

Senate Standing Committees on Economics
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3 October 2019

Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019

The Australian Energy Council (the “**AEC**”) welcomes the opportunity to make a submission to the Senate Economics Legislation Committee (the “**Committee**”) on the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019* (“**the 2019 Bill**”).

The AEC is the industry body representing 22 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The AEC also made a submission to this Committee’s Inquiry regarding the 2018 iteration of this Bill. This submission highlighted that the 2018 Bill contained unprecedented sector specific market interventions, that would increase risks for would be investors, and likely result in higher electricity prices for consumers. The AEC position on these issues has not changed, but noting the Government’s continued efforts to progress this Bill, this submission focuses on critical amendments necessary to ensure the 2019 Bill, if passed, does not unnecessarily damage the competitive market to the detriment of consumers.

During the 2018 Committee Inquiry, no evidence was presented by the Government regarding the need or likely efficacy of the provisions in the Bill. Similarly, the overwhelming majority of stakeholders submitted, both in writing and at hearings held on 5 and 6 February 2019, that the Bill was unwarranted and counter-productive. Specifically, noted experts such as Professor Ian Harper, co-author of the Australian Government’s 2015 Competition Policy Review (the Harper Review), and the Law Council of Australia, stated unequivocally that the drafting of the 2018 Bill would diminish the efficacy of the economy wide Competition and Consumer Act (CCA).

The 2019 Bill has not been redrafted to address stakeholder concerns. The Bill before this Committee is largely the same as the Bill that was introduced into Parliament prior to the election.

Competition Laws, such as the CCA, must tread a careful balance. The authors of the Harper Review asked four questions when considering whether competition laws were fit for purpose.

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than individual competitors?
- Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?
- Is the law as clear, simple and predictable as it can be?

The AEC position is that these four questions should be considered by the Committee in this Inquiry.

Development of the 2019 Bill

Following the election, the AEC and its members sought to work with the Government to ensure that the Bill when re-introduced was workable, clear, and did not diminish the efficiency and operation of electricity businesses, in turn resulting in higher prices for consumers. Substantial efforts were undertaken to highlight the types of changes which would mitigate against these undesirable impacts. These suggested amendments were not to repeal large swathes of the Bill, but rather to align it where possible to existing laws, and to take into account changes in the market structure since the 2018 Bill was withdrawn from Parliament. We attach a copy of these suggested amendments in **Appendix A**.

It was the AEC's view that if the Bill was to be progressed, it should be progressed in a manner that mitigated the risks highlighted in the previous Inquiry. Despite the availability of reasonable and logical amendments, the Government has only made a small number of changes largely immaterial to its operation, preferring to focus on the procedural requirements in the Bill.

A number of these procedural amendments are supported, but they will not mitigate the significant risks this Bill creates. The weight of evidence presented by credible experts that this Bill would have unintended and undesirable consequences has been ignored. The Committee should consider and support amendments to the Bill which would mitigate against its plausible economic consequences.

Amendments made to the 2018 Bill

The 2019 Bill incorporates only minor amendments, as compared to the 2018 Bill. These amendments are explained below:

Substantive amendments

The 2019 Bill provides for a 6 month transitional period from the date of Royal Assent. This is an important change. The 2018 Bill would have applied the day it received Royal Assent, prior to the Australian Competition and Consumer Commission (the '**ACCC**') developing and publishing its compliance guidelines. Given the lack of clarity in drafting, and the substantial powers provided to the ACCC by this Bill, the AEC strongly supports the inclusion of a transitional period. That being said, the AEC is concerned that the Government has not included any reference in the Bill to the ACCC developing compliance guidelines nor the timeframes required to develop them. It would be more appropriate to provide industry a transition period post completion of these guidelines, or, to require the ACCC to publish completed guidelines within 3 months. A transitional period of this nature would ameliorate the risk of ACCC guidelines not being finalised until near to, or after, the implementation date.

The 2019 Bill also includes the so-called 'Katter Amendment', which the Government advises in the Explanatory Memorandum ensures that Government-owned assets cannot be privatised by divestment. Despite fundamentally opposing divestment, the AEC considers this amendment improves the 2018 Bill, ensuring that Government-owned assets cannot be forcibly privatised. That being said, the amendment as currently drafted would effectively allow the Federal Government to re-organise the ownership structure of energy assets owned by a State Government. This is a concern, and may result in existing plant becoming inoperable, or uncommercial, post divestiture. Ultimately, as with all divestiture, the net public benefit test is unlikely to be achieved.

Procedural amendments

The 2019 Bill limits the application of the retail prohibition in s153E to market offers. Given the Government regulates the price of standing offers, this does not substantively amend the application of the Bill as it would be very unlikely that action would be taken against an offer that has been set by the regulator.

The 2019 Bill limits individual liability to senior executives, avoiding concerns raised that the 2018 Bill may have captured relatively junior staff members.

The 2019 Bill no longer requires the Treasurer to publish details of contracting orders made under s153X. This amendment is welcomed. The 2018 Bill required the Treasurer to publish information that could clearly be categorised as commercially sensitive.

Minor drafting amendments

There are some additional minor amendments that have been made which intend to rectify errors in the drafting of the 2018 Bill. These amendments are not notable and have no material impact on the application of the 2019 Bill.

Key amendments sought by Industry

As noted above, the AEC undertook extensive effort to attempt to clarify the Government's intent regarding the Bill's application, and proposed amendments that would achieve this intention without unnecessarily damaging the operation of the electricity market.

The attached **Appendix B** sets out in detail, the nature of the amendments industry considered would enhance the Bill, significantly decreasing the likelihood of unintended consequences. These proposed amendments remain relevant and necessary following the introduction of the 2019 Bill.

The industry continues to advocate for the following critical amendments:

Retail Prohibition – section 153E

Section 153E requires a retailer to make reasonable adjustments to the price of its offers if there is a substantial and sustained reduction in the cost of procuring energy.

Since the drafting of the 2018 Bill, there has been a fundamental shift in the structure of the retail regulatory framework. Previously, retail pricing had been de-regulated. In 2019, the market was re-regulated, capping the price for customers who were unwilling or unable to engage in the competitive market.

Section 153E was amended to exclude regulated standing offers in NSW, South East Queensland, and South Australia, but the amendment has been drafted in a manner that results in regulated standing offers in Victoria remaining captured by the provision. This is an error of drafting and must be amended.

The application of s153E in a regulated price market is challenging. Retailers are permitted to price offers at the regulated price, but are required, if the offer is a market offer, to adjust that offer if there is a substantial and sustained decrease in procurement costs. The presence of duplicative pricing regulations is sub-optimal, and was not recommended by the ACCC. There has never been any suggestion in any Government report that available market offers are not priced efficiently. Practically, s153E, as drafted, may require retailers to reprice their competitive market offers more frequently than they otherwise would have. Prices may need to more closely reflect highly dynamic input cost cycles, and this may operate to require more regular price changes (both up and down) in order to ensure that if challenged by the ACCC, retailers are able to prove they have adjusted their pricing appropriately.

Duplicative pricing regulation is unlikely to deliver positive outcomes for electricity consumers. But, if this provision is to remain, there are a number of alternative approaches that the Government could take to ensure s153E is able to be complied with, whilst maintaining a positive customer experience.

The Bill, as currently drafted, is unclear as to when costs should be considered 'reduced'. This appears to be a definitional issue. Whilst the Bill refers to reductions in a retailers procurement costs (that is, the costs actually incurred by a retailer), the EM describes cost reductions as reductions in market costs (that is, impacting retailers generally). This disconnect creates confusion, and will make enforcement difficult. The AEC considers that the Bill should be amended to refer only to reductions in market costs as described in the EM. Requiring retailers to pass through reductions in costs incurred will discourage innovation and investment in reducing actual costs. This outcome would not be in the interests of consumers.

Further, the EM states that this provision is not intended to capture short term, or insubstantial declines in procurement costs. The question remains though, as to what is short term, and what is insubstantial. Practically, retailers usually adjust their market offer prices once per year. This ensures that customers are better able to predict their energy costs, limiting price volatility and bill shock. At the same time, the retailer manages their risks and costs over the year. The new offers they make to customers take these risks and costs into account.

Section 153E appears to limit current practice. If procurement costs fall during the year, the drafting suggests that a price change may be required. We do not consider that would reflect the intent of the provision, nor deliver good customer outcomes. It would be preferable to require retailers to take into account reductions in cost annually, in line with standard price cycles, and provide greater clarity to retailers as to what constitutes a substantial and sustained decrease in costs.

Contracting Prohibition – Section 153F

Section 153F has been drafted in a manner that closely resembles the Misuse of Market Power provisions in s46(1) of the CCA. These provisions are drafted as follows:

46(1) Misuse of Market Power

A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:

(a) that market; or

(b) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) supplies goods or services, or is likely to supply goods or services; or

(ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or

(c) any other market in which that corporation, or a body corporate that is related to that corporation:

(i) acquires goods or services, or is likely to acquire goods or services; or

(ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.

Section 153F is drafted in a manner that appears to have a similar effect.

153F Prohibited conduct—electricity financial contract liquidity

A corporation contravenes this section if:

(a) any of the following conditions are satisfied:

(i) the corporation generates electricity;

(ii) a body corporate that is related to the corporation generates electricity; and

(b) the corporation does any of the following:

(i) fails to offer electricity financial contracts;

(ii) limits or restricts its offers to enter into electricity financial contracts;

(iii) offers to enter into electricity financial contracts in a way that has, or on terms that have, the effect or likely effect of preventing, limiting or restricting acceptance of those offers; and

(c) the corporation does so for the purpose of substantially lessening competition in any electricity market.

The AEC remains of the view that substantial risks arise from implementing duplicative, sector specific regulations, stated by the Government as mitigating conduct already prohibited in the Competition Laws. Given section 46 of the CCA has only recently been amended, the inclusion of energy specific obligations creates practical compliance challenges. Previous guidance around section 46 will no longer be applicable, creating additional uncertainty around whether it and the new section 153F can operate concurrently.

The Government has not provided any evidence that the existing provisions in s46 are inadequate to protect consumers against the type of conduct described in the EM.

It appears that the duplicate prohibition has been developed as a means to implement a sector specific penalty – the contracting order power in s153X. If this is the case, we urge the Committee to recommend that the duplicate provision be removed, and instead, recommend the remedy in s153X (amended as suggested below) be added to the potential remedies for a breach of s46.

Bidding Prohibition – Section 153G and 153H

Sections 153G and 153H prohibit generators from bidding, or failing to bid, fraudulently, dishonestly or in bad faith, and/or does so for the purpose of distorting or manipulating prices in the electricity spot market.

This concept, whilst expanded to include failing to bid, is similar to existing obligations in the National Electricity Rules. Rule 3.8.22A requires that all bids, offers, or rebids are not false or misleading. Given the concept is aligned, the AEC considers it would be preferable to align the drafting of s153G and 153H to that in rule 3.8.22A, with the expanded capture. Additionally, it must be made clear that any conduct found to breach the bidding prohibitions must be contrary to the spot market design.

It is important to note that the Australian Energy Market Commission removed the concept of good faith from the National Electricity Rules in 2015 because it was unable to be determined by the Courts. Given the previous failings of this terminology, it is concerning that the Government intends to re-introduce the concept through this Bill, particularly given the availability of the Government's own expert rule-maker's improved drafting.

Aligning 153G and 153H to the drafting of 3.8.22A would not in any way diminish the ability for the ACCC to determine liability of an electricity business for the type of conduct the Government considers should be avoided.

The AEC reiterates that the ACCC did not find any specific instances of misconduct by electricity businesses in its comprehensive Retail Electricity Pricing Inquiry, rather highlighting that stronger laws should be implemented proactively to avoid any risk. The AEC is not opposed to clear and justified obligations on electricity businesses, but cannot support the poorly drafted provisions of this Bill.

Contracting Orders – Section 153X

Section 153X delivers the Treasurer the extraordinary power to issue a contracting order. A contracting order would require an electricity business to offer financial contracts to any party on terms, price, and volume determined unfettered by the Treasurer. Further, the standards of proof required prior to making such an order are alarmingly low. The ACCC would only need to hold a ‘belief’ that the electricity business has engaged in the prohibited conduct. The Treasurer would then need only be ‘satisfied’ that a breach has occurred, without any judicial process or finding.

This is a serious and ill-considered incursion into the operation of private enterprises in the Australian economy, and one premised on a process that does not afford procedural fairness.

