



3 October 2019

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

Submitted online: <https://www.aph.gov.au>

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

Origin Energy Limited (Origin) appreciates the opportunity to provide comments to the Senate Economics Legislation Committee on the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019* (Bill). The legislation in its current form remains largely duplicative; runs the risk of discouraging investment; and is likely to impede efficient market operations. We are disappointed that to date, despite a great deal of engagement, there has been no material change to the 2018 version of the Bill which was subject to an earlier Inquiry by the Committee.

We therefore continue to urge the Government and policy makers to again consider some core amendments which are critical to minimising the risks identified below:

- The drafting of the retail prohibition (153E) should be more closely aligned with the Explanatory Memorandum to reflect that it is the movement in market wide price trends that is of relevance. This is needed to minimise the inherent ambiguity and confusion around how any requirement for the pass through of cost savings to retail tariffs will be ascertained.
- To address concerns around procedural fairness the Treasurer should be required to apply to the Court in seeking a contracting order.
- We maintain that the proposed introduction of powers to effect forced divestiture should not be pursued as it is a disproportionate remedy which singles out the energy sector.

One positive change that has been adopted is the plan to allow for a 6 month transitional period. The current draft states that this will be from the date of Royal Assent. However, given the operationalisation of the Bill requires the development of guidelines by the Australian Competition and Consumer Commission (ACCC), it is more appropriate that the transition period starts from the time the final ACCC guidelines are published. This will allow for better consultation by preventing the need for the ACCC to rush the process to avoid the prospect of the guidelines only being finalised towards the end of the transition period. Under this approach stakeholders would be given the necessary time to understand and prepare for the ACCC's intended enforcement approach.

### **Our concerns regarding the contents of the Bill are summarised below**

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. This will increase the risk profile of the energy sector and dissuade private sector investment, progressively increasing the reliance on government support schemes, which is not a sustainable or efficient approach. Our key concerns are set out in greater detail below.

#### Retail prohibition:

In seeking to prescribe the pass through of cost savings realised by energy companies in retail tariffs, retail prohibition 153E is likely to undermine the commercial incentive to strive for efficiency gains. Competitive markets are founded on the premise of participants seeking to attain productive efficient outcomes that will ultimately flow through to consumers in the form of lower prices. Often market participants incur risk in striving for such outcomes, however, if the resultant benefits of this must be passed through, there would be limited incentive to undertake such activities.

While the Explanatory Memorandum seeks to clarify issues such as these, it is still 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 ACCC, with the implication being that any perceived failure to pass through cost savings in an 'acceptable' manner would result in a contravention. This is exacerbated by the ACCC's ability to issue infringement notices.

We also note the introduction of the default market offer (DMO) and Victorian default offer (VDO) will deliver customers a price safety net and establish a clear benchmark for retail prices. This negates any need to mandate the pass through of retailer cost savings under 153E, given it provides consumers with access to a regulated price that is independently determined.

#### Spot market prohibitions:

Under sections 153G and 153H, generators are prohibited from engaging in behaviour that could undermine the effective operation of the spot market. However, such behaviour is already forbidden under the current regulatory framework. The Australian Consumer Law (ACL) and Competition and Consumer Act (CCA) respectively prohibit misleading or deceptive behaviour and prohibit firms that have substantial market power from engaging 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 Australian Energy Regulator (AER).

As discussed above, it is not clear what additional behaviours the new prohibition is looking to restrict. This added ambiguity could constrain legitimate behaviour that is consistent with the efficient operation of the market. In the context of generator bids, prohibitions that impede the ability of prices to reach a level that allows for the recovery of long run costs will reduce dynamic efficiency and undermine investment signals

#### Contract market prohibition:

Section 153F seeks to ensure that integrated generator/retailers ('gentailers') do not refuse to offer financial contracts for anti-competitive purposes. It should be noted however, that such conduct is already prohibited in certain cases under section 46 of the CCA. Additionally, the COAG Energy Council implemented the Retailer Reliability Obligation on 1 July 2019 which includes provision for a mandatory market making arrangement that is designed to facilitate access to financial contracts and limit any potential for withholding.

Vertically integrated firms are not perfectly hedged and actively participate in the contracts markets to cover customer demand and realise arbitrage opportunities, consistent with overarching risk limits. Prohibition 153F appears to confer significant powers on the ACCC to determine if a gentailer's risk management approach is inappropriate, increasing uncertainty and risk for the business. In the event a gentailer is served with a contracting order, this could result in the gentailer: being compelled to deviate from its optimal contracting strategy if it is prevented from holding sufficient contracts to manage its own

risks; or engaging in the trading of contracts in a manner that is not consistent with its view of the commercial realities of the market.

### **The proposed remedies are a disproportionate response to the contraventions in question**

The introduction of powers to force divestiture of assets is a disproportionate and punitive response to the contraventions outlined in the Bill. Moreover, the industry specific nature of this power will set the electricity sector apart from other industries, increasing the difficulty in attracting capital. It could also create a precedent for extending such powers to other industries, which could in turn dissuade investment in those sectors.

Allowing the Treasurer to impose punitive measures on corporations suspected of misconduct in the form of a contracting order will also undermine the separation of judicial and executive powers. Under the CCA it is the Courts that make a finding of a contravention, whereas under the approach set out in the Bill, the Treasurer, based on a recommendation 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 remove a vital check and balance that is an important feature of the current regulatory arrangements.

### **If progressed, the Bill should be amended to address the issues identified above**

Given the above factors, Origin remains of the view the proposed Bill should not be implemented. However, in the event the Bill is to be progressed, it is essential fundamental shortcomings with the current drafting are addressed. To this end, we believe the following changes should be considered.

#### *Prohibitions*

- Retail prohibition (153E): The retail prohibition should be amended to better reflect the intention expressed in the Explanatory Memorandum. The Explanatory Memorandum states that “the legislation is primarily concerned with broad, market-wide price trends” and does not require a retailer to adjust its prices to pass through efficiency gains. However, the Bill refers to “...reductions in its underlying cost of procuring electricity”. As currently drafted, there is a risk the prohibition would disincentivise electricity retailers, particularly vertically integrated retailers, from taking steps to reduce their own supply costs through efficiency improvements out of a concern that any cost reduction might require a corresponding decrease in the retail price while any cost increase would be borne by the retailer. Our proposed solution set out in Attachment A clarifies the legislation by incorporating the intent expressed in the Explanatory Memorandum.
- Contract market prohibition (153F): A threshold requirement should be introduced such that a corporation must have a substantial degree of market power in a relevant electricity market for the contracting prohibition to be breached. This would improve alignment with the CCA and ensure the prohibition principally targets cases where such conduct at least has the potential to have an anti-competitive effect.
- Spot market prohibitions (153G/153H): To provide greater clarity on how this will be applied in practice, the legislation should make clear that a corporation does not contravene the prohibition if it is engaging in bidding behaviour that it is consistent with the design and the nature of an energy only market such as the NEM.
- Purpose test (153J): The provision allowing the purpose of a participant’s conduct to be established by inference alone should be removed. The Bill will introduce some of the most significant penalties available under the CCA. It is essential therefore, that the standard of proof is sufficiently high to ensure confidence in the enforcement regime.

### *Remedies*

- Applying for contracting orders (153W): Consistent with the approach for divestiture orders, the Court, not the Treasurer, should be responsible for making contracting orders. Failure to allow for court oversight over the Treasurer's power to force a party to contract with certain types of counterparties on price and non-price terms specified by the Treasurer is inconsistent with fundamental principles of a market economy and raises issues in relation to separation of powers.
- Conditions for recommending and applying for, contracting and divestiture orders (153S, 153W, 153ZA): Consistent with the rationale for removing the purpose test, the threshold for recommending or applying for a contracting or divestiture order should be strengthened such that both the ACCC and the Treasurer must be satisfied 'on reasonable grounds' that the specified pre-conditions are met, and that the respective order will result, or is likely to result, in a 'significant and material' benefit to the public.
- Contracting order price range (153X): In setting prices at which hedge contracts must be offered under a contracting order, the Court should have regard to a clear set of criteria, that includes: the market price of electricity at the time the offers will be required to be made; the corporation's costs of procuring and producing electricity; and the ongoing financial viability of the corporation.
- Commission notices (Divisions 3 and 4): Consistent with earlier recommendations, the threshold for issuing public warning notices, infringement notices and prohibited conduct notices should be strengthened such that the ACCC must be 'satisfied on reasonable grounds' that the specified preconditions have been met.
- Commission responses (153L, 153M, 153P): Corporations should be provided with additional time to respond to public warning notices and prohibited conduct notices. The ACCC's decision to issue a public warning notice should also be subject to oversight by the Australian Competition Tribunal.

