



Guidelines on Part XICA— Prohibited conduct in the energy market

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Purpose of Guidelines

From 10 June 2020, certain types of conduct in electricity markets will be prohibited.

These changes result from the insertion of Part XICA into the *Competition and Consumer Act 2010 (CCA)* by the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019 (PEMM Act)*.

The three new types of prohibitions are outlined in these Guidelines:

- section 153E: prohibited conduct—retail pricing
- section 153F: prohibited conduct—electricity financial contract liquidity
- sections 153G and 153H: prohibited conduct—electricity spot market (basic and aggravated cases).

The ACCC is responsible for investigating whether conduct breaches the new prohibitions.

The ACCC has powers in relation to remedies similar to existing powers (public warning notices, infringement notices, court enforceable undertakings and instituting proceedings seeking pecuniary penalties and injunctions).

The ACCC and the Treasurer also have powers in relation to two new remedies:

- contracting orders (s. 153X)
- divestiture orders (s. 153ZB).

These Guidelines include:

- a description of the general approach the ACCC proposes to take when investigating alleged contraventions of the new prohibitions
- examples to illustrate the types of conduct that the ACCC considers are likely (and unlikely) to contravene the prohibitions
- an explanation of the steps which would need to occur prior to the making of a contracting order by the Treasurer or a divestiture order by the Federal Court.

The examples included in these Guidelines are simplified and high-level to illustrate particular principles. They necessarily describe circumstances of the market and features of participants, but the general principles illustrated in examples are intended to be useful in assisting industry participants to understand how the ACCC considers that the prohibitions may apply in other circumstances.

However, the ACCC recognises that real-world practices in the electricity industry are complex and are likely to be impacted by various market factors and matters specific to a participant's portfolio of assets. The ACCC recognises that because of this, a participant's individual circumstances may not neatly fit within the boundaries of the examples included.

These Guidelines set out how the ACCC currently proposes to interpret the prohibitions. Australian courts are ultimately responsible for interpreting the CCA and determining whether contraventions have occurred.

These Guidelines set out the ACCC's current understanding of the law and are prepared primarily for the general guidance of legal practitioners and industry participants. They are not a substitute for legal advice. The ACCC will periodically update these Guidelines to take into account any relevant court decisions or other relevant change in circumstances.

1. Introduction

- 1.1. Schedule 1 of the PEMM Act inserts Part XICA into the CCA, which creates three new electricity sector-specific prohibitions on certain conduct in electricity markets and a number of new remedies that the ACCC can pursue in the event of breaches.¹
- 1.2. Part XICA is concerned with prohibiting certain conduct in the following parts of the electricity supply chain:
 - The **retail market**, whereby electricity is supplied to most end users of electricity (such as residential and small business consumers) through retail contracts.
 - The **financial (or hedging) contract market**, whereby electricity generators, electricity retailers and some end users enter into derivative contract arrangements for reasons including managing price risk in the wholesale market. Other entities, such as financial intermediaries and speculators, may also engage in this market.
 - The **wholesale market**, whereby electricity generators produce electricity that is supplied into the electricity grid and distributed to customers. This can be done through a spot market, such as that which exists for the National Electricity Market (**NEM**).²
- 1.3. Part XICA prohibits conduct that, if engaged in by certain participants in electricity markets, can be detrimental to competition or to consumer welfare.³
- 1.4. Part XICA contains the new remedies for more serious contraventions arising under s. 153F (prohibited conduct—electricity financial contract liquidity) and s. 153H (prohibited conduct—electricity spot market (aggravated case)):
 - **Contracting order**: Following the receipt of a prohibited conduct recommendation from the ACCC, the Treasurer may issue a written order to the corporate entities identified in the ACCC's recommendation to make offers to enter into electricity financial contracts with particular kinds of third party entities.⁴ The contracting order is available for breaches of ss. 153F and 153H.
 - **Divestiture order**: Following the receipt of a prohibited conduct recommendation from the ACCC, the Treasurer may make an application to the Federal Court for a divestiture order. If the Court is satisfied that the relevant requirements are met, the Court can order the corporate entities identified in the ACCC's recommendation to dispose of specific interests in securities or assets, or specific kinds of interests in securities or assets, that are part of its electricity business.⁵ The divestiture order is available for breaches of s. 153H only.
- 1.5. There are also some differences in how public warning notices and infringement notices apply under Part XICA compared to other parts of the CCA. Part XICA

¹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.4.

² Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.6.

³ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.5.

⁴ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 4.3.

⁵ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 5.4 and 5.5.

requires the ACCC to provide a draft public warning notice before issuing a public warning notice and contains a higher infringement notice penalty for body corporates than other parts of the CCA.

- 1.6. Part XICA applies nationwide, to both NEM and non-NEM regions.⁶ However, as Part XICA is intended to support the ACCC's Electricity Monitoring Inquiry across the NEM between 2018 and 2025⁷, the examples that have been provided in these Guidelines are of conduct arising in parts of Australia that are connected to the NEM. Western Australia and the Northern Territory are not connected to the NEM and the ACCC's view is that Part XICA currently only has limited potential application in those jurisdictions. The ACCC's approach to enforcement and compliance will be focused on conduct arising in the NEM, although the ACCC may investigate if there are regulatory changes or the ACCC becomes aware of conduct in non-NEM regions that give rise to concerns under Part XICA. These Guidelines will be updated if the ACCC's general approach to non-NEM regions changes.
- 1.7. Part XICA does not create prohibitions on conduct by electricity network businesses (transmission and distribution businesses).⁸
- 1.8. These Guidelines relate to Schedule 1 to the PEMM Act only, which inserts Part XICA into the CCA. Schedule 2 to the PEMM Act, which relates to the Australian Energy Regulator's (AER's) information gathering powers, is not addressed in these Guidelines.

2. Retail pricing provision

- 2.1. Section 153E(1) of the CCA provides that:
 - (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.
- 2.2. These Guidelines use the term 'retailer' to describe a corporation that offers to supply electricity, or supplies electricity to small customers under s. 153E(1)(a). The ACCC acknowledges that the term 'retailer' may have a different meaning under state and territory energy legislation.
- 2.3. The key concepts in s. 153E are:
 - 'small customers'
 - 'underlying cost of procuring electricity'
 - 'sustained and substantial reductions'
 - 'reasonable adjustments'.

⁶ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 1.13.

⁷ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 1.4 and 1.5.

⁸ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.7.

Small customers

- 2.4. Section 153E applies only to a retailer's offers and prices to 'small customers'.
- 2.5. The ACCC is aware that several states and territories have their own statutory definitions of small customers. However, small customer has a specific definition for the purposes of s. 153E and means a residential customer or a small business customer.
- 2.6. A 'residential customer' is a customer who purchases, or proposes to purchase, electricity principally for personal, household or domestic use at premises.⁹
- 2.7. A 'small business customer' is 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.¹⁰ Where a business operates across multiple premises, the ACCC's general approach will be that the business will be a 'small business customer' if, across the combined premises, it purchases, or proposes to purchase, less than 100 MWh of electricity in a financial year.¹¹
- 2.8. The prohibition applies to market offers. The prohibition does not apply if the price is a standing offer price (within the meaning of the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*) (the **Code**).¹²
- 2.9. A retailer is not required by s. 153E to make adjustments which would contravene the requirements of Commonwealth, state, or territory legislation. For example, a retailer is not required to make an adjustment if doing so would contravene a requirement to charge a specific price set under state or territory legislation.¹³

⁹ *Competition and Consumer Act 2010* (Cth), s. 153C.

¹⁰ *Competition and Consumer Act 2010* (Cth), s. 153C.

¹¹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.27.

¹² *Competition and Consumer Act 2010* (Cth), s. 153E(2). The Code implemented a cap on standing offer prices in situations where the retailer is required under a law of a state or territory to offer to supply the electricity or when the electricity is not supplied under a contract. The Code does not apply if standing offer prices are set by a state or territory or in small distribution regions. See ss. 4 and 8, *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*.

¹³ *Competition and Consumer Act 2010* (Cth), s. 153E(3), and Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.20.

Example 1: Residential customers

Retailer A has a suite of market offers it currently makes available to current and prospective residential customers. Some of Retailer A's portfolio of residential customers are on these currently available offers but many customers are on historical market offers which Retailer A has since changed or which are no longer available to new customers. All of these market offers, both the currently available and the historical, are subject to s. 153E.

One of Retailer A's residential customers has very high household energy consumption and purchases electricity at a rate of more than 100 MWh each financial year. This customer joined Retailer A many years ago when Retailer A was offering a special 'Happy New Year Offer' on which this customer has remained. This customer is now Retailer A's only customer on the Happy New Year Offer.