There is a real risk that this power will be politicised. The AEC maintains that a contracting order should only be determined by the Federal Court, in line with the application of the Divestment Order power in s153ZX. No Treasurer could be expected to have the necessary expertise to make a determination of breach or an order of this nature, effectively requiring a detailed understanding of the role of an energy trader – determining available capacity, market price, and timeframes necessary to ensure an Order does not result in the generator becoming insolvent, or force them to breach other contractual obligations.

It is critical that section 153X is amended. The AEC considers that the Treasurer, with guidance from the Australian Energy Regulator, should be required to apply to the Court with a proposed contracting order. The Court must then determine whether it is satisfied that the conditions for making the contracting order, including the contravention of s153F or s153H, have been met. To mitigate any risk of unintended consequence as a result of a contracting order, the Court should also be required to consider evidence from the electricity business about the impact of the Treasurer’s proposed contracting order.

There are also potential constitutional issues with s153X as drafted. As noted by Ashurst in Appendix C:

“placing this power in the hands of the Treasurer may not be appropriate, particularly to the extent to which this might be characterised as a form of judicial power. In the context of these reforms, it gives the Treasurer the power to punish a business by fundamentally changing the structure and commercial arrangements of that business.”

Conclusion

The introduction of sector specific prohibitions into the CCA is undesirable and not justified by existing market outcomes. If not undertaken carefully, following thorough investigation into the appropriateness, effectiveness, and targeting of the new laws, the negative consequences could be dramatic. The Government in developing this Bill has not provided stakeholders with any evidence that these reforms will deliver positive outcomes for consumers.

When considered against the Harper Review’s four key questions highlighted above, the Bill is clearly deficient.

- **Does the law focus on enhancing consumer wellbeing over the long term?**

The Government states this to be the case, however provides no evidence that the prohibitions, and remedies they afford, have been drafted to avoid any specific negative outcomes. The Bill instead suggests it will enhance consumer wellbeing because of the mere presence of punitive laws.

- **Does the law protect competition rather than individual competitors?**

The Bill as drafted is unclear in its application. Whilst it would apply sector wide, Government rhetoric suggests that it is in fact intended to largely impact large electricity businesses, for the protection of smaller businesses.

- **Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?**

This assessment has not been undertaken. The Government drafted the 2018 Bill in a compressed timeframe, and as noted above has only made cursory amendments to the 2019 Bill following an informal consultation. There remain significant risks that implementing broad, vague, and sector specific powers will result in over capture.

- **Is the law as clear, simple and predictable as it can be?**

Submissions to the Committee Inquiry into the 2018 Bill were overwhelming in their conclusions. The weight of evidence presented was to the effect that this Bill has not been carefully drafted to mitigate unintended consequences, but rather the opposite. It provides near identical prohibitions to existing legislation, without any evidence provided as to why these obligations are inadequate. They are unpredictable, requiring numerous examples to attempt to clarify the types of conduct deemed prohibited. These examples continue to highlight conduct not found in the market, or already prohibited by existing laws.

Further, the fact that these recommendations, in particular the power to divest assets, were expressly considered by both the ACCC and the Harper Review, and rejected as unhelpful, should be a matter of grave concern.

The Government must amend this Bill. Without amendment, the so-called 'Big Stick' will not reduce energy prices, or benefit consumers in any way.

The AEC would welcome the opportunity to appear before the Committee, to highlight the genuine and continuing concerns of our members regarding the Bill.

Yours sincerely

Sarah McNamara
Chief Executive

Appendix A: Proposed AEC clarifications and amendments

2016-2017-2018

The Parliament of the
Commonwealth of Au

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.

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	The day this Act receives the Royal Assent.	
2. Schedule 1	The day <u>that is 3 months from the date that the Australian Competition and Consumer Commission publishes guidelines on the interpretation of this Act</u> after this Act receives the Royal Assent.	
<u>3. The operation of section 153E.</u>	<u>The day that is 6 months from the date that the Australian Competition and Consumer Commission publishes guidelines on the interpretation of this Act.</u>	
34. Schedule 2	The day this Act receives the Royal Assent.	

Commented [A1]: AEC members propose changes to allow a transition period as set out below.

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.

- (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.

3 Schedules

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.

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-Court~~ 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 ~~the Treasurer apply for~~ orders);
- (d) if the Commission has given the Treasurer a prohibited conduct recommendation, the Treasurer may:

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

- (i) apply to the Court to make a *contracting order* that requires making offers to enter into electricity financial contracts; and
- (ii) apply to the Court for a *divestiture order* that 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.

Commission decision means a decision made by the Commission to:

- (a) issue a prohibited conduct notice in accordance with section 153P;
- (b) vary a prohibited conduct notice in accordance with section 153Q;
- (c) give the Treasurer a prohibited conduct recommendation in accordance with section 153R or 153S;
- (d) vary a prohibited conduct recommendation in accordance with section 153T; or
- (e) vary or revoke a no Treasurer action notice in accordance with section 153V.

Commented [A2]: See the proposed section 153VA.

Court means the Federal Court of Australia.

Prohibited conduct in the electricity industry **Schedule 1**
Main amendments **Part 1**

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; **or**
- (b) a market for electricity financial contracts.

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

Industry benchmark costs means the costs, or range of costs, that would be incurred by an efficient standalone retailer in supplying small customers in the relevant jurisdiction. These costs include the wholesale costs associated with managing the risk associated with supplying those customers in the relevant jurisdiction. These costs do not include retail operating costs or retail margin.

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

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.

Commented [A3]: These sections would be updated if the prohibitions in section 153E and 153G are removed as proposed by AEC members.

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

small business customer means a customer who purchases, or proposes to purchase, electricity at a rate that is the lesser of:

(a) for a customer in:

(i) less than New South Wales, South Australia or South East Queensland, 100 MWh for a financial year; or

(ii) in Victoria, 40 MWh for a financial year; and

(b) the upper consumption threshold specified for the purposes of section 5 of the National Energy Retail Law as applied to the jurisdiction in which the customer consumes electricity.

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

(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.

Commented [A4]: This is consistent with the definition of "small business customer" in the VDO Order.

Prohibited conduct in the electricity industry **Schedule 1**
Main amendments **Part 1**

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 ~~its~~the underlying cost of procuring electricity.

~~(2) The underlying cost of procuring electricity is to be determined by reference to:~~

- ~~(a) whether there has been a reduction in the industry benchmark costs, being the costs that would be incurred by a prudent and efficient standalone retailer in managing the risks of supplying customers in the relevant market; and~~
- ~~(a) where there has been a reduction in these industry benchmark costs, whether there is any circumstance particular to the retailer such that the retailer has not experienced a reduction in its costs.~~

~~(4) For the purpose of determining whether a corporation has contravened subsection (1), a corporation does not fail to make a reasonable adjustment to the price of its offers, or to the price of its supplies, of electricity to small customers to the extent that the retailer does not make an adjustment where:~~

- ~~(a) the corporation forecasts on reasonable grounds that the underlying cost of procuring electricity is likely to rise and offset the sustained and substantial reduction;~~
- ~~(b) the reduction in the underlying cost of procuring electricity is offset by an increase in other costs incurred by the corporation reasonably attributable to the supply of electricity to small customers (including the cost of implementing the changes, the overall operating costs, current costs, costs over the longer term, viability, risk management strategies and efficiency gains derived from improving internal processes);~~
- ~~(c) the corporation delays the adjustment in order to comply with requirements imposed by other applicable legislation in~~

Commented [A5]: We propose that section 153E be removed. Section 153E goes further than the intention expressed in paragraphs 8.5 to 8.14 of the Explanatory Memorandum. We suggest that instead and the efficacy of the DMO Code and VDO Order should be reviewed before any this additional regime is implemented. If it is later considered the section 153E regime is needed, then this can be introduced by a further bill.

However, if this is not accepted, the following changes should be made to ensure it is workable.

Commented [A6]: This is an objective test, consistent with the intention expressed at paragraph 2.28 of the Explanatory Memorandum. Also consistent with paragraphs 2.26 and 2.28 of the Explanatory Memorandum.

Commented [A7]: Paragraph 2.38 of the Explanatory Memorandum.

Commented [A8]: Paragraphs 2.32, 2.41, 2.42 and 2.43 of the Explanatory Memorandum.

Commented [A9]: Paragraph 2.29 of the Explanatory Memorandum.

Schedule 1 Prohibited conduct in the electricity industry
Part 1 Main amendments

1 relation to when and how corporations may adjust the prices
2 of offers to supply electricity, or supplies of electricity, to
3 small customers; or
4 (d) the corporation delays the reasonable adjustment so as to
5 avoid making price adjustments more than once every 6
6 months.

Commented [A10]: Paragraph 2.38 of the Explanatory Memorandum.

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

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

153F Prohibited conduct—electricity financial contract liquidity

13 (1) A corporation contravenes this section if:

14 (a) any of the following conditions are satisfied:

15 (i) the corporation generates electricity; or

16 (ii) a body corporate that is related to the corporation
17 generates electricity; and

18 (b) the corporation does any of the following:

19 (i) fails to offer electricity financial contracts where it is
20 reasonably able to do so;

21 (ii) significantly limits or restricts its offers to enter into
22 electricity financial contracts;

23 (iii) offers to enter into electricity financial contracts in a
24 way that has, or on terms that have, the effect or likely
25 effect of unreasonably preventing, limiting or restricting
26 acceptance of those offers; ~~and,~~

27 to a person that offers or supplies electricity to small
28 customers; and;

29 (c) the corporation does so for the purpose of substantially
30 lessening competition in any electricity market.

31 (2) A corporation does not contravene subsection (1) to the
32 extent that the corporation:

33 (a) would need to vary or terminate binding contractual
34 arrangements in order to offer electricity financial contracts
35 to customers;

Commented [A11]: AEC's members preference is for section 135F to be removed, and instead for contracting orders to be available for a breach of section 46 of the *Competition and Consumer Act 2010* (Cth). This section could be construed as having a broad application, which is not intended taking into account paragraph 2.49 of the Explanatory Memorandum.

If it is retained, the following changes are proposed.

Commented [A12]: Paragraph 2.52 of the Explanatory Memorandum.

Commented [A13]: Paragraph 2.45 of the Explanatory Memorandum.

Commented [A14]: Paragraph 2.53 of the Explanatory Memorandum.

Prohibited conduct in the electricity industry **Schedule 1**
Main amendments **Part 1**

- 1 (b) reasonably considers that offering electricity financial
2 contracts would compromise the corporation's ability to
3 meet its commitments under existing contracts; or
4 (c) is giving effect to genuine strategies to mitigate its risk in
5 generating and offering electricity, including internal
6 contracting by the corporation, or arising from the offer of
7 electricity financial contracts;
8 (d) has made genuine offers of electricity financial contracts
9 which have not been accepted by customers;
10 (ee) is limited in its ability to offer electricity financial contracts
11 by a current or forecast reduction in available generation
12 because of operational and supply issues including but not
13 limited to physical issues arising in relation to generation
14 facilities, directions given by the Australian Energy Market
15 Operator or in order to make provision for planned or
16 unplanned outages;
17 (f) refuses to offer an electricity financial contract to a customer
18 where, on reasonable grounds, the corporation believes the
19 counterparty will re-supply, or offer to re-supply, the
20 electricity financial contract;
21 (g) has engaged in the conduct for the purpose of ensuring the
22 safety of its assets, including the generation facilities and
23 equipment; or;
24 (h) has not offered an electricity financial contract for the reason
25 that the corporation has closed, or will close, a generation
26 facility for the purpose of:
27 (i) a long term strategy to permanently close or retire the
28 generation facility; or
29 (ii) care, maintenance, safety of the assets, occupational
30 health or safety reasons, or other legitimate operational
31 reasons.

Commented [A15]: Paragraphs 2.54 and 2.69 of the Explanatory Memorandum.

Commented [A16]: Paragraphs 2.49 and 2.53 of the Explanatory Memorandum.

Commented [A17]: Paragraphs 2.49 and 2.53 of the Explanatory Memorandum.

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

- 34 (1) A corporation contravenes this section if:
35 (a) the corporation:

Commented [A18]: AEC members consider that, rather than introducing a new prohibition, the existing prohibition in rule 3.8.22A(a) of the NER should be relied on instead of this "basic case" provision. If a new provision is to be added, then the marked-up changes to the "basic case" are proposed.

