment environment in the National Electricity Market and further undermine the investment certainty so necessary to refresh the generation fleet to improve energy affordability and reliability.[18]

1.25 The BCA made it clear that it believed that the bill would discourage investment and would likely not reduce electricity prices:

> By adding to sovereign risk and interfering in market outcomes, the bill will discourage investment, and is unlikely to increase competition or reduce prices for consumers.[19]

1.26 The EUAA, a major stakeholder which would stand to benefit from lower energy prices, indicated that the legislation would increase investment uncertainty and that even higher energy prices would result:

> The investment uncertainty that passing the proposed legislation could create will only increase the risks faced by the electricity supply chain, and we can go into this more deeply as one of the key policy areas we work on. It's a risk that will inevitably be passed on to our members in the form of even higher prices, which will in turn have negative impacts on our members' businesses.[20]

1.27 The Law Council of Australia expressed concern that the retail price control provisions in the legislation could hinder investment in an environment where there is already underinvestment in the sector:

> We would, just at a level of principle, endorse that and say that if you are going to engage in retail price regulation you need to be very careful about it because of its fundamental impacts on investment and in the circumstances where the underlying issue that we're facing is of course underinvestment.[21]

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17 The Hon. Dr Craig Emerson, Private Capacity, *Committee Hansard*, 5 February 2019, pp. 14–15.

18 Mr Brett Redman, Chief Executive Officer and Managing Director, AGL Energy, *Committee Hansard*, 5 February 2019, pp. 20–21.

19 Mr Adam Boyton, Chief Economist, Business Council of Australia, *Committee Hansard*, 6 February 2019, p. 12.

20 Mr Andrew Richards, Chief Executive Officer, Energy Users' Association of Australia, *Committee Hansard*, 6 February 2019, p. 52.

21 Mr Geoff Carter, Competition and Consumer Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 6 February 2019, p. 60.

Privatisation

1.28 The Hon. Dr Craig Emerson set out that unless a government owned corporation is in genuine competition with another government owned corporation, privatisation could well occur:

> In respect of a government-owned electricity generator that is subject to forced divestiture, the government-owned corporation can divest to another government-owned corporation if it is genuinely in competition with the corporation subject to the divestiture order.
>
> This means that a divestiture order would allow a government-owned corporation to dispose of assets to another government-owned corporation, but only if they are not an associated entity and if they are genuinely in competition with each other.
>
> Unless these specific conditions are met, the bill therefore requires that a forced divestiture of a government-owned electricity generator must be to a private corporation, effectively requiring the privatisation of electricity generators.[22]

1.29 The Queensland Government also set out this concern as one of three possible pathways under which privatisation could occur:

> In this context, the meaning of genuine competition is not defined and it is unclear how this would be assessed. There are a number of different definitions and considerations at law for understanding whether two parties are in competition, and the Bill does not provide clarity on how this would be applied. It is also unclear how a newly formed entity would be considered in this context.[23]

1.30 Two other pathways set out by the Queensland Government include organisations that are not 'State Authorities' but hold public assets (in the case of Queensland, examples include Energex and Ergon Energy) and the State Government electing to proceed with privatisation under a divestiture order:

> The exception for State Authorities in the legislation appears to apply to Queensland GOCs [government owned corporation], but it is unclear, based on the definition of a State Authority in the *Competition and Consumer Act 2010* Section (4)1, whether this exception would apply to a subsidiary of these organisations, such as Ergon Energy and Energex.
>
> Due to the uncertainty around this term and how it would apply in the Queensland context, there is a risk that a Divestiture Order which targets public assets owned by a subsidiary of a Queensland GOC, could be required to privatise these assets.
>
> …
>
> However, there does not appear to be any restrictions applied to prevent selling these assets to the private sector. As such, the State Authority

22 The Hon. Dr Craig Emerson, *Submission 1*, pp. 2–3.

23 Queensland Government, *Submission 9*, p. 4.

> subject to the Divestiture Order could dispose of assets to the private sector. This privatisation would be directly prompted by Commonwealth action rather than by the state government as shareholder and would need to be completed in line with the terms of the Divestiture Order, diminishing the likelihood of achieving the maximum value for that asset.[24]

Deterioration of Federal-State relations

1.31 In proceeding with this rushed legislation in the way that it has, the Federal Government has not kept to the Australian Energy Market Agreement (AEMA) agreed to by the Federal Government and all states and territories.

1.32 The Western Australian Government sets out in its submission that:

> The process by which these proposed reforms were developed, in haste and without proper consultation with the Council of Australian Governments (COAG) Energy Council members, was fundamentally flawed.
>
> …
>
> The proposed reforms also do not have the support of COAG Energy Council members, industry or the institutions governing the electricity industry in Australia.[25]

1.33 The Queensland Government also set out similar concerns, and also sets out that it did not receive a copy of the legislation when it made two separate requests:

