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Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee

Inquiry into the provisions of Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019

The Business Council welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee on the provisions of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019 (the Bill).

As stated in previous submissions and inquiries, the Business Council does not support the Bill and would prefer to see the government to withdraw it. However, we recognise that the government took this policy to the Federal Election and now intends to implement it. We wish to work constructively with the government and the parliament to improve the current drafting of the Bill, make it workable for industry and promote certainty and risk management for investors.

That said, it is important to put on the record that while the Business Council supports policies that will drive down electricity prices, this will not be achieved by extreme intervention in the electricity market which brings new risks, unintended consequences and has never worked before.

While we understand the need to prioritise affordability, greater intervention and more regulation – including forced divestment which even the ACCC has rejected – is not the answer. By exacerbating sovereign risk and interfering in market outcomes, the Bill will discourage investment and is unlikely to increase competition nor reduce prices for consumers.

The anti-competitive behaviour the Bill seeks to prohibit is already appropriately dealt with, and prohibited, under existing laws and rules that apply to the electricity market. Further, inquiry after inquiry into retail prices, wholesale bidding and conduct and contract market liquidity has not found any evidence of fraudulent or dishonest behaviour, nor acts of bad faith with the purpose of distorting or manipulating prices. Consequently, the government's rationale behind developing this new intrusive legislative regime remains unclear and the policy case has not been made.

The remedies in the Bill are extreme and not only go well beyond what was recommended by the ACCC in its 2018 report but also exceed the bounds of legal protective norms.

The proposed introduction of this market intervention in the energy sector sets a dangerous precedent for other sectors of the economy and threatens our economic attractiveness by sending a signal to the world that investing in Australia comes with considerable risks. Alarming, there continue to be calls by some in the parliament to extend this legislation to other sectors, including the banks, superannuation and supermarkets.

Australia desperately needs policies in the energy sector that support investment in new large-scale generation and upgrading existing dispatchable generation assets. Both the reliability of the grid and

reducing power prices depend on this investment. However, investment will only occur if there is policy stability in the energy sector, as uncertainty has a significant impact on the risk appetite of companies and investors. Unfortunately, this Bill is contrary to creating an attractive investment environment.

New interventions into the market only serve to increase sovereign risk and discourage the new investment the sector urgently needs. Lower electricity prices will not be achieved through poorly targeted, extreme and incoherent intervention in the electricity market.

We note that the government has made several minor amendments prior to the reintroduction of this Bill. However, the Business Council does not believe these go far enough. We have attached our detailed list of proposed improvements to the current draft of the Bill, as well as a mark-up of the Bill that reflects these suggested amendments. The key elements the Business Council seeks to address are:

- **Contracting orders** – As currently drafted the Bill allows the Treasurer to step in and impose a contracting order on any terms, at any price and for any volume of electricity. This of great concern to the Business Council. We argue this should be amended to provide 'hybrid model' whereby the Court issues contracting orders and the Regulator assists with contract terms and price. This will ensure the court is the ultimate decision-maker and procedural fairness is upheld.
- **Retail cost pass-through** – not required with the new DMO/VDO provisions in place.
- **Contract market liquidity** – link the existing misuse of market power provisions in the *Competition and Consumer Act 2010 (Cth)* with the 'Big Stick' remedies for the energy industry.
- **Bidding in good faith** – clarify that ordinary market conduct is not market manipulation, and link existing bidding rules in the NER with 'Big Stick' remedies for energy industry where there is fraud, dishonesty or bad faith.
- **Process** – prioritise amendment of a range of provisions to address concerns around procedural fairness.
- **Divestiture** – oppose due to investment risk, contagion risk to other sectors, the availability of more effective remedies and the lack of international policy precedent.
- **Inferred purpose** – removal of inferred purpose drafting on the basis that the principle exists at general law anyway.

A number of other miscellaneous elements are also addressed in the detailed table. Please note that the table and mark-up is not exhaustive. Many provisions have not been marked-up – this does not mean that the Business Council agrees with the current drafting of those provisions.

Yours sincerely

Jennifer A. Westacott AO
Chief Executive

Attachment/s: Table of the Business Council's proposed improvements
Mark-up of the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019

'Big Stick' Bill: the BCA's proposed improvements

The purpose of the table below is to set out the BCA's proposed amendments to the Bill.

The table presents each of the key elements of the Bill in the order in which they appear in the draft legislation. For ease of reference, we have included a heading row for each element which summarises in a few words the BCA's views. As an overarching comment, we note that the concepts in the Bill are highly directed towards the operation of the national electricity market. We propose that the Bill be expressly limited to conduct within that market.

References to the 'Bill' refer to the *Treasury Laws Amendment (Prohibition Energy Market Misconduct) Bill 2018*, and references to the 'EM' refer to the Explanatory Memorandum for the Bill. References to capitalised terms are as defined in the Bill unless indicated otherwise.

Element of Bill	The BCA's position
<p>1. Retail cost pass-through</p>	<p>Not required with the new DMO/VDO provisions in place</p>
<p>Section 153E: Prohibited conduct – retail pricing</p> <p><i>A corporation contravenes this section if:</i></p> <p><i>(a) the corporation offers to supply electricity, or supplies electricity, to small customers; and</i></p> <p><i>(b) the corporation fails to make reasonable adjustments to the price of those offers, or to the price of those supplies, to reflect sustained and substantial reductions in its underlying cost of procuring electricity.</i></p>	<p>The BCA's view is that an objective AER assessment of any industry-wide reduction in wholesale costs would be more effective than the proposed subjective self-assessment by retailers, and also considerably easier to monitor and enforce. It would also provide consumers with more transparency and predictability in relation to retailer costs. The new Default Market Offer (DMO) provisions introduced on 1 July 2019 under the <i>Competition and Consumer Act 2010 (Cth) (CCA)</i> provide a possible regime to achieve this (noting that the intention is that this prohibition would only apply in the NECF jurisdictions i.e. those jurisdictions where the AER is already applying the DMO regime). Amending section 153E to build on these DMO provisions would be straightforward from a drafting perspective.</p> <p>Specifically, the BCA's view is that the notion of 'sustained and substantial reductions in its underlying cost of procuring electricity' should be replaced with a focus on reductions which:</p> <ul style="list-style-type: none"> • relate specifically to the costs set out in paragraph 2.26 of the EM (not 'underlying costs'); • are industry-wide, not entity-specific; and • are objectively verifiable – and ideally, advised to the Commission by the AER. <p>The BCA's view is that there should also be restrictions around the timing and frequency of 'reasonable adjustments'.</p> <p>Under the new DMO regime the AER sets a reference price which acts as a price cap on standing offers. Retailers are then required by these provisions and the National Energy Customer Framework (<i>NECF</i>) rules to adjust their standing offers so as not to exceed the reference price.</p> <p>A distinction needs to be drawn in relation to Victoria where the DMO regime does not apply, and instead the Victorian Default Offer (<i>VDO</i>) regime has been implemented by the <i>Energy Legislation Amendment (Victorian Default Offer) Act 2019 (Vic)</i>. A key difference between the two regimes is that the VDO regime effectively imposes true price regulation, with the Regulator broadly empowered to make price changes (for example, there is no limitation on the Regulator as to how often it can require standing offers to be changed). As such, no change is required to the Victorian regime in order to enable a Regulator to impose a price reduction of the kind described in section 153E.</p>