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- 1 (i) bids or offers to supply electricity in relation to an
2 electricity spot market that is part of the national
3 electricity market; or
4 (ii) fails to bid or offer to supply electricity in relation to an
5 electricity spot market that is part of the national
6 electricity market; and
7 (b) the corporation does so ~~fraudulently, dishonestly or in bad~~
8 ~~faith.~~
9 ~~(i) fraudulently, dishonestly or in bad faith; or~~
10 ~~(ii) for the purpose of distorting or manipulating prices in~~
11 ~~that electricity spot market.~~
12 (2) For the purposes of determining whether a corporation has
13 contravened subsection (1), a bid or offer, or failure to bid or offer,
14 is deemed to be fraudulent or dishonest if, at the time the bid or
15 offer is made, or the corporation failed to make the bid or offer, the
16 corporation:
17 (a) does not have a genuine intention to honour the bid or offer;
18 or
19 (b) does not have a reasonable basis to make or fail to make the
20 bid or offer.
21
22 Note 1: The Treasurer cannot apply to the Court ~~make for~~ a contracting order
23 in respect of a contravention of this section (see paragraph 153W(e)).
24 Note 2: The Treasurer cannot apply to the Court for a divestiture order in
25 respect of a contravention of this section (see paragraph 153ZA(e)).

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

- 26
27 (1) A corporation contravenes this section if:
28 (a) the corporation:
29 (i) bids or offers to supply electricity in relation to an
30 electricity spot market that is part of the national
31 electricity market; or
32 (ii) fails to bid or offer to supply electricity in relation to an
33 electricity spot market that is part of the national
34 electricity market; and

Commented [A19]: Paragraph 2.87 of the Explanatory Memorandum.

Commented [A20]: AEC members consider that, rather than introducing a new prohibition, the existing prohibition in rule 3.8.22A(a) of the NER should be relied on, but, where the conduct is fraudulent or dishonest, then the AER may apply for a contracting order. If this approach is not preferred, then the marked-up changes are proposed.

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1 (b) the corporation does so fraudulently ~~or~~; dishonestly ~~or in bad~~
2 ~~faith~~, for the purpose of distorting or manipulating prices in
3 that electricity spot market.

4 (2) For the purposes of determining whether a corporation has
5 contravened subsection (1):

6 (a) a bid or offer, or failure to bid or offer, is deemed to be
7 fraudulent or dishonest if, at the time the bid or offer is made,
8 or the corporation failed to make the bid or offer, the
9 corporation:

10 (i) does not have a genuine intention to honour the bid or
11 offer; or

12 (ii) does not have a reasonable basis to make or fail to make
13 the bid or offer; and

14 (b) when assessing whether a corporation engaged in the relevant
15 conduct for the purpose of distorting or manipulating prices,
16 the following must be taken into account:

17 (i) the design and objectives of the relevant market;

18 (ii) whether or not the bid or offer, or failure to bid or offer
19 is a single instance of bidding, or failure to bid, or part
20 of a series of bids, or failure to bids, with the prohibited
21 purpose; and

22 (iii) whether the corporation is giving effect to genuine
23 strategies to mitigate and balance its risk in generating
24 and offering electricity across its entire operation.

25 (3) Nothing in this section prohibits bidding conduct that is consistent
26 with the design of, and rules regulating, the relevant electricity spot
27 market and in the ordinary course of business, having regard to the
28 entirety of the corporation's operations.

Commented [A21]: Paragraph 2.87 of the Explanatory
Memorandum.

Commented [A22]: Paragraph 2.95 of the Explanatory
Memorandum.

Commented [A23]: Paragraph 2.101 of the Explanatory
Memorandum.

29 **153J Prohibited conduct — purpose**

30 (1) This section:

31 (a) applies for the purposes of sections 153F, 153G and 153H;
32 and

33 (b) does not limit the manner in which the purpose of a person
34 may be established for the purposes of any other provision of
35 this Act.

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~~(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 corporation or of any other person or from other relevant circumstances.~~

153K Prohibited conduct may be covered by other provisions

(1) 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.

(2) In deciding whether a corporation has contravened Division 2 of this Part, the following must be disregarded:
(a) anything specified in, and specifically authorised by an Act, or regulations made under such an Act;
(b) anything specified in, and specifically authorised by, an Act passed by the Parliament of a State, or regulations made under such an Act;
(c) anything specified in, and specifically authorised by, an enactment of the Australian Capital Territory or Northern Territory, or regulations made under such an enactment;
(d) anything specified in, and specifically authorised by, a licence or other instrument issued or made under a State Act, enactment or Ordinance.

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Division 3—Commission responses

Subdivision A—~~Public~~ Warning notices

153L Commission may give ~~draft public~~ confidential 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 ~~21~~ 45 days after being given the notice, make representations to the Commission regarding the matters mentioned in paragraphs (1)(a), (b) and (c); and
 - (ii) the Commission may ~~issue~~ apply to the Court for a public warning notice under section 153M in relation to the prohibited conduct after those ~~21~~ 45 days have passed.
- (3) A notice given under subsection (1) is not a legislative instrument.

Commented [A24]: This amendment is proposed as a result of amending section 153M.

These power to issue public warning notices are not well suited to dealing with these types of prohibitions, as they require detailed analysis in order to determine whether there has been a contravention. They are more suited where there is a sense of urgency that the public must be made aware of a matter in order to avoid harm. The ACCC should not have the power to issue any warning notices on a public basis, particularly without the contraventions having been established/proved. Accordingly, this should be a **confidential** process.

The broad power for the ACCC to issue a public warning notice could have very severe impact on retailers, particularly in circumstances where the contravention does not even have to be proved. For example, even if the ACCC or Court determines that the corporation has not engaged in prohibited conduct after the ACCC has issued a public warning notice, the corporation would already have been significantly affected by the public warning notices.

Commented [A25]: 21 days is not sufficient time for any corporation to identify the source of the conduct of concern, determine what happened, whether there was a breach, seek legal advice etc.

We consider 45 days would be more appropriate.

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153M Commission may ~~issue~~ apply to Court for 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 ~~21~~ 90 days have passed since the Commission gave the corporation the notice; and
 - (c) no more than ~~90~~ 120 days have passed since the Commission gave the corporation the notice.
- (2) The Court may, on application by the Commission, ~~may~~ issue to the public a written notice containing a warning about the prohibited conduct if the ~~Commission-Court 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.

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).

Commented [A26]: Only the Court should have the power to issue a public warning notice. These provisions should be **amended to reflect the language of section 86D of the CCA** which empowers the Court, on application by the ACCC, to make an adverse publicity order in relation to a corporation who has engaged in prohibited conduct.

The broad power for the ACCC to issue a public warning notice could have very severe impact on retailers, particularly in circumstances where the contravention does not even have to be proved. For example, even if the ACCC or Court determines that the corporation has not engaged in prohibited conduct after the ACCC has issued a public warning notice, the corporation would already have been significantly affected by the public warning notices.

Commented [A27]: These sections would be updated if the prohibitions in section 153E and 153G are removed as proposed by AEC members.

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- (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
 - (c) if that kind of order is, or those kinds of order include, a divestiture order—the following conditions are satisfied:
 - (i) such a divestiture order will result, or is likely to result, in a significant and material benefit to the public;
 - (ii) if such a divestiture order 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 notice must:
- (a) be expressed to be given under this section; and
 - (b) state the day on which the notice is given; and
 - (c) identify:
 - (i) the corporation; and

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- 1 (ii) the prohibited conduct mentioned in paragraph (1)(a);
2 and
3 (iii) each connected body corporate in relation to the
4 prohibited conduct (other than the corporation); and
5 (d) state the recommendations mentioned in subsection (1); and
6 (e) explain the reasons why the Commission ~~reasonably believes~~
7 ~~is satisfied on reasonable grounds~~ that:
8 (i) the requirements in paragraphs (1)(a) and (b) are met;
9 and
10 (ii) if paragraph (1)(c) applies—the requirement in that
11 paragraph is met; and
12 (f) state that the corporation may, within the period mentioned in
13 subsection (3), make representations to the Commission
14 regarding the conduct mentioned in subparagraph (c)(ii) and
15 the recommendations mentioned in paragraph (d).
- 16 (3) For the purposes of paragraph (2)(f), the period:
17 (a) starts on the day on which the notice is given; and
18 (b) ends:
19 (i) if subparagraph (ii) does not apply—~~45-60~~ days after
20 that day; or
21 (ii) if the Commission allows a later day—that later day.
- 22 (4) A failure to comply with subparagraph (2)(c)(iii) does not affect
23 the validity of the notice.
- 24 (5) The Commission must give each of the following a copy of the
25 notice as soon as practicable after issuing it:
26 (a) the corporation;
27 (b) each body corporate identified in the notice (in accordance
28 with subparagraph (2)(c)(iii)).
- 29 (6) A prohibited conduct notice is not a legislative instrument.

153Q Commission may vary or revoke prohibited conduct notice

- 31 (1) The Commission may, in writing, vary or revoke a prohibited
32 conduct notice given to a corporation.
- 33 (2) A variation or revocation under subsection (1) must:
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- (a) state the day on which it is made; and
(b) in the case of a variation—state that the corporation may, within the period mentioned in subsection (3), make representations to the Commission regarding the prohibited conduct notice as varied.

(3) For the purposes of paragraph (2)(b), the period:

- (a) starts on the day on which the Commission gives the corporation the copy of the variation; and
(b) ends:
(i) if subparagraph (ii) does not apply—~~45~~ 60 days after that day; or
(ii) if the Commission allows a later day—that later day.

(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:

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

26 **153S Prohibited conduct recommendations**

- 27 (1) The Commission may give the Treasurer a notice in writing (a
28 ***prohibited conduct recommendation***) in respect of the prohibited
29 conduct notice, stating one or more recommendations for the kind
30 or kinds of order ~~the Treasurer or~~ the Court could make under
31 Division 5 or 6, if the Commission ~~reasonably believes is satisfied~~
32 on reasonable grounds that:
33 (a) ~~any both~~ of the following conditions are satisfied:

Commented [A28]: Paragraphs 6.27 and 6.28 of the Explanatory Memorandum.

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

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- 1 (ii) if paragraph (1)(c) applies—the requirement in that
2 paragraph is met.
- 3 (3) To avoid doubt, the recommendations stated in the notice (in
4 accordance with paragraph (2)(d)) may be different from the
5 recommendations stated in the prohibited conduct notice (in
6 accordance with paragraph 153P(2)(d)).
- 7 (4) A failure to comply with subparagraph (2)(c)(iii) does not affect
8 the validity of the notice.
- 9 (5) To avoid doubt, the bodies corporate identified in the notice (in
10 accordance with subparagraph (2)(c)(iii)) need not be the same as
11 the bodies corporate identified in the prohibited conduct notice (in
12 accordance with subparagraph 153P(2)(c)(iii)).
- 13 (6) A prohibited conduct recommendation is not a legislative
14 instrument.
- 15 (7) A copy of the prohibited conduct recommendation must be given
16 to the corporation at the same time it is given to the Treasurer.
- 17 **153T Commission may vary or revoke prohibited conduct**
18 **recommendation**
- 19 (1) The Commission may, in writing, vary or revoke a prohibited
20 conduct recommendation.
- 21 (2) The Commission cannot make a variation ~~or revocation~~ under
22 subsection (1) later than 45 days after:
23 (a) unless paragraph (b) applies—the day on which the
24 Commission made the prohibited conduct recommendation;
25 or
26 (b) if there has been a previous variation of the prohibited
27 conduct recommendation under this section—the day on
28 which the Commission made the previous variation.
- 29 (3) The Commission cannot make a variation ~~or revocation~~ under
30 subsection (1) if:
31 (a) the Treasurer has ~~made~~ applied to the Court for a contracting
32 order in relation to the prohibited conduct recommendation;
33 or
-

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- 1 (b) the Treasurer has applied to the Court for a divestiture order
2 in relation to the prohibited conduct recommendation.
- 3 (4) The Commission cannot make a variation under subsection (1)
4 unless the Commission is satisfied that:
- 5 (a) the variation is minor or insubstantial; or
6 (b) all of the following conditions are met:
- 7 (i) the corporation or any related body corporate gave the
8 Commission information relevant to the prohibited
9 conduct notice that is false or misleading in a material
10 particular, or failed to give the Commission information
11 relevant to the prohibited conduct notice that is not
12 publicly available; and
13 (ii) the variation is reasonably necessary to address the
14 circumstances described in subparagraph (i); or
15 (c) the variation is reasonably necessary to address information
16 that was not in existence, or that the Commission did not
17 have, when the prohibited conduct notice was given.
- 18 (5) A variation or revocation under subsection (1) must state the day
19 on which it is made.
- 20 (6) The Commission must give a copy of a variation or revocation
21 under subsection (1) to the Treasurer as soon as practicable after
22 making it.
- 23 (7) A variation or revocation under subsection (1) is not a legislative
24 instrument.
- 25 (8) Subsection 33(3) of the *Acts Interpretation Act 1901* does not
26 apply in relation to a prohibited conduct recommendation.

