

## Article Information

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# Big stick for electricity providers: Prohibiting Energy Market Misconduct Bill 2018

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On 5 December 2018, the Australian Federal Government tabled in the House of Representatives the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 (Bill)* which aims to implement the so-called “big stick” energy reforms.

The Bill introduces proposed measures to amend the *Competition and Consumer Act 2010* (Cth) (**Act**) which are intended to increase price competitiveness and respond to misconduct in the electricity sector. The Bill was introduced in response to recommendations made by the Australian Competition and Consumer Commission (**ACCC**) in its [Electricity Price Monitoring Inquiry](#). However, the draft laws were not recommended by the ACCC in its inquiry.

The prohibitions in the Bill will apply to “corporations” which fall into the category of a body corporate that is:

- a foreign corporation; or
- a trading or financial corporation formed within Australia; or
- incorporated in an Australian territory; or
- the holding companies of such body corporates or foreign corporations.

A copy of the Bill is available [here](#). Below we summarise the key changes to the Act that the Bill, if passed in its current form, will introduce.

### **Retail pricing market**

Proposed section 153E would apply to corporations that supply, or offer to supply, electricity to “small customers”. These are defined as: (i) “residential customers” who purchase, or propose to purchase, electricity principally for personal, household or domestic use at a premises; and (ii) “small business customers” that purchase, or propose to purchase, electricity at a rate less than 100 MWh per financial year and who are not a residential customer in relation to that electricity.

A corporation would contravene proposed section 153E if, when supplying or offering to supply electricity to small customers, it “*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.*”

The Explanatory Memorandum to the Bill provides that:

- a “sustained” reduction would not capture a “*change in underlying costs that lasted a week or a month... However, where it becomes apparent over time that there has been a downward trend in supply chain costs, this would be considered sustained*”;[\[1\]](#)
- a “substantial” reduction occurs only where the reduction is, “*real or of substance, relative to the overall costs of procuring electricity, though not necessarily large*”;[\[2\]](#) and
- it is not intended that retailers adjust their retail prices in response to small moderations in their supply chain costs;[\[3\]](#) and

- gains made by a corporation due to improvements in its “*internal processes and becoming more productive*” are not “*required*” to be reflected in retail electricity price adjustments, though it is expected by the legislature that market competition will encourage it.[\[4\]](#)

### **Electricity financial contract market**

Proposed section 153F is aimed at ensuring that generators, including “gentailers”, do not unreasonably refuse to offer financial contracts for anti-competitive purposes. This section will apply to contracts which are derived from, or relate to, the price of electricity on an “electricity spot market” where the operator of that electricity spot market is **not** a party to the contract (**Electricity Financial Contracts**).

A contravention occurs if a corporation generates electricity (including through a body corporate related to the corporation that generates electricity) and the corporation fails to offer Electricity Financial Contracts; or limits or restricts its offers to enter into such contracts; or offers to enter into such contracts so as to have the effect, or likely effect, of preventing, limiting or restricting acceptance of those offers; and the corporation does so for the purpose of substantially lessening competition in any electricity market.

The Explanatory Memorandum to the Bill provides that the purpose of the above substantially lessening competition test is to “*distinguish contracting decisions reflecting genuine, efficient risk management from contracting decisions with an anti-competitive purpose.*”[\[5\]](#)

### **Wholesale electricity market**

Wholesale markets for the supply of electricity involve corporations who generate electricity and supply such electricity into an electricity grid, commonly through the use of an “electricity spot market” wherein electricity is bought, sold and supplied immediately at the then-current sale price.

Proposed section 153G seeks to prevent generators engaging in conduct which undermines the effective operation of an electricity spot market by providing that it would be a contravention of the Act for a corporation to bid or offer (or fail to bid or offer) to supply electricity in relation to an electricity spot market if 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.

The Explanatory Memorandum to the Bill provides that conduct of a corporation would satisfy the:

- first limb where, “*...its conduct was aimed at obtaining a financial or competitive advantage by unlawful or unfair means, involved wrongdoing or was not otherwise of a kind that would be expected of a person acting according to the standards of a reasonable and honest person*”;[\[6\]](#) and
- the second limb where such conduct “*seeks to undermine the process by which market participants would reasonably expect prices to be determined in a market characterised by effective competition*”.[\[7\]](#)

“*Effective competition*” in an electricity spot market is characterised in the Explanatory Memorandum as having active competitors in the market with a sustainable position; low barriers to entry to the market for new competitors; and prices largely determined in the long term by underlying costs, rather than the existence of market power. A corporation substantially negating or dampening these through deliberate actions would indicate that the second limb is satisfied as the prices would no longer reflect an effective competitive outcome and would be distorted or manipulated.[\[8\]](#)

Proposed section 153G provides that it would be a “*basic case*” contravention to commit conduct which breaches either one of the above limbs. Proposed section 153H provides that it would be an “*aggravated case*” contravention if the conduct breaches both of those limbs. Where the basic case is met, an ACCC response, but not a Treasurer response, can be applied to remedy the conduct. Where an aggravated case is met, a Treasurer response **and** an ACCC response can be applied. Further, harsher penalties can apply to aggravated cases, including the issuing of contracting orders from the Treasurer ordering a body corporate to enter into Electricity Financial Contracts; or a Court ordered “divestiture order” ordering a body corporate to dispose of interests in securities or assets.

