



3 October 2019

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

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

Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019

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

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

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

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

Our concerns regarding the contents of the Bill are summarised below

The new prohibitions would create uncertainty for market participants, as it is not clear what additional behaviours (beyond those that are already prohibited under the current regulatory framework) they are looking to restrict. This is problematic if it constrains legitimate behaviour that is consistent with the efficient operation of the market. This will increase the risk profile of the energy sector and dissuade private sector investment, progressively increasing the reliance on government support schemes, which is not a sustainable or efficient approach. Our key concerns are set out in greater detail below.

Retail prohibition:

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

While the Explanatory Memorandum seeks to clarify issues such as these, it is still not entirely clear on what basis a determination of whether costs savings are being reflected in retail tariffs would be made, or what level of pass through would be deemed appropriate. Invariably this will be reliant on the subjective judgement of the ACCC, with the implication being that any perceived failure to pass through cost savings in an 'acceptable' manner would result in a contravention. This is exacerbated by the ACCC's ability to issue infringement notices.

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

Spot market prohibitions:

Under sections 153G and 153H, generators are prohibited from engaging in behaviour that could undermine the effective operation of the spot market. However, such behaviour is already forbidden under the current regulatory framework. The Australian Consumer Law (ACL) and Competition and Consumer Act (CCA) respectively prohibit misleading or deceptive behaviour and prohibit firms that have substantial market power from engaging in conduct that would substantially lessen competition. The National Electricity Rules (NER) also require generators to submit bids into the market that are not false or misleading, and each generator must submit a verifiable reason for any rebids and keep a record that is reviewable by the Australian Energy Regulator (AER).

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

Contract market prohibition:

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

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

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

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

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

Allowing the Treasurer to impose punitive measures on corporations suspected of misconduct in the form of a contracting order will also undermine the separation of judicial and executive powers. Under the CCA it is the Courts that make a finding of a contravention, whereas under the approach set out in the Bill, the Treasurer, based on a recommendation from the ACCC, ascertains whether a firm has contravened the prohibition, and the subsequent nature of the contracting order. A court is only able to determine whether a business has failed to comply with the order, and not whether the order itself is justified. This would remove a vital check and balance that is an important feature of the current regulatory arrangements.

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

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

Prohibitions

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

Remedies

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

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

Yours Sincerely,

Keith Robertson
General Manager Regulatory Policy

2016-2017-2018

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

No. , 2018

(Treasury)

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

Style Definition: Heading 3

Contents

1	Short title	1
2	Commencement	1
3	Schedules	2
Schedule 1—Prohibited conduct in the electricity industry		3
Part 1—Main amendments		3
<i>Competition and Consumer Act 2010</i>		3
Part 2—Other amendments		35 ³⁴
<i>Competition and Consumer Act 2010</i>		35 ³⁴
Part 3—Application		37 ³⁴
Schedule 2—AER information gathering		38 ³⁵
<i>Competition and Consumer Act 2010</i>		38 ³⁵

Formatted Table

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

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

3 The Parliament of Australia enacts:

4 **1 Short title**

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

7 **2 Commencement**

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

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

Formatted Table

1

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

Formatted Table

2
3
4

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

5
6
7

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

8

3 Schedules

9
10
11
12

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.

Formatted Table

2	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</i>	<i>No. 4, 2018</i>
	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</i>	<i>No. 4, 2018</i>

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

Main amendments **Part 1**

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

3 **Part 1—Main amendments**

4 *Competition and Consumer Act 2010*

5 **1 After Part XIC**

6 Insert:

7 **Part XICA—The Electricity Industry**

8 **Division 1—Preliminary**

9 **153A Simplified outline of this Part**

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

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

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

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

Formatted Table

No. —, *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)*
~~2018~~No. —, *Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market*
2018 Misconduct) Bill 2018

3

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

1
2
3
4
5

- (i) ~~make apply to the Court for~~ 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.