27 **153U No Treasurer action notice**

- 28 (1) The Commission must give the Treasurer a **confidential** notice in
29 writing (a **no Treasurer action notice**) in respect of the prohibited
30 conduct notice mentioned in section 153R if the Commission
31 considers that it is not appropriate to give the Treasurer a
32 prohibited conduct recommendation in respect of the prohibited
33 conduct notice.
- 34 (2) The notice must:

Commented [A29]: Paragraph 6.37 of the Explanatory Memorandum.

Commented [A30]: This must be provided to the Treasurer in confidence. If the proposed amendments in respect of 'public warning notices' above are accepted, such that the warning notices are issued in confidence, then it follows that the 'no Treasurer action notice' should also be confidential.

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

6 ~~(3) The Commission must publish the notice by electronic or other~~
7 ~~means;~~

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

- 12 (43) A no Treasurer action notice is not a legislative instrument.

13 **153V Commission may vary or revoke no Treasurer action notice**

- 14 (1) The Commission may, in writing, vary or revoke a no Treasurer
15 action notice.
16 (2) The Commission cannot make a variation ~~or revocation~~ under
17 subsection (1) later than 45 days after:
18 (a) unless paragraph (b) applies—the day on which the
19 Commission made the no Treasurer action notice; or
20 (b) if there has been a previous variation of the no Treasurer
21 action notice under this section—the day on which the
22 Commission made the previous variation.
23 (3) The Commission cannot make a variation under subsection (1)
24 unless the Commission is satisfied that the variation is minor or
25 insubstantial.
26 (4) The Commission cannot make a revocation under subsection (1)
27 unless the Commission is reasonably satisfied that the conditions in
28 subsections (5) and (6) are met.
29 (5) The condition in this subsection is met if the Commission
30 ~~reasonably believes is satisfied on reasonable grounds~~ that it is
31 appropriate to:
32 (a) give the Treasurer a prohibited conduct recommendation in
33 respect of the prohibited conduct notice; or

Commented [A31]: If the proposed amendments in respect of public warning notices above are accepted, it follows that **subsection 153U(3) should be deleted.**

Given the issues identified in relation to public warning notices above and our view that this power should be removed, it follows that it would not be reasonable to require the ACCC to publish a “no action notice”.

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- 1 (b) give the corporation a new prohibited conduct notice in
2 respect of the prohibited conduct identified in the prohibited
3 conduct notice (in accordance with
4 subparagraph 153P(2)(c)(ii)).
- 5 (6) The condition in this subsection is met if the Commission
6 ~~reasonably believes is satisfied on reasonable grounds~~ that: |
7 (a) all of the following conditions are met:
8 (i) the corporation or any related body corporate gave the
9 Commission information relevant to the prohibited
10 conduct notice that is false or misleading in a material
11 particular, or failed to give the Commission information
12 relevant to the prohibited conduct notice that is not
13 publicly available;
14 (ii) the revocation is reasonably necessary to address the
15 circumstances described in subparagraph (i); or
16 (b) the revocation is reasonably necessary to address information
17 that was not in existence, or that the Commission did not
18 have, when the prohibited conduct notice was given.
- 19 (7) A variation or revocation under subsection (1) must state the day
20 on which it is made.
- 21 (8) The Commission must give a copy of a variation or revocation
22 under subsection (1) to the Treasurer as soon as practicable after
23 making it.
- 24 ~~(9) The Commission must publish a variation or revocation under~~
25 ~~subsection (1) by electronic or other means as soon as practicable~~
26 ~~after making it.~~
- 27 ~~(10) If the no Treasurer action notice has not yet been published in~~
28 ~~accordance with subsection 153U(3) by the time the Commission~~
29 ~~makes a variation or revocation under subsection (1):~~
30 ~~(a) despite subsection 153U(3), the Commission must not~~
31 ~~publish the no Treasurer action notice; and~~
32 ~~(b) despite subsection (9), the Commission must not publish the~~
33 ~~variation or revocation.~~
- 34 ~~(49)~~ A variation or revocation under subsection (1) is not a legislative
35 instrument.

Commented [A32]: If the proposed amendments in respect of public warning notices above are accepted, it follows that these paragraphs **should be deleted**.

Given the issues identified in relation to public warning notices above and our view that this power should be removed, it follows that it would not be reasonable to require the ACCC to publish a “no action notice”.

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(~~42~~10) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a no Treasurer action notice.

153VA Commission decisions

(1) Within 28 days after the appealable decision is made, an affected corporation, may, in writing, apply to the Tribunal for a review of a Commission decision or such longer time as allowed by the Tribunal.

(2) An application must be made in the form and manner determined by the Tribunal, and specify the grounds for review being relied on.

(3) An application for review in accordance with subsection (2) may be made on one or more of the following grounds:

(a) the Commission made error(s) of fact in its findings of fact(s), and the error(s) of fact was/were material to the making of the decision;

(b) the exercise of the Commission's discretion was incorrect, having regard to all the circumstances;

(c) the Commission's decision was unreasonable, having regard to all the circumstances; or

(d) any other specified ground.

(4) On the basis of the material before the Tribunal, the Tribunal may exercise the powers and discretions conferred on the Commission and make a decision, in writing, to:

(a) affirm the decision under review;

(b) vary the decision under review; or

(c) set aside the decision under review and:

(i) make a decision in substitution for the decision so set aside; or

(ii) remit the matter to the Commission for reconsideration in accordance with any directions or recommendations of the Tribunal.

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Division 5—Contracting orders

Subdivision A—~~Treasurer may make e~~Contracting orders

153W Conditions for making an application to the Federal Court for a contracting order

- (1) The Treasurer may ~~make apply to the Court for an order under section 153X-153Y~~ in respect of a body corporate if the Treasurer is satisfied that the following conditions are met:
- (a) the Commission has given the Treasurer a prohibited conduct recommendation under section 153S;
 - (b) the body corporate is identified in the recommendation (in accordance with subparagraph 153S(2)(c)(i) or (iii));
 - (c) the order is made no later than 45 days after:
 - (i) unless subparagraph (ii) applies—the day on which the Commission gave the Treasurer the recommendation; or
 - (ii) if there has been a variation of the recommendation under section 153T—the day on which the Commission made the variation;
 - (d) the order is of a kind stated in the recommendation (in accordance with paragraph 153S(2)(d));
 - (e) the conduct identified in the recommendation (in accordance with subparagraph 153S(2)(c)(ii)):
 - (i) is prohibited conduct engaged in by the corporation identified in the recommendation (in accordance with subparagraph 153S(2)(c)(i)) (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));
 - (f) 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;
 - (g) any of the following generate electricity:
 - (i) the body corporate;
 - (ii) another body corporate that is related to the body corporate.

Commented [A33]: These provisions should be amended so that the Treasurer may **apply to the Court** for a contracting order.

This is a significant power that would require the Treasurer to take the position of an electricity financial contract trader in order to apply, particularly in relation to a dynamic market.

We are concerned about the unbounded nature of this power. There is a material risk that, used inappropriately, the power could cause significant detriment to the firm and distort the market. We are also concerned that placing this power in the hands of the Treasurer may not be appropriate, particularly to the extent to which this might be characterised as a form of judicial power. In the context of these reforms, it gives the Treasurer the power to punish a business by fundamentally changing the structure and commercial arrangements of that business.

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- 1 (2) If an application has been made to the Tribunal under
2 section 153VA, the Treasurer may not apply to the Court for a
3 contracting order under this section 153W until the Tribunal has
4 heard and made a final determination in respect of that application.
- 5 (3) The application made under paragraph (1) above must not seek to
6 require a corporation to offer or enter into an electricity financial
7 contract in respect of a generation facility that was closed at the
8 date of the alleged contravention if the reason that the corporate
9 has closed the generation facility is for the purpose of:-
10 (a) a long term strategy to permanently close or retire the
11 generation facility; or
12 (b) care, maintenance, safety of the assets, occupational health or
13 safety reasons, or other legitimate operational reasons.
- 14 **153X Treasurer may make a proposed contracting order**
- 15 (1) Before making an application to the Court under section 153W, the
16 Treasurer must, in writing and on a confidential basis to the body
17 corporate, have made a proposed contracting order directing The
18 Treasurer may, in writing, order the body corporate to make offers
19 to enter into electricity financial contracts.
- 20 (2) The order must:
21 (a) be expressed to be made under this section; and
22 (b) state the day on which the order is ~~made~~to come into effect;
23 and
24 (c) identify:
25 (i) the body corporate; and
26 (ii) if the body corporate is not the relevant corporation—
27 the relevant corporation; and
28 (iii) the prohibited conduct mentioned in
29 paragraph 153W(e); and
30 (d) explain the reasons why the Treasurer is satisfied that the
31 conditions in paragraphs 153W(e) and (f) are met; ~~and~~
32 (e) specify the matters mentioned in subsection (3); ~~and~~
33 (f) provided in confidence to the body corporate.
- 34 (3) The matters are as follows:

Commented [A34]: Before making an application to the Court under section 153W, the Treasurer must have made a “*proposed* contracting order”, on a confidential basis, directing the relevant corporation to make offers to enter into electricity financial contracts. This must be confidential to the parties involved.

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- 1 (a) the kind of offers that the body corporate must make to enter
2 into electricity financial contracts;
3 (b) the manner in which the body corporate must make those
4 offers;
5 (c) the kind of entities to which those offers must be made;
6 (d) the period or periods during which the body corporate must
7 make those offers;
8 (e) any other matter that the Treasurer considers necessary for
9 the order to be effective.
- 10 (4) The order may specify the kind of offers that the body corporate
11 must make in any of the following ways:
12 (a) the kind of electricity financial contracts that must be offered;
13 (b) the price or range of prices in respect of electricity under the
14 electricity financial contracts that must be offered, or a
15 method or methods of working out that price or that range;
16 (c) the minimum number of megawatt hours of electricity to
17 which the electricity financial contracts that must be offered
18 must relate.
- 19 (4A) The proposed contracting order made under paragraph (1) above
20 must not require a corporation to offer, or enter into, an electricity
21 financial contract which has the effect of requiring the corporation
22 to offer an electricity financial contract in respect of a generation
23 facility that was closed at the date of the alleged contravention, or
24 will be closed at the time relevant to the contracting order, if the
25 reason that the corporate has closed, or will close, the generation
26 facility is for the purpose of:
27 (a) a long term strategy to permanently close or retire the
28 generation facility; or
29 (b) care, maintenance, safety of the assets, occupational health or
30 safety reasons, or other legitimate operational reasons.
31
- 32 (5) In determining the minimum number of megawatt hours to specify
33 for the purposes of paragraph (4)(c), the Treasurer must have
34 regard to the following matters:
35 (a) the total electricity generation capacity of the electricity
36 generation assets held by each connected body corporate in

Schedule 1 Prohibited conduct in the electricity industry
Part 1 Main amendments

- 1 relation to the prohibited conduct and related bodies
2 corporate;
3 (b) the nature and location of those electricity generation assets;
4 (c) the commitments that the body corporate has, and related
5 bodies corporate have, to supply electricity to customers;
6 (d) the need for the corporation to mitigate risk in generating and
7 offering electricity, including by internal contracting by the
8 corporation;
9 ~~(de)~~ the current and forecast state of the electricity market and the
10 market for electricity financial contracts for the period of the
11 proposed order;
12 (f) any other matter that the Treasurer considers to be relevant.
- 13 (6) The specified period or periods during which the body corporate
14 must make those offers must:
15 (a) start no earlier than ~~6~~12 months after the order is made; and
16 (b) end no later than ~~3~~2 years after the order is made.
- 17 (7) In determining the price or range of prices in respect of electricity
18 under the electricity financial contracts that must be offered for the
19 purposes of subsection (4)(b) the Court, must have regard to the
20 following matters:
21 (a) the market price of electricity at the time the offers will be
22 required to be made and the term of the offered electricity
23 financial contracts;
24 (b) the body corporate's costs of procuring and producing
25 electricity;
26 (c) the ongoing financial viability of the body corporate; and
27 (d) any other relevant matters.
- 28 ~~(78)~~ The Treasurer must not publish the proposed order by electronic or
29 other means.

153Y Making of contracting order

- 30
31 (1) This section applies if the Treasurer has made:
32 (a) an application to the Court under section 153W; and
33 (b) a proposed contracting order under section 153X.

Commented [A35]: Paragraph 4.23 of the Explanatory Memorandum.