The Happy New Year Offer is subject to s. 153E as it is a market offer and the customer falls within the definition of a residential customer in s. 153C. Section 153E applies to residential customers' market offers regardless of their level of electricity consumption.

Example 2: Small business customers

Retailer A operates in South Australia and offers a suite of market offers to small business customers. Under South Australian laws, the upper electricity consumption threshold for a small business customer is 160 MWh per year.¹⁴ Retailer A's market offers to small business customers are for electricity consumption not exceeding 160 MWh per year.

Retailer B also operates in South Australia and has market offers aimed at small business customers. Retailer B has one suite of market offers for small business customers whose electricity consumption is less than 100 MWh per year, and another suite of market offers for small business customers whose electricity consumption exceeds 100 MWh per year.

Section 153E applies to market offers for small business customers who purchase or propose to purchase electricity at a rate less than 100 MWh a financial year and are not residential customers in relation to that electricity.

All of Retailer A's market offers to small business customers apply to small business customers who purchase electricity at a rate less than 100 MWh in a financial year, and are therefore subject to s. 153E. The fact that Retailer A's same market offers are also available to small business customers who purchase electricity at a rate up to 160 MWh in a financial year does not exempt them from s. 153E.

For Retailer B, only its market offers to small business customers whose electricity consumption is less than 100 MWh per year are subject to s. 153E. Retailer B's market offers to customers whose electricity consumption exceeds 100 MWh in a financial year are not subject to s. 153E.

¹⁴ *National Energy Retail Law (Local Provisions) Regulations 2013 (SA)*, s. 5.

Example 3: Regulated offers

Retailer A operates in Victoria, where it offers a suite of market offers to residential customers. Retailer A also makes the Victorian Default Offer (**VDO**) available to its customers through its 'Basic Offer'. Retailer A's market offers are subject to s. 153E. However, Retailer A's Basic Offer is not subject to s. 153E as Retailer A is required to offer the VDO by a *Governor in Council Order* made under s. 13 of the *Electricity Industry Act 2000* (Vic).

Underlying cost of procuring electricity

- 2.10. A retailer is required to make adjustments to its prices for small customers in response to certain reductions in its 'underlying cost of procuring electricity'. The phrase 'underlying cost of procuring electricity' is not defined in the CCA.
- 2.11. The Explanatory Memorandum provides significant additional discussion of the concept of 'underlying cost of procuring electricity' and the ACCC will seek to maintain consistency with the Explanatory Memorandum.
- 2.12. In s. 153E, the 'cost of procuring electricity' means the cost to the retailer of getting electricity to their small customers, and includes wholesale costs, network costs and environmental costs.¹⁵ Retail costs and margins are not included in the cost of procuring electricity.¹⁶
- 2.13. The Explanatory Memorandum explains that the s. 153E prohibition is primarily concerned with sector-wide decreases in costs, rather than changes to individual retailers' costs.¹⁷
- 2.14. The ACCC's approach is that individual cost reductions, for example, reductions that are caused by an individual retailer's increased efficiency, do not need to lead to price adjustments in order to comply.
- 2.15. However, the ACCC does not consider that cost reductions need to be across the whole of the sector to fall within the scope of s. 153E. For example, the ACCC's approach is that a sustained and substantial reduction in network costs in a particular network region is sufficiently material such that s. 153E would apply to retailers benefitting from those reduced costs.
- 2.16. When looking at sector-wide cost reductions, the ACCC will still consider the individual circumstances of a retailer, to see if adjustment of its prices in this particular instance is required. This is further addressed under the concept of 'reasonable adjustments' below.

¹⁵ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 2.28 and 2.29.

¹⁶ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 2.30 and 2.46.

¹⁷ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.46.

Example 4: Individual cost reductions

After identifying a strategic opportunity, Retailer A establishes a customer portfolio with a load shape that allows it to secure a particularly cost-effective hedging contract.

There has not been a substantial and sustained reduction in broader market-wide prices so Retailer A would not need to make price adjustments in order to comply with s. 153E.

Example 5: Retail cost savings

A new customer billing technology that greatly improves accuracy and efficiency is developed and rapidly becomes the industry standard, resulting in a substantial, sector-wide reduction in retail operating costs.

Section 153E does not require a retailer to adjust its prices to pass through such efficiency gains, as only reductions relating to wholesale costs, network costs or environmental costs need to lead to price adjustments.

Sustained and substantial reductions

- 2.17. A retailer is only obliged to make reasonable adjustments to its prices when reductions in costs are sustained and substantial.
- 2.18. The general meaning of ‘sustained’ is something that is continuing and expected to continue.
- 2.19. The ACCC’s approach is that short-term fluctuations, such as normal variations in spot market prices that last only several weeks, do not require a change of retail prices. A downward trend in supply chain costs over time, however, is likely to fall within the meaning of ‘sustained’.¹⁸ The longer a reduction is lasting and expected to last, the more reason there is for a retailer to be considering price changes. The ACCC will take into account seasonality in wholesale electricity costs. This means that normal seasonal fluctuations in wholesale costs are not considered representative of a long-term trend.
- 2.20. The ACCC’s approach is that a substantial change is one which is real or of substance, relative to the overall costs of procuring electricity, though not necessarily large. This is consistent with the approach which courts have given to the word ‘substantial’ which is ‘real or of substance and not insubstantial or nominal’¹⁹, ‘meaningful or relevant’²⁰ and ‘substantial in a relative sense’.²¹

¹⁸ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.37.

¹⁹ *Re Arnotts Limited; Arnotts Biscuits Limited; Fledspac Limited and the Dickens Corporation Pty Limited v Trade Practices Commission* [1990] FCA 473.

²⁰ *Rural Press Limited v ACCC* (2003) 216 CLR 53.

²¹ *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd* (1990) 97 ALR 513.

2.21. The ACCC will not apply a set threshold in determining whether a reduction is sustained and substantial. Whether or not a reduction is considered sustained and substantial will depend on all the circumstances. Relevant factors could include, but are not limited to: the size of the reduction relative to the overall price of the retail product; the size of the reduction relative to the contribution that cost type makes to overall costs; the size of the reduction in combination with the duration of the reduction; and the factors causing the reduction.

Example 6: Sustained and substantial reductions in wholesale costs

A new, large generator has recently been connected to the electricity network in New South Wales. The extra generation capacity results in a greater immediate reduction in spot market prices than had been anticipated.

In such circumstances, the ACCC would recognise that the sudden reduction in spot market prices is unlikely to have a significant immediate impact on the cost of procuring electricity for most retailers, as they will have hedge contracts in place at the previously prevailing price levels.

If the reduction in contract market prices persists so that retailers should benefit from the continuing reduced prices, the circumstances would likely constitute a sustained and substantial reduction in the cost of procuring electricity. However, as discussed below, the ACCC will consider the individual position of a retailer in assessing what is a reasonable adjustment in the circumstances.

Example 7: Market-wide cost reduction

A network business reduces its network tariffs in a particular region by 10 per cent, in line with a new regulatory determination. This reduces a retailer's costs of serving small customers by 4 per cent on average.

The ACCC considers that this is a substantial cost reduction, given the size of the reduction relative to the overall price of the retail product and the size of the reduction relative to that part of the cost stack.

A network tariff reduction is a market-wide cost reduction, as it applies to all retailers active in the relevant network region. As this reduction will continue over five years, the ACCC considers that this a sustained and substantial reduction which on its face should be passed through to customers by retailers. However, as discussed below, the ACCC will consider the individual position of a retailer in assessing what is a 'reasonable adjustment' in the circumstances.

Reasonable adjustments

- 2.22. When reductions in procurement costs are considered ‘sustained and substantial’, a retailer will be required to make ‘reasonable adjustments’. When considering what ‘reasonable adjustments’ are, all relevant circumstances will need to be taken into account, including the relevant circumstances of the retailer.
- 2.23. One aspect the ACCC will assess is when adjustments have to be made in the particular circumstances. The ACCC’s approach is that the adjustment must be made within a reasonable period of time after the reduction, also taking into account the retailer’s next planned price adjustment.²²
- 2.24. The ACCC notes that some ‘sustained and substantial’ cost reductions may have been expected by retailers and will be incorporated in retailers’ regular price setting activities. The ACCC will take such action into account where it can be clearly demonstrated.
- 2.25. At times however, a sustained and substantial cost reduction can require price changes by a retailer in between its usual scheduled price resets. For example, the ACCC would expect a continuing, large, unexpected cost decrease that had not been incorporated into existing pricing decisions would warrant an adjustment to prices. Should the retailer be approaching its scheduled price reset, then it would be reasonable for the retailer to incorporate this new cost decrease into its scheduled price setting process. However, if the retailer’s next regular price reset process is not commencing soon, it may be reasonable to expect the retailer to make a specific price adjustment to reflect this new cost decrease.