### **ACCC, Treasurer and AER enforcement powers**

Each of the contraventions specified above are defined as “prohibited conduct”. If the ACCC reasonably believes that a corporation has contravened the prohibited conduct provisions, the proposed amendments would provide the ACCC with powers to:

- issue an infringement notice – the penalty amount for a corporation is 600 penalty units;[\[9\]](#)
- apply to a court for an order that a pecuniary penalty be imposed – the maximum penalty for a corporation is the greatest of the following: \$10,000,000; or three times the value of the benefit obtained; or if the value cannot be

determined, 10% of annual turnover during the 12 months prior to the conduct;<sup>[10]</sup>

- issue a prohibited conduct notice (**Notice**) to a corporation which states one or more recommendations for the kinds of order the Treasurer or the Court could make, including, but not limited to, a divestiture order and that such orders are a “proportionate” means of preventing future prohibited conduct;<sup>[11]</sup> and
- after issuing such a Notice, either give the Treasurer the prohibited conduct recommendation or a “no Treasurer action notice” in respect of the Notice.<sup>[12]</sup>

The Explanatory Memorandum to the Bill explains that in order for a response to be “proportionate” it must be “*necessary to prevent that kind of conduct from continuing or re-occurring in the future and that a lesser remedy would not achieve this.*”<sup>[13]</sup>

Where the Treasurer has received from the ACCC a prohibited conduct recommendation recommending certain orders and the Treasurer is satisfied that the conduct in question is “*prohibited conduct*” and that the order is “*proportionate*”, the proposed amendments would grant to the Treasurer powers to:

- order a body corporate to make offers to enter into Electricity Financial Contracts;<sup>[14]</sup> and
- for “*aggravated case*” contraventions, apply to the Federal Court for a “*divestiture order*”.<sup>[15]</sup>

Importantly, the power of the ACCC to issue a Notice or to make a prohibited conduct recommendation is subject to the ACCC being satisfied of a “*net public benefit*” test, being that it is satisfied that the Notice or recommendation will, or is likely to, result in a public benefit that would, or would be likely to, outweigh any public detriment.<sup>[16]</sup> The Treasurer (and the ACCC<sup>[17]</sup>) must also be satisfied of the “*net public benefit*” test in respect of a proposed divestiture order before the Treasurer can apply to the Federal Court for that order to be made.<sup>[18]</sup>

In deciding whether to grant a divestiture order, the Federal Court must be satisfied that the relevant conduct is in fact “*prohibited conduct*” and that the proposed order is “*proportionate*”. Prohibited conduct includes conduct engaged in on, and after, the commencement of the Bill and conduct engaged in before that commencement which continues to be engaged in on, and after, that commencement.<sup>[19]</sup>

Where the Australian Electricity Regulator (**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 its functions, the proposed amendments will provide the AER with additional powers to require that a person provide such information to the AER; and/or produce any documents that the AER requests; and/or appear before the AER to give evidence.<sup>[20]</sup>

### **Status of the Bill**

On 6 December 2018 the Senate referred the Bill to the Economics Legislation Committee for inquiry with a report due on 18 March 2019. Submissions were originally due by 11 February 2019 but the Committee changed the closing date to 25 January 2019.

The Federal Government has now announced that the Bill will be taken to the next federal election following concerns that the Bill could not be passed without first being amended by the Greens and the Labor party (who had the requisite numbers on the crossbench) in order to impose a prohibition on the Commonwealth from underwriting investment in new coal plants.

If you are interested in discussing the proposed amendments, please contact [the](#) Competition and Consumer Group at Piper Alderman.

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<sup>[1]</sup> Para 2.34 of the Explanatory Memorandum.

<sup>[2]</sup> Para 2.3.5 of the Explanatory Memorandum.

<sup>[3]</sup> Para 2.3.5 of the Explanatory Memorandum.

<sup>[4]</sup> Para 2.43 of the Explanatory Memorandum.

<sup>[5]</sup> Para 2.69 of the Explanatory Memorandum.

[\[6\]](#) Para 2.86 of the Explanatory Memorandum.

[\[7\]](#) Para 2.88 of the Explanatory Memorandum.

[\[8\]](#) Para 2.90 – 2.91 of the Explanatory Memorandum.

[\[9\]](#) Section 153N of the Bill.

[\[10\]](#) Section 6 of Part 2 of the Bill.

[\[11\]](#) Section 153P of the Bill.

[\[12\]](#) Section 153R of the Bill.

[\[13\]](#) Para 4.13 of the Explanatory Memorandum.

[\[14\]](#) Section 153X of the Bill.

[\[15\]](#) Section 153ZB(2) of the Bill.

[\[16\]](#) Sections 153P(1)(c) and 153S(c) of the Bill.

[\[17\]](#) Para 8.106 of the Explanatory Memorandum.

[\[18\]](#) Section 153ZA(g) of the Bill.

[\[19\]](#) Part 3, section 14 of the Bill.

[\[20\]](#) Section 44AAFA of the Bill.