Commented [A36]: In order for the contracting order power to be exercised appropriately by the Court, it will be essential to set out clear criteria / factors to which the Court must have regard when determining the price(s) in respect of electricity under the electricity financial contracts that must be offered.

We have drafted a new section 153Y which sets out the process for the Treasurer to apply to the Court for a contracting order to be made, as well as the process for the Court to impose any such order.

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- 1 (2) The Court may, on application of the Treasurer under section
2 153W, make an order under subsection (3) in relation to the body
3 corporate if:
4 (a) the Court finds, or has in another proceeding instituted under
5 this Act found, that the conduct identified in the
6 recommendation (in accordance with
7 subparagraph 153S(2)(c)(ii));
8 (i) is prohibited conduct engaged in by the relevant
9 corporation; and
10 (ii) is, or includes, prohibited conduct under section 153F
11 (electricity financial contract liquidity) or section 153H
12 (electricity spot market (aggravated case)); and
13 (b) the Court is satisfied that the proposed contracting order
14 made by the Treasurer under section 153X is a proportionate
15 means, and other remedy or remedies would not constitute
16 sufficient means, of preventing the relevant corporation, or
17 any related body corporate, from engaging in that kind of
18 prohibited conduct in the future, taking account of the impact
19 on the body corporate.
20 (3) The Court may order the body corporate to:
21 (a) comply with the proposed contracting order made by the
22 Treasurer under section 153X;
23 (b) if the period or periods specified in the proposed contracting
24 order (in accordance with paragraph 153X(3)(d)) have
25 already passed—comply with the contracting order, within a
26 new period, or new periods, specified in the order;
27 (c) comply with any other order that the Court considers
28 appropriate.
29 (4) The Court may not order the body corporate to offer or enter into
30 an electricity financial contract in respect of a generation facility
31 that was closed at the date of the alleged contravention if the
32 reason that the corporate has closed the generation facility is for
33 the purpose of:-
34 (a) a long term strategy to permanently close or retire the
35 generation facility; or
36 (b) care, maintenance, safety of the assets, occupational health or
37 safety reasons, or other legitimate operational reasons.

Commented [A37]: Paragraph 4.13 of the Explanatory Memorandum.

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Subdivision B—Variation and revocation of contracting order

153Y–153Z Treasurer or corporation may apply to vary or revoke
Variation and revocation of a contracting order

- (1) ~~The Treasurer or a corporation may, in writing, apply to the Court vary or revoke a contracting order in respect of a body corporate, on the Treasurer’s own initiative or on application made by the body corporate.~~
- (2) The Treasurer cannot make ~~an~~ variation application under subsection (1) unless the Treasurer is satisfied on reasonable grounds that:
- (a) the proposed 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 proposed 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 information relevant to the prohibited conduct recommendation that is not publicly available;
 - (ii) the variation is reasonably necessary to address the circumstances described in subparagraph (i).
- (3) 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 Court may, on the application of the Treasurer or body corporate, make an order to vary or revoke a contracting order in relation to the body corporate.~~

~~(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:~~

Commented [A38]: We propose amending section 153Y (now section 153Z) to enable the Treasurer, as well as the affected corporation, to apply to the Court for a variation or revocation of a contracting order.

Commented [A39]: Paragraph 4.32 of the Explanatory Memorandum.

Prohibited conduct in the electricity industry **Schedule 1**
Main amendments **Part 1**

- 1 ~~— (a) if there is only one period mentioned in~~
2 ~~paragraph 153X(3)(d) — that period has ended; or~~
3 ~~— (b) if there is more than one such period — all of those periods~~
4 ~~have ended.~~

- 5 ~~— (5) The Treasurer must publish a variation or revocation under~~
6 ~~subsection (1) by electronic or other means.~~

7 **Subdivision B—Enforcement of contracting orders**

8 **153Z Enforcement of contracting orders**

- 9 ~~— (1) This section applies if the Treasurer has made a contracting order~~
10 ~~in respect of a body corporate.~~
11 ~~— (2) If the Commission considers that the body corporate has failed to~~
12 ~~comply with the contracting order in a material manner, the~~
13 ~~Commission may apply to the Court for an order under~~
14 ~~subsection (3).~~
15 ~~— (3) If the Court is satisfied that the body corporate has failed to comply~~
16 ~~with the contracting order, the Court may make all or any of the~~
17 ~~following orders:~~
18 ~~— (a) an order directing the body corporate to comply with the~~
19 ~~contracting order;~~
20 ~~— (b) if the period or periods specified in the contracting order (in~~
21 ~~accordance with paragraph 153X(3)(d)) have already~~
22 ~~passed — an order directing the body corporate to comply~~
23 ~~with the contracting order, within a new period, or new~~
24 ~~periods, specified in the order;~~
25 ~~— (c) any other order that the Court considers appropriate.~~

Commented [A40]: If sections 153W and 153X are amended so that the Treasurer may apply to the Court for a contracting order, section 153Z (enforcement of contracting orders) can be consequently deleted – if a contracting order is to be made by the Court only, then this provision will be redundant.

26 **Division 6—Electricity divestiture orders**

27 **153ZA Treasurer may apply to Federal Court for divestiture order**

- 28 ~~(1) The Treasurer may apply to the Court for an order under~~
29 ~~subsection 153ZB(2) in respect of a body corporate if the Treasurer~~
30 ~~is satisfied that the following conditions are met:~~

Schedule 1 Prohibited conduct in the electricity industry
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- 1 (a) the Commission has given the Treasurer a prohibited conduct
2 recommendation under section 153S;
3 (b) the body corporate is identified in the recommendation (in
4 accordance with subparagraph 153S(2)(c)(i) or (iii));
5 (c) the application is made no later than 45 days after:
6 (i) unless subparagraph (ii) applies—the day on which the
7 Commission gave the Treasurer the recommendation; or
8 (ii) if there has been a variation of the recommendation
9 under section 153T—the day on which the Commission
10 made the variation;
11 (d) the order applied for is of a kind stated in the
12 recommendation (in accordance with paragraph 153S(2)(d));
13 (e) the conduct identified in the recommendation (in accordance
14 with subparagraph 153S(2)(c)(ii)):
15 (i) is prohibited conduct engaged in by the corporation
16 identified in the recommendation (in accordance with
17 subparagraph 153S(2)(c)(i)) (the *relevant corporation*);
18 and
19 (ii) is, or includes, prohibited conduct under section 153H
20 (electricity spot market (aggravated case));
21 (f) the order applied for is a proportionate means of preventing
22 the relevant corporation, or any related body corporate, from
23 engaging in that kind of prohibited conduct in the future;
24 (g) the following conditions are satisfied:
25 (i) the order applied for will result, or is likely to result, in
26 a *significant and material* benefit to the public;
27 (ii) if the order applied for will result, or is likely to result,
28 in a detriment to the public—the benefit mentioned in
29 subparagraph (i) would, or is likely to, outweigh that
30 detriment.
31 (2) If an application has been made to the Tribunal under
32 section 153VA, the Treasurer may not apply to the Court for a
33 divestiture order under this section 153ZA until the Tribunal has
34 heard and made a final determination in respect of that application.

Commented [A41]: Paragraph 8.53 of the Explanatory Memorandum.

Commented [A42]: Paragraph 8.92 of the Explanatory Memorandum.

Prohibited conduct in the electricity industry **Schedule 1**
Main amendments **Part 1**

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) 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. taking account of the impact on the body corporate.

Commented [A43]: Paragraph 8.53 of the Explanatory Memorandum.

Commented [A44]: Paragraphs 5.7 and 5.16 of the Explanatory Memorandum.

(2) The Court may order the body corporate to:

(a) offer to dispose of interests in securities or assets on reasonable commercial terms, 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); or

(c) implement measures to ensure that specified assets are operated on a standalone, functionally separate basis from the corporation business activities, as an alternative to a disposal.

(3) Despite paragraph (2)(a), the order must allow the disposal to be to a body corporate mentioned in subparagraph (2)(a)(i) or to an associate mentioned in subparagraph (2)(a)(ii) if:

(a) the body corporate or associate is an authority of the Commonwealth or an authority of a State or Territory; and

(b) the body corporate in relation to which the order is made is:

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

Prohibited conduct in the electricity industry **Schedule 1**
Main amendments **Part 1**

(8) A Court may, on application by the body corporate, vary or revoke an order under paragraph (2)(a) if the body corporate reasonably establishes that:

(i) it has offered to dispose of the assets in accordance with the order; and

(ii) either no buyer is willing to acquire the assets on reasonable commercial terms, or the only buyer does not intend to continue to operate the assets to generate electricity.

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).

Schedule 1 Prohibited conduct in the electricity industry

Part 2 Other amendments

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”.

7A At the end of subparagraph 76(2)

Insert:

or a provision of Division 2 of Part XICA.

Commented [A45]: This is to provide that individuals will not be liable for a pecuniary penalty.

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

Prohibited conduct in the electricity industry **Schedule 1**
Other amendments **Part 2**

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

Add “or”.

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;

Commented [A46]: These sections would be updated if the prohibitions in section 153E and 153G are removed as proposed by AEC members.

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”.

Schedule 1 Prohibited conduct in the electricity industry

Part 3 Application

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).

AER information gathering **Schedule 2**

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 in respect of the industry code prescribed for the purposes of Part IVB of the Act and declared to be a mandatory industry code under the Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019.

(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.

3 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.

(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;
- (c) a body established or appointed by the Governor-General, or by a Minister, otherwise than by or under a law of the Commonwealth;

Schedule 2 AER information gathering

1 (d) the holder of an office established for public purposes by or
2 under a law of the Commonwealth.

3 **4-2 Subsections 44AAF(4) and (5)**

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

5 **5-3 After section 44AAF**

6 Insert:

7 **44AFA Power of AER to obtain information and documents**

8 *Notice requiring information etc.*

9 (1) This section applies if the AER has reason to believe that a person
10 is capable of providing information, producing a document or
11 giving evidence ~~that the AER requires for the performance of the~~
12 ~~functions referred to in section 44AH (Commonwealth~~
13 ~~functions) relating to a matter that constitutes, or may constitute, a~~
14 ~~contravention of the Competition and Consumer (Industry Code –~~
15 ~~Electricity Retail) Regulations 2019 or the Order under section 13~~
16 ~~of the Electricity Industry Act 2000 regulating tariffs for the sale of~~
17 ~~electricity to prescribed customers published by the Victorian~~
18 ~~Government on 30 May 2019.~~

19 (2) The AER may, by written notice given to the person, require the
20 person to do one or more of the following:

- 21 (a) give such information to the AER;
22 (b) produce any such documents to the AER;
23 (c) appear before the AER, or before a specified person assisting
24 the AER who is an SES employee or an acting SES
25 employee, to give any such evidence (either orally or in
26 writing) and produce any such documents.

27 (2A) For the purposes of determining whether to issue a notice in
28 accordance with paragraph (2), the AER must have regard to:

- 29 (a) the objective of the default market offer or the Victorian
30 default offer;
31 (b) steps taken by the corporation to comply with the
32 requirements specified in paragraph (1);

Commented [A47]: Schedule 2 should be tightened so that the information gathering powers only apply in respect of the DMO Code.

This proposed amendment incorporates the language of section 155 of the CCA.

AER information gathering **Schedule 2**

- 1 (c) whether the notice is a proportionate means of obtaining the
2 information sought by the AER;
3 (d) whether the notice is a proportionate means of preventing the
4 relevant corporation, or any related body corporate, from
5 engaging in that kind of prohibited conduct in the future; and
6 (e) the time elapsed since the commencement of the
7 requirements specified in paragraph (1).

8 (3)The notice must specify:

- 9 (a) if paragraph (2)(a) or (b) applies:
10 (i) the period within which the person must comply with
11 the notice; and
12 (ii) the manner in which the person must comply with the
13 notice; or
14 (b) if paragraph (2)(c) applies:
15 (i) the time at which the person must appear before the
16 AER or person; and
17 (ii) the place at which the person must appear before the
18 AER or person.

19 *Oath or affirmation*

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

24 **44AAFB Failure to comply with notice to give information etc. is an**
25 **offence**

26 *Offence*

- 27 (1) A person commits an offence if:
28 (a) the person is given a notice under section 44AAFA; and
29 (b) the person fails to comply with the notice.

30 Penalty: Imprisonment for 2 years or 100 penalty units, or both.

Schedule 2 AER information gathering

Exceptions

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

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

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

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

- (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.

AER information gathering **Schedule 2**

(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.

6 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
- (c) the number of proceedings brought to challenge the validity of the notices.

7 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*.

8 Subparagraph 76(2)

Omit “or 45EA”, substitute “, 45EA, 153F, 153G or 153H”.