6

153B Part etc. ceases to be in force

7
8
9
10

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.

11

153C Interpretation

12

In this Part:

13
14

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

15

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

16
17

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

18

Court means the Federal Court of Australia.

19
20

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

21
22

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

23
24
25
26

- (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.

27

electricity market means any of the following:

28
29

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

4

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

No. 4,
2018
No. 4,
2018

Formatted Table

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

Main amendments **Part 1**

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

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

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

Formatted: Font: Not Bold

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

9 **prohibited conduct**: a corporation engages in **prohibited conduct** if
10 the corporation engages in conduct that contravenes section 153E,
11 153F, 153G or 153H.

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

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

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

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

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

24 **153D Meaning of *connected body corporate* in relation to prohibited**
25 **conduct**

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

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

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

Formatted Table

No. —, Treasury Laws Amendment (Prohibiting Energy Market Misconduct)
2018 No. —, Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market
2018 Misconduct) Bill 2018

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

- 1 (b) any of the following conditions are satisfied:
 2 (i) the prohibited conduct involves the direct or indirect use
 3 of assets held by the body corporate;
 4 (ii) the prohibited conduct involves direct or indirect
 5 dealings between the body corporate and the
 6 corporation.
- 7 (3) A body corporate is a *connected body corporate* in relation to
 8 prohibited conduct if:
 9 (a) the body corporate is a holding company of another body
 10 corporate; and
 11 (b) the other body corporate is a connected body corporate in
 12 relation to the prohibited conduct because of a previous
 13 operation of this section.

Division 2—Prohibited conduct

153E Prohibited conduct—retail pricing

- 16 (1) A corporation contravenes this section if:
 17 (a) the corporation offers to supply electricity, or supplies
 18 electricity, to small customers; and
 19 (b) the corporation fails to make reasonable adjustments to the
 20 price of those offers, or to the price of those supplies, to
 21 reflect sustained and substantial reductions in ~~the~~
 22 underlying ~~cost~~ market-based wholesale price of procuring
 23 electricity ~~and relevant network costs~~.
- 24
- 25 (2) A corporation does not contravene paragraph (1) if:
 26 (a) it has not had a reasonable amount of time to make an
 27 adjustment;
 28 (b) it has adjusted prices to reflect a cost reduction of the kind
 29 described in paragraph (1)(b) in the prior 6 months;
 30 (c) its own ~~prices~~ costs have not gone down to reflect reductions
 31 in the underlying market-based wholesale price of electricity
 32 and network costs;
 33 (d) it is precluded from making an adjustment under relevant
 34 regulations;

Formatted: Indent: Left: 0.5 cm, Hanging: 1 cm, Tab stops: 2.25 cm, Right + Not at 1.8 cm

Formatted Table

6	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct)</i>	<i>No. 4</i>
	<i>Bill 2018</i> <i>Treasury Laws Amendment (Prohibiting Energy Market</i>	<i>2018</i> <i>No. .</i>
	<i>Misconduct) Bill 2018</i>	<i>2018</i>

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

Main amendments **Part 1**

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

9 **153F Prohibited conduct—electricity financial contract liquidity**

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

Formatted Table

No. 2018, 2018 Treasury Laws Amendment (Prohibiting Energy Market Misconduct)
 No. 2018 Treasury Laws Amendment (Prohibiting Energy Market
 2018 Misconduct) Bill 2018

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

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

Formatted: paragraph,a, Indent: Left: 2 cm, Hanging:
 1.25 cm, Tab stops: 3.25 cm, Right

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

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

30 (2) A corporation does not contravene paragraph (1) merely by
 31 engaging in bidding behaviour for a legitimate commercial
 32 purpose which is consistent with the design and intended
 33 operation of the electricity spot market in which the corporation
 34 operates.