> The consultation process conducted by the Commonwealth Government for this Bill has been entirely inadequate, bypassing important discussions with the states and territories that are responsible for shared governance of the electricity market and will be directly impacted by the proposed legislation.
>
> There has been no consultation with Queensland and as a result, the legislation reflects a lack of understanding of Queensland's unique circumstances. In particular, I requested a copy of the legislation from the Commonwealth Treasurer on two separate occasions prior to it being introduced to Federal Parliament on 5 December 2018. The Queensland Government received no response to these requests despite media reports indicating that the legislation had been leaked and a limited circulation copy was being distributed to certain stakeholders.
>
> This lack of engagement is unacceptable given the significance of the legislation for the electricity sector, as well as Queensland's role in the Council of Australian Governments (COAG) Energy Council, and position as owner of substantial electricity generation assets.
>
> This process has not been conducted in the spirit of the Australian Energy Market Agreement (AEMA), an intergovernmental agreement between states, territories and the Commonwealth Government that sets out the governance arrangements for Australia's energy markets. Under this agreement, jurisdictions and the Commonwealth should be working

24 Queensland Government, *Submission 9*, pp. 3 and 5.

25 Western Australian Government, *Submission 24*, p. 2.

> together to provide oversight and coordination of energy policy development to ensure effective integration.[26]

1.34 The ESB was also agreed that COAG processes were not followed and that cooperation across the jurisdictions was preferable:

> **Senator KETTER:** The vast majority of submitters to the inquiry agree with that assessment. I want to move to a broader issue, which is the impact of this bill on federal-state relations. For example, AGL in their submission said:
>
> *The Bill was introduced without COAG consultation or agreement…*
>
> And the Queensland government said:
>
> *This process has not been conducted in the spirit of the Australian Energy Market Agreement…*
>
> Would you agree with those views?
>
> **Dr Schott:** I would agree insofar as I was in the COAG council and knew what was discussed, yes.
>
> **Senator KETTER:** Are you familiar with the Australian Energy Market Agreement?
>
> **Dr Schott:** Yes.
>
> **Senator KETTER:** Clause 6.7 says:
>
> *A Party will not take any action that would limit, vary or alter the effect, scope or operation of the Australian Energy Market Legislation without the agreement of the MCE.*
>
> Clause 6.8 talks about requiring unanimous agreement of the MCE in certain circumstances. Do you think the Commonwealth is in breach of the AEMA?
>
> **Dr Schott:** Senator, I'm not a lawyer, but, as John mentioned previously, the general spirit of the energy market does need to be one of cooperation across the jurisdictions.[27]

Constitutionality

1.35 Concerns remain that the forced contracting and divestment provisions in the legislation may still breach the constitution and could be open to court challenge, despite some improvement in the drafting between the Exposure Draft and the version introduced into Parliament:

1.36 The Australian Energy Council (AEC) set out that constitutional concerns remained:

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26 Queensland Government, *Submission 9*, p. 1.

27 Dr Kerry Schott AO, Chair, Energy Security Board, *Committee Hansard*, 5 February 2019, pp. 6–7.

> The Bill as tabled in the House of Representatives on 5 December 2018 remedies some of the issues raised by the AEC at the Exposure Draft stage. In particular, the AEC notes that the Government has acknowledged that the Exposure Draft sought to grant the Treasurer divestiture powers that were judicial in nature and therefore unconstitutional. However, not all constitutional issues have been addressed and there remain significant questions regarding the interpretation and operation of the Bill, together with concerns about the impact it will have on the energy market and consumers.[28]

1.37 The BCA set out a similar view:

> **Senator KETTER:** I might just have a follow-up on that firstly. Ms Collyer, you talked about the duplicative nature of the provisions of the bill in terms of competition. Do you have a comment about the constitutionality of the divestment and the contracting powers in the context of this bill? Does that add an extra level of uncertainty as well?
>
> **Ms Collyer:** The change that was made to the bill to introduce a court process in relation to divestiture went a long way in addressing potential constitutional concerns. I'm aware that there remain existing concerns. We haven't focused on that in our advice to the BCA. We've been focused on the substance of the bill.
>
> **Senator KETTER:** So there is a possibility that there still remains some constitutional issues?
>
> **Ms Collyer:** Yes.[29]

1.38 The Law Council of Australia also expressed concern and called for consultation with the Solicitor-General:

> My committee has not had sufficient time to fully consider the constitutional issues. We have not put in a submission between the exposure draft in the current bill and there has been a significant change in relation to the divestiture power in that it is now ultimately exercisable by a court that may bear on that. So, all I really want to say on this is that my members did and do have significant concerns that powers exercised by the Treasurer may raise issues about acquisitions other than on just terms, and also potentially in relation to interference with state rights. We would simply say that if we are going to proceed with new and novel remedies we would expect that the Solicitor-General would be consulted and would be providing advice as to the constitutionality of those arrangements.[30]

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28 Australian Energy Council, *Submission 19*, p. 2.

29 Ms Anna Collyer, Partner, Allens law firm in its capacity as external legal adviser to the Business Council of Australia, *Committee Hansard*, 6 February 2019, pp. 17– 18.

30 Mr Geoff Carter, Competition and Consumer Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 6 February 2019, p. 61.

Duplicative nature of the legislation, the difficulty of complying with the legislation, procedural fairness and court determinations

1.39 Many stakeholders noted that the types of misconduct set out in the legislation appear to duplicate existing rules and add another layer of uncertainty in the regulation of the energy sector. Many terms included in this legislation are new concepts which stakeholders claim will make it difficult to determine whether they are complying with this proposed legislation or not. Finally, some experts also set out the likely scenario that it will also take approximately ten years for the courts to interpret the legislation and provide guidance to the industry. In the meantime, many claimed that industry participants will err on the side of conservatism, which would likely result in reduced investment in the sector and put upwards pressure on electricity prices.