Element of Bill	The BCA's position
	<p>By contrast, the DMO provisions are stated to continue to allow for competition. So, unlike the Victorian provisions, new provisions are needed to allow the AER to determine a benchmark in relation to a further price reduction of the kind described in section 153E, but the end result is that customers could benefit from both the price reduction mechanism introduced by the Bill and competition in the retail market as already conceived by the DMO regime.</p> <p>The BCA acknowledges that the drafting intends for the new provisions to complement the DMO such that customers benefit from both the effective cap set by the DMO, as well as ensuring cost reductions are passed through within this umbrella.</p> <p>In these circumstances, the BCA considers the legislation should also explicitly reflect the concepts as set out in the EM that:</p> <ul style="list-style-type: none"> • different retailers will be affected by cost reductions in different ways, and even customers with the same retailer will not have their bills reduced in the same way – in fact the EM explains that the concept of 'reasonable adjustments' allows a retailer to make different adjustments to different tariffs; and • the provisions do not apply to short term fluctuations in supply chain costs, but are intended to cover sustained downward trends. <p>Set out below is further background on the DMO regime and how section 153E could be redrafted to build on this existing regime:</p> <p><u>DMO provisions</u></p> <p>The <i>Competition and Consumer (Industry Code – Electricity Retail Regulations) 2019</i> came into force on 1 July 2019. They prescribe the mandatory <i>Electricity Retail Code of Conduct</i>, which requires that standing offer prices be set such that the cost of supply (based on the model annual usage) does not exceed the reference price set annually by the AER. It also requires that customers be told how their prices compare with the reference price and regulates price-based advertising. (Note that the NECF provides that standing offers cannot be varied more than once every six months – see for example the model terms set out in Schedule 1 to the National Electricity Retail Rules).</p> <p>The AER determines the model annual usage and reference price in relation to each distribution region and each type of customer for a financial year. In determining the reference price it must have regard to:</p> <ul style="list-style-type: none"> • the prices electricity retailers charge for supplying electricity in the region to that type of small customer; • the principle that an electricity retailer should be able to make a reasonable profit in relation to supplying electricity in the region; • the following costs: <ul style="list-style-type: none"> ○ the wholesale cost of electricity in the region; ○ the cost of distributing and transmitting electricity in the region; ○ the cost of complying with the laws of the Commonwealth and relevant State or Territory in relation to supplying electricity in the region; ○ if relevant to the region—the cost of acquiring and retaining small customers; ○ the cost of serving small customers; • any other matter the AER considers relevant. <p>There are a number of procedural requirements the AER must observe before making this determination, including publishing a draft determination, inviting and considering submissions.</p> <p>Given that the AER is already required to make the DMO determination annually, the BCA suggests that section 153E allow the AER, at the same time as making this determination, to follow the same process and apply the same considerations in advising the Commission (and</p>

Element of Bill	The BCA's position
	publishing that advice) as to whether in the immediately preceding financial year there has been an industry-wide sustained and substantial reduction in the relevant costs categories. Corporations must then consider any such advice when deciding whether to make reasonable adjustments.

Element of Bill	The BCA's position
<p>2. Contract market liquidity</p>	<p>Link the existing misuse of market power provisions in the CCA with 'Big Stick' remedies for energy industry</p>
<p>Section 153F: Prohibited conduct – electricity financial contract liquidity</p> <p><i>A corporation contravenes this section if:</i></p> <p><i>(a) any of the following conditions are satisfied:</i></p> <p><i>(i) the corporation generates electricity;</i></p> <p><i>(ii) a body corporate that is related to the corporation generates electricity; and</i></p> <p><i>(b) the corporation does any of the following:</i></p> <p><i>(i) fails to offer electricity financial contracts;</i></p> <p><i>(ii) limits or restricts its offers to enter into electricity financial contracts;</i></p> <p><i>(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</i></p> <p><i>(c) the corporation does so for the purpose of substantially lessening competition in any electricity market.</i></p>	<p>The BCA considers that the purpose of section 153F – that is, to prevent generators from using their market position to deliberately reduce competition and liquidity by withholding financial contracts – would be best achieved by building upon the existing misuse of market power provisions in the CCA (which have been judicially tested and have a proven track record in achieving their policy purpose) by linking them with new 'Big Stick' penalties where the behaviour arises in the energy sector. In this way the energy industry would be visibly exposed to harsher penalties for engaging in this type of behaviour, Government would be better equipped to enforce these penalties, and industry would have certainty as to its obligations. It is also straightforward from a drafting perspective.</p> <p>The BCA observes that the underlying market liquidity objective here is already addressed by the new Market Liquidity Obligations (<i>MLO</i>) recently introduced into the NER as part of the Retailer Reliability Obligation.</p> <p>The only gap then is the punishment of the behaviour of deliberately withholding contracts. Relevantly, section 46(1) of the CCA provides that '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' either in that market or other markets in which that corporation or its related bodies corporate supplies or acquires goods or services.</p> <p>As such it is a broad prohibition which already encompasses the conduct described in section 153F where the corporation concerned has a 'substantial degree of power in the market'. While section 46 has been subject to recent amendments, the fundamental principles of market power and substantial lessening of competition are well understood and have the benefit of judicial consideration in established case law.</p> <p>The Bill already acknowledges that particular conduct of a corporation could result in the corporation contravening both section 46 and section 153F (see 'Example' immediately under section 153K in the Bill). Para 2.70 of the EM provides that the concept of 'substantially lessening competition' is intended to carry the same meaning in section 153F as in other parts of the CCA, 'adapted to the context of electricity markets...'. The BCA considers that the additional remedy should only arise in circumstances where the corporation engaged in the relevant conduct with the purpose of substantially lessening competition.</p> <p>The BCA's proposed approach would reduce overlap and duplication in the CCA (and utilise provisions with a proven track record in achieving their policy purpose), by relying on the existing provisions to determine whether misconduct has occurred and then providing that generators (as described in section 153F(a)) falling foul of section 46 for withholding supply with the purpose of substantially lessening competition would be subject to the 'Big Stick' remedies as well as the usual remedies that the rest of the economy faces for a contravention of section 46.</p> <p>To assist further in interpretation in this particular fact scenario, the BCA also proposes that section 153F include a non-exhaustive list of factors that may legitimately be taken into account by a corporation in relation to the conduct described in section 153F(b).</p>

Element of Bill	The BCA's position
<p>3. Bidding in good faith</p>	<p>Clarify that ordinary market conduct is not market manipulation, and link existing bidding rules in the NER with 'Big Stick' remedies for energy industry where there is fraud, dishonesty or bad faith</p>
<p>153G Prohibited conduct – electricity spot market (basic case)</p> <p><i>A corporation contravenes this section if:</i></p> <p><i>(a) the corporation:</i></p> <p><i>(i) bids or offers to supply electricity in relation to an electricity spot market; or</i></p> <p><i>(ii) fails to bid or offer to supply electricity in relation to an electricity spot market; and</i></p> <p><i>(b) the corporation does so:</i></p> <p><i>(i) fraudulently, dishonestly or in bad faith; or</i></p> <p><i>(ii) for the purpose of distorting or manipulating prices in that electricity spot market.</i></p> <p>153H Prohibited conduct – electricity spot market (aggravated case)</p> <p><i>A corporation contravenes this section if:</i></p> <p><i>(a) the corporation:</i></p> <p><i>(i) bids or offers to supply electricity in relation to an electricity spot market; or</i></p> <p><i>(ii) fails to bid or offer to supply electricity in relation</i></p>	<p>The BCA considers that at a minimum, these provisions need to be amended to ensure that ordinary market conduct is not prohibited, otherwise the policy objective of the electricity spot market will be undermined. In addition, the BCA's view is that the purpose of sections 153G and 153H – that is, to prevent generators from bidding in a way that undermines the objectives of the spot market – would be best achieved by building upon the existing rebidding provisions in the NER (which have been judicially tested and reformed to achieve their policy purpose) by linking them with new 'Big Stick' penalties for the type of behaviour described in sections 153G and 153H (i.e. where a generator bids fraudulently, dishonestly or in bad faith.) In this way the energy industry would be visibly exposed to harsher penalties for engaging in this type of behaviour, Government would be better equipped to enforce these penalties, and industry would have certainty as to its obligations. It is also straightforward from a drafting perspective.</p> <p>The BCA is concerned to ensure that ordinary permissible market conduct is not captured by these provisions – otherwise they will undermine the policy objectives of the spot market scheme, which was in fact designed so that generators' bids in times of high demand would send price signals to encourage investment in generation. The EM confirms that this is not the intention (para 2.88 provides that the relevant conduct occurs where a participant 'seeks to undermine the process by which market participants would reasonably expect prices to be determined in a market characterised by effective competition'. Para 2.101 further provides that 'Sections 153G and 153H are not intended to interfere with behaviour which is genuine commercial behaviour as intended by the design of the electricity spot market'.)</p> <p>As such the BCA would suggest that the language around distorting or manipulating prices is removed, and instead the prohibited purpose should arise where that purpose is directed to creating or maintaining an artificial price, that would not be expected within the design of the market. For example, sections 153G(b)(ii) and 153H(b)(ii) could be expressed as:</p> <p style="padding-left: 40px;">'on a systematic basis, for the sole purpose of creating or maintaining an artificial price, that would not be expected to be created or maintained within the design of the electricity spot market.'</p> <p>The BCA's view is that this clarification should be made regardless of whether or not these provisions are reformulated to cross-refer to the NER provisions (see below).</p> <p><u>NER rebidding rules</u></p> <p>Chapter 3 of the NER permits rebidding whereby generators can alter their market offers in response to changes in circumstance.</p> <p>Previously, rule 3.8.22 imposed a good faith obligation in that it required a generator to honour its offer to the market unless there was a change in the material conditions upon which the offer was based. However, in 2009 the AER unsuccessfully brought proceedings against Stanwell Corporation Ltd alleging a breach of this provision. The Federal Court's interpretation demonstrated that the rule was not achieving its policy intent, and so Rules 3.8.22 and 3.8.22A were amended on 1 July 2016 as follows:</p> <ul style="list-style-type: none"> • the requirement that offers be made in good faith has been replaced with a prohibition against making offers, bids or rebids that are 'false or misleading or likely to mislead'; and