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

Formatted Table

8	<u>Treasury Laws Amendment (Prohibiting Energy Market Misconduct)</u>	<u>No. 4,</u>
	<u>Bill 2018</u>	<u>2018</u>
	<u>Treasury Laws Amendment (Prohibiting Energy Market</u>	<u>No. 4,</u>
	<u>Misconduct) Bill 2018</u>	<u>2018</u>

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

Main amendments **Part 1**

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

3 **153H Prohibited conduct—electricity spot market (aggravated case)**

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

Formatted: Indent: Hanging: 1.75 cm, Tab stops: 2 cm, Right + Not at 1.8 cm

Formatted: Indent: Hanging: 0.65 cm

13 ~~**153J Prohibited conduct—(2) A corporation does not contravene**~~
14 ~~**paragraph (1) merely by engaging in bidding behaviour**~~
15 ~~**for a legitimate commercial purpose**~~

16 ~~(1) This section:~~

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

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

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

Formatted: paragraph,a

Formatted Table

No. —, Treasury Laws Amendment (Prohibiting Energy Market Misconduct)
2018 No. —, Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market
2018 Misconduct) Bill 2018

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

153K Prohibited conduct may be covered by other provisions

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

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

Division 3—Commission responses

Subdivision A—Public warning notices

153L Commission may give draft public warning notice

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

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

(2) The notice must:

- (a) state the day on which the notice is given; and
- (b) identify:
 - (i) the corporation mentioned in paragraph (1)(a); and
 - (ii) the prohibited conduct mentioned in paragraph (1)(a); and
- (c) explain the reasons why the Commission ~~reasonably believes~~ is satisfied on reasonable grounds that the requirements in paragraphs (1)(a), (b) and (c) are met; and
- (d) state that:
 - (i) the corporation may, within ~~21~~28 days after being given the notice, make representations to the Commission regarding the matters mentioned in paragraphs (1)(a), (b) and (c); and

Formatted Table

10	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct)</i>	<i>No. 4,</i>
	<i>Bill 2018</i>	<i>2018</i>
	<i>Treasury Laws Amendment (Prohibiting Energy Market</i>	<i>No. ,</i>
	<i>Misconduct) Bill 2018</i>	<i>2018</i>

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

Main amendments **Part 1**

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

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

5 **153M Commission may issue public warning notice**

6 (1) This section applies if:

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

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

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

24 (3) The notice must:

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

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

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

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

1

2

Subdivision B—Infringement notices

3

153N Infringement notices

4

(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).

5

6

7

8

9

10

11

(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.

12

Division 4—Procedure before contracting order or divestiture order

13

14

Subdivision A—Prohibited conduct notices

15

153P Prohibited conduct notices

16

(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:

17

18

19

20

21

(a) any of the following conditions are satisfied:

22

23

24

25

26

27

28

29

(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

12

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

*No. 4,
2018*
No. 2018
2018

Formatted Table

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

Main amendments **Part 1**

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

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

7 (4) A failure to comply with subparagraph (2)(c)(iii) does not affect
8 the validity of the notice.

9 (5) The Commission must give each of the following a copy of the
10 notice as soon as practicable after issuing it:

- 11 (a) the corporation;
12 (b) each body corporate identified in the notice (in accordance
13 with subparagraph (2)(c)(iii)).

14 (6) A prohibited conduct notice is not a legislative instrument.

15
16 **153Q Commission may vary or revoke prohibited conduct notice**

17 (1) The Commission may, in writing, vary or revoke a prohibited
18 conduct notice given to a corporation either on its own initiative or
19 on application of the corporation.

20 (2) A variation or revocation under subsection (1) must:
21 (a) state the day on which it is made; and
22 (b) in the case of a variation—state that the corporation may,
23 within the period mentioned in subsection (3), make
24 representations to the Commission regarding the prohibited
25 conduct notice as varied.