1.40 Origin Energy set out its position on the duplicative nature of parts of the legislation:

> Further, the prohibitions relating to the wholesale spot and contract markets duplicate existing rules and create uncertainty for the energy sector.[31]

1.41 The BCA set out a similar position:

> The prohibited conduct does not appear to address the problems sought to be solves. 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 proposed duplicative and radically expansive regulation with no detailed policy support.[32]

1.42 The Law Council of Australia also argued in favour of using existing measures, even if some need to be improved as set out in the ACCC report:

> **Senator KETTER:** The Business Council of Australia has told us about the duplicative nature of this bill, because there are a range of protections out there already. In their submission they talked about the National Electricity Rules, they talked about section 46 of the CCA and they talked about section 21 of the Australian Consumer Law, about unconscionable conduct, and about section 18 as well, which talks about misleading and deceptive conduct. They're saying that there is already a suite of measures available. What's your view about the existing suite of measures? Are they deficient in any way? Are they being used?
>
> **Mr Carter:** I can answer that question quite clearly. They're very powerful remedies. They're not deficient, in the committee's view, to address the types of misconduct which this bill indicates it is targeting. That is not to say that we think the existing provisions that you've outlined are sufficient to address the underlying problems which the ACCC has identified in its

31 Mr Frank Calabria, Chief Executive Officer, Origin Energy, *Committee Hansard*, 5 February 2019, p. 29.

32 Business Council of Australia, *Submission 15*, p. 2.

> retail inquiry report about the functioning of the National Electricity Market.[33]

1.43 The ESB also set out concerns that new concepts introduced in this legislation would be difficult for market participants to interpret and follow:

> **Mr Pierce:** …The second point we raised—and I think this is really a reflection of our experience in doing the legal drafting of rules. I'm not a lawyer, but the advice from our lawyers was that some of the terminology would be difficult for the compliance parts of the energy companies to interpret and manage, and that some of the terms are quite ill-defined and, on occasion, in the eye of the beholder rather than necessarily being able to be objectively tested.
>
> **Senator KETTER:** What's the consequence if the operators can't safely interpret the sanctions against them?
>
> **Mr Pierce:** I think it's like any group of people: if the rules under which they operate are vague, it tends to cause people to be very cautious and perhaps not do anything.[34]

1.44 Ai Group had a similar position:

> We fear that the bill before you is, unfortunately, unintentionally likely to achieve the opposite. It raises the prospect that participants in the electricity market will be subject to potentially severe threats and penalties for violating quite vaguely defined prohibitions. Investors would have to ask themselves why they should put money into assets that may be taken from them for reasons that they may not be able to predict.[35]

1.45 EnergyAustralia set out one case example to demonstrate the potential problems with the operation of the bill:

> What we thought would be helpful, in terms of what this means in day-to-day operations, is to try to provide an example of the uncertainty that it provides for us when we're making decisions in the market. A case study or an example we've unfortunately had recently was around our asset in New South Wales, Mount Piper power station, where we really faced significant uncertainty around the fuel supply. We had a single-mine supply and they have planning issues in relation to that mine. All of the other mines that we looked to contract coal from had not received planning approval, so we were effectively down to one, and there was a binary outcome as to whether or not we were going to continue to have coal supply or not. So, when we have a hedging decision of forward contracting, you're forming a view of: will you actually have energy to generate that you are actually hedging the

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33 Mr Geoff Carter, Competition and Consumer Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 6 February 2019, pp. 60–61.

34 Mr John Pierce AO, Chairman of the Australian Energy Market Commission, Energy Security Board, *Committee Hansard*, 5 February 2019, p. 8.

35 Mr Tennant Reed, Principal National Adviser, Public Policy, *Committee Hansard*, 6 February 2019, pp. 13–14.

> revenues for or not? And we took decisions which were around: we need to assess that risk and manage how much we're forward selling as a function of that exposure. This bill would introduce great uncertainty into what the right thing to do there is in terms of ensuring that you're compliant with the bill, because that does have an impact of lessening the supply of contracts into the market. We've done it for a very good reason, in terms of: we're not sure we're going to have the power to generate. But could there be a case where there is a reasonable belief that that's been done to reduce competition? I'd say: quite possibly. And, therefore, what should we do? So, when we look at those scenarios, it creates another layer of uncertainty about: what are the right decisions to make in this market? And that's one of our key challenges.[36]

1.46 The Law Council of Australia also agreed that key terms in the legislation were vague and ill-defined:

> The key central elements are things which are vaguely defined, which don't have clear meanings known to the law, if I might put it that way, or, indeed, it would seem, based on the submissions and the views of my members, reflecting known approaches or practices or concepts from the industry in question, and that is of real concern. We do, as a committee, think that, as to the elements of the bill, for example, on retail pricing, like failure to make 'reasonable adjustments' to 'reflect sustained and substantial reductions' in the 'underlying cost of procuring electricity', it is very difficult to say what 'reasonable' means in that context and very difficult to say what 'sustained' or 'substantial' means. As to the 'underlying cost of procuring electricity', one only has to look at the explanatory memorandum to see how complex that question could be, and yet this is going to be the foundation of a penal prohibition that, as I understand it, can attract, potentially, tens if not hundreds of millions of dollars in penalties.[37]