8-9 Subparagraph 79A(1)(a)(i)

After “section”, insert “44AAFB,”.

Commented [A48]: This change is to ensure that individuals are liable for being involved in a contravention by a regulated corporation.

Schedule 2 AER information gathering

9–10 Paragraph 79A(1)(d)

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

40–11 Subsection 163(5)

After “section”, insert “44AAFB,” *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*

12 Paragraph 16(5)

Omit this paragraph.

Commented [A49]: This provides for the instruments to be disallowable instruments, and so should be repealed following the changes to 44AH and item 7 above.

13 After section 17(3)

After section 17(3) add:

(3A) Before making a legislative instrument under section 16(1), the AER must make and publish a final decision setting out the determination to be made under section 16(1) and provide reasons.

(3B) The final decision made and published under paragraph 3A must be published at least 5 days before the determination is made.

14 Section 18

Omit this section.

Commented [A50]: This provides for what happens if an instrument is disallowed, and so should be repealed following the changes to 44AH and item 7 above.

Appendix B: Ashurst Memorandum – detailed suggested amendments to the Bill



Our ref: TLD\JDJ\1000 033 121

22 July 2019

MEMORANDUM

**TREASURY LAWS AMENDMENT (PROHIBITING ENERGY MARKET MISCONDUCT) BILL 2018
PROPOSED AMENDMENTS**

1. EXECUTIVE SUMMARY

- 1.1 This document sets out our proposed amendments to the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018* (**Bill**), prepared for the Australian Energy Council (**AEC**).
- 1.2 In summary, our view is that:
 - (a) the proposed obligation to reduce prices in response to reductions in the underlying cost of procuring electricity is not necessary and is inconsistent with the new pricing approach established by the default market offer obligations in the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (**DMO Code**) and the equivalent Order under section 13 of the *Electricity Industry Act 2000* regulating tariffs for the sale of electricity to prescribed customers published by the Victorian Government on 30 May 2019 (**VDO Code**), together with the extensive existing regulatory obligations under the *National Energy Retail Law* regime and equivalent *Energy Retail Code*;
 - (b) the proposed wholesale bids and financial electricity contract misconduct prohibitions regulate conduct that is already regulated by the bidding requirements in the *National Electricity Rules* and prohibition against misuse of market power in the *Competition and Consumer Act 2010* (Cth) (**CCA**);
 - (c) the proposed prohibitions are otherwise cast so broadly that there will be significant uncertainty over the extent to which legitimate operational decisions and conduct can be properly distinguished from illegal conduct, which may make the prohibitions difficult to interpret, apply and enforce; and
 - (d) the very serious enforcement consequences need to be proportionate to the misconduct. We have suggested amendments in the table below to ensure, to the extent possible, that this is the case.

2. TABLE OF PROPOSED AMENDMENTS

The following table sets out the key proposed amendments to the Bill, in order of significance. Other proposed amendments are set out in the Annexure.

#	Topic	Issue	Proposed amendments
1	<p>Prohibited conduct – retail pricing</p> <p>Section 153E, in effect, requires retailers to <i>"make reasonable adjustments to the price of [offers to supply electricity to small customers], or to the price of those supplies, to reflect sustained and substantial reductions in its underlying cost of procuring electricity"</i>.</p>	<p>This prohibition implements a form of price regulation and goes significantly further than the issue set out in the Explanatory Memorandum which states that it is to address customer confusion and ability to identify better offers (paragraphs 8.5 to 8.14 of the Explanatory Memorandum).</p> <p>The new regulatory requirements under the DMO and VDO (which took effect on 1 July 2019) address the issues of customer confusion and the ability to identify better offers, by establishing both a reference price for easier comparisons, and a regulated default offer.</p> <p>Section 153E would require a retailer to make "reasonable adjustments" to market prices and, unless amendments are made, the default offer to "reflect sustained and substantial reductions in its underlying cost of procuring electricity".</p> <p>This provision would also be difficult to interpret and apply. This is particularly true given this provision is inconsistent with existing obligations under the DMO and VDO and other price regulation regimes in other jurisdictions. Accordingly, there will be considerable difficulty in applying this regime in combination with these other obligations. The changes are potentially premature in circumstances where the Australian Competition and Consumer Commission (ACCC) will continue to monitor retail pricing as part of its seven year electricity review. In the event the ACCC concludes that the DMO and VDO do not achieve their identified purpose, then further regulation could be considered at that time.</p> <p>Electricity prices are set on the basis of the forecast costs of procuring electricity, hedging that risk, and recovering operational costs and overheads, generally a year in advance. Those costs are</p>	<p>Section 153E should be entirely removed, and the efficacy of the DMO Code and VDO Order should be reviewed before any more intrusive regulation is implemented.</p> <p>If section 153E was retained despite the concerns that introducing it now is premature, amendments would be required to be workable.</p> <p>These would include amendments to:</p> <ul style="list-style-type: none"> clarify what a "sustained and substantial reduction" in the underlying cost of procuring electricity would constitute—in the interests of compliance and effective enforcement, this should be an objective test based on the benchmark costs of a prudent and efficient standalone new entrant retailer. This is consistent with the intention expressed in the Explanatory Memorandum, for example, see paragraph 2.28; clarify that the wholesale energy cost component should be assessed with reference to a range of commercially legitimate risk management strategies and

#	Topic	Issue	Proposed amendments
		<p>significantly affected by a retailer's forecast demand. Demand is driven both by customer retention and acquisition, and customer use, which is in turn affected by a range of external factors, particularly the weather.</p> <p>Consequently, each retailer must make a risk-based decision about prices based on these uncertain forecasts. The retailer will then adjust its market prices in the course of the year in response to competition and changes in forecasts.</p> <p>The proposed provisions increase the risk to retailers by requiring them to make reasonable adjustments (ie reductions) in response to reductions in underlying costs. However, determining whether the underlying costs of procuring electricity have reduced for a retailer is difficult, as it will be based both on actual costs, and forecast costs. For example, a temporary reduction in spot market prices, even over several weeks, will not necessarily mean a reduction in forecast costs, particularly if it is in response to a particular event (eg summer temperatures being lower than expected). On the other hand, costs may increase rapidly (eg winter temperatures being lower than expected).</p> <p>Further, hedging costs are less easily forecast, and are likely to differ between retailers.</p> <p>Even if the underlying costs of procurement can be identified, the assessment of whether an individual retailer has made a "reasonable adjustment" is difficult, particularly where the majority of retailers offer a range of different prices on different plans (in addition to a default offer). For example, if a retailer has decided to take an aggressive price position on a plan with a limited margin, does this prohibition require it to reduce the price in line with that limited margin, or can it choose to maintain the price to recover other costs? Do the words "reasonable adjustments" allow it to recover other rising costs, such as increased retail costs? These matters are addressed in broad terms in the Explanatory Memorandum, but not the legislative provision.</p>	<p>observable forward market prices;</p> <ul style="list-style-type: none"> clarify that "reasonable adjustments" allow a retailer to take into account retailer-specific factors, including margin, changes in other costs, the need to "smooth out" price changes, the timing of past and future price changes; introduce a "materiality" threshold so that "sustained" and "substantial" can be easily identified and applied, both for retailers and the ACCC; ensure that default offers made in accordance with the DMO, VDO or any other legislation is exempt (particularly given that retailers may legitimately choose to price at the default offer level); and clarify that the underlying costs of procuring electricity is a forward looking, not backward looking, assessment to reflect industry practice. <p>In addition, further consideration should be given to aligning these processes so that the ACCC could just rely on the AER's setting of the DMO.</p>

#	Topic	Issue	Proposed amendments
		These factors will make the provision difficult to comply with, and difficult for the ACCC to enforce.	
2	Divestiture order Section 153ZA empowers the Treasurer to apply to the Court for a divestiture order.	<p>This is a significant power that allows, as a punitive measure, the court to break up an established business that has properly and lawfully acquired assets in response to breaches of a provision that may be enforced through significant, but less intrusive, means (including pecuniary penalties and injunctive orders).</p> <p>The effect of a divestment order would be significant and could leave the divested assets commercially unviable. As Rod Sims cautioned during a Senate Estimates Hearing in October 2018, <i>"divestiture is such an extreme step that we felt judgment would be very hard to reach"</i>. This echoes concerns raised by the Harper Panel: <i>"divestiture is likely to have broader impacts on the firm's general efficiency"</i> (Harper Review Final Report, page 346).</p> <p>While Australian legislation includes divestiture orders under the section 69 of the <i>Foreign Acquisitions and Takeovers Act 1976</i> (Cth) or section 81 of the CCA (and predecessor legislation), these orders apply where a corporation has, in effect, proceeded with a transaction that it should not have proceeded with. This is fundamentally different to a situation where a corporation has legitimately acquired assets, but is required to divest them as a result of subsequent conduct.</p> <p>Foreign legislation does contain divestiture laws but foreign laws are generally broad-based laws directed to correcting a misuse or abuse of market power or monopolisation (eg Canada, the European Union, the United States of America) or anti-competitive conduct that cannot be remedied through less intrusive means (United Kingdom). By contrast, the proposed laws are focussed on a specific industry (the energy industry) and specific conduct (bidding) that does not involve a misuse of market power or anti-competitive conduct.</p>	<p>The divestiture order powers should be removed entirely.</p> <p>If, despite the significant risks, a divestiture order were introduced, a range of amendments should be implemented to ensure procedural fairness and clear criteria, recognising that court-order divestiture be used "as a last resort in the most exceptional circumstances where other responses...would not sufficiently address the alleged prohibited conduct" (paragraph 5.7 of the Explanatory Memorandum – see also paragraphs 8.53 and 8.92). This should include amendments to:</p> <ul style="list-style-type: none"> • allow a court to impose a less intrusive order (such as requiring functional separation or ring-fencing, pecuniary penalties, or injunctions) instead of proceeding directly to divestiture where it considers divestiture is not proportionate; • the period for selling an asset should not be limited to 12 months, but should instead be assessed by the court on the evidence; • the purchaser should be required to operate the generation plant; • there should be a mechanism for revoking the order where there is

#	Topic	Issue	Proposed amendments
			<p>no buyer for fair value; and</p> <ul style="list-style-type: none"> the impact on the corporation should be taken into account.
3	<p>Prohibited conduct – financial contract market</p> <p>Section 153F effectively prohibits generators from refusing to offer electricity financial contracts for the purpose of substantially lessening competition in any electricity market.</p>	<p>The conduct regulated by section 153F is similar to a misuse of market power, which is already regulated by section 46 of the CCA. However, the provision removes any requirement to identify substantial market power.</p> <p>The framing of the provision as currently drafted is uncertain, and could be construed as having a broader interpretation than is suggested in the Explanatory Memorandum.</p> <p>We therefore suggest incorporating the limitations currently suggested in the Explanatory Memorandum into the provisions, and including provisions that make clear this section does not operate to require contracting off units that have been legitimately notified for mothballing or closure, and will not operate in a manner that interferes with legitimate operational concerns in respect of assets, such as reliability, maintenance requirements and safe operation.</p> <p>We also understand that the purpose of this prohibition is to ensure that retailers seek financial contracts to hedge risk in supplying small customers, and not more broadly. This is not reflected in the drafting.</p>	<p>Section 153F as currently drafted could be construed as having a very broad application, which is clearly not intended particularly taking into account paragraph 2.49 of the Explanatory Memorandum.</p> <p>It is preferable that section 153F be removed and, instead, a misuse of market power contrary to section 46 be subject to the contracting order remedy (as amended), discussed below.</p> <p>If it is retained, it should also be limited to electricity financial contracts offered to third party retailers supplying small customers.</p> <p>In particular, the following conduct should not constitute a breach:</p> <ul style="list-style-type: none"> conduct that would require a generator to breach an existing contract or compromise the ability to meet those requirements; a failure to offer contracts where there are physical or regulatory limitations in doing so; where conduct is to comply with legislation (including market liquidity or retailer reliability obligations);