26 (3) For the purposes of paragraph (2)(b), the period:
27 (a) starts on the day on which the Commission gives the
28 corporation the copy of the variation; ~~and~~
29 (b) ends:
30 (i) if subparagraph (ii) does not apply—4590 days after
31 that day; or

14 Treasury Laws Amendment (Prohibiting Energy Market Misconduct) No. 4,
Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market 2018 No. 4,
Misconduct) Bill 2018 2018

Formatted Table

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

Main amendments **Part 1**

- 1 (ii) if the Commission allows a later day—that later day—
2 ~~(c) the Commission must make an allowance for a longer time period~~
3 ~~where not to do so would unreasonably prejudice the corporation;~~
4 ~~and~~
5 —
6 (4) The Commission must give each of the following a copy of a
7 variation or revocation under subsection (1) or as soon as
8 practicable after making it:
9 (a) the corporation;
10 (b) each body corporate identified in the prohibited conduct
11 notice (in accordance with subparagraph 153P(2)(c)(iii));
12 (c) each connected body corporate in relation to the prohibited
13 conduct (other than a body corporate mentioned in
14 paragraph (b)) identified in the prohibited conduct notice as
15 varied.
16 (5) A variation or revocation under subsection (1) is not a legislative
17 instrument.
18 ~~(6) Subsection 33(3) of the Acts Interpretation Act 1901 does not~~
19 ~~apply in relation to a prohibited conduct notice.~~
20 —

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

23 **153R Commission must give Treasurer prohibited conduct**
24 **recommendation or no Treasurer action notice**

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

No. —, *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)*
2018 No. —, *Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market*
2018 *Misconduct) Bill 2018*

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

22 **153S Prohibited conduct recommendations**

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

16 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)* No. ~~4~~,
Bill 2018 *Treasury Laws Amendment (Prohibiting Energy Market* ~~2018~~ *No. .*
Misconduct) Bill 2018 *2018*

Formatted Table

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

Main amendments **Part 1**

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

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

12 **153T Commission may vary or revoke prohibited conduct**
13 **recommendation**

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

Formatted Table

18 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)* No. ~~4~~
Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market 2018No. ...
Misconduct) Bill 2018 2018

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

Main amendments **Part 1**

- 1 (4) The Commission cannot make a variation under subsection (1)
2 unless the Commission is satisfied that:
3 (a) the variation is minor or insubstantial; or
4 (b) all of the following conditions are met:
5 (i) the corporation or any related body corporate gave the
6 Commission information relevant to the prohibited
7 conduct notice that is false or misleading in a material
8 particular, or failed to give the Commission material
9 information relevant to the prohibited conduct notice
10 that is not publicly available in a manner that was false
11 or misleading;
12 (ii) the variation is reasonably necessary to address the
13 circumstances described in subparagraph (i); or
14 (c) the variation is reasonably necessary to address information
15 that was not in existence, or that the Commission did not
16 have, when the prohibited conduct notice was given.

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

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

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

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

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

29

30 **153U No Treasurer action notice**

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

No. _____, Treasury Laws Amendment (Prohibiting Energy Market Misconduct)
2018No. _____, Bill 2018 Treasury Laws Amendment (Prohibiting Energy Market
2018 Misconduct) Bill 2018

19

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

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

10 (3) The Commission must publish the notice by electronic or other
11 means:
12 (a) unless paragraph (b) applies—45 days after issuing it; or
13 (b) if the Commission and the Treasurer agree that it is
14 appropriate to publish the notice at an earlier time—at that
15 earlier time.

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

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

20 **153V Commission may vary or revoke no Treasurer action notice**

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

23 (2) The Commission cannot make a variation or revocation under
24 subsection (1) later than 45 days after:
25 (a) unless paragraph (b) applies—the day on which the
26 Commission made the no Treasurer action notice; or
27 (b) if there has been a previous variation of the no Treasurer
28 action notice under this section—the day on which the
29 Commission made the previous variation.