Example 8: Reasonable adjustments in line with usual price setting schedule

In response to a sustained reduction in spot market prices, prices for hedge contracts reduce commensurately.

Retailer A follows a prudent risk management methodology that involves progressively entering into contracts to cover its forecast load in any given period. Retailer A undertakes this process over the 24 months leading up to each period, contracting a relatively similar proportion of its forecast load each month until it is fully hedged going into the relevant period. The impact of the reduction in spot market prices (and the resulting reduction in contract prices) is therefore not immediately reflected in Retailer A’s costs. Instead, Retailer A’s wholesale costs reduce progressively as forecast load is hedged at the new, lower prices.

Retailer A undertakes an annual pricing reset, which, amongst other factors, incorporates forecasts of hedge contract prices. After the reduction in hedge contract prices, Retailer A updates its forecasts to incorporate the new, lower price, and this becomes part of its annual pricing decisions. The next scheduled pricing reset is three months away.

In these circumstances, it would be reasonable for Retailer A to incorporate these changes in line with its regular schedule of price resets, rather than as an additional, out-of-cycle price adjustment, so long as the reduction in costs is ultimately incorporated.

²² Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.40.

Example 9: Reasonable adjustments outside of usual price setting schedule

One of Retailer A's market offers is a '100% Green Energy' product for which Retailer A purchases and surrenders green energy certificates for each unit of electricity consumed by customers on the product. Due to a limited supply of certificates, certificate prices have remained at a high price for a number of years, which Retailer A converts to an additional cost of 5 cents per kWh to the 100% Green Energy offer's per kWh usage charge.

A large influx of renewable generation comes online that pushes renewable generation beyond the target that underpins the certificate scheme, resulting in certificate prices suddenly and permanently dropping to a level very close to zero. Retailer A does not have any legacy contracts for the supply of certificates, so is immediately able to benefit from the cost reduction.

Shortly after the new certificate price is established, Retailer A reduces the usage charge in its 100% Green Energy deal by 5 cents per kWh. Retailer A has made reasonable adjustments.

Example 10: Reasonable adjustments for fixed rate contracts

Amongst a suite of retail offerings, Retailer A offers a 12 month fixed price contract, the 'Guaranteed Rate Deal', where customers who sign up are guaranteed that their daily fixed charge and per kWh usage charge will not change over the 12 month period of the contract.

A few months after Retailer A starts offering the Guaranteed Rate Deal, the retailer identifies a sustained and substantial reduction in the cost of procuring electricity. Retailer A factors the cost reduction into its fixed price contracts going forward and starts offering a new product with lower charges, the 'New Guaranteed Rate Deal', but does not change the rates for customers that already signed up to the original Guaranteed Rate Deal because that contract requires Retailer A to maintain the fixed price.

The ACCC's approach would be that it is likely that it is reasonable for Retailer A to leave the fixed price contract unchanged. However, the longer the period of a fixed rate contract, the less likely it will be that not adjusting prices within the term of the contract following a relevant cost reduction will be reasonable.

- 2.26. A second aspect that the ACCC will take into account is that the types of tariff the retailer is offering can lead to offers being adjusted in different ways. The ACCC recognises that competitive choices can lead to not all cost reductions being reflected to the same extent in each type of offer. However, the ACCC's approach is that differentiation in the level of adjustment made to different retail offers has to be based on genuine differences in products; offers that represent products with the same characteristics should be reduced to a similar extent. Any difference in price reductions should be related to the difference the reduced costs play in the respective products. Example 12 provides additional context about reasonable adjustments for different offers with the same tariff structure.
- 2.27. The ACCC's approach is that reductions that are passed on to customers by lowering the underlying tariffs of the product (that is, the base rate, before any discounts are applied) are most likely to be compliant with the provision.
- 2.28. The ACCC understands that bottom-up price resets can be a significant process for individual retailers to undertake. In some circumstances, increasing a guaranteed discount may allow a retailer to make a more timely adjustment, out of the price reset cycle. An increase in a guaranteed discount may also constitute a reasonable adjustment, provided that the adjustment appropriately reflects the cost reduction and all relevant customers receive the benefit of the increased discount. A retailer may ultimately choose to adjust the relevant underlying tariffs at its next scheduled price reset.
- 2.29. Retailers should be careful if making price adjustments through other means, such as providing one-off credits, to ensure that the adjustment reflects the level and duration of the cost reduction, and that all relevant customers receive the reduction. In particular, the ACCC would have concerns about retailers making adjustments in the form of increases to conditional discounts.
- 2.30. The ACCC would also not consider it reasonable for a retailer to reduce its underlying tariffs or increase guaranteed discounts to reflect a cost reduction where the retailer also changes other terms and conditions so that the net effect of these adjustments is that customers do not receive the benefit of the cost reduction.
- 2.31. The ACCC does not intend for the application of s. 153E to inhibit competitive or efficient conduct by retailers, including the creation of new and innovative offers or the restructuring of existing offers. However, retailers will need to consider the requirements of s. 153E when creating new offers or restructuring existing offers, including prior cost reductions that may need to be taken into account in the new or restructured offers.
- 2.32. To the extent that market offers made by a retailer already incorporate cost reductions that have since become sustained and substantial, it may be reasonable for a retailer to not make price adjustments to those offers, or to make lesser adjustments compared to other offers.

Example 11: Reasonable adjustments for different retail products

Retailer A offers a 'green contract', which is backed by purchasing green energy certificates for each unit of consumption by customers on this contract. Retailer A also offers a standard electricity contract for which it does not purchase green energy certificates.

The cost of green energy certificates undergoes a sustained and substantial reduction, while other costs stay the same. Retailer A decides to adjust the prices of its green contracts to pass through the reduction in green energy certificate costs, but does not adjust its other offers. Retailer A has made the required reasonable adjustments.

Example 12: Reasonable adjustments for similar retail products

Retailer A has one group of customers on an aggressively priced offer that it has been heavily marketing to attract new customers. The offer is a standard electricity supply tariff with a daily charge and a per kWh usage charge. The offer has no other substantive features or conditions.

Retailer A has another group of customers on a higher priced offer, which has the same structure as the aggressively priced offer that the other group of customers receive. Apart from their prices, these two offers are substantively the same.

In circumstances where a sustained and substantial cost reduction has occurred, it would not be reasonable for Retailer A to pass on the cost reduction only to the group of customers on the aggressively priced offer, and not to the other group. The ACCC considers that passing cost reductions through to the higher priced customers is important. For customers on aggressively priced products, it may be relevant to consider the margins associated with those products when assessing the reasonableness of price adjustments.

Example 13: Cost reductions presented in the form of a new offer

A sustained and substantial reduction in the costs of procuring electricity occurs that applies to the supply to all small customers in a particular region.

A retailer in that region decides to pass on the cost reduction by introducing a new product that is much cheaper than the current products it offers or supplies. It does not change the tariffs of its existing products, but it does give those customers the opportunity to switch to the better deal.

This retailer has not made a reasonable adjustment to the prices of its offers and supplies for the purposes of s. 153E(1)(b). Offering its existing customers the opportunity to take up another product is not a reasonable adjustment to the price of existing offers and supplies.

- 2.33. A third aspect to the ACCC's approach to 'reasonable adjustments' is that a reduction must also be seen in the context of cost trends in the period leading up to the reduction in a particular cost component, as well as the trend of other cost components. The way in which the retailer has responded to recent cost increases or cost reductions plays a role in determining to what extent price reductions would be appropriate in the face of a cost reduction.

- 2.34. If a reduction in one cost component is offset by increased costs for another component, this might also influence the extent to which a retailer will be obliged to reduce its prices. All components of a retailer's costs that can be reasonably attributed to supplying electricity to the relevant customers may be factored into the ACCC's assessment of whether a retailer has made a reasonable adjustment. However, it would not be open for a retailer to claim that it has reasonably adjusted its prices (or reasonably failed to adjust its prices) where offsetting costs have been artificially inflated.
- 2.35. It is not expected that compliance would require price reductions to be made that would result in retailers needing to offer products below cost price (that is the total cost, including relevant retail costs).