1.47 Many stakeholders also set out their view that the bill lacks procedural fairness.

1.48 AGL stated that:

> **Senator KETTER:** Would you still say that this bill lacks procedural fairness and is contrary to the rule of law?
>
> **Mr Redman:** I think it does lack procedural fairness. It is set up in a way that creates an awful lot of judgement in the way that it is written. It makes it very difficult for us to argue if somebody forms the view that perhaps we haven't passed on costs or we haven't operated in accordance with the way

36 Mr Ross Edwards, Head of Trading, Energy, EnergyAustralia, *Committee Hansard*, 6 February 2019, p. 31.

37 Mr Geoff Carter, Competition and Consumer Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 6 February 2019, pp. 63–64.

> that the rules are written. It is not clear how courts will interpret judgement that is made on it.[38]

1.49 The Law Council of Australia set out concerns about procedural fairness for contracting orders and divestiture powers:

> Our committee's most significant concerns are around the Treasurer's contracting orders and the divestiture power. As things that should even be contemplated, whether by a court or on the order of the Treasurer, if they are going to be pursued—and we're getting into territories not covered by our written submissions—they are the sorts of things that, at the very least, should be things that are only able to be ordered by a court or are decisions of any government minister or regulator that is subject to full merits review by the courts. This is because they are so consequential not simply for the entity concerned—and this is a really critical point—but because there is a net public benefit test involved and because we need to make sure that the interests of consumers are protected and we don't have unintended negative consequences for consumers.[39]

1.50 The Queensland Law Society (QLS) set out procedural fairness concerns regarding section 153J of the legislation:

> We are concerned that the wording of this proposed section is not consistent with principles of procedural fairness particularly with respect to requirements for probative evidence and clarity about the case a party is required to meet. Proposals which seek to alter legal or evidentiary threshold tests require significant and evidence based consideration and stakeholder consultation.[40]

1.51 Finally, the nature of new concepts and definitions raises the likelihood that it could take up to a decade for the courts to interpret the legislation. The Hon. Dr Craig Emerson set out that:

> The sort of provision that creates can be illustrated by a provision that is already in the Competition and Consumer Act, and it's actually the pivotal provision, which says, 'A corporation with a substantial degree of power in a market shall not take advantage of that market power for the purpose, effect or likely effect of substantially lessening competition.' Why is this relevant? It is because the various terms that I just read out there have been the subject of litigation for over at least a decade—for example, what constitutes a substantial degree of power in a market, what does 'take advantage' mean, what does the 'purpose test' mean, what does the new 'effect or likely effect test' mean, and what does 'substantially lessening competition' mean?

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38 Mr Brett Redman, Chief Executive Officer and Managing Director, AGL Energy, *Committee Hansard*, 5 February 2019, p. 24.

39 Mr Geoff Carter, Competition and Consumer Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 6 February 2019, p. 61.

40 Queensland Law Society, *Submission 16*, p. 2.

> Now, we've got clarity around most of those—not the effect or likely effect, because that's a relatively new provision. But that clarity was only generated by over a decade of legal cases taken by the Australian Competition and Consumer Commission. Here where we have got this obligation to pass on reductions in costs, which was exemplified on 11 occasions, is absolutely set up to be a problem for a decade while the courts work out whether a particular conduct actually amounted to prohibited conduct. So, retailers will be in a position of not knowing whether they are breaching the law, whether they are engaging in prohibited conduct, or not.
>
> …
>
> The second part, which goes again to your question, is about legal uncertainty. When CEOs and boards make their decision, they get economists, engineers and lawyers. There's the provision I read out about substantially lessening competition. That has taken at least a decade to sort. In fact, the Australian Competition and Consumer Act wanted to remove the purpose test and wanted to remove the take-advantage limb from that substantial lessening of competition provision to reduce uncertainty—admittedly for them to win more cases but to reduce uncertainty. In a very rushed bill, we have all of that uncertainty and more, because there are terms in this legislation such as 'reasonable'. What does 'reasonable' mean? 'Don't worry. We'll sort that out over the next decade.' The truth is that, in the electricity generating sector, whether people like it or not, coal-fired power stations are being retired. Hazelwood's gone; Liddell is going in 2022. These need to be replaced by renewables or firming capacity—that is, pumped hydro or gas. When you look at this, you could say, 'I could be breaching the law by doing any of those things. I could be engaging in prohibited conduct and it would take the best part of a decade to work out whether I am or not. But, in the meantime, our reputation could be badly damaged. No thanks. I'll go elsewhere'.[41]

Unprecedented divestment powers

1.52 ACCC Chair, Mr Rod Sims, stated in Senate Estimates in October 2018 that he found out about the government's position on divestment powers in the energy sector in the newspaper. This government policy was also not recommended by the ACCC:

> **Senator KETTER:** Mr Sims, I will start off with some of the news we've seen today. Did you provide a recommendation to the government for divestment powers in the energy sector?
>
> **Mr Sims:** No, that wasn't one of our recommendations. I guess we took the view that there should be a range of forward-looking measures to promote competition—things like the 20 per cent cap on new acquisitions, our debt underwriting recommendation and bidding demand into the market. So we did take a different approach.

