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

Dear Committee Members

## Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019 (the Bill)*.

We support the Bill, which will ensure the Australian Energy Regulator (**AER**) has appropriate powers and tools to gather information in the interests of the community. The Bill will also enable appropriate responses to misconduct or consumer harm that is identified by the Australian Consumer and Competition Commission's (**ACCC**) ongoing price monitoring inquiry. However, to ensure that the ACCC as an independent authority is not inhibited in acting in the public interest, the Bill should be adjusted to allow it to make application for contracting and divestment orders, rather than this be the responsibility of the Treasurer.

### About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

## Objectives of the Bill

We support the objectives of the Bill, which are to support the ACCC's ongoing Electricity Price Monitoring Inquiry across the National Electricity Market by allowing the ACCC to respond appropriately to misconduct identified as part of its inquiry.<sup>1</sup>

It is our observation that in the absence of meaningful remedies, price monitoring powers will not deter abuses of market power. The Productivity Commission has said that a key factor in determining the effectiveness of a price monitoring regime is "the consequences for abusing market power".<sup>2</sup> Public statements about abusive practices are unlikely to have an impact and are only going to serve to reduce consumer confidence if they are not acted upon.

## New prohibitions

We support the new proposed prohibitions in the Bill which allow the ACCC to take action where price monitoring demonstrates retail, financial contracting or wholesale price outcomes that are not aligned with competitive market outcomes.

We support, in particular, the inclusion of "prohibited conduct in relation to retail prices". We note, however, that the standard is set at a very high bar—the retailer must not have made "reasonable adjustments" following "sustained and substantial reductions in its underlying cost of procuring electricity".

Other legislative provisions involving price exploitation (such as GST price exploitation and the fire services levy in NSW & Victoria) provide more flexibility, where the price is unreasonably high having regard to a number of factors. A similar approach could be adopted where "prohibited conduct in relation to retail prices" means that retailers have not made "reasonable price adjustments" subject to various factors, including substantial and/or sustained reductions in underlying costs of energy. Such an approach should be considered for this legislation so as not to unreasonably constrain the ability of the regulator to respond. The discretion of the regulator would be appropriately moderated in terms of the use of "reasonable", which will ensure consideration of current costs and costs over the longer-term.

## The ACCC should be empowered to seek the full range of orders

We support the range of responses available to the ACCC, which include public warning, infringement notices, court enforceable undertakings, court-imposed injunctions and court imposed pecuniary penalty.

We recommend that other remedies (such as contracting orders, divestment) also be available to the ACCC in relation to all types of misconduct, subject to application to court. In our view, there is no reason that divestment should be limited to prohibited contract in wholesale electricity market. We consider that the ACCC requires flexibility for appropriate remedy, as it is undesirable to unreasonably constrain the regulator.

More generally, divestment should be available as a remedy for competition law breaches across the economy. Divestiture is not unusual in the context of anti-trust, for example, it is a remedy for mergers in the EU and the US. However, this should be ACCC-led on application to the court. It is not clear what the policy justification is for contracting remedies to be vested in the Treasurer, or the divestment remedy to be court-imposed upon application of the Treasurer.

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<sup>1</sup> Explanatory Memorandum, paragraphs 1.2-1.5.

<sup>2</sup> See <https://www.pc.gov.au/inquiries/current/airports-2019/issues/airports-issues.pdf>, p. 13.

The ACCC is the appropriate body to enforce consumer and competition law, and ensuring remedies are approved by the court ensures consistency with other areas of law. A court order also protects against the remedy being used inappropriately. The Bill should be redrafted to remove the Treasurer from contracting orders or divestment processes in order to remove risks of barriers (such as interference for political manoeuvring purposes) to appropriate intervention from independent regulators.

We note that divestiture is already a remedy an available court order under section 81 of the Competition and Consumer Act 2010 where a merger contravenes section 50 of that Act. The Senate Standing Committee on Economics also recommended in 2004 that divestiture be available for contraventions of section 46 (misuse of market power).<sup>3</sup> The Committee's report noted that divestiture powers are widely available to authorities in Europe and the US. The Committee noted that the threat of divestiture 'forms the heart of US antitrust law', and that 'international experience indicates that where the threat of divestiture fails, the implementation of divestiture provisions can be effective.'<sup>4</sup>

### **Regulator information gathering powers**

We strongly support the extension of section 155 notices for the purposes of ACCC oversight of this new function. We also strongly support AER information gathering powers. Section 44AAF(3A) and (3B) enables the AER to provide information to another body, which we consider that this should be extended to relevant state government departments, such as the Essential Services Commission in Victoria, which has relevant jurisdiction regarding retail energy market and pricing in that state.

Yours Sincerely,

**CONSUMER ACTION LAW CENTRE**

**Gerard Brody** | Chief Executive Officer

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<sup>3</sup> See [https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Completed\\_inquiries/2002-04/trade\\_practices\\_1974/index](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2002-04/trade_practices_1974/index), p. xviii.

<sup>4</sup> Ibid, p. 65.