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

20 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)* No. ~~4~~
Bill 2018 *Treasury Laws Amendment (Prohibiting Energy Market* ~~2018~~No. ~~...~~
Misconduct) Bill 2018 ~~2018~~

Formatted Table

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

Main amendments **Part 1**

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

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

- 1 (89) The Commission must give a copy of a variation or revocation
- 2 under subsection (1) to the Treasurer as soon as practicable after
- 3 making it.
- 4 (910) The Commission must publish a variation or revocation under
- 5 subsection (1) by electronic or other means as soon as practicable
- 6 after making it.
- 7 (4011) If the no Treasurer action notice has not yet been published in
- 8 accordance with subsection 153U(3) by the time the Commission
- 9 makes a variation or revocation under subsection (1):
- 10 (a) despite subsection 153U(3), the Commission must not
- 11 publish the no Treasurer action notice; and
- 12 (b) despite subsection (9), the Commission must not publish the
- 13 variation or revocation.
- 14 (412) A variation or revocation under subsection (1) is not a legislative
- 15 instrument.
- 16 ~~(12) Subsection 33(3) of the Acts Interpretation Act 1901 does not~~
- 17 ~~apply in relation to a no Treasurer action notice.~~

Division 5—Contracting orders

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

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

- 24 The Treasurer may make apply to the Court for an order under
- 25 section 153X in respect of a body corporate if the Treasurer is
- 26 satisfied on reasonable grounds that the following conditions are
- 27 met:
- 28 (a) ~~(a)~~ the Commission has given the Treasurer a prohibited
- 29 conduct recommendation under section 153S;
- 30 (b) the Commission has provided the corporation with a
- 31 copy of the prohibited conduct recommendation;

Formatted: Numbered + Level: 1 + Numbering Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned at: 2.25 cm + Indent at: 2.91 cm

Formatted Table

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

Main amendments **Part 1**

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

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

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

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

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

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

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

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

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

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

(2) The order must:

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

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

(c) identify:

(i) the body corporate; and

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

Formatted: Indent: Left: 0 cm, First line: 0 cm

Formatted Table

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

Main amendments **Part 1**

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

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

(c) the commitments or current plans that the body corporate has, and related bodies corporate have, to supply electricity to customers;

~~(d) any other matter the commitments that the Treasurer considers to be body corporate has, and related bodies corporate have, to supply electricity under derivative contracts;~~

(e) current availability of the body corporate's generation capacity availability, including having regard to availability of fuel;

(f) the need for the body corporate to engage in prudent risk management (for example, having reserve capacity available to meet commitments in the case of an unplanned outage); and

(g) any other relevant matters.

~~(6) (6) In determining the price or range of prices in respect of electricity under the electricity financial contracts that must be offered for the purposes of paragraph (4)(b) the Court, must have regard to the following matters:~~

(a) the market price of electricity at the time the offers will be required to be made;

(b) the body corporate's costs of procuring and producing electricity;

(c) the ongoing financial viability of the body corporate; and

(d) any other relevant matters.

~~(7) The specified period or periods during which the Court may order the body corporate ~~must~~to make those offers must:~~

~~(a) start no earlier than 6 months after the order is made; and~~

~~(b) end no later than 3 years after the order is made.~~

~~(78) The ~~Treasurer~~Court must publish the order by electronic or other means except to the extent that doing so would damage the competitive position of the corporation.~~

Formatted: Indent: Hanging: 0.65 cm

Formatted Table

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

Main amendments **Part 1**

153Y Variation and revocation of contracting order

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

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

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

- ~~(2)~~ The Treasurer cannot make a variation application under subsection (1) unless the Treasurer is satisfied that:
- (a) the order as varied is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in the kind of prohibited conduct (mentioned in the order) in the future; and
 - (b) if the body corporate does not consent to the variation—the variation is minor or insubstantial, or all of the following conditions are met:
 - (i) the corporation or any related body corporate gave the Treasurer or the Commission information relevant to the prohibited conduct recommendation that is false or misleading in a material particular, or failed to give the Treasurer or the Commission material information relevant to the prohibited conduct recommendation that is not publicly available in a manner that was false or misleading;
 - (ii) the variation is reasonably necessary to address the circumstances described in subparagraph (i).