41 The Hon. Dr Craig Emerson, Private Capacity, *Committee Hansard*, 5 February 2019, pp. 13 and 18.

> **Senator KETTER:** When was the first you learned of the government's intention to pursue this policy? When did you find out about this?
>
> **Mr Sims:** I think I can confidently say I found out about it when everybody else did: when I read about it in the newspaper. But I have no idea when that was. Certainly that's when I found out about it.[42]

1.53 Divestment powers do exist in current competition law, but have a very narrow application. As set out by the Hon. Dr Craig Emerson:

> There are forced divestiture provisions in the Competition and Consumer Act, but they are limited to this: if a merger or acquisition occurred without seeking authorisation and the ACCC considered that that substantially lessened competition, it could order that. That is where companies have not complied with the legislation or, alternatively, where they have sought authorisation but the corporations have provided false or misleading information. They are the only circumstances in which forced divestiture is contemplated under the act. I just wanted to deal with the possibility that I would get a question, because there are forced divestiture provisions. Yes, but they are very, very narrow. They are not provisions that relate to a penalty for a breach of the act as such.[43]

1.54 The EUAA stated that it opposed the proposed divestment powers:

> The EUAA is very concerned about the proposed divestment powers of the Treasurer, even if they are operating on the advice of the ACCC. These powers represent deep and genuine sovereign risk and set up a dangerous precedent. They are inconsistent with best practice for a modern economy, such as Australia's, and were specifically considered and rejected by the ACCC in its 2018 report and the Harper Competition Policy Review. We do not believe that they are consistent with the National Electricity Objective of the long term interests of consumers.[44]

1.55 The ESB also believed that the divestment powers were not necessary:

> **Senator KETTER:** Just coming back to the issue of divestment, your report seems to make it clear that you reject that policy of divestment.
>
> **Dr Schott:** This is something that has been discussed with the ACCC previously. It is a huge sledgehammer to use. There are those sorts of powers available in other countries for really gross behaviour. It basically rests around anti-competition laws. I would discuss it further with the ACCC, who I think have made it clear previously that they did not recommend it in their recommendations.[45]

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42 Senate Economics Legislation Committee, Supplementary Budget Estimates, *Committee Hansard*, 25 October 2018, p. 4.

43 The Hon. Dr Craig Emerson, Private Capacity, *Committee Hansard*, 5 February 2019, p. 14.

44 Energy Users' Association of Australia, *Submission 8*, p. 1.

45 Dr Kerry Schott AO, Chair, Energy Security Board, *Committee Hansard*, 5 February 2019, p. 7.

1.56 The Law Council of Australia also set out that the divestment powers set out in this legislation were not in keeping with what occurs generally in the OECD:

> That's why, generally, in the OECD [Organisation for Economic Cooperation and Development] we only see divestiture as a specific remedy for a structural change to the market—that is, where there's been a merge that's anti-competitive or where parties are proposing a merger that the regulators believe, after close examination, will be anti-competitive and they're proposing a divestiture to alleviate that concern. Or in the case of the UK there is a power—and I don't think it has been fully implemented yet—to potentially order divestiture after a comprehensive market inquiry process. But in those cases again there would be very comprehensive examination of all aspects of the supply chain of the industry, not a response to an instance of market misconduct—egregious though that might potentially be—by one entity in the market.[46]

1.57 Professor Ian Harper, as former Panel Chair of the Competition Policy Review, stated that the powers in this bill were not necessary and could even be counterproductive. He also sets out that singling out the energy industry goes against past precedent of having consistent competition law where feasible across the economy:

> I submit to the Committee that the divestiture powers mooted in the Bill are neither necessary nor desirable.
>
> …
>
> The Bill proposes introducing just such discriminatory treatment into the CCA by singling out the energy industry. To allow this to occur distorts the even-handed application of the CCA across the economy.
>
> If market power is misused, it should be prosecuted and remedied to the same extent and using the same means irrespective of where it arises.[47]

Schedule 2—AER Powers added with no prior consultation

1.58 Many stakeholders were surprised at the inclusion of Schedule 2, titled 'AER information gathering'. There were concerns that this schedule was inserted only on introduction of the legislation to Parliament and that stakeholders had not had the opportunity to comment on the schedule through a normal Treasury consultation process.

1.59 Origin Energy stated that:

> **Mr Calabria:** The first thing to note about Schedule 2 is that it was introduced, and I don't believe there's been any regulatory impact statement done on it and it was not included in the first draft, so, as the result of that, it hasn't been the subject of any discussion or debate. We're interested in understanding the reason for its introduction, particularly in the context of

46 Mr Geoff Carter, Competition and Consumer Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 6 February 2019, p. 62.