Element of Bill	The BCA's position
<p><i>to an electricity spot market; and</i></p> <p><i>(b) the corporation does so fraudulently, dishonestly or in bad faith, for the purpose of distorting or manipulating prices in that electricity spot market.</i></p>	<ul style="list-style-type: none"> • generators and market participants wishing to rebid are now required to provide the justification for the rebid and to make the rebid as soon as practicable. <p>Rule 3.8.22A(b) provides that an offer, bid or rebid is deemed to be false or misleading if, at the time of making it, the generator or market participant:</p> <ul style="list-style-type: none"> • does not have a genuine intention to honour, or • does not have a reasonable basis to make, <p>the representations it has made in making the offer to the market (i.e. that its offer, bid or rebid will not be changed unless there is a change in the material circumstances upon which it is based).</p> <p>There does not need to be any malintent; all that is needed is for a generator to have made its initial bid or offer without reasonable basis. Rule 3.8.22A(c) provides that a generator or market participant may be taken to have breached the prohibition notwithstanding that, after all the evidence has been considered, the false or misleading character of the offer, bid or rebid is ascertainable only by inference from:</p> <ul style="list-style-type: none"> • other offers, bids and rebids made by the generator or market participant, • other conduct, knowledge, belief or intention of the relevant generator; • the conduct, knowledge, belief or intention of any other person; • information published by AEMO to the relevant generator, or • any other relevant circumstances. <p>This broad prohibition therefore already encompasses the more culpable behaviour described in sections 153G and 153H in relation to bidding behaviour, and could be used as the basis for sections 153G(a)(i) and 153H(a)(i) and linking contravention of existing Rule 3.8.22A to the 'Big Stick' remedies where there is dishonesty or bad faith.</p>

Element of Bill	The BCA's position
4. Inferred purpose	Argue for removal of inferred purpose drafting on the basis that the principle exists at general law anyway
Section 153J: Prohibited conduct – purpose	<p>The BCA's position is that there is no need for section 153J to be included because the principle of ascertaining purpose by inference exists as a matter of general law.</p> <p>In determining whether certain conduct has the 'purpose of substantially lessening competition', while the courts have found that it is the subjective purpose of the parties that is relevant (<i>ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)</i> (1990) 27 FCR 460), they have confirmed that subjective purpose can be inferred from the surrounding circumstances (<i>Universal Music Australia Pty Ltd v ACCC</i> [2003] FCAFC 193).</p> <p>In addition, it is important to note that section 46 of the CCA previously provided that the existence of a purpose was ascertainable only by inference, but this language was removed in 2017 as part of the Harper reforms which extended the prohibition against misuse of market power to a broader range of conduct. The EM for those amendments clarified that a corporation's purpose may still be ascertained only by inference:</p> <p><i>"1.23 The rewritten section 46 does not limit the manner in which the existence of a purpose may be established. Purpose is primarily a subjective enquiry as to the direct effect which the corporation intended to achieve through its conduct.</i></p> <p><i>1.24 However, the enquiry is not limited only to subjective factors. The fact that the purpose of the corporation is ascertainable only by inference does not prevent a finding, where appropriate, that the corporation acted with the purpose of substantially lessening competition."</i></p> <p>The BCA therefore considers that the inclusion of section 153J is unnecessary.</p>

Element of Bill	The BCA's position
5. Market notices	Concede, provided that the process provisions are amended (refer row 6 below)
Refer directly to the Bill for the text of these provisions: <i>153L Commission may give draft public warning notice</i> <i>153M Commission may issue public warning notice</i>	The BCA proposes that these provisions can remain unamended provided that concerns relating to process are addressed elsewhere in the Bill (refer row 6 below).

Element of Bill	The BCA's position
<p>6. Process</p>	<p>Prioritise amendment of these provisions to address concerns around procedural fairness</p>
<p>Refer directly to the Bill for the text of these provisions:</p> <p>153D Meaning of connected body corporate in relation to prohibited conduct</p> <p>153P Prohibited conduct notices</p> <p>153Q Commission may vary or revoke prohibited conduct notice</p> <p>153R Commission must give Treasurer prohibited conduct recommendation or no Treasurer action notice</p> <p>153S Prohibited conduct recommendations</p> <p>153T Commission may vary or revoke prohibited conduct recommendation</p> <p>153U No Treasurer action notice</p> <p>153V Commission may vary or revoke no Treasurer action notice</p>	<p>The BCA believes that the procedural fairness issues which the Bill currently presents can be addressed by including better checks and balances in the process provisions.</p> <p>The BCA would request that the relevant provisions in the Bill be amended to address the following issues:</p> <ul style="list-style-type: none"> • (Court-led process) The Court, and not the Treasurer, should be the decision-maker with respect to contracting orders as well as divestiture orders. Otherwise, there is no opportunity for the corporation to have the allegations tested in the ordinary way through an independent and impartial judiciary, and the burden of proof is effectively reversed (as a corporation is required to respond to allegations by the Treasurer); • (Remedy of last resort) In the case of contracting orders and divestiture orders, the test for the Court should be that no other available remedy is sufficient to prevent the corporation from engaging in that prohibited conduct in the future (and not just that the order is a proportionate means of preventing such conduct); • (Reasonable belief) The threshold tests for various decision points throughout the process provisions generally require the ACCC to have a 'reasonable belief'. Holding 'reasonable belief' is too low a threshold for a decision-maker assessing the culpability of a corporation – the concept of decision-maker being 'satisfied' is more appropriate and presumably acceptable to Government given it is used widely throughout the CCA in relation to the decisions of the Commission, the Minister and other decision-makers; • (Connected body corporate) The concept of a 'connected body corporate' is too broadly defined and used. As currently drafted, the Bill provides that an order (including a contracting order or divestiture order) can be made to a 'connected body corporate' even where that body corporate is not the entity engaging in the prohibited conduct, simply because it is considered a proportionate means of preventing the related bodies corporate of that entity from engaging in that conduct in the future. On our reading, any entity in a corporation's group structure is potentially within the scope of the definition; • (Transparency) The enforcement process generally seems to lack transparency for a corporation which has been issued with a notice by the ACCC (and in particular, Prohibited Conduct Notices). For example: <ul style="list-style-type: none"> (a) A recommendation provided by the ACCC to the Treasurer may differ in content from the recommendation originally stated in the Prohibited Conduct Notice provided by the ACCC to the corporation without the corporation being notified of that difference; (b) While corporations have the right to make submissions to the ACCC in response to notices, there is no requirement on the ACCC to have regard to these submissions, and so corporations have no visibility as to whether their submissions (or other factors) have been taken into account; (c) There may be a prolonged period of time when a corporation is not provided with any relevant update as to the status of a Prohibited Conduct Notice. For example, where a corporation is given a Prohibited Conduct Notice and is then given 45 days to make representations in response, the ACCC then has 45 days from the end of that period to either issue a Prohibited Conduct Recommendation or a No