We have included suggested mark-ups to the legislation for the Committee's consideration in Attachment A. If you wish to discuss any of these issues further please contact Steve Reid at

Yours Sincerely,

Keith Robertson  
General Manager Regulatory Policy

2016-2017-2018

Style Definition: Heading 3

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*Presented and read a first time*

**Treasury Laws Amendment (Prohibiting  
Energy Market Misconduct) Bill 2018**

**No.     , 2018**

*(Treasury)*

**A Bill for an Act to amend the *Competition and  
Consumer Act 2010*, and for related purposes**



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**A Bill for an Act to amend the *Competition and Consumer Act 2010*, and for related purposes**

The Parliament of Australia enacts:

**1 Short title**

This Act is the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2018*.

**2 Commencement**

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<i>No. —, Treasury Laws Amendment (Prohibiting Energy Market Misconduct) 2018</i>	<i>No. —, Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</i>	1
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1

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	<del>The 6 months from the day the Australian Competition and Consumer Commission guidelines are published</del> <u>his Act receives the Royal Assent.</u>	
2. Schedule 1	<del>The 6 months from the day the Australian Competition and Consumer Commission guidelines are published after this Act receives the Royal Assent.</del>	
3. Schedule 2	<del>The 6 months from the day the Australian Competition and Consumer Commission guidelines are published</del> <u>this Act receives the Royal Assent.</u>	

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4

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

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(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

8

### 3 Schedules

9

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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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2	<del>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</del> <u>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</u>	<del>No. 4,</del> <u>No. 2018</u> , <del>2018</del> <u>2018</u>
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Prohibited conduct in the electricity industry **Schedule 1**

Main amendments **Part 1**

## Schedule 1—Prohibited conduct in the electricity industry

### Part 1—Main amendments

#### *Competition and Consumer Act 2010*

##### 1 After Part XIC

Insert:

### Part XICA—The Electricity Industry

#### Division 1—Preliminary

##### 153A Simplified outline of this Part

This Part deals with prohibited conduct by corporations in relation to electricity. It ceases to be in force on 1 January 2026.

Division 2 of this Part sets out the circumstances in which a corporation engages in *prohibited conduct*.

Responses to a corporation engaging in prohibited conduct include the following:

- (a) the Commission may issue a public warning notice;
- (b) the Commission may give the corporation an infringement notice;
- (c) the Commission may give the corporation a *prohibited conduct notice* that sets out proposed orders (and the Commission may later give the Treasurer a *prohibited conduct recommendation* that recommends orders);
- (d) if the Commission has given the Treasurer a prohibited conduct recommendation, the Treasurer may:

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**Schedule 1** Prohibited conduct in the electricity industry

**Part 1** Main amendments

- |   |   |
|---|---|
| 1 | (i) <del>make</del> <u>apply to the Court</u> for a <b>contracting order</b> that |
| 2 | requires making offers to enter into electricity financial                        |
| 3 | contracts; and  |
| 4 | (ii) apply to the Court for a <b>divestiture order</b> that                       |
| 5 | requires divestment of interests in assets and securities.                        |

**153B Part etc. ceases to be in force**

The following cease to be in force on 1 January 2026:

- (a) this Part;
- (b) any other provision of this Act, to the extent that the provision relates to this Part.

**153C Interpretation**

In this Part:

**associate** has the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975*.

**connected body corporate** has the meaning given by section 153D.

**contracting order** means an order of the ~~Treasurer~~Court under section 153X.

**Court** means the Federal Court of Australia.

**divestiture order** means an order of the Court under section 153ZB.

**electricity financial contract**: a contract is an **electricity financial contract** if:

- (a) rights under the contract are derived from or relate to the price of electricity on an electricity spot market; and
- (b) the operator of that electricity spot market is not a party to the contract.

**electricity market** means any of the following:

- (a) a market in relation to the supply of electricity;
- (b) a market for electricity financial contracts.

Prohibited conduct in the electricity industry **Schedule 1**

Main amendments **Part 1**

**electricity spot market** means a spot market for the supply of electricity.

**interest**, in an asset or a security, has the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975*.

**network costs** means the costs charged by transmission and distribution network operators for the transmission and distribution of electricity.

**no Treasurer action notice** means a notice under section 153U.

**prohibited conduct**: a corporation engages in **prohibited conduct** if the corporation engages in conduct that contravenes section 153E, 153F, 153G or 153H.

**prohibited conduct notice** means a notice under section 153P.

**prohibited conduct recommendation** means a notice under section 153S.

**residential customer** means a customer who purchases, or proposes to purchase, electricity principally for personal, household or domestic use at premises.

**small business customer** means a customer who purchases, or proposes to purchase, electricity at a rate less than 100 MWh a financial year and is not a residential customer in relation to that electricity.

**small customer** means a residential customer or a small business customer.

**153D Meaning of *connected body corporate* in relation to prohibited conduct**

(1) A corporation is a **connected body corporate** in relation to prohibited conduct engaged in by the corporation.

(2) A body corporate is a **connected body corporate** in relation to prohibited conduct engaged in by a corporation if:

(a) the body corporate is related to the corporation; and

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**Schedule 1** Prohibited conduct in the electricity industry

**Part 1** Main amendments

- (b) any of the following conditions are satisfied:
- (i) the prohibited conduct involves the direct or indirect use of assets held by the body corporate;
  - (ii) the prohibited conduct involves direct or indirect dealings between the body corporate and the corporation.

- (3) A body corporate is a **connected body corporate** in relation to prohibited conduct if:
- (a) the body corporate is a holding company of another body corporate; and
  - (b) the other body corporate is a connected body corporate in relation to the prohibited conduct because of a previous operation of this section.

**Division 2—Prohibited conduct**

**153E Prohibited conduct—retail pricing**

- (1) 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 ~~the~~ underlying cost-market-based wholesale price of procuring electricity and relevant network costs.

- (2) A corporation does not contravene paragraph (1) if:
- (a) it has not had a reasonable amount of time to make an adjustment;
  - (b) it has adjusted prices to reflect a cost reduction of the kind described in paragraph (1)(b) in the prior 6 months;
  - (c) its own prices costs have not gone down to reflect reductions in the underlying market-based wholesale price of electricity and network costs;
  - (d) it is precluded from making an adjustment under relevant regulations;

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6	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct)</i>	<i>No. 4,</i>
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Prohibited conduct in the electricity industry **Schedule 1**

Main amendments **Part 1**

- 1 (e) there has not been a real, sustained or substantive reduction  
2 relative to the overall cost of supplying electricity to small  
3 customers; or  
4 (f) to adjust prices would undermine that corporation's viability.
- 5 Note 1: The Treasurer cannot ~~make~~apply for a contracting order in respect of a  
6 contravention of this section (see paragraph 153W(~~eg~~)).
- 7 Note 2: The Treasurer cannot apply for a divestiture order in respect of a  
8 contravention of this section (see paragraph 153ZA(~~ef~~)).