Monitoring and investigation of s. 153E

- 2.36. The ACCC's general approach to monitoring and enforcing the Part XICA prohibitions is set out in section 5 of our Guidelines below. Section 153E raises some specific monitoring and investigation issues, which are discussed here. The ACCC intends to take a two-stage process to monitoring s.153E:
- First, the ACCC will undertake routine monitoring of costs and retail prices as part of its Electricity Monitoring Inquiry.
 - Second, should the ACCC observe particular pricing conduct that raises concern under s.153E, the ACCC may investigate individual retailers' conduct to determine whether a breach has occurred.

Monitoring of costs and prices

- 2.37. As explained above in 'sustained and substantial reductions', the ACCC will be focusing on reductions in the underlying cost of procuring electricity that are market-wide, or at least affect a broad number of retailers such as a reduction in the regulated network tariffs for a particular network region.
- 2.38. The ACCC will consider complaints that relate to reductions in relevant costs as part of its monitoring activities.
- 2.39. The ACCC will also routinely monitor developments in costs as part of its current Electricity Monitoring Inquiry.²³ Under the current Electricity Monitoring Inquiry, the ACCC undertakes an annual assessment of cost changes in the NEM. The information in this analysis is obtained from retailers and is based on their incurred costs in the preceding financial year. The ACCC will consider the analysis undertaken in this reporting activity in its monitoring of costs for the purpose of s. 153E. Should the ACCC's analysis of cost changes reveal a market wide cost reduction that appears to be sustained and substantial (or at least one affecting a broad number of retailers), the ACCC may review relevant retail prices to determine whether further investigation is necessary.
- 2.40. However, the ACCC's assessment of annual cost changes in its monitoring inquiry is unlikely to be determinative in assessing whether a sustained and substantial reduction in costs has occurred. Cost reductions may take a form that is not well captured in the ACCC's analysis, or may span the end and beginning of financial

²³ Further information is available at <https://www.accc.gov.au/regulated-infrastructure/energy/electricity-market-monitoring-2018-2025>.

years and therefore not be clearly represented in the ACCC's annual analysis.²⁴ The ACCC may undertake other routine monitoring of costs in the course of its Electricity Monitoring Inquiry.

- 2.41. There are a number of other cost and price forecasts and analyses undertaken by agencies in the sector, such as the AER's annual process to set the Default Market Offer (**DMO**) in each relevant distribution region, and the Australian Energy Market Commission's (**AEMC**'s) annual Residential Electricity Price Trends report. These forecasts and analyses of costs are another source of information that the ACCC will use to identify the potential for sustained and substantial reductions in the underlying cost of procuring electricity.
- 2.42. The ACCC may also undertake a review of price changes in the market to understand, at a high level, if there has been a reaction in market prices to observed cost reductions.

Investigating particular pricing conduct

- 2.43. Following the monitoring of costs and retail prices, should the ACCC have specific concerns that a retailer has not adjusted its prices following a sustained and substantial market wide cost reduction, the ACCC may investigate individual retailers' conduct to determine whether a breach of s. 153E has occurred. The ACCC will expect retailers to be able to justify their price adjustments (or lack thereof), should the ACCC seek such information.
- 2.44. Section 153E only requires reasonable adjustments where actual sustained and substantial cost reductions have occurred. Forecasts and analyses of trends will only be indicative of how costs might change in the future. For example, if a retailer did not reduce its market offer prices following a reduction in the DMO, this would not by itself form a basis for the ACCC to initiate detailed investigations of that retailer's price adjustments. Similarly, the ACCC would not accept a lack of change in the DMO as a retailer's basis for establishing compliance with s. 153E, where there have been actual sustained and substantial reductions in the underlying cost of procuring electricity.
- 2.45. Section 153E applies only to offers to supply electricity and the supply of electricity from the date of commencement (10 June 2020). However, when assessing whether there has been a sustained and substantial reduction, the ACCC may consider reductions in the underlying cost of procuring electricity that occur, or partially occur, in the lead up to 10 June 2020. In such circumstances, the ACCC's assessment of whether a retailer has made 'reasonable adjustments' post-commencement would take into account factors such as any relevant price adjustments made by retailers pre-commencement, and changes in other costs over the relevant period, including any portion of that period that occurred pre-commencement.

²⁴ For example, the ACCC's annual cost analysis takes a snapshot of the costs experienced by retailers over a financial year, so may underrepresent a cost reduction that has begun late in one financial year and continued into the following year.

3. Electricity financial contract liquidity provision

3.1. Section 153F of the CCA provides that:

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.

3.2. There are three separate matters that must be established under s. 153F:

- whether the corporation is subject to s. 153F
- the nature of the corporation's offer of (or failure to offer) electricity financial contracts
- whether the corporation's conduct had the purpose of substantially lessening competition in any electricity market.

3.3. Businesses are generally free to choose who they deal with. Failing to offer contracts, either to specific participants or the market more broadly, or offering them with unattractive terms will not on its own constitute a breach of s. 153F. Section 153F will only be breached where that conduct has the purpose of substantially lessening competition in any electricity market.

3.4. The prohibition contained in s. 153F applies to 'electricity financial contracts'. These are defined as contracts where rights are derived from, or relate to, the price of electricity on an electricity spot market but where the operator of that spot market is not a party to the contract.²⁵

3.5. Electricity financial contracts do not include contracts for the *supply* of electricity (sometimes referred to as 'physical' contracts). Electricity financial contracts are financial instruments that are not settled through a wholesale spot market but, rather, via side payments between the parties to the contract, or via an exchange trading platform.

3.6. Electricity financial contracts are an important risk management tool for both generators and wholesale users of electricity. By entering into electricity financial contracts, a retailer (generator) can reduce its exposure to volatility in the spot market, and by doing so provide a more certain future cost (revenue) stream to incorporate into business decisions.

²⁵ *Competition and Consumer Act 2010* (Cth), s. 153C.

- 3.7. Section 153F does not exclude any types of counterparties to electricity financial contracts from the prohibition. In many cases, counterparties will be electricity retailers and conduct relating to these contracts is clearly intended to be captured.²⁶ In other cases, counterparties will be large end-users, financial intermediaries, or speculators. The ACCC's general approach will be to focus on conduct relating to retailer counterparties as this conduct is more likely to substantially lessen competition in an electricity market (as required by s. 153F(3)). However, the ACCC may pursue conduct affecting other types of counterparties should that conduct also have the potential purpose of substantially lessening competition in an electricity market.
- 3.8. For electricity retailers, the availability of financial contracts with counterparties is critical to managing the risk of price volatility in the wholesale market²⁷, and standalone retailers without physical generation rely on a liquid financial contract market for financial contracts to manage risk exposure to wholesale spot prices.²⁸
- 3.9. Electricity financial contracts may be entered into via an exchange with a centralised clearing function, such as the Australian Securities Exchange, or through bilateral contracting between parties (over-the-counter (**OTC**)). Section 153F is intended to capture these contracts regardless of what forum they are entered into or through.²⁹
- 3.10. Section 153F aims to ensure that generators, including gentailers, do not refuse to offer financial contracts, or offer financial contracts with unattractive terms, for anti-competitive purposes.³⁰ The Explanatory Memorandum states that the prohibition contained in s. 153F is not intended to:
- extinguish contractual arrangements already on foot or compromise a generator's ability to meet its commitments under existing contracts
 - deal with contract illiquidity as a result of physical issues in the electricity sector
 - interfere with genuine efficient risk management strategies by participants in electricity markets, including internal contracting by a gentailer.³¹

Establishing whether a corporation is subject to s. 153F

- 3.11. Section 153F only applies to a corporation's financial contracts behaviour if:
- the corporation itself generates electricity³², or
 - the corporation is related to another body corporate which generates electricity.³³

²⁶ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.49.

²⁷ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.49.

²⁸ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.51.

²⁹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 2.61 and 2.62.

³⁰ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.48.

³¹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.52.

³² *Competition and Consumer Act 2010* (Cth), s. 153E(a)(i).

³³ *Competition and Consumer Act 2010* (Cth), ss. 4A and 153F(a)(ii).

- 3.12. The ACCC notes that Part XICA does not define when a corporation generates electricity. The ACCC's proposed approach is that a corporation generates electricity for the purposes of this provision if it is required under Chapter 2 of the National Electricity Rules (**NER**) to be registered by the Australian Energy Market Operator (**AEMO**) in respect of its ownership, operation or control of a generating system.³⁴
- 3.13. A corporation will be related to a body corporate that generates electricity if it is a 'related body corporate' for the purposes of s. 4A(5) of the CCA.

