



Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019

No. 115, 2019

An Act to amend the *Competition and Consumer Act 2010*, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)



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No. 115, 2019

An Act to amend the *Competition and Consumer Act 2010*, and for related purposes

[Assented to 10 December 2019]

The Parliament of Australia enacts:

1 Short title

This Act is the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019*.

No. 115, 2019 *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019* 1

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.	10 December 2019
2. Schedule 1	The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent.	10 June 2020
3. Schedule 2	The day this Act receives the Royal Assent.	10 December 2019

Note: This table relates only to the provisions of this Act as originally enacted.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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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 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 under section 153X.

Court means the Federal Court of Australia.

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

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

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

electricity market means any of the following:

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

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

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

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

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

prohibited conduct notice means a notice under section 153P.

prohibited conduct recommendation means a notice under section 153S.

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

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

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

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

- (1) A corporation is a *connected body corporate* in relation to prohibited conduct engaged in by the corporation.
- (2) A body corporate is a *connected body corporate* in relation to prohibited conduct engaged in by a corporation if:
 - (a) the body corporate is related to the corporation; and
 - (b) any of the following conditions are satisfied:
 - (i) the prohibited conduct involves the direct or indirect use of assets held by the body corporate;
 - (ii) the prohibited conduct involves direct or indirect dealings between the body corporate and the corporation.

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

Division 2—Prohibited conduct

153E Prohibited conduct—retail pricing

- (1) A corporation contravenes this section if:
- (a) the corporation offers to supply electricity, or supplies electricity, to small customers; and
 - (b) the corporation fails to make reasonable adjustments to the price of those offers, or to the price of those supplies, to reflect sustained and substantial reductions in its underlying cost of procuring electricity.

Note 1: The Treasurer cannot make 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)).

- (2) Despite subsection (1), the corporation does not contravene this section if the price is a standing offer price (within the meaning of the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*).
- (3) Despite subsection (1), the corporation does not contravene this section if the adjustments would contravene:
- (a) an Act of the Commonwealth, a State or a Territory; or
 - (b) an instrument made under such an Act.

153F Prohibited conduct—electricity financial contract liquidity

A corporation contravenes this section if:

- (a) any of the following conditions are satisfied:
 - (i) the corporation generates electricity;

- (ii) a body corporate that is related to the corporation generates electricity; and
- (b) the corporation does any of the following:
 - (i) fails to offer electricity financial contracts;
 - (ii) limits or restricts its offers to enter into electricity financial contracts;
 - (iii) offers to enter into electricity financial contracts in a way that has, or on terms that have, the effect or likely effect of preventing, limiting or restricting acceptance of those offers; and
- (c) the corporation does so for the purpose of substantially lessening competition in any electricity market.

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) the corporation does so:
 - (i) fraudulently, dishonestly or in bad faith; or
 - (ii) for the purpose of distorting or manipulating prices in that electricity spot market.

Note 1: The Treasurer cannot make 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) the corporation does so fraudulently, dishonestly or in bad faith, for the purpose of distorting or manipulating prices in that electricity spot 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 electricity spot market;even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

153K Prohibited conduct may be covered by other provisions

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

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

Division 3—Commission responses

Subdivision A—Public warning notices

153L Commission may give draft public warning notice

- (1) The Commission may give a corporation a notice in writing if the Commission reasonably believes that:
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- (a) any of the following conditions are satisfied:
 - (i) the corporation has engaged in prohibited conduct;
 - (ii) the corporation is engaging in prohibited conduct; and
 - (b) one or more persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct; and
 - (c) it is in the public interest to issue the notice.
- (2) The notice must:
- (a) state the day on which the notice is given; and
 - (b) identify:
 - (i) the corporation mentioned in paragraph (1)(a); and
 - (ii) the prohibited conduct mentioned in paragraph (1)(a); and
 - (c) explain the reasons why the Commission reasonably believes that the requirements in paragraphs (1)(a), (b) and (c) are met; and
 - (d) state that:
 - (i) the corporation may, within 21 days after being given the notice, make representations to the Commission regarding the matters mentioned in paragraphs (1)(a), (b) and (c); and
 - (ii) the Commission may issue a public warning notice under section 153M in relation to the prohibited conduct after those 21 days have passed.
- (3) A notice given under subsection (1) is not a legislative instrument.