**153F Prohibited conduct—electricity financial contract liquidity**

- 10 A corporation contravenes this section if:
- 11 (a) any of the following conditions are satisfied:
- 12 (i) the corporation generates electricity;
- 13 (ii) a body corporate that is related to the corporation  
14 generates electricity; and
- 15 (b) the corporation does any of the following:
- 16 (i) fails to offer electricity financial contracts;
- 17 (ii) limits or restricts its offers to enter into electricity  
18 financial contracts;
- 19 (iii) offers to enter into electricity financial contracts in a  
20 way that has, or on terms that have, the effect or likely  
21 effect of preventing, limiting or restricting acceptance of  
22 those offers; and
- 23 (c) the corporation does so for the purpose of substantially  
24 lessening competition in any electricity market; and  
25 (d) the corporation has a substantial degree of power in that  
26 electricity market.
- 27 (2) For the purpose of determining whether a corporation has  
28 contravened subsection (1);
- 29 (a) this section:
- 30 (i) does not require the corporation to vary or terminate  
31 contractual arrangements already on foot;
- 32 (ii) does not require the corporation to offer electricity  
33 financial contracts in circumstances where the  
34 corporation reasonably considers that doing so would

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**Schedule 1** Prohibited conduct in the electricity industry

**Part 1** Main amendments

- 1 compromise the corporation's ability to meet its  
2 commitments under existing contracts;  
3 (iii) does not require a corporation to increase the extent to  
4 which it offers electricity financial contracts in response  
5 to a reduction in the availability of electricity financial  
6 contracts caused by a reduction in available generation  
7 because of physical issues arising in relation to  
8 generation facilities; or  
9 (b) a corporation does not contravene subsection (1) where a  
10 substantial purpose for engaging in the activity referred to in  
11 subsection (1)(b) is to give effect to genuine strategies to  
12 mitigate its risk in generating and offering electricity,  
13 including internal contracting by the corporation, or arising  
14 from the offer of electricity financial contracts.

15  
16 Note:        The Treasurer cannot apply for a divestiture order in respect of a  
17 contravention of this section (see paragraph 153ZA(e)).

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**153G Prohibited conduct—electricity spot market (basic case)**

- 18  
19 (1) A corporation contravenes this section if:  
20 (a) the corporation:  
21 (i) bids or offers to supply electricity in relation to an  
22 electricity spot market; or  
23 (ii) fails to bid or offer to supply electricity in relation to an  
24 electricity spot market; and  
25 (b) the corporation does so:  
26 (i) fraudulently, dishonestly or in bad faith; or  
27 (ii) for the purpose of distorting or manipulating prices in  
28 that electricity spot market.  
29  
30 (2) A corporation does not contravene paragraph (1) merely by  
31 engaging in bidding behaviour for a legitimate commercial  
32 purpose which is consistent with the design and intended  
33 operation of the electricity spot market in which the corporation  
34 operates.

35 Note 1: The Treasurer cannot make apply for contracting order in respect of a  
36 contravention of this section (see paragraph 153W(e)).

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8	<u>Treasury Laws Amendment (Prohibiting Energy Market Misconduct)</u>	<u>No. 4,</u>
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Prohibited conduct in the electricity industry **Schedule 1**

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Note 2: The Treasurer cannot apply for a divestiture order in respect of a contravention of this section (see paragraph 153ZA(ef)).

**153H Prohibited conduct—electricity spot market (aggravated case)**

- (1) A corporation contravenes this section if:
- (a) the corporation:
    - (i) bids or offers to supply electricity in relation to an electricity spot market; or
    - (ii) fails to bid or offer to supply electricity in relation to an electricity spot market; and
  - (b) the corporation does so fraudulently, dishonestly or in bad faith, for the purpose of distorting or manipulating prices in that electricity spot market.

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**153J Prohibited conduct—(2) A corporation does not contravene paragraph (1) merely by engaging in bidding behaviour for a legitimate commercial purpose**

(1) This section:

- (a) applies for which is consistent with the purposes of sections 153F, 153G design and 153H; and
- (b) does not limit intended operation of the manner in which the purpose of a person may be established for the purposes of any other provision of this Act.

(2) A corporation may be taken to have done something:

- (a) for the purpose of substantially lessening competition in an electricity market; or
  - (b) for the purpose of distorting or manipulating prices in an electricity spot market;
- even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the in which the corporation or of any other person or from other relevant circumstances operates.

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**Schedule 1** Prohibited conduct in the electricity industry

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**153K Prohibited conduct may be covered by other provisions**

To avoid doubt, this Division does not limit the operation of any other provision of this Act.

Example: Particular conduct of a corporation could result in the corporation contravening both section 46 and section 153F.

**Division 3—Commission responses**

**Subdivision A—Public warning notices**

**153L Commission may give draft public warning notice**

(1) The Commission may give a corporation a notice in writing if the Commission ~~reasonably believes~~ is satisfied on reasonable grounds that:

(a) any of the following conditions are satisfied:

(i) the corporation has engaged in prohibited conduct;

(ii) the corporation is engaging in prohibited conduct; and

(b) one or more persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct; and

(c) it is in the public interest to issue the notice.

(2) The notice must:

(a) state the day on which the notice is given; and

(b) identify:

(i) the corporation mentioned in paragraph (1)(a); and

(ii) the prohibited conduct mentioned in paragraph (1)(a); and

(c) explain the reasons why the Commission ~~reasonably believes~~ is satisfied on reasonable grounds that the requirements in paragraphs (1)(a), (b) and (c) are met; and

(d) state that:

(i) the corporation may, within ~~24~~28 days after being given the notice, make representations to the Commission regarding the matters mentioned in paragraphs (1)(a), (b) and (c); and

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Prohibited conduct in the electricity industry **Schedule 1**

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(ii) the Commission may issue a public warning notice under section 153M in relation to the prohibited conduct after those ~~24~~28 days have passed.

(3) A notice given under subsection (1) is not a legislative instrument.

**153M Commission may issue public warning notice**

(1) This section applies if:

- (a) the Commission gave a corporation a notice under section 153L in relation to prohibited conduct; and
- (b) at least ~~24~~28 days have passed since the Commission gave the corporation the notice; and
- (c) no more than 90 days have passed since the Commission gave the corporation the notice.

(2) The Commission may issue to the public a written notice containing a warning about the prohibited conduct if the Commission ~~reasonably believes~~is satisfied on reasonable grounds that:

- (a) any of the following conditions are satisfied:
  - (i) the corporation has engaged in the prohibited conduct;
  - (ii) the corporation is engaging in the prohibited conduct; and
- (b) one or more persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct; and
- (c) it is in the public interest to issue the notice.

(3) The notice must:

- (a) state the day on which the notice is issued; and
- (b) identify:
  - (i) the corporation mentioned in paragraph (2)(a); and
  - (ii) the prohibited conduct mentioned in paragraph (2)(a).

(4) A notice issued under subsection (2) is not a legislative instrument.

~~(5) The Commission's decision to issue a public warning notice is subject to injunctive relief.~~

**Schedule 1** Prohibited conduct in the electricity industry

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**Subdivision B—Infringement notices**

**153N Infringement notices**

- (1) Subject to subsection (2), Division 5 of Part V applies in relation to an alleged contravention of section 153E, 153F, 153G or 153H in the same way in which it applies in relation to an alleged contravention of an infringement notice provision (within the meaning of that Part).
- (2) For the purposes of applying Division 5 of Part V in accordance with subsection (1), treat the reference in paragraph 60L(5)(b) to 60 penalty units as being a reference to 600 penalty units.