#	Topic	Issue	Proposed amendments
			<ul style="list-style-type: none"> conduct to give effect to genuine risk strategies (including counterparty risk), maintenance and outage planning and management, or managing safety; or where the conduct is to manage a vertically-integrated generator/retailer's own risk position. <p>In addition, we recommend the insertion of a paragraph which makes clear that the provision does not require corporations to contract units that are mothballed or closed, or otherwise do anything that raises legitimate operational or safety concerns.</p>
4	<p>Prohibited conduct – electricity spot market</p> <p>Sections 153G and 153H prohibit corporations from bidding or offering to supply electricity in relation to an electricity spot market fraudulently, dishonestly or in bad faith, or for the purpose of distorting or manipulating prices in that electricity spot market.</p>	<p>The need for these provisions and the type of conduct it is intended to prevent has not been clearly established. The provision as currently drafted would be difficult to practically and definitively interpret and apply—for example, it is unclear how to practically instruct traders about how to comply with the rules, in circumstances where the market design is intended to allow high prices to send a signal to the market that further generation investment is required.</p> <p>Further consultation and discussion is required in order to identify, with greater precision, the target conduct, and then draft provisions that will achieve the desired result.</p> <p>The words "distorting" and "manipulating" without further definition and clear guidance are capable of multiple meanings and are difficult to practically apply in the context of an energy-only market, in which prices are intended to change constantly to reflect the prevailing circumstances of the market.</p>	<p>Unless the conduct of concern can be clearly identified, rather than introducing a new prohibition, the existing prohibition in rule 3.8.22A(a) of the National Electricity Rules should be relied on, with a new provision that provides that if the conduct is also fraudulent or dishonest, then the enhanced divestment power may be used (if it is retained, despite the risks identified above).</p> <p>If a new prohibition is to be added:</p> <ul style="list-style-type: none"> the "basic case" should be limited to bids and offers that are fraudulent or dishonest; the "aggravated case" should require both that bids and offers that are fraudulent or dishonest,

#	Topic	Issue	Proposed amendments
		<p>The market design is premised on individual participants making interval-by-interval decisions based on a host of factors, while properly pursuing the commercial objective to achieve an economic return over the longer term. Accordingly, it must be made clear that these prohibitions are not intended to prohibit bidding conduct that is consistent with market design and the necessity for higher prices at a time of tight supply and demand as a signal for further market investment. The prohibitions may be difficult to interpret and enforce, with the potential for considerable argument about the measures of these words, particularly when coupled with a very considerable and invasive remedy, such as a divestment order. The introduction of provisions that are not conducive to a clear understanding of what constitutes compliant conduct are particularly concerning.</p> <p>The existing regulation of dispatch offers and bids in Chapter 3 of the National Electricity Rules already captures a broad range of conduct. For example, rule 3.8.22A(a) prohibits making an offer, bid or rebid that is false, misleading or likely to mislead. An offer or bid made fraudulently, dishonestly or in bad faith will be prohibited under this existing rule.</p> <p>It is notable that the AER has not sought to enforce this formulation of the bidding rule in any public proceedings since its introduction, and the ACCC did not identify any bids or offers of concern in its Retail Electricity Prices Inquiry. If there was a significant concern, then it would be reasonable to expect the AER to have run a case, and for the ACCC to have identified specific issues in its report.</p>	<p>and that they are made with the purpose of distorting or manipulating prices in the electricity spot market, taking into account the design of the electricity spot market—ie they are not intended to change the design and operation of the electricity spot markets; and</p> <ul style="list-style-type: none"> both prohibitions should be limited to the National Electricity Market and should incorporate the language of paragraph 2.101 from the Explanatory Memorandum.
5	<p>Contracting order</p> <p>Sections 153W and 153X provide the Treasurer with broad powers to make a contracting order.</p>	<p>This is a significant power that would require the Treasurer to take the position of an electricity financial contract trader in order to apply, particularly in relation to a dynamic market.</p> <p>We are concerned about the unbounded nature of this power. There is a material risk that, used inappropriately, the power could cause significant detriment to the firm and distort the market, particularly</p>	<p>These provisions should be amended so that the Treasurer may apply to the Court for a contracting order.</p> <p>Before making an application to the Court under section 153W, the Treasurer must have made a "proposed contracting order", on a confidential basis, directing the</p>

#	Topic	Issue	Proposed amendments
		<p>to the extent that the obligation to contract:</p> <ul style="list-style-type: none"> • may prevent a vertically-integrated firm from realising the efficiencies of having sufficient wholesale energy contracting arrangements for its own retail operations; • requires the firm to contract on terms that are not commercial, having regard to the broader economic cycle—wholesale energy prices fluctuate over time, so requiring a firm to contract in a particular time period may damage the firm's ability to compete if they cannot make contracting decisions that take account of the economic cycle, including their own views about it; or • inadvertently provides opportunities to other businesses to acquire electricity financial contracts below their market cost, on the basis that acquirer will on-sell them rather than use them as a hedge against retail risk. <p>We are also concerned that placing this power in the hands of the Treasurer may not be appropriate, particularly to the extent to which this might be characterised as a form of judicial power. In the context of these reforms, it gives the Treasurer the power to punish a business by fundamentally changing the structure and commercial arrangements of that business.</p>	<p>relevant corporation to make offers to enter into electricity financial contracts. This must be confidential to the parties involved.</p> <p>In order for this power to be exercised appropriately by the Court, it will be essential to set out clear criteria / factors to which the Court must have regard when determining the price(s) in respect of electricity under the electricity financial contracts that must be offered.</p> <p>We have drafted a new section 153Y which sets out the process for the Treasurer to apply to the Court for a contracting order to be made, as well as the process for the Court to impose any such order.</p> <p>In addition, we recommend the insertion of a paragraph which makes clear that the provision does not require corporations to contract units that are mothballed or closed, or otherwise do anything that raises safety concerns.</p> <p>We have also amended section 153Y (now section 153Z) to enable the Treasurer, as well as the affected corporation, to apply to the Court for a variation or revocation of a contracting order.</p> <p>Consequently, all references to "<i>an order of the Treasurer</i>" should be substituted with "<i>an order of the Court</i>", for example, in the definition of "contracting order" in section 153C.</p> <p>Consequently, section 153Z (enforcement of</p>

#	Topic	Issue	Proposed amendments
			contracting orders) can be deleted – if a contracting order is to be made by the Court only, then this provision will be redundant.
6	Public warning notices Sections 153L and 153M provide the ACCC with the power to issue a public warning notice if it reasonably believes a corporation has engaged in prohibited conduct.	<p>The broad power for the ACCC to issue a public warning notice could have very severe impacts on retailers, particularly in circumstances where the contravention does not even have to be proved. For example, even if the ACCC or Court determines that the corporation has not engaged in prohibited conduct after the ACCC has issued a public warning notice, the corporation would already have been significantly affected by the public warning notices.</p> <p>This provision also only provides corporations with less than 21 days to respond to a warning notice. This is not sufficient time for any corporation to identify the source of the conduct of concern, investigate what happened, whether there was a breach, seek legal advice etc.</p>	<p>Firstly, the ACCC should not have the power to issue any warning notices on a public basis, without the contraventions having been established/proved. Any warning notice should be made on a confidential basis.</p> <p>Secondly, only the Court should have the power to issue a public warning notice. These provisions should be amended to reflect the language of section 86D of the CCA which empowers the Court, on application by the ACCC, to make an adverse publicity order in relation to a corporation who has engaged in prohibited conduct.</p> <p>In addition, corporations should have 45 days, rather than 21 days, to respond to a warning notice. The ACCC should not be able to apply to the Court for a warning notice within 90 days of first giving the corporation notice of its intention to apply for a warning notice.</p>
7	No Treasurer action notice Under section 153U, the ACCC must give the Treasurer a notice if it considers that it is not appropriate to give the	<p>Given the issues identified in relation to public warning notices above and our view that this power should be removed, it follows that it would not be reasonable to require the ACCC to publish a "no action notice".</p>	<p>If the proposed amendments in respect of public warning notices above are accepted, it follows that subsection 153U(3) should be deleted.</p> <p>If it is accepted that the "public warning notice" will no longer be public, it follows that the "no Treasurer action notice" should</p>

#	Topic	Issue	Proposed amendments
	Treasurer a prohibited conduct recommendation, and the ACCC must also publish this notice.		also not be public.
8	Threshold for ACCC issuing warning notice and prohibited conduct notices Sections 153L and 153M provide the ACCC with the power to issue a public warning notice if it reasonably believes a corporation has engaged in prohibited conduct. Similarly, section 153P allows the ACCC to issue a prohibited conduct notice.	"Reasonable belief" is a very low threshold for the ACCC to meet before issuing notices that could have significant and detrimental impacts on retailers. Such a threshold is typically a threshold for the ACCC to initiate an investigation and/or issue a section 155 notice (both typically confidential processes). The ACCC should be required to have more than reasonable belief, particularly given that the ACCC would have conducted an investigation and obtained further evidence of any likely prohibited conduct.	Given the potential consequences on retailers if the ACCC issues these notices, the ACCC should only be able to issue a warning notice or prohibited conduct notice if it is satisfied that the corporation <u>has</u> engaged, or is engaging in, the prohibited conduct.
9	Appeal rights The ACCC will have very broad powers to issue a prohibited conduct notice and give the Treasurer a prohibited conduct recommendation.	Given that this unfettered power to issue notices will significantly impact corporations and the market, we consider it would be appropriate to ensure that any such decisions may be the subject of review/appeal.	We have recommended the insertion of a new section 153VA which enables affected corporations to apply to the Tribunal for a review of a decision by the ACCC to issue/vary a prohibited conduct notice or give/vary a prohibited conduct recommendation, or vary/revoke a no Treasurer action notice. This provision will enable the Tribunal to review any such decision for error(s) of facts, incorrect or unreasonable exercise(s) of discretion, or any other specified ground. The Tribunal may affirm, vary or set aside the ACCC's decision and make a decision in

#	Topic	Issue	Proposed amendments
			substitution or remit the matter to the ACCC.
10	Transitional period Section 2 states the obligations will commence on the day the Act receives Royal Assent.	<p>Given the significant implications of the amendments on the structure and commercial arrangements of corporations, and the desire of firms to fully prepare their businesses for compliance, we consider it would be necessary to provide firms with the necessary time to comply and ensure that their staff, processes and policies are all ready for the commencement of the obligations. This would involve considering and implementing guidelines published by the ACCC.</p> <p>It is important to recognise that the ACCC's guidelines will not be legally binding, and that regulated entities will need to form their own views about how to comply with the legislation. However, the ACCC's guidelines are an important part in informing regulated entities about the ACCC's compliance and enforcement approach.</p> <p>ACCC guidelines are common and serve an important compliance role. By way of example, the recent guidelines in relation to the DMO have assisted retailers in understanding how the industry code implementing the DMO will be interpreted and applied by the ACCC.</p>	<p>Given the significant and extensive nature of the proposed prohibitions, we consider it would be appropriate to implement a transition period of:</p> <ul style="list-style-type: none"> for the retail pricing prohibited conduct (section 153E), 6 months from the date of publication of final ACCC guidelines that would apply; 3 months from the date of publication of ACCC guidelines that would apply. <p>This will enable affected corporations to interpret and implement the necessary changes and educative programs.</p> <p>A longer transitional period is proposed for the retail pricing prohibited conduct given the potential interactions with the DMO/VDO and the obligations that retailers have under those regimes and also to allow retailers to comply with the bill and DMO/VDO without causing further consumer confusion arising from frequent changes to retail pricing.</p> <p>As an alternative, the transitional period could be 6 months from the date of royal assent.</p>
11	Personal liability	The amendments to section 76 of the CCA set out in Schedule 2 of the Bill effectively mean that any person "involved in" a contravention of the above prohibitions is exposed to pecuniary	If personal liability was not intended, then this should be clarified by adding an express exclusion of liability consistent with

#	Topic	Issue	Proposed amendments
		<p>penalties.</p> <p>This effectively imposes individuals to personal liability. It is not clear whether this intended, given that the provisions currently impose very broad and uncertain obligations that extend to all retailers and generators across Australia, irrespective of whether they are privately or government owned. The nature of the prohibited conduct means that a range of individuals may be involved in conduct alleged to breach the legislation, but it is unlikely that a single individual would be responsible for engaging in the conduct.</p> <p>The prospect of individual liability for individual traders, pricing analysts and relatively junior employees could be unfairly impacted. In circumstances where the provisions are so broad and uncertain and have the potential to impact daily decision making that is currently done at relatively junior levels of the private and public organisations, individual liability should not be considered appropriate.</p>	section 76(2) of the CCA.
12	Status of AER instruments	<p>The amendments introducing the DMO expressly provide for AER instruments (including the pricing instruments) to be disallowed instruments. However, the amendments to Schedule 2 reverse the position, making them non-disallowable.</p> <p>The Explanatory Memorandum indicates that AER's instrument making power is to introduce a price determination that will effectively set the reference price under the DMO. The power is currently not subject to any criteria, leaving considerable discretion to the AER. It would be preferable for the AER to have specific criteria (and there is considerable precedent for this under the State pricing regimes that apply a cost-based model).</p>	<p>The legislation should be amended so that:</p> <ul style="list-style-type: none"> the AER's instrument making power is clearly only a power to make price determinations for the DMO; before making a price determination, the AER should be required to make a decision, based on specific criteria, about the recommended price and that this should be subject to public consultation before being made final; and once the decision is made final, the AER should then be able to issue an instrument consistent with the

#	Topic	Issue	Proposed amendments
			final decision.
12	AER information gathering The proposed amendment to section 44AH in Schedule 2 enables the AER to make legislative instruments.	This is a very broad power, which the Explanatory Memorandum suggested was necessary in order to enable the AER to obtain information to make price determinations. Given that the DMO and VDO have now been introduced via the industry code provisions in the CCA and via the Victorian Order, this power is no longer necessary. It should be noted that it is currently cast in terms that does not limit the legislative making power of the AER in any way.	The information gathering powers only apply in respect of the DMO and VDO, and it should also include a framework and principles the AER must have regard to before exercising those powers.