Example 14: Related body corporate

The following corporate entities exist:

- Trading Arm Pty Ltd offers electricity financial contracts
- Gentailer Parent Pty Ltd owns all the shares in Trading Arm Pty Ltd
- Generator 1 Pty Ltd holds a generating licence to operate a generator in South Australia and is required to be registered as a generator under Chapter 2 of the NER
- Gentailer Parent Pty Ltd also owns all the shares in Generator 1 Pty Ltd.

In this example Trading Arm Pty Ltd, a corporation that offers electricity financial contracts, is related to a body corporate that generates electricity (Generator 1 Pty Ltd). Trading Arm Pty Ltd will be a corporation that is subject to s. 153F.³⁵

Nature of corporation's offer (or failure to offer) electricity financial contracts

- 3.14. Section 153F(b) provides for three ways in which a corporation may engage in prohibited contracting behaviour to limit competition³⁶:
- **Failing to offer electricity financial contracts.** The ACCC's position is that only a corporation that is able to offer financial contracts can 'fail' for the purposes of this provision (where it chooses not to offer financial contracts).³⁷
 - **Limiting or restricting offers to enter into electricity financial contracts.** The ACCC's position is that this would apply where a corporation has generation capacity such that it is able to offer financial contracts, but does not offer them to the extent to which it could. This might be apparent where a generator significantly reduces the number of electricity contracts that it is willing to offer to the market.³⁸
 - **Offering to enter into contracts in a way that has, or on terms that have, the effect of limiting or restricting acceptance of those offers.** The ACCC's position is that this would apply to a corporation which has generation capacity such that it is able to offer financial contracts, but when doing so the corporation

³⁴ To the extent that s. 153F applies to non-NEM regions (see paragraph 1.6), the ACCC will consider whether a corporation is required to be licensed under state or territory legislation in relation to its ownership, operation or control of a generator.

³⁵ Because of the operation of s. 4A(5)(c) of the *Competition and Consumer Act 2010* (Cth).

³⁶ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.56.

³⁷ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.56.

³⁸ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.56.

applies such commercially unattractive terms that no reasonable counterparty would be likely to accept them.³⁹

- 3.15. The ACCC notes that corporations with generation assets may regularly seek to limit or restrict their supply, or acceptance, of electricity financial contracts for legitimate risk management purposes. Where a counterparty rejects an offer because it is not satisfied with the terms, this does not necessarily mean that a corporation has engaged in the conduct set out in s. 153F(b)(iii). More is required than a counterparty's assessment that it prefers more attractive terms in order to accept the contract on offer. The necessary element of purpose is considered below.
- 3.16. The ACCC notes that the concept 'preventing, limiting, or restricting acceptance of offers' is very similar to the words in s. 45AD(3)(a) of the CCA.
- 3.17. The ACCC will give the words 'preventing, limiting or restricting' their ordinary meaning. The ACCC will take into account how a reasonable counterparty is likely to respond to offers which include the relevant terms, other terms being used in the industry, the previous contracting behaviour of the corporation making the offer, and other relevant facts, in making its assessment.

Example 15: Not failing to offer electricity financial contracts

Generator A operates a wind farm with intermittent output and sells its output into the spot market. Generator A has not sought to firm its wind farm's capacity yet, though is exploring options for doing so with the goal of being able to offer hedging contracts and reducing the risk profile of its revenue streams. Generator A does not currently offer contracts as the output from its wind farm, absent any firming, is not suitable to back the types of contracts that counterparties are interested in.

Generator B operates an ageing coal plant that has become less reliable. It does not make commercial sense to upgrade the plant as alternative technologies are now considerably cheaper. Generator B therefore continues to operate the coal plant but, taking its unreliability into account, only offers contracts for up to 60% of the coal plant's capacity.

Generator C operates a portfolio of generation assets, which includes an ageing coal plant. In December 2019, Generator C made a decision to shut the ageing coal plant down at the end of 2026 as it anticipated the plant would no longer be profitable after this date. Generator C does not plan to replace the ageing coal plant with any new generation assets. Generator C continues to offer hedging contracts, in line with its risk management policy, for periods up to the end of 2026. For periods after 2026, Generator C offers proportionately fewer hedging contracts than it did while its coal plant was operational.

Generator D operates a gas-powered unit, which it constructed 3 years ago. Generator D partially funds this investment by selling cap contracts for peak periods. To ensure it is able to defend its cap position, Generator D only offers caps once it has secured a commercially viable price for gas supply for the relevant period. Generator D has not been able to secure a commercially viable price for gas supply for the first quarter of 2021 and for this reason is not offering any contracts for that period.

³⁹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.56.

In these circumstances, Generators A, B, C and D have not breached s. 153F because they have not failed to offer contracts or did not have a purpose of substantially lessening competition (or both). The purpose of the substantially lessening competition element is explored below.

Purpose for the corporation's behaviour must be to substantially lessen competition

- 3.18. A corporation which fails to offer electricity financial contracts, or offers contracts in the ways set out in s. 153F(b)(ii) and (iii), will not contravene s. 153F unless its purpose is to substantially lessen competition.
- 3.19. The anti-competitive purpose needs to be a substantial purpose of the corporation.⁴⁰
- 3.20. Even if the corporation's conduct has the effect of substantially lessening competition, this will not contravene the prohibition if the corporation does not have a substantial anti-competitive purpose. Conversely, a corporation could potentially have a purpose of substantially lessening competition, even if its conduct did not have the effect of substantially lessening competition.

Example 16: Failing to offer electricity financial contracts, but not for the purpose of substantially lessening competition

Generator A is a corporation subject to s. 153F and regularly offers electricity financial contracts. However, Generator A observes a particular upcoming month in which it anticipates spot market prices are likely to be a superior revenue opportunity than selling contracts. Generator A decides to stop offering contracts that cover this month and instead utilises its remaining uncontracted capacity to expose itself to spot market prices.

Generator A's conduct would likely be covered by s. 153F(b). However, Generator A has a legitimate commercial purpose for not offering contracts for this month. Generator A's purpose was not to substantially lessen competition, and it therefore has not breached s. 153F.

Example 17: Limiting acceptance of electricity financial contracts for the purpose of substantially lessening competition

Gentailer A is one of the few owners of firm generation in a region. A potential new entrant retailer, Cut Price Power, plans to enter the region and approaches Gentailer A to secure a hedge contract.

Gentailer A has identified Cut Price Power as a serious competitive threat to its significant retail business. For this reason, Gentailer A offers Cut Price Power a hedge contract at an extremely uncompetitive price such that Cut Price Power will be unlikely to be able to sustainably compete on price with Gentailer A's retail business. Gentailer A does this with the intent of discouraging Cut Price Power from entering the region.

⁴⁰ *Competition and Consumer Act 2010 (Cth)*, s. 4F.

Cut Price Power ultimately secures hedge contracts that allow it to maintain its pricing strategy from a different market participant and enters the region.

Even though Gentailer A's conduct has not had the effect of substantially lessening competition, it still had the purpose of doing so. Gentailer A has therefore likely breached s. 153F.

- 3.21. The effect of s. 153J will be that a corporation's purpose may be inferred from its conduct (or that of its officers) or other relevant circumstances.
- 3.22. The ACCC's approach will be that the 'purpose of substantially lessening competition' test is to distinguish between contracting decisions reflecting genuine, efficient risk management from contracting decisions with an anti-competitive purpose.

Example 18: Limiting or restricting offers to enter into electricity financial contracts, but not for the purpose of substantially limiting competition

Gentailer A is a gentailer with a risk management policy that allocates 90 per cent of its generation capacity to the consumption of its own retail customers and third party bilateral contracts. The remaining 10 per cent of its generation capacity is left uncontracted, to allow for unplanned outages and maintenance. When all of Gentailer A's capacity is available, the uncommitted 10 per cent is sold on the spot market.

Gentailer A refuses to enter into a bilateral contract with Retailer B for the last 10 per cent of Gentailer A's generation capacity because it would contravene its risk management policy. Gentailer A has not contravened s. 153F, as its refusal to enter into a contract did not have the purpose of substantially lessening competition.

- 3.23. The ACCC will seek to maintain a consistent approach to applying the concept of 'substantially lessening competition' in s. 153F as it does in other sections of the CCA.
- 3.24. There is no legislative definition of 'substantially lessening competition'; however, the test is longstanding within Australia's competition laws. In essence, conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deterring, hindering or preventing competition. This can be done by raising barriers to competition or to entry into a market.
- 3.25. 'Lessening competition' means that the process of rivalry is diminished or lessened, or the competitive process is compromised or impacted. 'Lessening competition' extends to 'preventing or hindering competition'.⁴¹
- 3.26. 'Substantially' means meaningful or relevant to the competitive process. It is a relative concept and does not require an impact on the whole market.
- 3.27. The concept of substantially lessening competition is generally concerned with the impact on the competitive process rather than the impact on any particular participant in the market. In some instances, harm to an actual or potential individual competitor may also substantially lessen competition where that competitor represents a strong competitive constraint.