Element of Bill	The BCA's position
	<p>Treasurer Action Notice. The ACCC is not required to publish a No Treasurer Action Notice until another 45 days after it has been given to the Treasurer. In addition, prior to the publishing deadline the ACCC may vary or revoke a No Treasurer Action Notice, which would restart the clock again, allowing the ACCC a further 45 days to issue a recommendation to the Treasurer or to give a new prohibited conduct notice to the corporation. As such, there could be a prolonged period (in this example, up to 179 days) between the corporation receiving the original notice and any further update or communication being made available by the ACCC or Treasurer; and</p> <p>(d) A Prohibited Conduct Notice need only state why a contracting order or divestiture order is a proportionate means of preventing the corporation from engaging in the prohibited conduct in the future. It is unclear whether the notice need provide any detail as to the terms of the contracting order or divestiture order (for example, the terms of the contracts to be entered into, or the assets to be divested). These notices should provide the affected corporation with better certainty and transparency especially given the severity of the punishment;</p> <ul style="list-style-type: none"> • (Sequencing) As currently drafted, it is possible for all three notices (i.e. a public warning notice, infringement notice and a prohibited conduct notice leading to a contracting or divestiture order) to be issued simultaneously. Presumably this is not the intention, so the Bill should be clarified for that multiple forms of punishment for the same contravention are not imposed simultaneously; • (Public benefit test) The drafting in section 153ZA(g) which requires the Treasurer in applying to the Court for a divestiture order to be satisfied that the order will result in an overall benefit to the public should be replicated in section 153ZB to require the Court to apply the same test in making the divestiture order; and • (Time periods) When a corporation is issued with a draft public warning notice, it only has 21 days to make representations to the ACCC. When a corporation is issued with a Prohibited Conduct Notice, it has only 45 days to make representations to the ACCC (unless this timeframe is extended by the ACCC). The same period of time is given to a Corporation to make representations if a varied Prohibited Conduct Notice has been issued to it by the ACCC. From a practical perspective these time periods are too short. With respect to the time periods for contracting and divestiture orders, the BCA suggests that a corporation should only be required to make the offers prescribed by a contracting order for two years (not three), and that the deadline for making a disposal required by a divestiture order should be two years rather than one. • (Publication of certain notices in relation to prohibited conduct notices and recommendations) It is unclear from the EM why certain notices are proposed to be published. We propose that the matters the subject of prohibited conduct notices and recommendations be confidential between the Commission, Treasurer and relevant corporation, subject to usual court processes if an application to court is ultimately made.

Element of Bill	The BCA's position
7. Contracting orders	Amend to provide 'hybrid model' whereby Court issues contracting orders and the Regulator assists with contract terms and price
<p>Refer directly to the Bill for the text of these provisions:</p> <p>153W Conditions for making contracting order</p> <p>153X Treasurer may make contracting order</p> <p>153Y Variation and revocation of contracting order</p> <p>153Z Enforcement of contracting orders</p>	<p>The BCA proposes a hybrid model whereby the Court issues contracting orders and the Regulator assists with contract terms and price. This approach would ensure that affected corporations are afforded procedural fairness, Court time is minimised, and the obligations to propose, negotiate and approve the contractual terms sits with the most appropriate party in terms of resources and expertise.</p> <p>The BCA's view is that it is preferable for the Court to be the ultimate decision-maker (as explained in row 6 above). However the BCA acknowledges that as a practical matter, the Court is unlikely to order a remedy of this nature, and indeed given the highly specialised and technical nature of these contracts, the Treasurer is unlikely to have access to the knowledge and expertise that is required to make commercial contracts for the electricity market. The BCA therefore proposes a hybrid approach whereby:</p> <ul style="list-style-type: none"> • the Court makes a contracting order; • the corporation submits proposed contractual terms to the Regulator (as it is best placed in terms of resources and expertise to do this); • the Regulator makes a determination in relation to these proposed terms, similar to an access arrangement, with the Court ultimately responsible for deciding to implement that determination; <p>in accordance with a process set out in the Bill.</p> <p>In order to provide certainty, consistency and familiarity to contract counterparties (and to assist the Regulator and the Court), the BCA suggests that in addition to setting out this hybrid process, the Bill could also provide guidance as to what must be taken into account in proposing, negotiating and approving the contract terms, for example:</p> <ul style="list-style-type: none"> • the contract may be offered on a trading platform (such as the ASX) • the contract may be on market standard terms (i.e. those used for ASX trading); • the contract may be priced by reference to a publicly available price; • mothballed or retired plant should be excluded from any capacity assessment (to ensure that mothballing in and of itself is not construed as decreasing the contracts available); • the terms imposed by a contracting order must fall within the scope of the company's legitimate risk management practices – for example, selling contracts off less reliable plant at a higher price; and • the terms imposed must not impede a retailer's ability to comply with its existing contracts. <p>The BCA notes that the EM already provides helpful language in this regard (see for example paras 4.26 and 4.28).</p>

Element of Bill	The BCA's position
<p>8. Divestiture</p>	<p>Oppose on the basis of contagion to other sectors, the availability of more effective remedies and the lack of international policy precedent</p>
<p>Refer directly to the Bill for the text of these provisions:</p> <p>153ZA Treasurer may apply to Federal Court for divestiture order</p> <p>153ZB Making of divestiture order</p>	<p>The BCA remains concerned about the introduction of divestiture powers, primarily because of the risk of contagion to other sectors. The BCA notes that there are other more consistent, proportionate and targeted judicial remedies available, such as pecuniary penalties and injunctive orders. Other regulatory mechanisms, such as ring-fencing and enforceable structural separation undertakings, would also better address the underlying policy concerns. Divestiture orders are rarely used internationally and are considered a drastic remedy.</p> <p>Divestiture is a significant new power that allows the Court to break up an established business that has properly and lawfully acquired assets. Introduction of this divestiture power presents a significant new risk not only to the energy sector but to other industries also. The impacts of this risk will be felt across the economy, with investment deterred and the costs to industry of bearing that risk inevitably being passed down to consumers.</p> <p>In addition, the BCA understands that internationally, divestiture orders are considered a drastic remedy and are rarely used other than in relation to anti-competitive mergers.</p> <p>In the UK, the <i>Enterprise Act 2002</i> empowers the Competition and Markets Authority to order divestiture (among other remedies) for competition concerns (section 161 and Schedules 8 and 13). Divestiture is typically directed at remedying structural features adversely affecting competition, rather than punishing anti-competitive behaviour. In addition, the divestiture process in the UK is much more robust and protracted, involving a market investigation, the publication of a report on that investigation within 18 months, and the CMA taking action within 6 months of publishing the report. The factors that the CMA must take into account are set out clearly and extensively. Divestiture is just one of the remedies available to the CMA and it must be 'reasonable and practicable' (section 134). There is also a separate appeals process. To date, the process has rarely been used, and when it has it has usually related to anti-competitive mergers.</p> <p>In the US, divestiture is available as a remedy for violations of section 2 of the <i>Sherman Act 1890</i>, which prohibits anti-competitive mergers and monopolies, and section 7 of the <i>Clayton Act 1914</i> which prohibits mergers and acquisitions that result in reduced competition. (Note that section 50 of the CCA already applies these same prohibitions so there is no need for new provisions in this regard). Divestiture can therefore be used as a penalty in anti-competition conduct cases, but it is rarely ordered. The last major use of the divestiture remedy was the 1982 consent decree that broke the American Telephone and Telegraph Company into seven operating companies and a long-distance company.</p> <p>There is therefore no applicable international precedent to suggest that the introduction of a divestiture power in Australia is necessary, desirable or likely to achieve the stated policy aim.</p> <p>However, if the divestiture power is to remain in the legislation, the BCA would strongly suggest that:</p> <ul style="list-style-type: none"> • the process provisions of the Bill are amended to ensure procedural fairness, as explained in row 6 above; and • an additional threshold test is included to ensure that divestiture is, as intended, only used as a remedy of last resort. We propose that a Court would only be empowered to order divestiture where the corporation (or a related body corporate) had previously been found to have been in contravention of section 153H and an alternative remedy awarded by the Court. That is, the corporation (or a

Element of Bill	The BCA's position
	<p>related body corporate) must have re-offended notwithstanding the application of a previous remedy, in effect demonstrating that the remedy was insufficient to deter the conduct in question.</p> <p>The BCA has also proposed some further checks and balances to provide that:</p> <ul style="list-style-type: none">• the assets the subject of the order must be directly involved with the prohibited conduct;• a divestiture order requires the corporation to offer to dispose of the interests on reasonable commercial terms; and• the corporation may apply to the Court for revocation or variation of a divestiture order where it has been unable to find a party willing and able to purchase the assets on reasonable commercial terms. <p>Finally, we note that the Court would also be subject to existing section 76(1) of the CCA and established case law in determining the appropriate remedy in any particular case.</p>

Element of Bill	The BCA's position
9. AER powers	Concede, on the basis pricing determinations are non-disallowable
Refer directly to the Bill for the text of these provisions: <i>Schedule 2: AER information gathering</i>	The BCA understands that the Bill is seeking to ensure that the AER has sufficient powers to properly undertake its role in relation to the DMO, and that pricing determinations are intended to be non-disallowable. BCA proposes this would also apply to the proposed benchmarking determination discussed in row 1 above.