Should you have any questions, please contact Tanya Denning, Partner, on 03 9679 3364 or Justin Jones, Partner, on 03 9679 3640.

Ashurst

ANNEXURE – CLASSIFICATION OF PROPOSED CHANGES

#	Requested change	Type of change	Reasons
1.	Remove section 153E (retail pricing prohibition).	Substantive	Section 153E should be entirely removed, and the efficacy of the DMO Code and VDO Order should be reviewed before any more intrusive regulation is implemented.
2.	Amend section 153E to clarify that "sustained and substantial reduction in the underling cost of procuring electricity" would constitute an objective test based on the benchmark costs of a prudent and efficient standalone new entrant retailer.	Technical/clarifying	This is consistent with the intention expressed in the Explanatory Memorandum, for example, see paragraph 2.28.
3.	Amend section 153E to clarify that the wholesale energy cost component should be assessed with reference to a range of commercially legitimate risk management strategies and observable forward market prices.	Technical/clarifying	This reflects how procurement works. Retailers set prices based on forecast spot market prices, and necessarily need to hedge against risk.
4.	Amend section 153E to clarify that "reasonable adjustments" allow a retailer to take into account retailer-specific factors, including margin, changes in other costs, the need to "smooth out" price changes, the timing of past and future price changes.	Technical/clarifying	This reflects how procurement works. Retailers set prices based on forecast spot market prices, and necessarily need to hedge against risk.
5.	Amend section 153E to introduce a "materiality" threshold so that "sustained" and "substantial" can be easily identified and applied, both for retailers and the ACCC.	Technical/clarifying	This will make section 153E easier for retailers and the ACCC to identify whether a reduction in the underlying cost of procuring electricity is "sustained and substantial" and, accordingly, provides more clarity regarding what this section is intended to capture.
6.	Amend section 153E to ensure that default offers made in accordance with the DMO, VDO or any other legislation is exempt (particularly given that retailers may legitimately choose to price at the default offer level).	Technical/clarifying	This ensures the bill does not operate to capture conduct that is otherwise consistent with the DMO, VDO or any other legislation (particularly given that retailers may legitimately choose to price at the default offer level).

#	Requested change	Type of change	Reasons
7.	Amend section 153E to clarify that the underlying costs of procuring electricity is a forward looking, not backward looking, assessment to reflect industry practice.	Technical/clarifying	This reflects how procurement works. Retailers set prices based on forecast spot market prices, and necessarily need to hedge against risk.
8.	Further consideration should be given to aligning the proposed processes in section 153E so that the ACCC could just rely on the AER's setting of the DMO.	Technical/clarifying	This ensures consistency with the DMO and the AER is best placed to determine the appropriate threshold.
9.	Remove section 153ZA (divestment).	Substantive	The divestiture order powers should be removed entirely.
10.	Section 153ZA should be amended to: <ul style="list-style-type: none"> allow a court to impose a less intrusive order (such as requiring functional separation or ring-fencing, pecuniary penalties, or injunctions) instead of proceeding directly to divestiture where it considers divestiture is not proportionate; the period for selling an asset should not be limited to 12 months, but should instead be assessed by the court on the evidence; the purchaser should be required to operate the generation plant; there should be a mechanism for revoking the order where there is no buyer for fair value; and the impact on the corporation should be taken into account. 	Substantive	A range of amendments should be implemented to ensure procedural fairness and clear criteria, recognising that court-order divestiture be used "as a last resort in the most exceptional circumstances where other responses...would not sufficiently address the alleged prohibited conduct" (paragraph 5.7 of the Explanatory Memorandum – see also paragraphs 8.53 and 8.92).
11.	Remove section 153F (prohibited conduct – financial contract market).	Substantive	Section 153F as currently drafted could be construed as having a very broad application, which is clearly not intended, particularly taking into account paragraph 2.49 of the Explanatory Memorandum.

#	Requested change	Type of change	Reasons
			It is preferable that section 153F be removed and, instead, a misuse of market power contrary to section 46 be subject to the contracting order remedy (as amended).
12.	<p>If section 153F is retained, it should also be limited to electricity financial contracts offered to third party retailers supplying small customers.</p> <p>In particular, the following conduct should not constitute a breach:</p> <ul style="list-style-type: none"> conduct that would require a generator to breach an existing contract or compromise the ability to meet those requirements; a failure to offer contracts where there are physical or regulatory limitations in doing so; where conduct is to comply with legislation (including market liquidity or retailer reliability obligations); conduct to give effect to genuine risk strategies (including counterparty risk), maintenance and outage planning and management, or managing safety; or where the conduct is to manage a vertically-integrated generator/retailer's own risk position. 	Technical/clarifying	These proposed amendments reflect the purpose of this prohibition, which is to ensure that retailers seek financial contracts to hedge risk in supplying small customers, and not more broadly.
13.	Insert a new paragraph in section 153F which makes clear that the provision does not require corporations to contract units that are mothballed or closed, or otherwise do anything that raises legitimate operational or safety concerns.	Technical/clarifying	This makes clear that section 153F does not operate to require contracting off units that have been legitimately notified for mothballing or closure, and will not operate in a manner that interferes with legitimate operational concerns in respect of assets, such as reliability, maintenance requirements and safe operation.

#	Requested change	Type of change	Reasons
14.	Sections 153G (electricity spot market – basic case) and 153H (electricity spot market – aggravated case) should be removed.	Substantive	Unless the conduct of concern can be clearly identified, rather than introducing a new prohibition, the existing prohibition in rule 3.8.22A(a) of the National Electricity Rules should be relied on, with a new provision that provides that if the conduct is also fraudulent or dishonest, then the enhanced divestment power may be used (if it is retained).
15.	<p>If sections 153G and 153H are retained, the following amendments should be made to both sections:</p> <ul style="list-style-type: none"> the "basic case" should be limited to bids and offers that are fraudulent or dishonest; the "aggravated case" should require both that bids and offers that are fraudulent or dishonest, and that they are made with the purpose of distorting or manipulating prices in the electricity spot market, taking into account the design of the electricity spot market—ie they are not intended to change the design and operation of the electricity spot markets; and both prohibitions should be limited to the National Electricity Market and should incorporate the language of paragraph 2.101 from the Explanatory Memorandum. 	Technical/clarifying	These proposed amendments clarify the relevant test and make section 153G more practical to interpret and apply.
16.	<p>If sections 153G and 153H are retained, the following subsection should be included in both sections 153G and 153H:</p> <p>"Nothing in this section prohibits bidding conduct that is consistent with the design of, and rules regulating, the relevant electricity spot market and in the ordinary course of business."</p>	Technical/clarifying	This ensures the design of the electricity spot market must be considered for the purposes of determining whether a corporation has contravened sections 153G or 153H.
17.	Amend section 153W and 153X (contracting order) to allow the Treasurer to apply to a Court to seek a contracting order, rather	Procedural	This power should be placed in the hands of the Court rather than the Treasurer, particularly to the extent to which this might be characterised as

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	<p>than make an order administratively.</p> <p>The following consequential amendments should be made:</p> <ul style="list-style-type: none"> • Before making an application to the Court under section 153W, the Treasurer must have made a "<i>proposed</i> contracting order", on a confidential basis, directing the relevant corporation to make offers to enter into electricity financial contracts. This must be confidential to the parties involved. • In order for this power to be exercised appropriately by the Court, it will be essential to set out clear criteria / factors to which the Court must have regard when determining the price(s) in respect of electricity under the electricity financial contracts that must be offered. • Insert a paragraph which makes clear that the provision does not require corporations to contract units that are mothballed or closed, or otherwise do anything that raises safety concerns. • Amend section 153Y (now section 153Z) to enable the Treasurer, as well as the affected corporation, to apply to the Court for a variation or revocation of a contracting order. • Consequently, all references to "<i>an order of the Treasurer</i>" should be substituted with "<i>an order of the Court</i>", for example, in the definition of "contracting order" in section 153C. • Consequently, section 153Z (enforcement of contracting orders) can be deleted – if a contracting order is to be made by the Court only, then this provision will be redundant. 		a form of judicial power.
18.	Amend sections 153L and 153M (public warning notices) so that:	Procedural	The ACCC should not have the power to issue any warning notices on a public basis, without the

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	<ul style="list-style-type: none"> warning notices are issued by the ACCC on a confidential (rather than public) basis; only the Court may issue a public warning notice. These provisions should be amended to reflect the language of section 86D of the CCA which empowers the Court, on application by the ACCC, to make an adverse publicity order in relation to a corporation who has engaged in prohibited conduct. 		contraventions having been established/proved. Any warning notice should be made on a confidential basis.
19.	Amend sections 153L and 153M so that corporations have 45 days, rather than 21 days, to respond to a warning notice.	Procedural	<p>21 days is not sufficient time for any corporation to identify the source of the conduct of concern, investigate what happened, whether there was a breach, seek legal advice etc.</p> <p>The ACCC should not be able to apply to the Court for a warning notice within 90 days of first giving the corporation notice of its intention to apply for a warning notice.</p>
20.	Delete subsection 153U(3), which requires the ACCC to publish a No Treasurer Action notice.	Procedural	This mirrors the proposed amendments in respect of public warning notices above. If it is accepted that the "public warning notice" will no longer be public, it follows that the "no Treasurer action notice" should also not be public.
21.	Amend sections 153L and 1653M so that the ACCC can only issue a warning notice if it is "satisfied" (rather than "has a reasonable belief") that the corporation <u>has</u> engaged, or is engaging in, the prohibited conduct.	Substantive	The ACCC should be required to have more than a "reasonable belief" that the corporation has engaged in the prohibited conduct before issuing a warning notice, particularly given that the ACCC would have conducted an investigation and obtained further evidence of any likely prohibited conduct.
22.	Insert new section 153VA which enables affected corporations to apply to the Tribunal for a review of a decision by the ACCC to	Substantive	Given that this unfettered power to issue notices will significantly impact corporations and the

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	issue/vary a prohibited conduct notice or give/vary a prohibited conduct recommendation, or vary/revoke a no Treasurer action notice.		market, we consider it would be appropriate to ensure that any such decisions may be the subject of review/appeal.
23.	<p>Amend the commencement date in section 2 to implement a transition period of:</p> <ul style="list-style-type: none"> for the retail pricing prohibited conduct (section 153E), 6 months from the date of publication of final ACCC guidelines that would apply; 3 months from the date of publication of ACCC guidelines that would apply. <p>As an alternative, the transitional period could be 6 months from the date of royal assent.</p>	Procedural	This will enable affected corporations to interpret and implement the necessary changes and educative programs, and also to allow retailers to comply with the bill and DMO/VDO without causing further consumer confusion arising from frequent changes to retail pricing.
24.	Add an express exclusion of liability consistent with section 76(2) of the CCA.	Technical/clarifying	This clarifies that individuals will not be personally liable. The prospect of individual liability for individual traders, pricing analysts and relatively junior employees could be unfairly impacted.
25.	<p>Schedule 2 (status of AER instruments) should be amended so that:</p> <ul style="list-style-type: none"> the AER's instrument making power is clearly only a power to make price determinations for the DMO; before making a price determination, the AER should be required to make a decision, based on specific criteria, about the recommended price and that this should be subject to public consultation before being made final; and once the decision is made final, the AER should then be able to issue an instrument consistent with the final decision. 	Procedural	It would be preferable for the AER to have specific criteria (and there is considerable precedent for this under the State pricing regimes that apply a cost-based model).

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26.	The proposed amendment to the AER's information gathering powers in section 44AH in Schedule 2 should only apply in respect of the DMO and VDO, and should also include a framework and principles the AER must have regard to before exercising those powers.	Procedural	This clarifies the scope of the AER's information gathering powers.