⁴¹ *Competition and Consumer Act 2010* (Cth), s. 4G.

3.28. In *Rural Press v ACCC*, the majority of the High Court relevantly assessed ‘substantially’ by asking:

*...whether the effect of the arrangement was substantial in the sense of being meaningful or relevant to the competitive process, and whether the purpose of the arrangement was to achieve an effect of that kind.*⁴²

3.29. In *Universal Music v ACCC*, the Full Court observed:

*... The lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind. It must be ‘meaningful or relevant to the competitive process’.*⁴³

Example 19: Limiting or restricting offers to enter into electricity financial markets for the purpose of substantially lessening competition

Gentailer A competes in the retail market in a particular region and has regular bilateral contracts with Retailers B, C and D, who are retailers without generation assets.

Retailer B becomes a competitive threat to Gentailer A at the retail level by marketing a new, innovative product. The new product becomes popular and Gentailer A starts to lose customers to Retailer B.

Gentailer A knows that Retailer B does not own any generation assets and that without contracts with Gentailer A, Retailer B’s exposure to volatility in the spot market will increase. Gentailer A continues contracting with Retailers C and D as normal, but refuses to contract with Retailer B in the hope that Retailer B will be forced to significantly reduce the scale of its operation.

Retailer B’s offers to customers represented a significant competitive constraint on Gentailer A’s conduct in the retail market. In refusing to contract with Retailer B, Gentailer A had the purpose of substantially lessening competition in an electricity market at the retail level and has likely contravened s. 153F.

⁴² *Rural Press v ACCC* (2003) 216 CLR 53 at [41].

⁴³ *Universal Music v ACCC* (2003) 131 FCR 529 at [242] quoting *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 at [114].

Example 20: Offering to enter into electricity financial contracts on terms that have the effect of limiting or restricting acceptance to those offers, but not for the purpose of substantially lessening competition

Generator A has a risk management policy that seeks to balance maximising revenue with minimising the amount of spot price risk Generator A is exposed to for any given quarter. ‘Quarter 6’ is a three month period in the future for which Generator A’s risk management policy sets out that Generator A should sell—in the current month—electricity financial contracts that represent 3 per cent of Generator A’s nameplate capacity. The generator then enters into contracts for that 3 per cent.

Subsequently, Retailer B approaches Generator A seeking a large contract for Quarter 6.

Generator A decides to offer Retailer B a contract but prices in the additional risk that Generator A is exposed to by entering into the contract (and exceeding the parameters of its usual contracting schedule). Having priced in this additional risk, Generator A’s contract offer is very uncompetitive and Retailer B rejects it.

Generator A’s conduct is likely covered by s. 153F(b)(iii). However, because the purpose for the prices in Generator A’s offer was to manage its risk and was not to substantially lessen competition, Generator A has not breached s. 153F.

Example 21: Offering to enter into electricity financial contracts on terms that have the effect of limiting or restricting acceptance to those offers, for the purpose of substantially lessening competition

Gentailer A transfers electricity between its generation and retail businesses by an internal transfer price. This is conducted at arm’s length, with the effect that the retail business pays a wholesale electricity price comparable to that which they could procure independently through contracting with other parties.

Retailer B is a competitor to Gentailer A in the retail market and approaches Gentailer A for a hedging contract for a future quarter. Gentailer A is currently also determining the price at which it will transfer electricity to its retail business for that same quarter. Gentailer A offers Retailer B a contract with pricing terms that are significantly worse than what it determines is appropriate for its own retail arm.

Gentailer A knows that there are few other sources of hedging contracts for Retailer B. Gentailer A also knows that Retailer B has succeeded in growing its retail market share recently, including winning many of Gentailer A’s customers. Gentailer A hopes that by offering Retailer B a high-priced contract, Retailer B will have to increase its prices to the point that it will struggle to compete for customers and may exit the market.

Gentailer A’s conduct had a purpose of substantially lessening competition and has likely breached s. 153F.

Factors the ACCC will consider when assessing electricity financial contracting conduct

- 3.30. The ACCC is aware that a generator will consider many factors when deciding whether and when to offer electricity financial contracts. For example, prudent management of spot market risk may involve contracting a generator's capacity progressively over a period of months or years. This may mean that a generator is only willing to offer a certain amount of contracts at any one time, and once those contracts have been taken up, it may not offer any more contracts for a period of time.
- 3.31. Prudent risk management may also restrict the amount of capacity that a generator makes available in contracts to something less than the nameplate capacity of the generator, to allow for outages or other issues that may result in the generator not being able to supply at its full capacity.
- 3.32. To the extent that these decisions are part of the corporation's legitimate risk management strategies, and do not have an anti-competitive purpose, the ACCC will not seek to address such contracting behaviour.
- 3.33. Electricity financial contracts can also expose parties to counterparty default. Inappropriate contracting can increase the risk faced by parties rather than reduce it. Such an increase in risk is likely to flow through to consumers across the sector as an increased cost of supply. The ACCC therefore considers it important that s. 153F does not force generators to enter into contracts that they would otherwise have rejected due to legitimate counterparty risks.
- 3.34. Other factors that the ACCC will have regard to when assessing a potential breach of s. 153F include:
- the age of the plant and decisions regarding maintenance, investment, retirement, and safety
 - fuel availability and alternative uses, and markets, for that fuel.

4. Electricity spot market provision (basic and aggravated cases)

- 4.1. Sections 153G and 153H apply to generators that bid or offer to supply electricity in an electricity spot market.
- 4.2. Sections 153G and 153H of the CCA provide that:

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.

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.

4.3. Each of the basic (s. 153G) and aggravated (s. 153H) cases has two elements that must be present for the prohibition to apply:

- the behaviour of a generator in the spot market
- the characterisation and/or purpose of that behaviour.

4.4. These two elements are treated separately below.

Spot market behaviour

4.5. The first element of the basic and aggravated cases, ss. 153G(a) and 153H(a), describes the kind of activities that may be considered prohibited conduct in an electricity spot market.⁴⁴ These activities are the same for both cases, and involve bidding and rebidding, or the failure to do so.

Bidding and rebidding

4.6. Sections 153G(a) and 153H(a) are intended to cover all forms of generator bidding behaviour on a spot market, including initial bidding/offers, rebidding (whereby initial bids are re-submitted), or a generator's failure to bid.⁴⁵

4.7. In the NEM, scheduled generators submit offers to supply the market the day before dispatch occurs.⁴⁶ These offers include specified volumes for every five minutes at up to 10 different prices. Offers can be adjusted at any time up to the point of dispatch, through rebids.

4.8. In practice it is technically difficult for a generator to 'fail to bid', as scheduled generators are required to submit bids even if they do not intend to be in the market (for example, if they are down for maintenance). In such circumstances, these bids specify a volume of zero MW of capacity.⁴⁷ Given these technical considerations, it is likely that most ACCC assessments of conduct under these prohibitions would utilise

⁴⁴ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.82.

⁴⁵ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.83.

⁴⁶ A generator with an aggregate nameplate capacity of 30 MW or more usually classifies as scheduled if it has appropriate equipment to participate in the central dispatch process managed by AEMO. A generating system with intermittent output and an aggregate nameplate capacity of 30 MW or more usually classifies as semi-scheduled, unless AEMO approves its classification as a scheduled or non-scheduled generating unit. Both scheduled and a semi-scheduled generators must participate in the central dispatch process managed by AEMO, including submitting a schedule of offers to supply a day in advance. See AEMO, *Participant categories in the National Electricity Market*, https://aemo.com.au/-/media/files/electricity/nem/participant_information/new-participants/generator-exemption-and-classification-guide.pdf?la=en, viewed 6 May 2020.

⁴⁷ *National Electricity Rules*, clause 3.8.6(a)(3).

the bidding or rebidding behaviour, even if the practical effect of that bidding or rebidding was to withdraw capacity.

- 4.9. AEMO prepares pre-dispatch schedules to show participants the forecast outcome of aggregated participant bids and market forecasts. These schedules are regularly updated with new information submitted by participants, network operators and AEMO.⁴⁸ Late rebidding may increase the price volatility in the spot market, and decrease confidence in forward market information, such as the pre-dispatch forecast, and price volatility caused by (deliberate) late rebidding has the potential to inflate the value of financial hedge contracts and/or wholesale prices.⁴⁹
- 4.10. However, while rebidding may provide an opportunity for generators to make misleading bids, or to distort or manipulate prices (as discussed below), the ACCC recognises that rebidding in the NEM allows generators to adjust bids in response to unforeseen events or market conditions, and thus is an important risk management tool for generators, and facilitates efficient pricing and investment outcomes.⁵⁰ For the purposes of ss. 153G and 153H, the ACCC will not consider rebidding, including rebidding close to a dispatch interval, to be a concerning practice in and of itself.