Element of Bill	The BCA's position
10. Miscellaneous	
	<ul style="list-style-type: none"> • (Personal liability) the BCA's view is that personal liability should be entirely excluded, consistent with section 76(2) of the CCA which excludes individual liability for contraventions of certain provisions. Part 2, section 6 of the Bill currently proposes adding a breach of the relevant provisions of the Bill to section 76(1) of the CCA, which sets out the maximum pecuniary penalties that the Court can order for certain contraventions. Section 76(2) of the CCA clarifies that section 76(1) does not authorise the making of an order against an individual in respect of certain contraventions listed in section 76(1). The relevant provisions of the Bill should be added to this list in section 76(2), as individual liability is not appropriate, especially given that in this context, relevant day-to-day decision-making is often carried out at relatively junior levels (for example, pool traders) rather than at the officer level. • (Sunset clause) BCA notes that the sunset clause providing that these new provisions fall away on 1 January 2026 should remain. • (Transitional period) The BCA considers that a transition period of 12 months from the date of Royal Assent, to enable the ACCC and AER (as applicable) to prepare and publish guidelines to enable affected corporations to interpret and implement internally the necessary compliance and education programs.

2016-2017-2018

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

[BCA mark-up. This mark-up should be read alongside the table headed 'Big Stick' Bill: the BCA's proposed improvements'. This mark-up addresses only the key issues in that table. It is not exhaustive. Many provisions have not been marked-up – this does not mean that the BCA agrees with the current drafting of those provisions.]

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***

[\[BCA mark-up. This mark-up should be read alongside the table headed 'Big Stick' Bill: the BCA's proposed improvements'. This mark-up addresses only the key issues in that table. It is not exhaustive. Many provisions have not been marked-up – this does not mean that the BCA agrees with the current drafting of those provisions.\]](#)

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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 that is 12 months after the day this Act receives the Royal Assent.	
3. Schedule 2	The day this Act receives the Royal Assent.	

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.

Schedule 1—Prohibited conduct in the electricity industry

Part 1—Main amendments

Competition and Consumer Act 2010

1 After Part XIC

Insert:

Part XICA—The Electricity Industry

Division 1—Preliminary

153A Simplified outline of this Part

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

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

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

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

153B Part etc. ceases to be in force

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

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

153C Interpretation

In this Part:

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

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

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

Court means the Federal Court of Australia.

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

draft public warning notice means a notice under section 153L.

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

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

electricity market means any of the following:

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

electricity procurement costs means the following costs incurred by retailers:

- (a) wholesale costs of trading in electricity (including in the electricity spot market);
- (b) the costs of contracting to manage exposure to wholesale spot price volatility (including any internal contracting or other risk management strategies);
- (c) the costs charged by transmission and distribution network operators for the transmission and distribution of electricity; and
- (d) the costs of complying with environmental schemes.

environmental scheme means a scheme imposed under the law of a State, Territory or the Commonwealth that imposes costs on retailers in relation to the promotion of renewable generation, energy efficiency or the reduction of carbon emissions.

electricity spot market means a spot market for the supply of electricity established under the National Electricity Law.

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

National Electricity Law means:

- (a) the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia as in force from time to time; or
- (b) that Law as it applies as a law of another State; or
- (c) that Law as it applies as a law of a Territory; or
- (d) that Law as it applies as a law of the Commonwealth.

National Electricity Rules means:

- (a) the National Electricity Rules, as in force from time to time, made under the National Electricity Law set out in the Schedule to the *National Electricity (South Australia) Act 1996* of South Australia; or
- (b) those Rules as they apply as a law of another State; or
- (c) those Rules as they apply as a law of a Territory; or
- (d) those Rules as they apply as a law of the Commonwealth.

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.

public warning notice means a notice under section 153M.

reasonable adjustments means an adjustment that is:

(a) reasonable for the purposes of the corporation complying with section 153E(1), taking into account the particular circumstances of that corporation (including that corporation's overall operating costs and existing contractual commitments);

(b) made within a reasonable amount of time, taking into account:

(i) if applicable, the timing of the AER's advice relative to the corporation's next planned price adjustment;

(ii) the costs to both consumers and the corporation of making the adjustment; and

(iii) the impact of the corporation's risk management strategies or pricing strategies.

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

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

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

153D Meaning of *connected body corporate* in relation to prohibited conduct (1) A corporation is a *connected body corporate* in relation to prohibited conduct engaged in by the corporation.

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

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

(b) any of the following conditions are ~~satisfied~~met:

(i) the prohibited conduct involves the ~~direct or indirect~~ use of assets held by the body corporate;

(ii) the prohibited conduct involves ~~direct or indirect~~ dealings between the body corporate and the corporation.

(3) A body corporate is a *connected body corporate* in relation to prohibited conduct if:

(a) the body corporate is a holding company of another body corporate; and

(b) the other body corporate is a *connected body corporate* in relation to the prohibited conduct because of a previous operation of this section.

Division 2—Prohibited conduct

153E Prohibited conduct—retail pricing

(1) A corporation contravenes this section if:

(a) the corporation offers to supply electricity, or supplies electricity, to small customers; and

(b) the corporation fails to make *reasonable adjustments* to the price of those offers, or to the price of those supplies, ~~to reflect where there has been a~~ where there has been a sustained and substantial ~~reductions in its underlying cost of procuring electricity~~ industry-wide reduction in electricity procurement costs, having considered any advice given by the AER in accordance with paragraph (2).

(2) The AER may, for the immediately forthcoming financial year in relation to supplying electricity, advise the Commission as to whether in the immediately preceding financial year

there has been a sustained and substantial industry-wide reduction in *electricity procurement costs* that persists at the time of that advice and is expected to continue to persist such that it should be taken into consideration by a corporation in deciding whether to make *reasonable adjustments* under paragraph (1)(b).

(3) In advising the Commission pursuant to paragraph (2), the AER must:

(a) have regard to the determination it is making under Regulation 16(1) of the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019*;

(b) have regard to the same matters it is required to have regard to in making the determination described in paragraph (a);

(c) comply with Regulation 17 of the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* as though references in that regulation to a determination under Regulation 16 were references to a determination under paragraph (2); and

(d) publish its advice by electronic or other means as soon as practicable after making it.

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

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

[BCA drafting note: the intention is that this prohibition would only apply in the NECF jurisdictions (where the AER is already applying the DMO regime).]

153F Prohibited conduct—electricity financial contract liquidity

~~A~~(1) Subject to subsections (2) and (3), a corporation contravenes this section if:

(a) any of the following conditions are ~~satisfied~~met:

(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, and in doing so contravenes section 46(1):

(i) fails to offer electricity financial contracts;

(ii) materially 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*.

(2) A corporation will not be considered to have engaged in the conduct described in subsection 1(b) where the corporation makes a genuine offer to enter into an electricity financial contract, but the offer is not accepted.

(3) A corporation will not be considered to have the purpose set out in paragraph 1(c) where the purpose of the corporation engaging in the conduct described in subsection 1(b) is:

(a) to ensure the corporation's compliance with:

(i) the corporation's commitments under existing contracts;

(ii) the corporation's risk management strategies, including internal contracting;

(iii) the corporation's asset management strategies, including the retiring or mothballing or proposed retiring or mothballing of generation facilities;

(iv) the corporation's decisions with respect to occupational health and safety; or

(v) the corporation's other commitments and obligations with respect to governance, risk and compliance.

(b) to respond to:

(i) physical issues in the electricity sector, including supply issues, outages or directions from a market operator; or

(ii) operational issues for the corporation, including insufficient firm capacity.

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

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

A corporation contravenes this section if:

(a) the corporation:

(i) bids or offers to supply electricity in relation to an *electricity spot market*; or

(ii) fails to bid or offer to supply electricity in relation to an *electricity spot market*; and

(b) taking into account the bidding strategy of the corporation across its entire asset base, the corporation does so:

(i) fraudulently, dishonestly or in bad faith; or

(ii) on a systematic basis, for the sole purpose of creating or maintaining an artificial price that would not be expected to be created or maintained having regard to the design of the relevant *electricity market*.