153M Commission may issue public warning notice

- (1) This section applies if:
- (a) the Commission gave a corporation a notice under section 153L in relation to prohibited conduct; and
 - (b) at least 21 days have passed since the Commission gave the corporation the notice; and
 - (c) no more than 90 days have passed since the Commission gave the corporation the notice.

- (2) The Commission may issue to the public a written notice containing a warning about the prohibited conduct if the Commission reasonably believes that:
 - (a) any of the following conditions are satisfied:
 - (i) the corporation has engaged in the prohibited conduct;
 - (ii) the corporation is engaging in the prohibited conduct;and
 - (b) one or more persons has suffered, or is likely to suffer, detriment as a result of the prohibited conduct; and
 - (c) it is in the public interest to issue the notice.
- (3) The notice must:
 - (a) state the day on which the notice is issued; and
 - (b) identify:
 - (i) the corporation mentioned in paragraph (2)(a); and
 - (ii) the prohibited conduct mentioned in paragraph (2)(a).
- (4) A notice issued under subsection (2) is not a legislative instrument.

Subdivision B—Infringement notices

153N Infringement notices

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

Division 4—Procedure before contracting order or divestiture order

Subdivision A—Prohibited conduct notices

153P Prohibited conduct notices

- (1) The Commission may give a corporation a notice (a *prohibited conduct notice*) in writing, stating one or more recommendations for the kind or kinds of order the Treasurer or the Court could make under Division 5 or 6, if the Commission reasonably believes that:
 - (a) any of the following conditions are satisfied:
 - (i) the corporation has engaged in prohibited conduct;
 - (ii) the corporation is engaging in prohibited conduct;
 - (b) the Treasurer or the Court making that kind or those kinds of order in relation to the corporation, or any other connected body corporate in relation to the prohibited conduct, is a proportionate means of preventing the corporation, or any related body corporate, from engaging in that kind of prohibited conduct in the future; and
 - (c) if that kind of order is, or those kinds of order include, a divestiture order—the following conditions are satisfied:
 - (i) such a divestiture order will result, or is likely to result, in a benefit to the public;
 - (ii) if such a divestiture order will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.
- (2) The notice must:
 - (a) be expressed to be given under this section; and
 - (b) state the day on which the notice is given; and
 - (c) identify:
 - (i) the corporation; and
 - (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 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; 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 notice is given; and
 - (b) ends:
 - (i) if subparagraph (ii) does not apply—45 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 notice.
- (5) The Commission must give a copy of the notice to each body corporate identified in the notice (in accordance with subparagraph (2)(c)(iii)) as soon as practicable after issuing it.
- (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 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) as soon as practicable after making it:
- (a) the corporation;
 - (b) each body corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(2)(c)(iii));
 - (c) each connected body corporate in relation to the prohibited conduct (other than a body corporate mentioned in paragraph (b)) identified in the prohibited conduct notice as varied.
- (5) A variation or revocation under subsection (1) is not a legislative instrument.
- (6) Subsection 33(3) of the *Acts Interpretation Act 1901* does not apply in relation to a prohibited conduct notice.

Subdivision B—Prohibited conduct recommendations and no Treasurer action notices

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

- (1) If the Commission has given a corporation a prohibited conduct notice, the Commission must, within 45 days after the end of the period mentioned in subsection (3), give the Treasurer:
- (a) a prohibited conduct recommendation in respect of the prohibited conduct notice; or

- (b) a no Treasurer action notice in respect of the prohibited conduct notice.
- (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(3) 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; 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 that:
 - (a) any of the following conditions are satisfied:
 - (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 following conditions are satisfied:
 - (i) such a divestiture order will result, or is likely to result, in a benefit to the public;
 - (ii) if such a divestiture order will result, or is likely to result, in a detriment to the public—the benefit mentioned in subparagraph (i) would, or is likely to, outweigh that detriment.
- (2) The notice must:
- (a) be expressed to be given under this section; and
 - (b) state the day on which the notice is given; and
 - (c) identify:
 - (i) the corporation; and
 - (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 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, the recommendations stated in the notice (in accordance with paragraph (2)(d)) may be different from the recommendations stated in the prohibited conduct notice (in accordance with paragraph 153P(2)(d)).

