

FEDERAL GOVERNMENT REVIVES ITS CONTROVERSIAL ELECTRICITY MISCONDUCT BILL

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Legal Briefings - By **Sarah Benbow**

The Federal Government re-introduced its much-criticised ‘big stick’ energy laws this month after having abandoned the first iteration of the bill in December 2018.

IN BRIEF

- On 19 September the Government introduced the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019* into the House of Representatives.
- The Bill introduces sector specific misconduct provisions into the *Competition and Consumer Act* for certain retail pricing, financial contracting and wholesale bidding conduct by electricity generators and retailers.
- The Bill also introduces radical remedies for contraventions of these provisions, including:
 - significant financial penalties;
 - the power for the Treasurer to order an electricity generator to enter into financial contracts of any type, size, or price for a period of three years; and
 - most controversially, the power for the Federal Court to make orders requiring electricity companies to forcibly divest assets.

THE PROHIBITED CONDUCT

The Bill was originally introduced in December 2018, purportedly in response to the ACCC’s final report and recommendations from its inquiry into electricity pricing. However, it was quickly abandoned amid concerns it would not pass parliament.

Since then, there has been a Senate Economics Committee Inquiry into the merits of the Bill as well as substantial comment from the energy industry and legal and economics experts. Many questioned the ability of the Bill to achieve its purported aim of reducing electricity prices. Widespread concern was also raised about the radical remedies proposed in the Bill and the potential adverse effects the prohibitions (as drafted) would have on the electricity industry.

Despite this, only minor amendments were made to the Bill before it was re-introduced last month. The new Bill still contains the same three key prohibitions:

1. A **retail pricing prohibition**, which will prohibit the electricity retailers from failing to make reasonable adjustments to the prices that are offered or supplied small customers to reflect sustained reductions in their underlying costs of procuring electricity.
2. A **contract liquidity prohibition**, which will prohibit electricity generators from failing to offer or limiting their offer of financial contracts, where that is done for the purpose of substantial lessening of competition.
3. A **wholesale bidding prohibition** will prohibit generators from engaging in bidding conduct fraudulently, dishonestly or in bad faith or for the purpose of distorting or manipulating spot prices.

RADICAL REMEDIES

The Bill proposes a range of significant remedies for contravening these prohibitions, including ACCC-issued public warning notices and infringement notices and court ordered penalties. The maximum penalties are proposed to be the same as the penalties for a contravention of the competition and consumer provisions of the *Competition and Consumer Act*. These include up to \$10 million or 10% of the annual group turnover of the corporation in the 12 months before the conduct occurred (per contravention).

Controversial and potentially radical remedies are proposed for certain contraventions, including:

- for contraventions of the contract liquidity prohibition, it is proposed that the Treasurer will be empowered to issue Contracting Orders requiring generators to offer financial contracts for sale to retailers on terms determined by the Treasurer for up to 3 years; and

- for ‘aggravated’ contraventions of the wholesale bidding prohibition, it is proposed that on recommendation of the ACCC and Treasurer, the Federal Court could issue Divestiture Orders requiring electricity generators to divest assets.

In a move that will no doubt raise concerns among those in leadership and governance positions at energy companies, the Government also proposes that company directors, secretaries and senior managers could be held personal liability for pecuniary penalties in relation to the prohibited conduct.

A BIG HOLLOW STICK?

Much of the criticism that was raised in relation to the original version of the Bill remains. Critics question both how the Bill will lead to lower electricity prices and why it is necessary in light of the recent default pricing regimes that were introduced on the East Coast of Australia.

Industry stakeholders have raised concerns about potential adverse effects on electricity companies. These include additional compliance costs as well as the risks resulting from uncertainty about the way in which the proposed prohibitions (and their radical remedies) will be interpreted and applied. This has led some to question whether the Bill could actually have an adverse impact on electricity prices by leading to higher costs and discouraging much needed investment in the sector.

Many commentators also note that this interventionist regulation of electricity companies is not justified by the ACCC’s electricity inquiry, as the ACCC did not find evidence of the type of misconduct the Bill proposes to prohibit. The ACCC also expressly stated that it does not believe forced divestment would be an appropriate way to address the issues it identified in its electricity inquiry.

Nonetheless, the Government seems undeterred and is pressing on with its proposed ‘Big Stick’ reforms. If it is passed, the Bill will commence 6 months after it receives royal assent.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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