~~(ii) for the purpose of distorting or manipulating prices in that electricity spot market.~~

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

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

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

A corporation contravenes this section if:

(a) the corporation:

(i) bids or offers to supply electricity in relation to an *electricity spot market*; or

(ii) fails to bid or offer to supply electricity in relation to an *electricity spot market*; and

(b) taking into account the bidding strategy of the corporation across its entire asset base, the corporation does so:

~~(i) fraudulently, dishonestly or in bad faith, for the purpose of distorting or manipulating prices in that electricity spot market; and~~

(ii) on a systematic basis, for the sole purpose of creating or maintaining an artificial price that would not be expected to be created or maintained having regard to the design of the relevant *electricity market*.

153J Prohibited

~~conduct—purpose—(1)—This section:~~

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

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

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

~~(a) for the purpose of substantially lessening competition in an electricity market; or~~

~~(b) for the purpose of distorting or manipulating prices in an~~ conduct – electricity spot market;
(National Electricity Rules)

For so long as clause 3.8.22A of the National Electricity Rules is in effect in the same form as at the Commencement Date, a corporation will only engage in conduct for the purposes of section 153G(a)(i) and (b)(i) or section 153H(a)(i) and (b)(i) in relation to bidding or offering to supply electricity in relation to an *electricity spot market* dishonestly or in bad faith by the same conduct which contravenes clause 3.8.22A of the National Electricity Rules.

~~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

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 (a draft public warning notice) in writing if the Commission ~~reasonably believes is satisfied~~ that:
 - (a) any of the following conditions are ~~satisfied~~met:
 - (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 draft public warning notice.
- (2) The draft public warning notice must:
 - (a) state the day on which the draft public warning 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 that~~ that the requirements in paragraphs (1)(a), (b) and (c) are met; and
 - (d) state that:
 - (i) the corporation may, within ~~21~~60 days after being given the draft public warning notice, make representations to the Commission regarding the matters mentioned in paragraphs (1)(a), (b) and (c); and
 - (ii) the Commission may issue a public warning notice under section 153M in relation to the prohibited conduct after those ~~21~~60 days and ~~no more than 90~~ days have passed.
- (3) A draft public warning notice ~~given under subsection (1)~~ is not a legislative instrument.

153M Commission may issue public warning notice

- (1) This section applies if:

- (a) the Commission gave a corporation a draft public warning notice ~~under section 153L~~ in relation to prohibited conduct; and
 - (b) ~~at least 21~~ no less than 60 days have passed since the Commission gave the corporation the draft public warning notice; ~~and~~
 - (c) no more than 90 days have passed since the Commission gave the corporation the ~~notice~~ draft public warning notice; ~~and~~
 - (d) the Commission has considered any representations it has received from the corporation pursuant to this Division regarding the draft public warning notice.
- (2) The Commission may issue to the public a written notice (a public warning notice) containing a warning about the prohibited conduct identified in the notice given under section 153L if the Commission ~~reasonably believes is satisfied~~ that:
- (a) any of the following conditions are ~~satisfied~~ met:
 - (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 public warning notice; ~~and~~
 - (d) if the Commission has already given the corporation one or more of an infringement notice or a prohibited conduct notice in relation to the prohibited conduct:
 - (i) not less than 60 days have passed since the Commission last gave the corporation one of these notices; and
 - (ii) no more than 90 days have passed since the Commission last gave the corporation one of these notices.
- (3) The public warning notice must:
- (a) state the day on which the public warning 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 public warning notice ~~issued under subsection (2)~~ is not a legislative instrument.

Subdivision B—Infringement notices

153N Infringement notices

- (1) Subject to ~~subsection (2)~~ subsections (2) and (3), Division 5 of Part V applies in relation to an alleged contravention of section 153E, 153F, 153G or 153H in the same way in which it applies in relation to an alleged contravention of an infringement notice provision (within the meaning of that Part).
- (2) For the purposes of applying Division 5 of Part V in accordance with subsection (1), treat the reference in paragraph 60L(5)(b) to 60 penalty units as being a reference to 600 penalty units.

(3) This section does not apply if:

(a) the Commission has already given the corporation one or more of a draft public warning notice, a public warning notice or a prohibited conduct notice in relation to the prohibited conduct;

(i) less than 60 days have passed since the Commission last gave the corporation one of these notices; and

(ii) more than 90 days have passed since the Commission last gave the corporation one of these notices.

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~~ that:
 - (a) any of the following conditions are ~~satisfied~~met:
 - (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~~ the following conditions are ~~satisfied~~met:
 - (i) such ~~a divestiture-an~~ order will result, or is likely to result, in a benefit to the public;
 - (ii) if such ~~a divestiture-an~~ 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 ~~;~~ and
 - (d) if the Commission has already given the corporation one or more of a draft public warning notice, a public warning notice or an infringement notice in relation to the prohibited conduct:
 - (i) not less than 60 days have passed since the Commission last gave the corporation one of these notices; and
 - (ii) no more than 90 days have passed since the Commission last gave the corporation one of these notices.
- (2) The prohibited conduct 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
 - (ii) the prohibited conduct mentioned in paragraph (1)(a); and
 - (iii) each connected body corporate in relation to the prohibited conduct (other than the corporation); and
 - (d) state the recommendations mentioned in subsection (1); ~~and~~
 - (e) explain the reasons why the Commission ~~reasonably believes is satisfied~~ that ~~:(i) the requirements in paragraphs (1)(a) and (b), (b) and (c) are met; and~~
~~(ii) if paragraph (1)(c) applies—the requirement in that paragraph is met; and~~
 - (f) state that the corporation may, within the period mentioned in subsection (3), make representations to the Commission regarding the conduct mentioned in subparagraph (c)(ii) and the recommendations mentioned in paragraph (d).
- (3) For the purposes of paragraph (2)(f), the period:
 - (a) starts on the day on which the prohibited conduct notice is given; and
 - (b) ends:

- (i) if subparagraph (ii) does not ~~apply—45~~ apply—90 days after that day; or
 - (ii) if the Commission allows a later day—that later day.
- (4) A failure to comply with subparagraph (2)(c)(iii) does not affect the validity of the prohibited conduct notice.
- (5) The Commission must give each of the following a copy of the prohibited conduct notice as soon as practicable after issuing it:
 - (a) the corporation;
 - (b) each body corporate identified in the notice (in accordance with subparagraph (2)(c)(iii)).
- (6) A prohibited conduct notice is not a legislative instrument.

153Q Commission may vary or revoke prohibited conduct notice

- (1) The Commission may, in writing, vary or revoke a prohibited conduct notice given to a corporation.
- (2) A variation or revocation under subsection (1) must:
 - (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~~ apply—90 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:

- (a) a prohibited conduct recommendation in respect of the prohibited conduct notice [in accordance with section 153S](#); or
 - (b) a no Treasurer action notice in respect of the prohibited conduct notice [in accordance with section 153U](#).
- (2) Subsection (1) does not apply if the prohibited conduct notice has been revoked under section 153Q.
- (3) The period is:
- (a) unless paragraph (b) applies—the period mentioned in subsection 153P(3) for the prohibited conduct notice; or
 - (b) if there has been a variation of the prohibited conduct notice under section 153Q—the period mentioned in subsection 153Q(4) for the variation.
- (4) Subsection (5) applies if:
- (a) the Commission has given the Treasurer a no Treasurer action notice in respect of the prohibited conduct notice, in accordance with paragraph (1)(b); and
 - (b) the Commission has made a revocation of the no Treasurer action notice under subsection 153V(1).
- (5) The Commission must, within 45 days after making the revocation:
- (a) give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice, [in accordance with section 153S](#); or
 - (b) give the corporation a new prohibited conduct notice in respect of the prohibited conduct identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(ii)).