Character or purpose of behaviour

- 4.11. The second element of the basic and aggravated cases, ss. 153G(b) and 153H(b), looks to whether the behaviour covered by the first element has a particular character or purpose.⁵¹ In the basic case, the prohibited conduct will be made out where either of the below limbs is present, while both of those limbs must be present for the aggravated case to be made out⁵²:
- the corporation has acted ‘fraudulently, dishonestly or in bad faith’ in carrying out the behaviour
 - the behaviour has been carried out for the ‘purpose of distorting or manipulating prices’ in the electricity spot market.

Fraudulently, dishonestly, or in bad faith

- 4.12. The Explanatory Memorandum provides that a corporation acts ‘fraudulently, dishonestly or in bad faith’ where its conduct is aimed at obtaining a financial or competitive advantage by unlawful or unfair means, involves wrongdoing or is not otherwise of a kind that would be expected of a person acting according to the standards of a reasonable and honest person.⁵³
- 4.13. In different contexts, courts have held that ‘fraudulently’ has a meaning interchangeable with ‘dishonestly’ and the ACCC proposes to take the same approach when interpreting ss. 153G and 153H.⁵⁴

⁴⁸ AEMC, *Gaming in rebidding assessment (Grattan response)—Final Report*, September 2018, p. 11.

⁴⁹ AEMC, *Bidding in good faith—Information sheet*, <https://www.aemc.gov.au/sites/default/files/content/8d8ee814-aa4e-46bd-ba2f-addef9fa08a2/Bidding-in-good-faith-information-sheet-final-determination.pdf>, viewed 6 May 2020.

⁵⁰ AEMC, *Gaming in rebidding assessment (Grattan response)—Final Report*, September 2018, pp. 10–11.

⁵¹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.85.

⁵² Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 2.85 and 2.86.

⁵³ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.89.

⁵⁴ See *Macleod v The Queen* (2003) 197 ALR 333 at [34]; *Peters v The Queen* (1998) 192 CLR 493 at [114]; *R v Glenister* [1980] 2 NSWLR 597 at [604], [607].

- 4.14. In determining whether a person has acted ‘dishonestly’, courts have applied a test of whether the person had knowledge, belief or intent which rendered their actions dishonest according to the standards of ordinary, decent people.⁵⁵ The ACCC proposes to adopt a similar approach using the standards of a reasonable and honest person to determine whether conduct is ‘fraudulent’ or ‘dishonest’.
- 4.15. The ACCC considers that s. 153G(b)(i) and clause 3.8.22A of the NER are concerned with similar types of behaviour. Clause 3.8.22A provides that a Scheduled Generator, Semi-Scheduled Generators or Market Participant must not make an offer, bid and rebid that is ‘false, misleading or likely to mislead’.
- 4.16. Noting these similarities, there may be conduct that both the ACCC and AER could consider pursuing respectively under these prohibitions. In such circumstances, the ACCC would seek to coordinate with the AER to determine the most appropriate enforcement action. However, the Part XICA prohibitions differ from the NER provisions, and conduct that the ACCC considers to be in breach of ss. 153G and 153H may not contravene clause 3.8.22A of the NER.
- 4.17. The ACCC position is that a corporation’s offer to supply energy at a particular price will be in ‘bad faith’ if, at the time when the corporation makes the offer, it does not intend to supply energy, or the relevant amount of energy, at the price made in the offer. That is, if the corporation’s actions or inactions at a particular time did not reflect what the corporation intended to do later should the conditions and circumstances upon which the offer, bid or rebid were based remain unchanged, then this action or inaction may breach the prohibition. However, if there was a change in the material conditions and circumstances upon which an offer was based following the making of the offer which led to the corporation rebidding (on the basis of that change), the ACCC’s position would be that the original offer was not necessarily made in ‘bad faith’. Examples of matters that may constitute changes in material conditions and circumstances may include, but are not limited to, changes in:
- AEMO’s forecasts
 - the weather
 - technical plant conditions.

Example 22: Bidding fraudulently, dishonestly, or in bad faith but not for the purpose of distorting or manipulating prices in an electricity spot market

Generator A bids in 500 MW of capacity at 3 pm on a particular day. At 9 am on the day, Generator A learns that its available capacity at 3 pm will only be 450 MW. Generator A does not expect that this change in its available capacity will have much impact on the spot price at 3 pm as plenty of other sources will be available, but considers that certain rivals will incur greater costs if they only learn they will be called on to provide additional capacity at short notice. Generator A therefore decides to keep its original bid in place until close to 3 pm when it rebids to reflect its available capacity.

Regardless of the outcome on other participants or spot prices, Generator A’s failure to rebid when it became aware of the change in circumstances was in bad faith and would likely contravene s. 153G.

⁵⁵ See *Peters v The Queen* (1998) 192 CLR 493 at [15].

- 4.18. Sections 153G and 153H do not limit the types of conduct that might be found to be in ‘bad faith’, and other forms of conduct not described in these Guidelines may represent bad faith on the part of a bidding generator.
- 4.19. The ACCC also notes that rule 542 of the National Gas Rules provides that a gas trading exchange member must not act ‘fraudulently, dishonestly or in bad faith’, and must not engage in any conduct with the ‘intent of distorting or manipulating prices’. This wording is very similar to that of ss. 153G and 153H. As at the time of publication of the Guidelines, there has been no judicial consideration of rule 542. Should such judicial consideration occur, those decisions will be used to inform and revise the ACCC’s approach to ss. 153G and 153H as appropriate.

Purpose of distorting or manipulating prices

- 4.20. The Explanatory Memorandum provides that a corporation acts for the ‘purpose of distorting or manipulating prices in an electricity spot market where its conduct seeks to undermine the process by which market participants would reasonably expect prices to be determined in a market characterised by effective competition.’⁵⁶ However, prices will not be considered ‘distorted’ or ‘manipulated’ merely because they are changed as a result of a corporation’s behaviour.⁵⁷
- 4.21. Courts have previously taken the view that market manipulation is centrally concerned with conduct, intentionally engaged in, which has resulted in a price which does not reflect the forces of supply and demand.⁵⁸
- 4.22. The NEM is designed to provide incentives for new entry or expansion through price signals in the spot market. These signals include high prices and price volatility. Frequent or persistent high prices may indicate a scarcity of generation capacity and provide a market signal and incentives for new investment. The ACCC will not consider high price events to be necessarily indicative of ‘distortion’ or ‘manipulation’ of electricity prices.

Example 23: Bidding to take advantage of higher prices

Generator A owns a peaker plant and has sold \$300 caps. These cap contracts mean that Generator A is required to pay the buyer the difference between the spot price and \$300 per MWh every time the spot price exceeds \$300 per MWh during the specified contract period.⁵⁹

At 2 pm on a trading day within the contract period for Generator A’s sold caps, the market price rises above \$300. Generator A responds by rebidding the capacity of its peaker plant to a level that will allow it to cover its sold cap position by being dispatched or causing the spot price to fall below \$300 per MWh. When the peaker plant is rebid, it has the effect of depressing the market price.

As outlined in paragraph 4.21 above, market manipulation is centrally concerned with

⁵⁶ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.91.

⁵⁷ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.95.

⁵⁸ See *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at [70].

⁵⁹ AEMC, *Spot and contract markets*, <https://www.aemc.gov.au/energy-system/electricity/electricity-market/spot-and-contract-markets>, viewed 6 May 2020.

conduct, intentionally engaged in, which has resulted in a price which does not reflect the forces of supply and demand. Here, the peaker plant is being turned on in response to an increase in demand and/or decrease in supply that has increased the market price.

While the turning on of the peaker plant has had the effect of depressing the market price, Generator A's conduct had a legitimate purpose: covering or defending its sold cap position in a manner that is consistent with the design of the spot market.

Generator A has therefore not contravened ss. 153G or 153H.