**Division 4—Procedure before contracting order or divestiture order**

**Subdivision A—Prohibited conduct notices**

**153P Prohibited conduct notices**

- (1) The Commission may give a corporation a notice (a *prohibited conduct notice*) in writing, stating one or more recommendations for the kind or kinds of order the ~~Treasurer or the~~ Court could make under Division 5 or 6, if the Commission ~~reasonably believes~~ *is satisfied on reasonable grounds* that:
- (a) any of the following conditions are satisfied:
- (i) the corporation has engaged in prohibited conduct;
- (ii) the corporation is engaging in prohibited conduct; and
- (b) ~~the Treasurer or the~~ Court making that kind or those kinds of order in relation to the corporation, or any other connected body corporate in relation to the prohibited conduct, is a proportionate means of preventing the corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future; and

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- 1 (c) if that kind of order is, or those kinds of order include, a  
2 divestiture order—the following conditions are satisfied:  
3 (i) such a divestiture order will result, or is likely to result,  
4 in a **significant and material** benefit to the public;  
5 (ii) if such a divestiture order will result, or is likely to  
6 result, in a detriment to the public—the benefit  
7 mentioned in subparagraph (i) would, or is likely to,  
8 outweigh that detriment.
- 9 (2) The notice must:  
10 (a) be expressed to be given under this section; and  
11 (b) state the day on which the notice is given; and  
12 (c) identify:  
13 (i) the corporation; and  
14 (ii) the prohibited conduct mentioned in paragraph (1)(a);  
15 and  
16 (iii) each connected body corporate in relation to the  
17 prohibited conduct (other than the corporation); and  
18 (d) state the recommendations mentioned in subsection (1); and  
19 (e) explain the reasons why the Commission **reasonably believes**  
20 **that is satisfied on reasonable grounds that:**  
21 (i) the requirements in paragraphs (1)(a) and (b) are met;  
22 and  
23 (ii) if paragraph (1)(c) applies—the requirement in that  
24 paragraph is met; and  
25 (f) state that the corporation may, within the period mentioned in  
26 subsection (3), make representations to the Commission  
27 regarding the conduct mentioned in subparagraph (c)(ii) and  
28 the recommendations mentioned in paragraph (d).
- 29 (3) For the purposes of paragraph (2)(f), the period:  
30 (a) starts on the day on which the notice is given; and  
31 (b) ends:  
32 (i) if subparagraph (ii) does not apply—**4590** days after  
33 that day; or  
34 (ii) if the Commission allows a later day—that later day.

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2018 Misconduct) Bill 2018

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- 1 (iii) the Commission must make an allowance for longer  
2 where not to do so would unreasonably prejudice the  
3 corporation.  
4 (iv) the Commission's decisions in relation to permitted time  
5 are subject to injunctive relief.

- 6  
7 (4) A failure to comply with subparagraph (2)(c)(iii) does not affect  
8 the validity of the notice.  
9 (5) The Commission must give each of the following a copy of the  
10 notice as soon as practicable after issuing it:  
11 (a) the corporation;  
12 (b) each body corporate identified in the notice (in accordance  
13 with subparagraph (2)(c)(iii)).  
14 (6) A prohibited conduct notice is not a legislative instrument.

**153Q Commission may vary or revoke prohibited conduct notice**

- 17 (1) The Commission may, in writing, vary or revoke a prohibited  
18 conduct notice given to a corporation either on its own initiative or  
19 on application of the corporation.  
20 (2) A variation or revocation under subsection (1) must:  
21 (a) state the day on which it is made; and  
22 (b) in the case of a variation—state that the corporation may,  
23 within the period mentioned in subsection (3), make  
24 representations to the Commission regarding the prohibited  
25 conduct notice as varied.  
26 (3) For the purposes of paragraph (2)(b), the period:  
27 (a) starts on the day on which the Commission gives the  
28 corporation the copy of the variation; ~~and~~  
29 (b) ends:  
30 (i) if subparagraph (ii) does not apply—4590 days after  
31 that day; or

14 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)* *No. 4,*  
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(ii) if the Commission allows a later day—that later day—

(c) the Commission must make an allowance for a longer time period where not to do so would unreasonably prejudice the corporation; and

- (4) The Commission must give each of the following a copy of a variation or revocation under subsection (1) or as soon as practicable after making it:
- (a) the corporation;
  - (b) each body corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(iii));
  - (c) each connected body corporate in relation to the prohibited conduct (other than a body corporate mentioned in paragraph (b)) identified in the prohibited conduct notice as varied.

- (5) A variation or revocation under subsection (1) is not a legislative instrument.

~~(6) Subsection 33(3) of the Acts Interpretation Act 1901 does not apply in relation to a prohibited conduct notice.~~

**Subdivision B—Prohibited conduct recommendations and no Treasurer action notices**

**153R Commission must give Treasurer prohibited conduct recommendation or no Treasurer action notice**

- (1) If the Commission has given a corporation a prohibited conduct notice, the Commission must, within 45 days after the end of the period mentioned in subsection (3), give the Treasurer:
- (a) a prohibited conduct recommendation in respect of the prohibited conduct notice; or
  - (b) a no Treasurer action notice in respect of the prohibited conduct notice.

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- 1 (2) Subsection (1) does not apply if the prohibited conduct notice has  
2 been revoked under section 153Q.
- 3 (3) The period is:
  - 4 (a) unless paragraph (b) applies—the period mentioned in  
5 subsection 153P(3) for the prohibited conduct notice; or
  - 6 (b) if there has been a variation of the prohibited conduct notice  
7 under section 153Q—the period mentioned in  
8 subsection 153Q(4) for the variation.
- 9 (4) Subsection (5) applies if:
  - 10 (a) the Commission has given the Treasurer a no Treasurer  
11 action notice in respect of the prohibited conduct notice, in  
12 accordance with paragraph (1)(b); and
  - 13 (b) the Commission has made a revocation of the no Treasurer  
14 action notice under subsection 153V(1).
- 15 (5) The Commission must, within 45 days after making the revocation:
  - 16 (a) give the Treasurer a prohibited conduct recommendation in  
17 respect of the prohibited conduct notice; or
  - 18 (b) give the corporation a new prohibited conduct notice in  
19 respect of the prohibited conduct identified in the prohibited  
20 conduct notice (in accordance with  
21 subparagraph 153P(2)(c)(ii)).

**153S Prohibited conduct recommendations**

- 23 (1) The Commission may give the Treasurer a notice in writing (a  
24 ***prohibited conduct recommendation***) in respect of the prohibited  
25 conduct notice, stating one or more recommendations for the kind  
26 or kinds of order the ~~Treasurer or the~~ Court could make under  
27 Division 5 or 6, if the Commission ~~reasonably believes~~ is satisfied  
28 on reasonable grounds that:
  - 29 (a) any of the following conditions are satisfied:
    - 30 (i) the corporation has engaged in the kind of prohibited  
31 conduct specified in the prohibited conduct notice;
    - 32 (ii) the corporation is continuing to engage in the kind of  
33 prohibited conduct specified in the prohibited conduct  
34 notice; and

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- 1 (b) ~~the Treasurer or~~ the Court making that kind or those kinds of  
2 order in relation to the corporation, or any other connected  
3 body corporate in relation to the prohibited conduct, is a  
4 proportionate means of preventing the corporation, or any  
5 related body corporate, from engaging in that kind of  
6 prohibited conduct in the future; and  
7 (c) if that kind of order is, or those kinds of order include, a  
8 divestiture order—the following conditions are satisfied:  
9 (i) such a divestiture order will result, or is likely to result,  
10 in a **significant and material** benefit to the public;  
11 (ii) if such a divestiture order will result, or is likely to  
12 result, in a detriment to the public—the benefit  
13 mentioned in subparagraph (i) would, or is likely to,  
14 outweigh that detriment.
- 15 (2) The notice must:  
16 (a) be expressed to be given under this section; and  
17 (b) state the day on which the notice is given; and  
18 (c) identify:  
19 (i) the corporation; and  
20 (ii) the prohibited conduct mentioned in paragraph (1)(a);  
21 and  
22 (iii) each connected body corporate in relation to the  
23 prohibited conduct (other than the corporation); and  
24 (d) state the recommendations mentioned in subsection (1); and  
25 (e) explain the reasons why the Commission ~~reasonably~~  
26 **believes is satisfied on reasonable grounds** that:  
27 (i) the requirements in paragraphs (1)(a) and (b) are met;  
28 and  
29 (ii) if paragraph (1)(c) applies—the requirement in that  
30 paragraph is met.
- 31 (3) To avoid doubt, the recommendations stated in the notice (in  
32 accordance with paragraph (2)(d)) may be different from the  
33 recommendations stated in the prohibited conduct notice (in  
34 accordance with paragraph 153P(2)(d)).