153S Prohibited conduct recommendations

- (1) The Commission may give the Treasurer a notice in writing (a *prohibited conduct recommendation*) in respect of the prohibited conduct notice, 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~~ that:
- (a) any of the following conditions are ~~satisfied~~[met](#):
 - (i) the corporation has engaged in the kind of prohibited conduct specified in the prohibited conduct notice;
 - (ii) the corporation is continuing to engage in the kind of prohibited conduct specified in the prohibited conduct notice; 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~~ [the](#) following conditions are ~~satisfied~~[met](#):
 - (i) such ~~a divestiture-an~~ order will result, or is likely to result, in a benefit to the public;
 - (ii) ~~if~~ such ~~a divestiture-an~~ 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;[; and](#)
 - [\(d\) the Commission has considered any representations it has received from the corporation pursuant to this Division in relation to the prohibited conduct notice.](#)
- (2) The ~~notice~~[prohibited conduct recommendation](#) 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
 - (ii) the prohibited conduct mentioned in paragraph (1)(a); and
 - (iii) each connected body corporate in relation to the prohibited conduct (other than the corporation); and
 - (d) state the recommendations mentioned in subsection (1); and
 - (e) explain the reasons why the Commission ~~reasonably believes is satisfied~~ that:
 - (i) the requirements in paragraphs (1)(a) and (b) are met; and
 - (ii) if paragraph (1)(c) applies—the requirement in that paragraph is met.
- (3) ~~To avoid doubt, If~~ the recommendations stated in the ~~notice prohibited conduct recommendation~~ (in accordance with paragraph (2)(d)) ~~may be are~~ different from the recommendations stated in the prohibited conduct notice (in accordance with paragraph 153P(2)(d)), the Commission must state that this is the case and include in the prohibited conduct recommendation an explanation for this difference.
- (4) A failure to comply with subparagraph (2)(c)(iii) does not affect the validity of the ~~notice prohibited conduct recommendation.~~
- (5) ~~To avoid doubt, If~~ the bodies corporate identified in the ~~notice prohibited conduct recommendation~~ (in accordance with subparagraph (2)(c)(iii)) ~~need are~~ not ~~be~~ the same as the bodies corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(iii)), the Commission must state that this is the case and include in the prohibited conduct recommendation an explanation for this difference.
- (6) The Commission must give each of the following a copy of a prohibited conduct recommendation 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 body corporate identified in the prohibited conduct recommendation (in accordance with subparagraph 153S(2)(c)(iii)).
- (6) A prohibited conduct recommendation is not a legislative instrument.

153T Commission may vary or revoke prohibited conduct recommendation

- (1) The Commission may, in writing, vary or revoke a prohibited conduct recommendation.
- (2) The Commission cannot make a variation or revocation under subsection (1) later than 45 days after:
 - (a) unless paragraph (b) applies—the day on which the Commission made the prohibited conduct recommendation; or
 - (b) if there has been a previous variation of the prohibited conduct recommendation under this section—the day on which the Commission made the previous variation.
- (3) The Commission cannot make a variation or revocation under subsection (1) if:
 - (a) the Treasurer has ~~made~~ applied to the Court for a contracting order in relation to the prohibited conduct recommendation; or
 - (b) the Treasurer has applied to the Court for a divestiture order in relation to the prohibited conduct recommendation.
- (4) The Commission cannot make a variation under subsection (1) unless the Commission is satisfied that:
 - (a) the variation is minor or insubstantial; or
 - (b) all of the following conditions are met:

- (i) the corporation or any related body corporate gave the Commission information relevant to the prohibited conduct notice that is false or misleading in a material particular, or failed to give the Commission information relevant to the prohibited conduct notice that is not publicly available;
 - (ii) the variation is reasonably necessary to address the circumstances described in subparagraph (i); or
 - (c) the variation is reasonably necessary to address information that was not in existence, or that the Commission did not have, when the prohibited conduct notice was given.
- (5) A variation or revocation under subsection (1) must state the day on which it is made.
- (6) The Commission must give a copy of a variation or revocation under subsection (1) to the Treasurer as soon as practicable after making it.
- (7) 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 recommendation (in accordance with subparagraph 153S(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 recommendation as varied.
- ~~(7)~~(8) A variation or revocation under subsection (1) is not a legislative instrument.
- ~~(8)~~(9) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a prohibited conduct recommendation.

153U No Treasurer action notice

- (1) The Commission must give the Treasurer ~~-, and~~ a notice in writing (a *no Treasurer action notice*) in respect of the prohibited conduct notice mentioned in section 153R if the Commission considers that it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice.
- (2) The notice must:
- (a) be expressed to be given under this section; and
 - (b) state the day on which the notice is given; and
 - (c) explain the reasons why the Commission considers that it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice.
- (3) The Commission must ~~publish the notice by electronic or other means~~ give each of the following a copy of a no Treasurer action notice as soon as practicable after making it:
- ~~(a) unless paragraph (b) applies—45 days after issuing it; or~~
 - ~~(b) if the Commission and the Treasurer agree that it is appropriate to publish the notice at an earlier time—at that earlier time.~~
- (a) the corporation;
- (b) each body corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(iii) or subparagraph 153Q(4)(c)).
- (4) A no Treasurer action notice is not a legislative instrument.

153V Commission may vary or revoke no Treasurer action notice

- (1) The Commission may, in writing, vary or revoke a no Treasurer action notice.
- (2) The Commission cannot make a variation or revocation under subsection (1) later than 45 days after:
 - (a) unless paragraph (b) applies—the day on which the Commission made the no Treasurer action notice; or
 - (b) if there has been a previous variation of the no Treasurer action notice under this section—the day on which the Commission made the previous variation.
- (3) The Commission cannot make a variation under subsection (1) unless the Commission is satisfied that the variation is minor or insubstantial.
- (4) The Commission cannot make a revocation under subsection (1) unless the Commission is satisfied that the conditions in subsections (5) and (6) are met.
- (5) The condition in this subsection is met if the Commission ~~reasonably believes~~ is satisfied that that it is appropriate to:
 - (a) give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice; or
 - (b) give the corporation a new prohibited conduct notice in respect of the prohibited conduct identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(ii)).
- (6) The condition in this subsection is met if the Commission ~~reasonably believes~~ is satisfied that:
 - (a) all of the following conditions are met:
 - (i) the corporation or any related body corporate gave the Commission information relevant to the prohibited conduct notice that is false or misleading in a material particular, or failed to give the Commission information relevant to the prohibited conduct notice that is not publicly available;
 - (ii) the revocation is reasonably necessary to address the circumstances described in subparagraph (i); or
 - (b) the revocation is reasonably necessary to address information that was not in existence, or that the Commission did not have, when the prohibited conduct notice was given.
- (7) A variation or revocation under subsection (1) must state the day on which it is made.
- (8) The Commission must give a copy of a variation or revocation under subsection (1) to the Treasurer as soon as practicable after making it.
- (9) The Commission must ~~publish a variation or revocation under subsection (1) by electronic or other means as soon as practicable after making it.~~ give each of the following a copy of a variation or revocation ~~under subsection (1) as soon as practicable after making it:~~
 - (a) the corporation;
 - ~~(a) despite subsection 153U(3), the Commission must not publish~~ (b) each body corporate identified in the no Treasurer action notice; ~~and~~ conduct notice;
 - (c) each connected body corporate in relation to the prohibited conduct (other than a body corporate mentioned in paragraph (b)) identified in the no Treasurer action notice as varied.

~~(b) despite subsection (9), the Commission must not publish the variation or revocation.~~

~~(10)~~ A variation or revocation under subsection (1) is not a legislative instrument.

~~(11)~~ Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a no Treasurer action notice.

Division 5—Contracting orders

~~Subdivision A—Treasurer may make contracting orders~~

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

The Treasurer may ~~make~~ apply to the Court for an order under section 153X in respect of a body corporate if the Treasurer is satisfied 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~~ application 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; and

(h) the following conditions are met:

(i) the order applied for will result, or is likely to result, in a 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.

~~153X Treasurer may make~~ Making of contracting order

(1) The Court may, on the application of the Treasurer under section 153W, 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 153F (electricity financial contract liquidity) or section 153H (electricity spot market (aggravated case)); and

(b) The Court is satisfied that:

(i) 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

(ii) there is no other remedy available to the Court that would prevent the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future;

~~(1) The Treasurer may, in writing, (2) The Court may~~ order the body corporate to make offers to enter into electricity financial contracts on terms submitted by the AER pursuant to subsection (8) as amended or approved by the Court.