47 Professor Ian Harper, Melbourne Business School, *Submission 29*, p. 2

> the fact that it introduces regulatory powers to set default market offers in the retail sector for South-East Queensland, New South Wales and South Australia. That seems to cut across the current regime where the state governments have that jurisdiction and therefore seems to be inconsistent. We're just interested in understanding more about how it's intended to operate, but it does appear to be a departure from the current arrangements that are in existence.
>
> **Senator McALLISTER:** Can I just ask you a follow-up question about that, Mr Calabria? As drafted, between the explanatory memorandum and the proposed legislation itself, it does seem a little unclear about the purpose of Schedule 2. It's titled Information Gathering, yet the EM seems to suggest that the application of those provisions would go to some other and much border objectives.
>
> **Mr Calabria:** That's how we read it. We haven't had the opportunity to discuss that in any depth, but that's how we read it. We read it as an ability to set default market offers in those jurisdictions. I'm not sure how that relates to the current National Electricity Market arrangements, which invest that into those states for that case.[48]

1.60 The BCA was also uncertain as to whether Schedule 2 had been developed through the COAG process or not:

> **Senator McALLISTER:** I want to seek the witness's views about Schedule 2. It is part of the bill we haven't talked about a great deal but it is titled 'AER information gathering'. Some of the evidence before us raises procedural issues around providing the AER the power to make a legislative instrument that would not be disallowable. The second issue raised goes to the material issues of how the powers in the schedule might be applied and, in particular, whether or not it would allow default pricing mechanism to be implemented by the AER, and how that would be interact with the work being undertaken at COAG. Can your organisations provide any insight about either the procedural issues of the legislative instrument or the material application of the powers set out in the schedule?
>
> **Ms Collyer:** I could comment on the last point, which was around the confusion. My understanding was that COAG had supported amendments to the National Electricity Law in order to provide certain powers to the Australian Energy Regulator so this seems like it was doubling up; it wasn't clear why there were powers also within this bill which were potentially to do the same thing.
>
> **Senator McALLISTER:** So you don't think that the amendments come out of that COAG process; you see that they in fact our second track, pursuing the same objective as that being pursued in COAG?

48 Mr Frank Calabria, Chief Executive Officer, Origin Energy, *Committee Hansard*, 5 February 2019, p. 32.

Ms Collyer: It is not clear to me; I found it confusing.[49]

1.61 The AEC confirmed that Schedule 2 was not part of the draft legislation consultation and was inconsistent with decisions taken by the COAG Energy Council in December:

> We would simply observe that, while the ACCC report did consider a default market offer, the COAG Energy Council in its December meeting rejected a default market offer and asked instead that any decision by the federal government to implement price regulation over the top of the states would only be done with the support of the states. What the provision in the bill does, which was not present in the exposure draft and was a surprise to all of us when the bill was tabled on 5 December, is open the door for the AER to be able to implement a default market offer via a code set by a regulation by the Treasurer, which would in fact result in price regulation for the states. This is inconsistent with an agreement that was reached with the states and territories at COAG in December. It is additionally inconsistent with the recommendations of the AEMC report provided at that COAG meeting in which the AEMC put forward its recommendation that a default market offer could actually increase prices for consumers and would not be a good way to go.[50]

Conclusion

1.62 This bill is more about headlines and short term politics rather than good policy. This bill has managed to unite both energy producers and energy users, concerned that this bill will likely have counterproductive outcomes and increase electricity prices in the long term.

1.63 The process for developing the legislation was rushed, which Labor Senators believe was a deliberate decision of this government. The government wanted to limit scrutiny of these poor policies and wanted to hastily cobble together an energy policy after the abandonment of the NEG.

1.64 The interventions proposed in this bill are almost unprecedented and yet there is such little evidence to warrant interventions of this magnitude. As set out by the Hon. Dr Craig Emerson:

> I do conclude, having read the legislation, that this bill would constitute the largest ever peacetime intervention by an Australian government in a market. I don't make that statement lightly.[51]

1.65 In addition, by singling out a particular industry for intervention, this proposed legislation cuts across decades of reforms to harmonise competition policy across the entire economy. The policy also lacks the support of a former Competition

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49 Ms Anna Collyer, Partner, Allens law firm in its capacity as external legal adviser to the Business Council of Australia, *Committee Hansard*, 6 February 2019, p. 21.

50 Ms Sarah McNamara, Chief Executive Officer, Australian Energy Council, *Committee Hansard*, 6 February 2019, pp. 25–26.

51 The Hon. Dr Craig Emerson, Private Capacity, *Committee Hansard*, 5 February 2019, p. 13.

Minister, the current Chair of the ACCC, and a former Chair of a competition policy review.

1.66 This legislation fails to take the ACCC report seriously. At best, stakeholders indicate that this legislation would implement only a handful of the 56 recommendations. Labor Senators agree with stakeholders that this legislation is more of a distraction to the real work that lies ahead of implementing the ACCC recommendations and reviving the NEG.

1.67 It is also clear that the government has not followed the normal processes of seeking energy market reforms through the COAG Energy Council. At least two states have submitted to this inquiry that they were not consulted on the legislation and that the reforms do not have the support of the COAG Energy Council. It appears that this government was prepared to jeopardise Federal-State relations in its quest to fix political problems of its own making.

1.68 The problems in the energy sector are well known. Issues such as the integration of climate and energy policy, the need to replace aging assets and managing a distributed grid are front and centre. This bill does nothing to help alleviate these issues. In fact, many aspects of this bill will make it harder to attract the investment needed to modernise Australia's energy grid.

1.69 Labor Senators also note media reports indicating that even the government has conceded defeat on this bill.[52] If true, the only other major energy policy remaining for this government is the underwriting program, which both regulators such as the ACCC[53] and stakeholders hold deep concerns.[54] What is becoming evident is that this government's energy policy is unravelling with speed.

1.70 The government has an incoherent, ad-hoc, chaotic approach to energy policy and has no credible plan for affordable, reliable and clean power for Australia.