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**Schedule 1** Prohibited conduct in the electricity industry

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- 1 (4) A failure to comply with subparagraph (2)(c)(iii) does not affect  
2 the validity of the notice.
- 3 (5) To avoid doubt, the bodies corporate identified in the notice (in  
4 accordance with subparagraph (2)(c)(iii)) need not be the same as  
5 the bodies corporate identified in the prohibited conduct notice (in  
6 accordance with subparagraph 153P(2)(c)(iii)).
- 7 (6) A prohibited conduct recommendation is not a legislative  
8 instrument.
- 9 (7) The Commission must provide the relevant corporation(s) with a  
10 copy of the recommendations made under the provision at the same  
11 time it is provided to the Treasurer.

**153T Commission may vary or revoke prohibited conduct recommendation**

- 14 (1) The Commission may, in writing, vary or revoke a prohibited  
15 conduct recommendation, either on its own initiative or on  
16 application of the corporation.
- 17 (2) The Commission cannot make a variation or revocation under  
18 subsection (1) later than 45 days after:  
19 (a) unless paragraph (b) applies—the day on which the  
20 Commission made the prohibited conduct recommendation;  
21 or  
22 (b) if there has been a previous variation of the prohibited  
23 conduct recommendation under this section—the day on  
24 which the Commission made the previous variation.
- 25 (3) The Commission cannot make a variation or revocation under  
26 subsection (1) if:  
27 (a) the Treasurer has ~~made~~applied to the Court for a contracting  
28 order in relation to the prohibited conduct recommendation;  
29 or  
30 (b) the Treasurer has applied to the Court for a divestiture order  
31 in relation to the prohibited conduct recommendation.

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18 Treasury Laws Amendment (Prohibiting Energy Market Misconduct) No. 4,  
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- 1 (4) The Commission cannot make a variation under subsection (1)  
2 unless the Commission is satisfied that:  
3 (a) the variation is minor or insubstantial; or  
4 (b) all of the following conditions are met:  
5 (i) the corporation or any related body corporate gave the  
6 Commission information relevant to the prohibited  
7 conduct notice that is false or misleading in a material  
8 particular, or failed to give the Commission material  
9 information relevant to the prohibited conduct notice  
10 that is not publicly available in a manner that was false  
11 or misleading;  
12 (ii) the variation is reasonably necessary to address the  
13 circumstances described in subparagraph (i); or  
14 (c) the variation is reasonably necessary to address information  
15 that was not in existence, or that the Commission did not  
16 have, when the prohibited conduct notice was given.

- 17 (5) A variation or revocation under subsection (1) must state the day  
18 on which it is made.

- 19 (6) The Commission must give a copy of a variation or revocation  
20 under subsection (1) to the Treasurer as soon as practicable after  
21 making it.

- 22 (7) A variation or revocation under subsection (1) is not a legislative  
23 instrument.

- 24 ~~(8) Subsection 33(3) of the Acts Interpretation Act 1901 does not~~  
25 ~~apply in relation to a prohibited conduct recommendation.~~

- 26 (8) The Commission must provide the relevant corporation(s) with a  
27 copy of the recommendations made under the provision at the same  
28 time it is provided to the Treasurer.

29

30 **153U No Treasurer action notice**

- 31 (1) The Commission must give the Treasurer a notice in writing (a *no*  
32 *Treasurer action notice*) in respect of the prohibited conduct

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notice mentioned in section 153R if the Commission considers that it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice.

(2) The notice must:

- (a) be expressed to be given under this section; and
- (b) state the day on which the notice is given; and
- (c) explain the reasons why the Commission considers that it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice.

(3) The Commission must publish the notice by electronic or other means:

- (a) unless paragraph (b) applies—45 days after issuing it; or
- (b) if the Commission and the Treasurer agree that it is appropriate to publish the notice at an earlier time—at that earlier time.

(4) A no Treasurer action notice is not a legislative instrument.

(5) The Commission must provide the relevant corporation(s) with a copy of the recommendations made under the provision at the same time it is provided to the Treasurer.

**153V Commission may vary or revoke no Treasurer action notice**

(1) The Commission may, in writing, vary or revoke a no Treasurer action notice.

(2) The Commission cannot make a variation or revocation under subsection (1) later than 45 days after:

- (a) unless paragraph (b) applies—the day on which the Commission made the no Treasurer action notice; or
- (b) if there has been a previous variation of the no Treasurer action notice under this section—the day on which the Commission made the previous variation.

(3) The Commission cannot make a variation under subsection (1) unless the Commission is satisfied that the variation is minor or insubstantial.

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- 1 (4) The Commission cannot make a revocation under subsection (1)  
2 unless the Commission is satisfied that the conditions in  
3 subsections (5), ~~(6)~~ and ~~(7)~~ are met.
- 4 (5) The condition in this subsection is met if the Commission  
5 ~~reasonably believes~~ is satisfied on reasonable grounds that it is  
6 appropriate to:  
7 (a) give the Treasurer a prohibited conduct recommendation in  
8 respect of the prohibited conduct notice; or  
9 (b) give the corporation a new prohibited conduct notice in  
10 respect of the prohibited conduct identified in the prohibited  
11 conduct notice (in accordance with  
12 subparagraph 153P(2)(c)(ii)).
- 13 — (6) The condition in this subsection is not met if the Commission  
14 ~~reasonably believes~~ has not provided the corporation with the  
15 opportunity to make representations to the Commission in  
16 alignment with the time periods set out in s153P(3)
- 17 — (7) The condition in this subsection is met if the Commission is  
18 satisfied on reasonable grounds that:  
19 (a) all of the following conditions are met:  
20 (i) the corporation or any related body corporate gave the  
21 Commission information relevant to the prohibited  
22 conduct notice that is false or misleading in a material  
23 particular, or failed to give the Commission material  
24 information relevant to the prohibited conduct notice  
25 that is not publicly available in a manner that was false  
26 or misleading;  
27 (ii) the revocation is reasonably necessary to address the  
28 circumstances described in subparagraph (i); or  
29 (b) the revocation is reasonably necessary to address information  
30 that was not in existence, or that the Commission did not  
31 have, when the prohibited conduct notice was given.
- 32 ~~(7)~~ A variation or revocation under subsection (1) must state the day  
33 on which it is made.

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- 1 (89) The Commission must give a copy of a variation or revocation  
2 under subsection (1) to the Treasurer as soon as practicable after  
3 making it.
- 4 (910) The Commission must publish a variation or revocation under  
5 subsection (1) by electronic or other means as soon as practicable  
6 after making it.
- 7 (1011) If the no Treasurer action notice has not yet been published in  
8 accordance with subsection 153U(3) by the time the Commission  
9 makes a variation or revocation under subsection (1):  
10 (a) despite subsection 153U(3), the Commission must not  
11 publish the no Treasurer action notice; and  
12 (b) despite subsection (9), the Commission must not publish the  
13 variation or revocation.
- 14 (1112) A variation or revocation under subsection (1) is not a legislative  
15 instrument.
- 16 ~~(12) Subsection 33(3) of the Acts Interpretation Act 1901 does not~~  
17 ~~apply in relation to a no Treasurer action notice.~~

**Division 5—Contracting orders**

**Subdivision A—Treasurer may ~~make~~ apply to Federal Court  
for contracting orders**

**153W ~~Conditions for making~~ Treasurer may apply to Federal Court  
for contracting order**

The Treasurer may ~~make~~ apply to the Court for an order under  
section 153X in respect of a body corporate if the Treasurer is  
satisfied on reasonable grounds that the following conditions are  
met:

- (a) ~~(a)~~ the Commission has given the Treasurer a prohibited  
conduct recommendation under section 153S;  
(b) ~~(b)~~ the Commission has provided the corporation with a  
copy of the prohibited conduct recommendation;