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

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

Formatted: Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 1.32 cm + Indent at: 2.01 cm

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

1

2

3

4

5

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

6

Subdivision B—Enforcement of contracting orders

7

153Z Enforcement of contracting orders

8

9

(1) This section applies if the ~~Treasurer~~Court has made a contracting order in respect of a body corporate.

10

11

12

13

(2) If the Commission considers on reasonable grounds that the body corporate has failed to comply with the contracting order in a material manner, the Commission may apply to the Court for an order under subsection (3).

14

15

16

17

18

19

20

21

22

23

24

(3) If the Court is satisfied that the body corporate has failed to comply with the contracting order in a material manner, the Court may make all or any of the following orders:

(a) an order directing the body corporate to comply with the contracting order;

(b) if the period or periods specified in the contracting order (in accordance with paragraph 153X(3)(d)) have already passed—an order directing the body corporate to comply with the contracting order, within a new period, or new periods, specified in the order;

(c) any other order that the Court considers appropriate.

Formatted: Space After: 12 pt

25

26

Division 6—Electricity divestiture orders

27

153ZA Treasurer may apply to Federal Court for divestiture order

28

29

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

Formatted Table

28

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

*No. 4,
2018*
No. 4,
2018

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

Main amendments **Part 1**

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

Formatted: Outline numbered + Level: 1 + Numbering
Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned
at: 2.25 cm + Indent at: 2.91 cm

Formatted Table

No. 2018, Treasury Laws Amendment (Prohibiting Energy Market Misconduct)
 2018 No. 2018, Treasury Laws Amendment (Prohibiting Energy Market
 2018 Misconduct) Bill 2018

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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.
 - ~~(c) the following conditions are satisfied:~~
 - ~~(i) the order applied for will result, or is likely to result, in a significant and material benefit to the public;~~
 - ~~(ii) if the order applied for will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.~~
- (2) The Court may order the body corporate to:
- (a) dispose of interests in securities or assets, other than to any of the following:
 - (i) another body corporate that is related to the body corporate;
 - (ii) an associate of the body corporate; and
 - (b) comply with conditions (if any) specified in the order in accordance with subsection (6).

Formatted Table

30	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct)</i>	<i>No. 4</i>
	<i>Bill 2018</i>	<i>2018</i>
	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</i>	<i>2018</i>

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

Main amendments **Part 1**

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

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

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

4 (8) It will be defence to non-compliance with these provisions if the
5 corporation can demonstrate a reasonable and genuine attempt to secure
6 a sale of the assets or interest and no entity is willing to acquire the
7 assets in accordance with the order on terms and conditions, including
8 price, that are acceptable to the corporation, acting reasonably.
9

10 **Division 7—Miscellaneous**

11 **153ZC Acquisition of property**

12 *Scope*

- 13 (1) This section applies to the following:
14 (a) Divisions 5 and 6;
15 (b) any other provision of this Act, to the extent to which the
16 provision relates to Division 5 or 6.

17 *Effect of provision*

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

22 **153ZD Review by Tribunal**

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

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

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

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

32 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct)* No. ~~4~~
Bill 2018 *Treasury Laws Amendment (Prohibiting Energy Market* ~~2018~~No. ~~...~~
Misconduct) Bill 2018 ~~2018~~

Formatted: Indent: Left: 1.32 cm, First line: 0 cm

Formatted Table

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

Main amendments **Part 1**

- 1 (i) vary a prohibited conduct notice; or
 2 (ii) revoke a prohibited conduct notice.
 3 (2) If the Commission makes a reviewable decision, a person whose
 4 interests are affected by the decision may apply in writing to the
 5 Tribunal for a review of the decision.
 6 (3) An application under this section for a review of a decision must be
 7 made within 21 days after the Commission made the decision.
 8 (4) If the Tribunal receives an application under this section for a
 9 review of a decision, the Tribunal must review the decision.