1.71 Only Labor has a clear, consistent and modernising vision for Australia's energy future; with cleaner renewable energy, more storage, and a modern transmission network.

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52 Shane Wright and Cole Latimer, 'Nationals anger as energy laws delayed in face of defeat', *Sydney Morning Herald*, 14 February 2019, https://www.smh.com.au/politics/federal/nationals-anger-as-energy-laws-delayed-in-face-of-defeat-20190214-p50xsb.html (accessed 15 March 2019).

53 Patrick Durkin, 'Scott Morrison's "fair dinkum power" plan flawed says the ACCC's Rod Sims', *Financial Review*, 21 February 2019, https://www.afr.com/business/energy/scott-morrisons-fair-dinkum-power-plan-flawed-says-the-acccs-rod-sims-20190221-h1biwx (accessed 15 March 2019).

54 See, for example, Australian Industry Group, *Submission on Underwriting of New Generation*, 15 November 2018, https://cdn.aigroup.com.au/Submissions/Environment_and_Energy/2018/Submission_Underwriting_November_2018.pdf (accessed 15 March 2019).

Recommendation 1

1.72 That the bill be opposed.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

Dissenting report from the Australian Greens

1.1 This bill would amend the *Competition and Consumer Act 2010* to define energy market misconduct, and introduce penalties for engaging in prohibited conduct in the retail, contract and wholesale electricity markets.

1.2 The Greens do not believe that the government has put forward this bill to ensure that the energy market operates 'competitively, efficiently and to the benefit of consumers'. The real reasons for this bill are to try to force the sale of the aging Liddell coal-fired power station to keep it open beyond its slated closure date of 2022; and to break-up and privatise publicly owned Queensland electricity companies. Multiple public statements from government ministers and backbenchers make this clear.

Underwriting coal

1.3 This government's fetish with coal is making climate change worse. Instead of encouraging Australia's biggest polluter to close down a dirty coal-fired power station and replace it with cleaner energy, this government publicly pressured the former CEO of AGL to extend its operating life.

1.4 This push from the government coincides with Australia having just experienced its hottest month on record and its hottest summer on record. This last summer also saw floods devastating Queensland, and bushfires ravaging Tasmania and Victoria. Last year, New South Wales declared the entire state was in drought. An attempt to extend the life of dirty coal-fired power stations in the midst of this climate emergency is offensive to the people who have suffered because of these events.

1.5 In February 2019, Greens' climate spokesperson, Adam Bandt MP, flagged that, upon the resumption of debate in the House of Representatives on this bill, he would move an amendment prohibiting the Commonwealth from providing financial or other support to electricity generators with an emissions intensity greater than 650kg of CO_2 per megawatt-hour. This would effectively prevent the government from providing public money for coal-fired power stations.

1.6 If the government truly recognised the existential climate challenge posed by the continued burning of coal, it would support this amendment. Instead, out of fear of this amendment passing, the government withdrew this bill from their legislative agenda. The conservatives are so wedded to coal that they will even walk away from their self-professed signature energy policy lest it stop them from shovelling public money into coal-fired power stations.

1.7 The Federal Energy Minister has indicated that of the 66 submissions to the 'Underwriting Investment in New Generation' program, 10 involved the use of coal-fired power. There is a real risk that the government will attempt to provide taxpayer support to these projects without passing legislation. If the government manages to sign a contract to underwrite coal-fired power, Labor have stated that they will not seek to rescind that contract if they were in government.

1.8 The importance of the Greens' amendment to this bill cannot be understated. The Greens amendment is an opportunity to protect the future and interests of every single Australian. If the government's intention is to give taxpayer support to coal-fired power stations, Parliament must be given the opportunity to deliberate on that question.

Privatising state-owned assets

1.9 The relentless privatisation of the electricity market under Labor and Liberal governments has resulted in higher prices for consumers, leading to households being disconnected from what should be an essential service.

1.10 Yet the Greens believe that this bill, as currently drafted, would enable further privatisation of state-owned power assets. It is hard to fathom how this would be to the 'benefit of consumers'.

1.11 The Greens want to re-regulate electricity prices to stop excessive profiteering and anti-competitive behaviour, particularly by the big three power companies. It is clear that big power companies have made enormous amounts of money selling what should be a vital, essential public service.

Recommendation 1

1.12 That the Greens' amendment to this Bill, preventing public, financial or other support for high emissions electricity generators, be supported, so that the Commonwealth or an authority of the Commonwealth must not: provide financial or other support for the purpose (or for purposes that include the purpose) of the refurbishment or building of a high emissions generator; purchase, or assist the purchase or transfer of ownership of, a high emissions generator; or provide financial or other support that assists the owner of a high emissions generator to use, fund or operate the generator.