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- 1 (c) the corporation has been given reasonable opportunity to  
2 make submissions to the Treasurer in relation to the  
3 recommendation, and in any event not less than 45 days;  
4 (d) the body corporate is identified in the recommendation (in  
5 accordance with subparagraph 153S(2)(c)(i) or (iii));  
6 (e) is made no later than 45 days after:  
7 (i) unless subparagraph (ii) applies—the day on which the  
8 Commission gave the Treasurer the recommendation; or  
9 (ii) if there has been a variation of the recommendation  
10 under section 153T—the day on which the Commission  
11 made the variation;  
12 (f) the order is of a kind stated in the recommendation (in  
13 accordance with paragraph 153S(2)(d));  
14 (g) the conduct identified in the recommendation (in accordance  
15 with subparagraph 153S(2)(c)(ii)):  
16 (i) is prohibited conduct engaged in by the corporation  
17 identified in the recommendation (in accordance with  
18 subparagraph 153S(2)(c)(i)) (the **relevant corporation**);  
19 and  
20 (ii) is, or includes, prohibited conduct under section 153F  
21 (electricity financial contract liquidity) or section 153H  
22 (electricity spot market (aggravated case));  
23 (h) the order applied for is a proportionate means of preventing  
24 the relevant corporation, or any related body corporate, from  
25 engaging in that kind of prohibited conduct in the future;  
26 (i) any of the following generate electricity:  
27 (i) the body corporate;  
28 (ii) another body corporate that is related to the body  
29 corporate; and  
30 (j) the following conditions are satisfied:  
31 (i) the order applied for will result, or is likely to result, in a  
32 significant and material benefit to the public;  
33 (ii) if the order applied for will result, or is likely to result,  
34 in a detriment to the public—the benefit mentioned in  
35 subparagraph (i) would, or is likely to, outweigh that  
36 detriment.  
37

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**153X** ~~Treasurer~~**Court** may make contracting order

~~(1)–(4)~~ The ~~Treasurer~~**Court** may, ~~in writing upon the written application of the Treasurer under section 153W~~, order the body corporate to make offers to enter into electricity financial contracts if:

~~(a) the Court finds, or has in another proceeding instituted under this Act found, that the conduct identified in the recommendation (in accordance with subparagraph 153S(2)(c)(ii)):~~

~~(i) is prohibited conduct engaged in by the relevant corporation; and~~

~~(ii) is, or includes, prohibited conduct under section 153F (electricity financial contract liquidity) or section 153H (electricity spot market (aggravated case));~~

~~(b) the Court is satisfied that the order is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future; and~~

~~(c) the following conditions are satisfied:~~

~~(i) the order applied for will result, or is likely to result, in a significant and material benefit to the public;~~

~~(ii) if the order applied for will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.~~

(2) The order must:

(a) be expressed to be made under this section; and

(b) state the day on which the ~~order~~**application** is made; and

(c) identify:

(i) the body corporate; and

(ii) if the body corporate is not the relevant corporation—the relevant corporation; and

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- 1 (iii) the prohibited conduct mentioned in  
2 paragraph 153W(e); and  
3 ~~(d) explain the reasons why the Treasurer~~~~Court is satisfied that~~  
4 ~~the conditions in paragraphs 153W(e), (h) and (f) are met;~~  
5 ~~and~~  
6 ~~(de)~~ specify the matters mentioned in subsection ~~(35)~~.
- 7 (3) The matters are as follows:  
8 (a) the kind of offers that the body corporate must make to enter  
9 into electricity financial contracts;  
10 (b) the manner in which the body corporate must make those  
11 offers;  
12 (c) the kind of entities to which those offers must be made;  
13 (d) the period or periods during which the body corporate must  
14 make those offers;  
15 (e) any other matter ~~that the Treasurer considers~~ necessary for  
16 the order to be effective.
- 17 (4) The order may specify the kind of offers that the body corporate  
18 must make in any of the following ways:  
19 (a) the kind of electricity financial contracts that must be offered;  
20 (b) the price or range of prices in respect of electricity under the  
21 electricity financial contracts that must be offered, or a  
22 method or methods of working out that price or that range;  
23 (c) the minimum number of megawatt hours of electricity to  
24 which the electricity financial contracts that must be offered  
25 must relate.
- 26 (5) In determining the minimum number of megawatt hours to specify  
27 for the purposes of paragraph (4)(c), the ~~Treasurer~~~~Court~~ must have  
28 regard to the following matters:  
29 (a) the total electricity generation capacity of the electricity  
30 generation assets held by each connected body corporate in  
31 relation to the prohibited conduct and related bodies  
32 corporate;  
33 (b) the nature and location of those electricity generation assets;

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- 1 (c) the commitments or current plans that the body corporate  
2 has, and related bodies corporate have, to supply electricity to  
3 customers;
- 4 (d) ~~any other matter~~ the commitments that the ~~Treasurer~~  
5 ~~considers to be~~ body corporate has, and related bodies  
6 ~~corporate have, to supply electricity under derivative~~  
7 ~~contracts;~~  
8 (e) current availability of the body corporate's generation  
9 capacity availability, including having regard to availability  
10 of fuel;  
11 (f) the need for the body corporate to engage in prudent risk  
12 management (for example, having reserve capacity available  
13 to meet commitments in the case of an unplanned outage); and  
14 (g) any other relevant matters.
- 15 ~~(6)~~ (6) In determining the price or range of prices in respect of  
16 electricity under the electricity financial contracts that must be  
17 offered for the purposes of paragraph (4)(b) the Court, must have  
18 regard to the following matters:
- 19 (a) the market price of electricity at the time the offers will be  
20 required to be made;  
21 (b) the body corporate's costs of procuring and producing  
22 electricity;  
23 (c) the ongoing financial viability of the body corporate; and  
24 (d) any other relevant matters.
- 25  
26
- 27 (7) The specified period or periods during which the Court may order  
28 the body corporate ~~must~~ to make those offers must:
- 29 (a) start no earlier than 6 months after the order is made; and  
30 (b) end no later than 3 years after the order is made.
- 31 (78) The ~~Treasurer~~ Court must publish the order by electronic or other  
32 means except to the extent that doing so would damage the  
33 competitive position of the corporation.
- 34

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**153Y Variation and revocation of contracting order**

~~(1)–(4)~~ The Treasurer may, in writing, apply to the Court to vary or revoke a contracting order in respect of a body corporate, ~~on the Treasurer's own initiative or on application made by~~.

(2) The corporation may, in writing, apply to the body corporate Court to vary or revoke a contracting order in respect of that corporation.

~~(23)~~ The Treasurer cannot make a variation application under subsection (1) unless the Treasurer is satisfied that:

(a) the order as varied is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in the kind of prohibited conduct (mentioned in the order) in the future; and

(b) if the body corporate does not consent to the variation—the variation is minor or insubstantial, or all of the following conditions are met:

(i) the corporation or any related body corporate gave the Treasurer or the Commission information relevant to the prohibited conduct recommendation that is false or misleading in a material particular, or failed to give the Treasurer or the Commission material information relevant to the prohibited conduct recommendation that is not publicly available in a manner that was false or misleading;

(ii) the variation is reasonably necessary to address the circumstances described in subparagraph (i).

~~(34)~~ A variation can be of a kind that results in the order, as varied, not being of a kind recommended in the prohibited conduct recommendation (in accordance with paragraph 153S(2)(d)).

~~(4) The Treasurer need not consider an application by the body corporate to vary or revoke a contracting order if the application is made after:~~

~~(a) if there is only one period mentioned in paragraph 153X(3)(d) that period has ended; or~~

~~(b) if there is more than one such period—all of those periods have ended.~~

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- (5) The ~~Treasurer~~Court must publish a variation or revocation under subsection (1) by electronic or other means except to the extent that doing so would damage the competitive position of the body corporate.