(3) Where the Court makes an order pursuant to subsection (2), the body corporate must within the timeframe specified by the Court propose to the AER the terms on which the body corporate will enter into electricity financial contracts, including:

~~(2) The order must:~~

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

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

~~(c) identify:~~

~~(i) the body corporate; and~~

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

~~(iii) the prohibited conduct mentioned in paragraph 153W(e); and~~

~~(d) explain the reasons why the Treasurer is satisfied that the conditions in paragraphs 153W(e) and (f) are met; and~~

~~(e) specify the matters mentioned in subsection (3).~~

~~(3) The matters are as follows:~~

(a) the kind of offers that the body corporate must make to enter into electricity financial contracts;

(b) the manner in which the body corporate must make those offers;

(c) the kind of entities to which those offers must be made;

(d) the period or periods during which the body corporate must make those offers;

(e) any other matter that the ~~Treasurer~~ body corporate considers necessary for the order to be effective.

~~(4) The order~~ For the purposes of subsection (3) the body corporate may specify the kind of offers that the body corporate must make in any of the following ways:

(a) the kind of electricity financial contracts that must be offered, which may include electricity financial contracts offered on a trading platform on which electricity financial contracts are traded;

(b) the terms on which the electricity financial contracts must be offered, which may include the standard terms used for electricity financial contracts offered on a trading platform on which electricity financial contracts are traded;:

~~(b)~~ (c) the price or range of prices in respect of electricity under the electricity financial contracts that must be offered, or a method or methods of working out that price or that range, which may be determined by reference to the price for the relevant kind of electricity financial contract set by the offers and bids on a trading platform on which electricity financial contracts are traded;

~~(ed)~~ (d) the minimum number of megawatt hours of electricity to which the electricity financial contracts that must be offered must relate;:

(e) the period over which the electricity financial contracts must be offered.

(5) Where the body corporate proposes terms to the AER pursuant to subsection (3) it may also address any or all of the matters set out in paragraph (6), and any other matters it considers necessary for the AER to consider in the context of the order.

~~(5) In determining the minimum number of megawatt hours to specify for the purposes of paragraph (4)(c), the Treasurer must have—~~ (6) Where the body corporate proposes terms to the AER pursuant to subsection (3), the AER must within the timeframe specified by the Court notify the body corporate as to whether or not it considers those proposed terms to be reasonable, having regard to the following matters:

- (a) the total electricity generation capacity of the electricity generation assets held by each connected body corporate in relation to the prohibited conduct and related bodies corporate, excluding any such assets which are, or are proposed to be, mothballed or retired;
- (b) the nature ~~and~~ location and operating capacity and characteristics of those electricity generation assets;
- (c) the commitments that the body corporate has, and related bodies corporate have, to supply electricity to customers;
- (d) the body corporate's operational management considerations, including the need to manage the risks of unplanned outages and maintenance requirements; and
- ~~(e)~~ (e) any other matter that the Treasurer considers to be relevant raised by the body corporate in accordance with subsection (5).

(7) The AER must accept terms proposed by a body corporate pursuant to subsection (3) to the extent those terms require the body corporate to:

- (i) offer electricity financial contracts on a trading platform on which electricity financial contracts are traded;
- (ii) offer electricity financial contracts on the standard terms used by the trading platform;
- (iii) offer electricity financial contracts at prices determined by reference to the offers and bids on the trading platform, where the body corporate is a price taker.

(8) Where pursuant to subsection (6) the AER notifies the body corporate that it:

(i) does consider the proposed terms to be reasonable, the AER must submit them to the Court for its consideration within the timeframe specified by the Court;

(ii) does not consider the proposed terms to be reasonable, the AER must propose amendments to those terms which it considers reasonable having regard to the matters set out in subsection (6) and submit those terms to the Court for its consideration within the timeframe specified by the Court.

~~(6)(9) The specified period or periods during which the body corporate must make those offers must:~~

- (a) start no earlier than 6 months after the order is made; and
- (b) end no later than ~~3~~2 years after the order is made.

~~(7) The Treasurer must publish the order by electronic or other means.~~

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

~~(1) The Treasurer may, in writing, 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 a variation 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 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 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.~~
- ~~(5) The Treasurer must publish a variation or revocation under subsection (1) by electronic or other means.~~

Subdivision B—Enforcement of contracting orders

153Z—Enforcement of contracting orders

- ~~(1) This section applies if the Treasurer has made a contracting order in respect of a body corporate.~~
- ~~(2) If the Commission considers that the body corporate has failed to comply with the contracting order, the Commission may apply to the Court for an order under subsection (3).~~
- ~~(3) If the Court is satisfied that the body corporate has failed to comply with the contracting order, 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.~~

Division 6—Electricity divestiture orders

153ZA Treasurer may apply to Federal Court for divestiture order

The Treasurer may apply to the Court for an order under subsection 153ZB(2) in respect of a body corporate if the Treasurer 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 application 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 applied for 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 153H (electricity spot market (aggravated case));
- (f) the order applied for 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
- (g) the following conditions are ~~satisfied~~met:
 - (i) the order applied for will result, or is likely to result, in a 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.

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 of preventing the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future; and
 - (c) the relevant corporation, or any related body corporate, has on at least one prior occasion been subject to a remedy under this Act in respect of conduct of the same nature as the prohibited conduct;
 - (d) there is no other remedy available to the Court that would prevent the relevant corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future.
- (2) The Court may order the body corporate to:
 - (a) on reasonable commercial terms offer to dispose of interests in securities or assets directly involved in the conduct described in paragraph 1(a), 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).

- (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:
 - (i) if the body corporate or associate mentioned in paragraph (a) is an authority of the Commonwealth—an authority of the Commonwealth; or
 - (ii) if the body corporate or associate mentioned in paragraph (a) is an authority of a State or Territory—an authority of that State or Territory; and
 - (c) the body corporate or associate mentioned in paragraph (a) is genuinely in competition in relation to *electricity markets* with the body corporate in relation to which the order is made.
- (4) The order must specify:
- (a) the interests in the securities and assets, or the kinds of interests in the securities and assets, that the body corporate must offer to dispose of; and
 - (b) the day by which the disposal must be made; and
 - (c) any other matter that the Court considers necessary for the order to be effective.
- (5) The day by which the disposal must be made must be no earlier than ~~12 months~~ 2 years after the day on which the order is made.
- (6) The order may specify conditions with which the body corporate must comply during the period between the making of the order and the disposal of an interest, if the Court is satisfied that those conditions are necessary to preserve any of the following:
- (a) the value of the interest;
 - (b) in the case of an interest in an asset—the commercial operation of the asset.
- (7) Without limiting the scope of subsection (6), those conditions may relate to any of the following:
- (a) the interest to be disposed;
 - (b) if the interest is a share or other security in a body corporate—the exercise of rights attached to the share or other security.
- (8) The body corporate may apply to the Court for a variation or revocation of an order under paragraph (1) if the body corporate considers that, notwithstanding its compliance with the order, it has been unable to make the disposal on reasonable commercial terms.

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).

Part 2—Other amendments

Competition and Consumer Act 2010

2 Paragraph 29(1A)(a)

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

3 After paragraph 2B(1)(b)

Insert:

(ba) Part XICA;

4 After paragraph 5(1)(b)

Insert:

(ba) Part XICA;

5 Paragraph 5(1)(f)

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

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

Insert:

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

7 Paragraph 76(1A)(aa)

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

8 Paragraph 76(2)

Replace "45E or 45EA" with "45E, 45EA or 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”.

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”.

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

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.

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

4 Subsections 44AAF(4) and (5)

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

5 After section 44AAF

Insert:

44AAFA Power of AER to obtain information and documents

Notice requiring information etc.

- (1) This section applies if the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance of the functions referred to in section 44AH (Commonwealth functions).
- (2) The AER may, by written notice given to the person, require the person to do one or more of the following:
 - (a) give such information to the AER;
 - (b) produce any such documents to the AER;

- (c) appear before the AER, or before a specified person assisting the AER who is an SES employee or an acting SES employee, to give any such evidence (either orally or in writing) and produce any such documents.
- (3) The notice must specify:
 - (a) if paragraph (2)(a) or (b) applies:
 - (i) the period within which the person must comply with the notice; and
 - (ii) the manner in which the person must comply with the notice; or
 - (b) if paragraph (2)(c) applies:
 - (i) the time at which the person must appear before the AER or person; and
 - (ii) the place at which the person must appear before the AER or person.

Oath or affirmation

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

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

Offence

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

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

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.
- (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 79A(1)(a)(i)

After “section”, insert “44AAFB,”.

9 Paragraph 79A(1)(d)

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

10 Subsection 163(5)