- (4) A failure to comply with subparagraph (2)(c)(iii) does not affect the validity of the notice.
- (5) To avoid doubt, the bodies corporate identified in the notice (in accordance with subparagraph (2)(c)(iii)) need not be the same as the bodies corporate identified in the prohibited conduct notice (in accordance with subparagraph 153P(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 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) A variation or revocation under subsection (1) is not a legislative instrument.
 - (8) 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 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 give a copy of the notice to the corporation:
 - (a) unless paragraph (b) applies—45 days after issuing it; or
 - (b) if the Commission and the Treasurer agree that it is appropriate to give a copy of the notice to the corporation at an earlier time—at that earlier time.

- (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 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 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 give a copy of a variation or revocation under subsection (1) to the corporation as soon as practicable after making it.
- (10) If the no Treasurer action notice has not yet been given to the corporation in accordance with subsection 153U(3) by the time the Commission makes a variation or revocation under subsection (1):
 - (a) in the case of a variation:
 - (i) for the purposes of subsection 153U(3), the Commission must give the corporation a copy of the no Treasurer action notice as varied; and
 - (ii) despite subsection (9), the Commission must not give the corporation a copy of the variation; or
 - (b) in the case of a revocation:
 - (i) despite subsection 153U(3), the Commission must not give the corporation a copy of the no Treasurer action notice; and
 - (ii) despite subsection (9), the Commission must not give the corporation a copy of the revocation.
- (11) A variation or revocation under subsection (1) is not a legislative instrument.
- (12) 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 contracting order

The Treasurer may make 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 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.

153X Treasurer may make contracting order

- (1) The Treasurer may, in writing, order the body corporate to make offers to enter into electricity financial contracts.
- (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 considers necessary for the order to be effective.
- (4) The order 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;
 - (b) 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;
 - (c) the minimum number of megawatt hours of electricity to which the electricity financial contracts that must be offered must relate.

- (5) In determining the minimum number of megawatt hours to specify for the purposes of paragraph (4)(c), the Treasurer must have 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;
 - (b) the nature and location of those electricity generation assets;
 - (c) the commitments that the body corporate has, and related bodies corporate have, to supply electricity to customers;
 - (d) any other matter that the Treasurer considers to be relevant.
- (6) 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 years after the order is made.
- (7) The Treasurer must publish, by electronic or other means, the following information:
 - (a) the fact that the order has been made;
 - (b) the day on which the order is made;
 - (c) the name of the body corporate.

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
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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, by electronic or other means, the following information:
 - (a) the fact that the variation or revocation has been made;
 - (b) the day on which the variation or revocation is made;
 - (c) the name of the body corporate.

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) or (3) 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;
- (g) the following conditions are satisfied:
 - (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) or (3) 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.
- (2) If the body corporate is not an authority of the Commonwealth or an authority of a State or Territory, the Court may order the body corporate to:
 - (a) dispose of interests in securities or assets, other than to any of the following:
 - (i) another body corporate that is related to the body corporate;
 - (ii) an associate of the body corporate; and
 - (b) comply with conditions (if any) specified in the order in accordance with subsection (7).