**Subdivision B—Enforcement of contracting orders**

**153Z Enforcement of contracting orders**

- (1) This section applies if the ~~Treasurer~~Court has made a contracting order in respect of a body corporate.
- (2) If the Commission considers on reasonable grounds that the body corporate has failed to comply with the contracting order in a material manner, the Commission may apply to the Court for an order under subsection (3).
- (3) If the Court is satisfied that the body corporate has failed to comply with the contracting order in a material manner, the Court may make all or any of the following orders:
- (a) an order directing the body corporate to comply with the contracting order;
  - (b) if the period or periods specified in the contracting order (in accordance with paragraph 153X(3)(d)) have already passed—an order directing the body corporate to comply with the contracting order, within a new period, or new periods, specified in the order;
  - (c) any other order that the Court considers appropriate.

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**Division 6—Electricity divestiture orders**

**153ZA Treasurer may apply to Federal Court for divestiture order**

The Treasurer may apply to the Court for an order under subsection 153ZB(2) in respect of a body corporate if the Treasurer

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1 is satisfied on reasonable grounds that the following conditions are  
2 met:  
3 (a) — ~~(a)~~ the Commission has given the Treasurer a prohibited  
4 conduct recommendation under section 153S;  
5 (b) — ~~(b)~~ The Commission has provided a copy of the  
6 prohibited conduct recommendations to the relevant  
7 corporation  
8 (c) the body corporate is identified in the recommendation (in  
9 accordance with subparagraph 153S(2)(c)(i) or (iii));  
10 (d) — ~~(e)~~ the application is made no later than 45 days after:  
11 (i) unless subparagraph (ii) applies—the day on which the  
12 Commission gave the Treasurer the recommendation; or  
13 (ii) if there has been a variation of the recommendation  
14 under section 153T—the day on which the Commission  
15 made the variation;  
16 (—(d) — the application — (de)) the order applied for is of a  
17 kind stated in the recommendation (in accordance with  
18 paragraph 153S(2)(d));  
19 (ef) the conduct identified in the recommendation (in accordance  
20 with subparagraph 153S(2)(c)(ii)):  
21 (i) is prohibited conduct engaged in by the corporation  
22 identified in the recommendation (in accordance with  
23 subparagraph 153S(2)(c)(i)) (the **relevant corporation**);  
24 and  
25 (ii) is, or includes, prohibited conduct under section 153H  
26 (electricity spot market (aggravated case));  
27 (fg) the order applied for is a proportionate means of preventing  
28 the relevant corporation, or any related body corporate, from  
29 engaging in that kind of prohibited conduct in the future;  
30 (gh) the following conditions are satisfied:  
31 (i) the order applied for will result, or is likely to result, in  
32 a significant and material benefit to the public;  
33 (ii) if the order applied for will result, or is likely to result,  
34 in a detriment to the public—the benefit mentioned in  
35 subparagraph (i) would, or is likely to, outweigh that  
36 detriment.

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**153ZB Making of divestiture order**

- (1) The Court may, on the application of the Treasurer under section 153ZA, make an order under subsection (2) in relation to the body corporate if:
- (a) the Court finds, or has in another proceeding instituted under this Act found, that the conduct identified in the recommendation (in accordance with subparagraph 153S(2)(c)(ii)):
    - (i) is prohibited conduct engaged in by the relevant corporation; and
    - (ii) is, or includes, prohibited conduct under section 153H (electricity spot market (aggravated case)); and
  - ~~(b) —(b)—~~ the Court is satisfied that the order is a proportionate means, and other remedy or remedies would not constitute sufficient means, of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future.
  - (c) the following conditions are satisfied:
    - (i) the order applied for will result, or is likely to result, in a significant and material benefit to the public;
    - (ii) if the order applied for will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.
- (2) The Court may order the body corporate to:
- (a) dispose of interests in securities or assets, other than to any of the following:
    - (i) another body corporate that is related to the body corporate;
    - (ii) an associate of the body corporate; and
  - (b) comply with conditions (if any) specified in the order in accordance with subsection (6).

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- 1 (3) Despite paragraph (2)(a), the order must allow the disposal to be to  
2 a body corporate mentioned in subparagraph (2)(a)(i) or to an  
3 associate mentioned in subparagraph (2)(a)(ii) if:  
4 (a) the body corporate or associate is an authority of the  
5 Commonwealth or an authority of a State or Territory; and  
6 (b) the body corporate in relation to which the order is made is:  
7 (i) if the body corporate or associate mentioned in  
8 paragraph (a) is an authority of the Commonwealth—an  
9 authority of the Commonwealth; or  
10 (ii) if the body corporate or associate mentioned in  
11 paragraph (a) is an authority of a State or Territory—an  
12 authority of that State or Territory; and  
13 (c) the body corporate or associate mentioned in paragraph (a) is  
14 genuinely in competition in relation to electricity markets  
15 with the body corporate in relation to which the order is  
16 made.
- 17 (4) The order must specify:  
18 (a) the interests in the securities and assets, or the kinds of  
19 interests in the securities and assets, that the body corporate  
20 must dispose of; and  
21 (b) the day by which the disposal must be made; and  
22 (c) any other matter that the Court considers necessary for the  
23 order to be effective.
- 24 (5) The day by which the disposal must be made must be no earlier  
25 than 12 months after the day on which the order is made.
- 26 (6) The order may specify conditions with which the body corporate  
27 must comply during the period between the making of the order  
28 and the disposal of an interest, if the Court is satisfied that those  
29 conditions are necessary to preserve any of the following:  
30 (a) the value of the interest;  
31 (b) in the case of an interest in an asset—the commercial  
32 operation of the asset.
- 33 (7) Without limiting the scope of subsection (6), those conditions may  
34 relate to any of the following:  
35 (a) the interest to be disposed;

**Schedule 1** Prohibited conduct in the electricity industry

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(b) if the interest is a share or other security in a body corporate—the exercise of rights attached to the share or other security.

(8) It will be defence to non-compliance with these provisions if the corporation can demonstrate a reasonable and genuine attempt to secure a sale of the assets or interest and no entity is willing to acquire the assets in accordance with the order on terms and conditions, including price, that are acceptable to the corporation, acting reasonably.

**Division 7—Miscellaneous**

**153ZC Acquisition of property**

*Scope*

(1) This section applies to the following:

- (a) Divisions 5 and 6;
- (b) any other provision of this Act, to the extent to which the provision relates to Division 5 or 6.

*Effect of provision*

(2) The provision has no effect to the extent (if any) to which its operation would result in the acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) otherwise than on just terms (within the meaning of that paragraph).

**153ZD Review by Tribunal**

(1) For the purposes of this section, each of the following decisions of the Commission is a reviewable decision:

(a) a decision under section 153M(2) issue a public warning notice;

(b) a decision under section 153P(1) to issue a prohibited conduct notice; and

(c) a decision under section 153Q(1) to:

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- 1 (i) vary a prohibited conduct notice; or
- 2 (ii) revoke a prohibited conduct notice.
- 3 (2) If the Commission makes a reviewable decision, a person whose
- 4 interests are affected by the decision may apply in writing to the
- 5 Tribunal for a review of the decision.
- 6 (3) An application under this section for a review of a decision must be
- 7 made within 21 days after the Commission made the decision.
- 8 (4) If the Tribunal receives an application under this section for a
- 9 review of a decision, the Tribunal must review the decision.
- 10
- 11 **153ZE Functions and powers of Tribunal**
- 12 (1) On a review of a decision of the Commission of a kind mentioned
- 13 in section 153ZD, the Tribunal may make a decision affirming,
- 14 setting aside or varying the decision of the Commission and, for
- 15 the purposes of the review, may perform all the functions and
- 16 exercise all the powers of the Commission.
- 17 (2) A decision by the Tribunal affirming, setting aside or varying a
- 18 decision of the Commission is taken for the purposes of this Act
- 19 (other than for the purpose of s 153ZD) to be a decision of the
- 20 Commission.
- 21 (3) For the purposes of a review by the Tribunal, the member of the
- 22 Tribunal presiding at the review may require the Commission to
- 23 give such information, make such reports and provide such other
- 24 assistance to the Tribunal as the member specifies.
- 25 (4) For the purposes of a review, the Tribunal may have regard to any
- 26 information given, documents produced or evidence given to the
- 27 Commission in connection with the making of the decision to
- 28 which the review relates.
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Other amendments **Part 2**

## **Part 2—Other amendments**

### ***Competition and Consumer Act 2010***

#### **2 Paragraph 29(1A)(a)**

Omit “XIB or XIC”, substitute “XIB, XIC or XICA”.