10
11 **153ZE Functions and powers of Tribunal**

- 12 (1) On a review of a decision of the Commission of a kind mentioned
 13 in section 153ZD, the Tribunal may make a decision affirming,
 14 setting aside or varying the decision of the Commission and, for
 15 the purposes of the review, may perform all the functions and
 16 exercise all the powers of the Commission.
 17 (2) A decision by the Tribunal affirming, setting aside or varying a
 18 decision of the Commission is taken for the purposes of this Act
 19 (other than for the purpose of s 153ZD) to be a decision of the
 20 Commission.
 21 (3) For the purposes of a review by the Tribunal, the member of the
 22 Tribunal presiding at the review may require the Commission to
 23 give such information, make such reports and provide such other
 24 assistance to the Tribunal as the member specifies.
 25 (4) For the purposes of a review, the Tribunal may have regard to any
 26 information given, documents produced or evidence given to the
 27 Commission in connection with the making of the decision to
 28 which the review relates.

29
30
31
32
33

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 1 Main amendments

1

Formatted Table

34	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</i>	<i>No. 4, 2018</i>
	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018</i>	<i>No. 4, 2018</i>

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:

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

7 Paragraph 76(1A)(aa)

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

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

Omit “or”.

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

Add:

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

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

Add “or”.

Formatted Table

Schedule 1 Prohibited conduct in the electricity industry

Part 2 Other amendments

11 After paragraph 84(1)(b)

Insert:

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

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

Add:

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

or

(vii) a divestiture order (within the meaning of Part XICA).

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

Omit "XIB or XIC", substitute "XIB, XIC or XICA".

Formatted Table

36 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018* *No. 4, 2018*
Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 *No. 2018*

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

Application **Part 3**

Part 3—Application

14 Application

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

Schedule 2 AER information gathering

Schedule 2—AER information gathering

Competition and Consumer Act 2010

1 Section 44AH

Before “The”, insert “(1)”.

2 At the end of section 44AH

Add:

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

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

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

31 After subsection 44AAF(3)

Insert:

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

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

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

(3B) The entities are as follows:

(a) a Department;

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

AER information gathering **Schedule 2**

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

6 **42 Subsections 44AAF(4) and (5)**

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

8 **53 After section 44AAF**

9 Insert:

10 **44AAFA Power of AER to obtain information and documents**

11 *Notice requiring information etc.*

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

Schedule 2 AER information gathering

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

5 *Oath or affirmation*

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

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

12 *Offence*

- 13 (1) A person commits an offence if:
14 (a) the person is given a notice under section 44AFA; and
15 (b) the person fails to comply with the notice.

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

17 *Exceptions*

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

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

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

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

AER information gathering **Schedule 2**

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

10 **44AAFC AER may inspect, copy and retain documents**

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

25 **64 After subsection 44AAJ(1)**

26 Insert:

- 27 (1A) Without limiting subsection (1), the report must include:
28 (a) the number of notices given by the AER under
29 section 44AAFA; and
30 (b) a general description of the nature of the matters in respect of
31 which the notices were given; and

Schedule 2 AER information gathering

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

3 ~~75~~ **At the end of section 51AE**

4 Add:

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

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

14 **86 Subparagraph 79A(1)(a)(i)**

15 After “section”, insert “44AAFB”.

16 **97 Paragraph 79A(1)(d)**

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

19 **108 Subsection 163(5)**

20 After “section”, insert “44AAFB”.

Formatted Table

42 ~~Treasury Laws Amendment (Prohibiting Energy Market Misconduct)~~ ~~No. 4,~~
~~Bill 2018~~ ~~Treasury Laws Amendment (Prohibiting Energy Market~~ ~~2018~~ ~~No. 4,~~
~~Misconduct) Bill 2018~~ ~~2018~~