- (3) If the body corporate is an authority of the Commonwealth or an authority of a State or Territory, the Court may order the body corporate to:
- (a) dispose of interests in securities or assets to:
 - (i) if the body corporate is an authority of the Commonwealth—an authority of the Commonwealth that is genuinely in competition in relation to electricity markets with the body corporate in relation to which the order is made and that the Commonwealth has a controlling interest in that is equal to or greater than the controlling interest that the Commonwealth has in that body corporate; and
 - (ii) if the body corporate is an authority of a State or Territory—an authority of that State or Territory that is genuinely in competition in relation to electricity markets with the body corporate in relation to which the order is made and that the State or Territory has a controlling interest in that is equal to or greater than the controlling interest that the State or Territory has in that body corporate; and
 - (b) comply with conditions (if any) specified in the order in accordance with subsection (7).
- (4) To avoid doubt, the Court cannot make an order under subsection (3) for the body corporate to dispose of interests in securities or assets otherwise than in accordance with paragraph (3)(a).
- (5) An order under subsection (2) or (3) 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 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.
- (6) The day by which the disposal must be made must be no earlier than 12 months after the day on which the order is made.
- (7) The order may specify conditions with which the body corporate must comply during the period between the making of the order
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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.
- (8) Without limiting the scope of subsection (7), 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.
- (9) If a body corporate disposes of interests in assets to another body corporate as required by an order made under this section, then for the purposes of paragraph 311(1)(d) or 768AD(1)(d) of the *Fair Work Act 2009*, there is taken to be a connection between the body corporate and the other body corporate as described in subsection 311(3) or 768AD(2), as the case may be, of that Act.

Note: This means any employees of the body corporate who become employees of the other body corporate and satisfy paragraphs 311(1)(a) to (c) or 768AD(1)(a) to (c) will be transferring employees in relation to a transfer of business for the purposes of Part 2-8 or Part 6-3A of that Act.

153ZBA Arrangements or undertakings in relation to employees

- (1) This section applies if:
- (a) a body corporate (the **old employer**) has made arrangements or undertakings in relation to employees of the body corporate (whether or not those arrangements or undertakings bind the old employer); and
 - (b) the Court makes an order under subsection 153ZB(2) or (3) for the old employer to dispose of assets; and
 - (c) the old employer disposes of the assets to another entity (the **new employer**); and
 - (d) regulations made for the purposes of this paragraph before the disposal specify requirements in respect of arrangements or undertakings in relation to employees; and
 - (e) the arrangements or undertakings satisfy those requirements.

(2) The new employer must comply with the arrangements or undertakings.

(3) Subsection (2) applies despite anything in the *Fair Work Act 2009*.

Division 7—Miscellaneous

153ZC Acquisition of property

Scope

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

Effect of provision

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

153ZD No orders under subsection 76(1) against certain individuals

- (1) Nothing in subsection 76(1) authorises the making of an order against an individual covered under subsection (2) because the individual:
- (a) has aided, abetted, counselled or procured a corporation to contravene section 153E, 153F, 153G or 153H; or
 - (b) has induced, or attempted to induce, a corporation, whether by threats or promises or otherwise, to contravene section 153E, 153F, 153G or 153H; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a corporation of section 153E, 153F, 153G or 153H; or
 - (d) has conspired with others for a corporation to contravene section 153E, 153F, 153G or 153H.

- (2) An individual is covered under this section unless the individual is a director, secretary or senior manager (within the meaning of the *Corporations Act 2001*) of the corporation.

Part 2—Other amendments

Competition and Consumer Act 2010

2 After paragraph 2B(1)(b)

Insert:

(ba) Part XICA;

3 After paragraph 5(1)(b)

Insert:

(ba) Part XICA;

4 Paragraph 5(1)(f)

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

5 Paragraph 29(1A)(a)

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

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

Insert:

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

7 Paragraph 76(1A)(aa)

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

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

Omit “or”.

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

Add:

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

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

Add “or”.

11 After paragraph 84(1)(b)

Insert:

- (ba) a proceeding 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).

Part 4—Review of amendments

15 Review of amendments

Before the end of the period of 4 years after this Schedule commences, the Treasurer must establish a review of the effectiveness of the amendments made by Parts 1 and 2 of this Schedule, including a review of the following:

- (a) impacts on electricity market performance, including market efficiency, equity, reliability, affordability, emission reduction and investment outcomes;
- (b) any other factors relevant for an assessment of the effectiveness of the amendments on the Australian electricity sector and economy.

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;
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- (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 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*.

7 Subparagraph 79A(1)(a)(i)

After “section”, insert “44AAFB”.

8 Paragraph 79A(1)(d)

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

9 Subsection 163(5)

After “section”, insert “44AAFB,”.

*[Minister’s second reading speech made in—
House of Representatives on 18 September 2019
Senate on 11 November 2019]*

(191/19)