#### **3 After paragraph 2B(1)(b)**

Insert:

(ba) Part XICA;

#### **4 After paragraph 5(1)(b)**

Insert:

(ba) Part XICA;

#### **5 Paragraph 5(1)(f)**

Omit “(b) or (c)”, substitute “(b), (ba) or (c)”.

#### **6 After subparagraph 76(1)(a)(iii)**

Insert:

(iiia) a provision of Division 2 of Part XICA;

#### **7 Paragraph 76(1A)(aa)**

After “section 45AJ or 45AK”, insert “or to a provision of Division 2 of Part XICA”.

#### **8 Subparagraph 80(1)(a)(iv)**

Omit “or”.

#### **9 At the end of paragraph 80(1)(a)**

Add:

(v) a provision of Division 2 of Part XICA; or

#### **10 At the end of paragraph 84(1)(b)**

Add “or”.

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**Part 2** Other amendments

**11 After paragraph 84(1)(b)**

Insert:

(ba) a proceeding under Part XICA in respect of conduct engaged in by a body corporate, being conduct in relation to which section 153E, 153F, 153G or 153H applies;

**12 At the end of paragraph 155(2)(b)**

Add:

; or (vi) a contracting order (within the meaning of Part XICA);  
or  
(vii) a divestiture order (within the meaning of Part XICA).

**13 Subsection 155AAA(21) (paragraph (a) of the definition of core statutory provision)**

Omit “XIB or XIC”, substitute “XIB, XIC or XICA”.

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Prohibited conduct in the electricity industry **Schedule 1**

Application **Part 3**

## Part 3—Application

### 14 Application

- (1) The amendments made by Parts 1 and 2 of this Schedule apply in relation to:
- (a) conduct that is engaged in on and after the commencement of this Schedule; and
  - (b) conduct that was engaged in before that commencement, and is continued to be engaged in on and after that commencement.
- (2) To avoid doubt, subsection 4(2) of the *Competition and Consumer Act 2010* applies in relation to subitem (1).

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Schedule 2 AER information gathering

**Schedule 2—AER information gathering**

***Competition and Consumer Act 2010***

**~~1 Section 44AH~~**

Before “The”, insert “(1)”.

**~~2 At the end of section 44AH~~**

Add:

~~(2) Regulations made for the purposes of paragraph (1)(b) may empower the AER to make legislative instruments.~~

~~(3) Section 42 (disallowance) of the *Legislation Act 2003* does not apply to legislative instruments empowered by regulations made for the purposes of paragraph (1)(b).~~

~~(4) Subsection (3) has effect subject to any express provision to the contrary in the regulations.~~

**~~31~~ After subsection 44AAF(3)**

Insert:

(3A) If the AER is satisfied that particular information will enable or assist an entity covered by subsection (3B) to perform or exercise any of the entity’s functions or powers, ~~disclosing the information to the entity is authorised use and disclosure of the information.~~

(a) disclosing the information to the entity is authorised use and disclosure of the information; and

(b) any existing confidentiality in the material must be maintained

(3B) The entities are as follows:

(a) a Department;

(b) a body (whether incorporated or not) established or appointed for a public purpose by or under a law of the Commonwealth;

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- (c) a body established or appointed by the Governor-General, or by a Minister, otherwise than by or under a law of the Commonwealth;
- (d) the holder of an office established for public purposes by or under a law of the Commonwealth.

**42 Subsections 44AAF(4) and (5)**

After “subsection (3)”, insert “or (3A)”.

**53 After section 44AAF**

Insert:

**44AAFA Power of AER to obtain information and documents**

*Notice requiring information etc.*

- (1) This section applies if the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance of the functions referred to in section 44AH (Commonwealth functions).
- (2) The AER may, by written notice given to the person, require the person to do one or more of the following:
- (a) give such information to the AER;
  - (b) produce any such documents to the AER;
  - (c) appear before the AER, or before a specified person assisting the AER who is an SES employee or an acting SES employee, to give any such evidence (either orally or in writing) and produce any such documents.
- (3) The notice must specify:
- (a) if paragraph (2)(a) or (b) applies:
    - (i) the period within which the person must comply with the notice; and
    - (ii) the manner in which the person must comply with the notice; or
  - (b) if paragraph (2)(c) applies:

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**Schedule 2** AER information gathering

- 1 (i) the time at which the person must appear before the  
2 AER or person; and  
3 (ii) the place at which the person must appear before the  
4 AER or person.

5 *Oath or affirmation*

- 6 (4) The AER may require the evidence given under paragraph (2)(c) to  
7 be given on oath or affirmation. For that purpose, an AER member  
8 or a person assisting the AER may administer the oath or  
9 affirmation.

10 **44AAFB Failure to comply with notice to give information etc. is an**  
11 **offence**

12 *Offence*

- 13 (1) A person commits an offence if:  
14 (a) the person is given a notice under section 44AAFA; and  
15 (b) the person fails to comply with the notice.  
16 Penalty: Imprisonment for 2 years or 100 penalty units, or both.

17 *Exceptions*

- 18 (2) Subsection (1) does not apply to the extent that the person is not  
19 capable of complying with the notice.

20 Note: A defendant bears an evidential burden in relation to the matters in  
21 this subsection (see subsection 13.3(3) of the *Criminal Code*).

- 22 (3) Subsection (1) does not apply to the extent that:  
23 (a) the notice relates to producing documents; and  
24 (b) the person proves that, after a reasonable search, the person is  
25 not aware of the documents; and  
26 (c) the person provides a written response to the notice,  
27 including a description of the scope and limitations of the  
28 search.

29 Note: A defendant bears a legal burden in relation to the matter in  
30 paragraph (3)(b) (see section 13.4 of the *Criminal Code*).

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AER information gathering **Schedule 2**

- (4) For the purposes of (but without limiting) paragraph (3)(b), a determination of whether a search is reasonable may take into account the following:
- (a) the nature and complexity of the matter to which the notice relates;
  - (b) the number of documents involved;
  - (c) the ease and cost of retrieving a document relative to the resources of the person who was given the notice;
  - (d) any other relevant matter.

**44AAFC AER may inspect, copy and retain documents**

- (1) A member of the AER, or a person authorised by a member of the AER, may inspect a document produced under section 44AAFA and may make and retain copies of such a document.
- (2) The AER may take, and retain for as long as is necessary, possession of a document produced under section 44AAFA.
- (3) The person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by a member of the AER to be a true copy.
- (4) The certified copy must be received in all courts and tribunals as evidence as if it were the original.
- (5) Until a certified copy is supplied, the AER must, at such times and places as the AER thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of the document.

**64 After subsection 44AAJ(1)**

Insert:

- (1A) Without limiting subsection (1), the report must include:
  - (a) the number of notices given by the AER under section 44AAFA; and
  - (b) a general description of the nature of the matters in respect of which the notices were given; and

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**Schedule 2** AER information gathering

(c) the number of proceedings brought to challenge the validity of the notices.

**75** ~~At the end of section 51AE~~

Add:

~~(3) If regulations prescribe an industry code that applies to one or more entities that are authorised by or under a law of the Commonwealth or of a State or Territory to sell electricity, the regulations may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.~~

~~(4) Subsection (3) applies despite subsection 14(2) of the *Legislation Act 2003*.~~

**86** Subparagraph 79A(1)(a)(i)

After “section”, insert “44AAFB,”.

**97** Paragraph 79A(1)(d)

Omit “or the Commission,”, substitute “, the Commission or (in the case of an offence against section 44AAFB) the AER”.

**108** Subsection 163(5)

After “section”, insert “44AAFB,”.

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