Senator Peter Whish-Wilson
Senator for Tasmania

Appendix 1

Submissions, answers to questions on notice and tabled documents

Submissions

1 The Hon Dr Craig Emerson
2 Grattan Institute
3 Allan Gray Australia
4 The Australian Industry Group
5 Electrical Trades Union of Australia
6 Mr Melville Miranda
7 Consumer Action Law Centre
8 Energy Users' Association of Australia
9 Queensland Government
10 ENGIE
11 Meridian Energy Australia Group
12 Origin Energy
13 Energy Networks Australia
14 EnergyAustralia
15 Business Council of Australia
16 Queensland Law Society
17 Alinta Energy
18 AGL
19 Australian Energy Council
20 Council of Small Business Organisations Australia
21 The Australia Institute
22 Stanwell
23 CS Energy
24 Western Australian Government
25 Energy Consumers Australia
26 General Electric
27 Australian Chamber of Commerce and Industry
28 Mr Dylan McConnell, Climate & Energy College, University of Melbourne
29 Professor Ian Harper, Melbourne Business School
30 ATCO
31 Energy Locals
32 Northern Territory Government
33 Confidential

Answers to questions on notice

1 Meridian Energy Australia Group: Answers to questions taken on notice at a public hearing in Melbourne on 6 February 2019, received 7 February 2019.

2 Australian Energy Market Commission: Answers to questions taken on notice at a public hearing in Sydney on 5 February 2019, received 11 February 2019.

3 ACCC: Answers to questions taken on notice at a public hearing in Melbourne on 6 February 2019, received 12 February 2019.

4 The Treasury: Answers to questions taken on notice at a public hearing in Melbourne on 6 February 2019, received 13 February 2019.

5 Dr Kerry Schott, Chair, Energy Security Board: Answers to questions taken on notice at a public hearing in Sydney on 5 February 2019, received 14 February 2019.

6 Energy Consumers Australia: Answers to questions taken on notice at a public hearing in Sydney on 5 February 2019, received 19 February 2019.

7 Origin Energy: Answers to questions taken on notice at a public hearing in Sydney on 5 February 2019, received 19 February 2019.

8 AGL: Answers to questions taken on notice at a public hearing in Sydney on 5 February 2019, received 20 February 2019.

9 EnergyAustralia: Answers to questions taken on notice at a public hearing in Melbourne on 6 February 2019, received 20 February 2019.

Tabled documents

1 Document tabled by Energy Networks Australia at a public hearing in Melbourne on 6 February 2019.

Appendix 2
Public hearings

Sydney, 5 February 2019

Members in attendance: Senators Hume, Ketter, McAllister, Stoker.

ALEXANDER, Mr Christopher, Director, Advocacy and Communications, Energy Consumers Australia

BRISKIN, Mr Jon, Executive General Manager, Retail, Origin Energy

CALABRIA, Mr Frank, Chief Executive Officer, Origin Energy

CAMPBELL, Mr Roderick (Rod), Research Director, The Australia Institute

EMERSON, The Hon. Craig, Private capacity

GALLAGHER, Ms Lynne, Director, Research, Energy Consumers Australia

GAULD, Mr Trevor, National Policy Officer, Electrical Trades Union

PAGE, Mr Justin, State Secretary, NSW/ACT Branch, Electrical Trades Union

PIERCE, Mr John, AO, Chairman of the Australian Energy Market Commission, Energy Security Board

REDMAN, Mr Brett, Chief Executive Officer and Managing Director, AGL Energy

SCHOTT, Dr Kerry, AO, Chair, Energy Security Board

STRONG, Mr Peter, Chief Executive Officer, Council of Small Business Organisations Australia

Melbourne, 6 February 2019

Members in attendance: Senators Hume, Ketter, McAllister, Paterson, Stoker.

ADAMS, Mr Peter, General Manager, Australian Energy Regulator

BOURKE, Ms Angela, Acting General Manager, Australian Energy Regulator

BOYTON, Mr Adam, Chief Economist, Business Council of Australia

CARTER, Mr Geoff, Competition and Consumer Committee, Business Law Section, Law Council of Australia

COLLYER, Ms Anna, Partner, Allens law firm in its capacity as external legal adviser to the Business Council of Australia

DILLON, Mr Andrew, Chief Executive Officer, Energy Networks Australia

EDWARDS, Mr Ross, Head of Trading, Energy, EnergyAustralia

FEATHER, Mr Mark, General Manager, Policy and Performance, Australian Energy Regulator

GILBERT, Mr Chris, Economic Analyst, Energy Networks Australia

GRIST, Mr Peter, Senior Economist, Economics and Industry Policy, Australian Chamber of Commerce and Industry

LAMBERT, Ms Jenny, Acting Director, Economics and Industry Policy, Australian Chamber of Commerce and Industry

McCONNELL, Mr Dylan, Graduate Researcher, Climate and Energy College, University of Melbourne

McDONALD, Mr Hamish, First Assistant Secretary, Treasury

McMANUS, Mr Ed, Chief Executive Officer, Meridian Energy Australia and Powershop Australia

McNAMARA, Ms Sarah, Chief Executive Officer, Australian Energy Council

MULLEN, Mr Baethan, General Manager, Economic Group, Australian Competition and Consumer Commission

O'TOOLE, Mr James, Assistant Secretary, Electricity Branch, Electricity Division, Department of the Environment and Energy

PRICE, Mr Danny, Managing Director, Frontier Economics

REED, Mr Tennant, Principal National Adviser, Public Policy, Australian Industry Group

RICHARDS, Mr Andrew, Chief Executive Officer, Energy Users Association of Australia

TANNA, Ms Catherine, Managing Director, EnergyAustralia

WILD, Mr Daniel, Director of Economics, The Institute of Public Affairs

WOOD, Mr Tony, Energy Program Director, Grattan Institute