- 4.23. The ACCC recognises that the generation and technology mix in the NEM is diverse, and different generation technologies lend themselves to different bidding strategies and operational constraints. Flexible generation technologies such as a gas-fired plant tend to operate at peak times, whereas continuous technologies, such as coal-fired generators, tend to operate around the clock.
- 4.24. The generation fleet is currently undergoing a major transformation. This transition is likely to increase price volatility in the NEM and send signals to generators to adjust their behaviour in response to the growing share of renewable generation capacity. It is important that the application of ss. 153G and 153H does not impede efficient commercial responses to a market in transition.
- 4.25. The ACCC also acknowledges that generation assets will require maintenance and closure but considers that discretionary maintenance during periods of high demand will likely raise concerns about whether a generator has a 'purpose of distorting or manipulating prices'.

Example 24: Discretionary maintenance during periods of high demand

Generator A's power plants represent a significant amount of a network region's available capacity. Generator A takes one of its generators offline for unplanned and non-urgent maintenance when demand is at its peak and capacity is already constrained. Maintenance did not need to occur that day but Generator A knew its actions would cause a price spike resulting in Generator A receiving higher revenue from its remaining plants than it would have if all had remained online.

Generator A is likely to have engaged in behaviour with the purpose of distorting or manipulating prices, in breach of s. 153G.

Example 25: Required maintenance during periods of high demand

Generator A owns a coal fired generator, and becomes aware that it needs to conduct some emergency maintenance on one of its units. The maintenance has to be done promptly and will take three days to complete.

It is early summer and Generator A knows that there is unlikely to be an opportunity to conduct the maintenance at a time that will not cause a large increase in prices in the spot market.

There is currently high demand in the market, but market forecasts indicate that there will likely soon be a period characterised by days of extreme demand. Generator A decides to

conduct the maintenance across three days during the current period of high demand. Generator A believes this will cause a relatively lower increase in prices than if it waits.

On the second day that Generator A is conducting maintenance, a critical interconnector linking the relevant NEM region to other regions is tripped unexpectedly. This causes spot prices in the region to increase dramatically.

Generator A's failure to bid into the market due to maintenance has not been undertaken for the purpose of distorting or manipulating prices. While Generator A's conduct will likely have the effect of increasing spot prices, including exacerbating the effect of the interconnector tripping, the emergency maintenance represents a legitimate purpose for its withdrawal of capacity. Generator A has therefore not contravened ss. 153G or 153H.

- 4.26. The Explanatory Memorandum provides that ss. 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.⁶⁰ This includes strategies undertaken by generators to optimise their operation and the economic rationing of capacity.⁶¹
- 4.27. The Explanatory Memorandum provides that bidding and optimisation strategies may change in response to various market signals such as forecast supply and demand balances.⁶² As discussed in the 'Spot market behaviour' section above, the ACCC does not view rebidding to be a concerning practice in and of itself, and understands that generators rebid in response to changing market conditions or other relevant and material circumstances.

Example 26: Utilising a reasonable optimisation strategy

Generator A owns a large coal-fired generator, with high start-up costs and a long lead time from ignition to full capacity. Generator A bids in at \$40 per MWh to ensure dispatch and allow it to operate constantly, despite operating costs of \$50 per MWh. Constant operation allows Generator A to avoid high start-up costs while offsetting losses through its contract position, and by receiving higher prices during periods when supply and demand are tighter.

Generator A's conduct is an optimisation strategy reasonably expected of a large coal-fired generator operating in the spot market and does not have the purpose of distorting or manipulating prices. Generator A's bidding conduct has not contravened ss. 153G or 153H.

⁶⁰ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.104.

⁶¹ Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraphs 2.101 and 2.102.

⁶² Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.103.

Example 27: Utilising a reasonable optimisation strategy

Generator A has a 1000 MW base-load generator and has sold 400 MW of contracts. For the majority of the year it bids its entire capacity into the NEM at its marginal cost of \$30 per MWh. In most intervals, its entire capacity is dispatched. Generator A's strategy means that its uncontracted capacity earns no return when it sets the price, but does earn a return whenever the price is higher. While the resulting dispatch is efficient, this spot income is insufficient to cover Generator A's fixed costs.

With a very high demand forecast tomorrow, it is apparent that Generator A's capacity will be required. As soon as practicable after the change in forecast demand, Generator A changes its bidding strategy and bids in at high prices for the period of the peak, resulting in significantly higher prices during the peak period. The increased revenue helps Generator A to recoup some of its fixed costs.

Generator A rebids in accordance with the NER and the high price period is communicated to participants in advance of it occurring via AEMO's predispatch forecasting system.

While Generator A's conduct has a significant impact on prices during the high demand period, this type of scarcity pricing is a design feature of the NEM and an important signal to investors. By rebidding to high prices, Generator A is risking being displaced in the merit order by other generators and missing out on revenue.

Generator A's bidding behaviour does not have the purpose of distorting or manipulating prices. It is an optimisation strategy that would reasonably be expected of a generator operating in an energy only spot market. Generator A has not contravened ss. 153G or 153H.

Example 28: Rebidding in response to an unplanned outage

A generator operates a 400 MW coal plant comprised of four 100 MW units. The generator has a low operating cost at optimal output levels of 75 MW for each unit or 300 MW in total. To cover its costs and to provide some revenue certainty the generator sells a forward contract for 300 MW.

The contract encourages the generator to bid so that it is dispatched for at least 300 MW of its 400 MW capacity when spot prices are higher than its operating costs. Consequently the generator bids 300 MW into the market. The balance of capacity, 100 MW, is bid into the market at prices above \$300 per MWh.

At 12:55 pm, the generator has been dispatched for 300 MW. The price of electricity is \$60 per MWh and pre-dispatch forecasts suggest it will remain at or above this level for several hours. At 12:57 pm, one of the generator's units unexpectedly trips and can only be restarted after a period of several hours, so the generator rebids the unit as unavailable. Forecast prices are now expected to be high.

If the generator does not change its bids for the other units, at 1:00 pm, AEMO will dispatch it to generate 225 MW and prices in the region will increase to over \$300 per MWh for several hours. This motivates the generator to restore its output to 300 MW as soon as possible to cover its contracted load and avoid incurring costs under the contract. It rebids the 75 MW available from the three remaining units (25 MW per unit) into the low price

bracket so that 300 MW of capacity is dispatched until the fourth unit is ready to be returned to service. As a result of the rebid, prices in the region fall to \$60 per MWh and are forecast to remain at this level for several hours, as before.

In this example, the generator has bid and rebid, including rebids very close to the dispatch interval. However, the generator's purpose for bidding was to cover its contract position. Its conduct did not have a character or purpose prohibited by ss. 153G(b) or 153H(b).

- 4.28. The ACCC also recognises that some corporations' bidding strategies are conducted at a portfolio level—that is, across multiple generation assets which may utilise different generation technologies. In assessing whether conduct has a purpose of distorting or manipulating prices, the ACCC may consider aspects such as the bidding strategies of individual generation units in the context of the corporation's generation portfolio.
- 4.29. As with the Electricity Financial Contract Market Liquidity provisions, the effect of s. 4F(1)(b) of the CCA is that the prohibited 'purpose of distorting or manipulating prices' must be a substantial purpose of the corporation.
- 4.30. In assessing whether conduct has the 'purpose of distorting or manipulating prices', the ACCC will consider whether there is any other legitimate purpose for the conduct. These assessments will be difficult. The ACCC may consider whether an offer or bid would have been made (or not made) but for a 'purpose of manipulating or distorting prices'.⁶³
- 4.31. Section 153J provides that the existence of a prohibited purpose may be found even if it is only ascertainable by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

Example 29: Conduct that is fraudulent, dishonest, or in bad faith and for the purpose of distorting or manipulating prices in the electricity spot market

Generator A submits offers to provide 500 MW of capacity at 3 pm on the following day but at 9 am on the following day, Generator A learns that its available capacity at 3 pm will only be 400 MW.

Generator A expects that there will be a tight supply-demand balance at 3 pm, and so Generator A anticipates that this change in its available capacity will have a large impact on the spot price at 3 pm. Generator A wants to maximise the price it will receive for its available capacity and considers that the increase in prices as a result of it reducing its capacity will be greater the closer to 3 pm that it rebids.

Generator A therefore decides to keep its original bid in place until very close to 3 pm, when it rebids to reflect its actual available capacity.

Generator A has likely bid fraudulently, dishonestly or in bad faith, and for the purpose of distorting or manipulating prices, in breach of s. 153H.

⁶³ See *North v Marra Developments Limited* (1981) 148 CLR 42.

Example 30: Conduct that is fraudulent, dishonest, or in bad faith and for the purpose of distorting or manipulating prices in the electricity spot market

Generator A owns four large generating units. Generator A anticipates that there will be a tight supply-demand balance between 1 pm and 3 pm on a particular day.

Generator A believes that if one of its generating units, Unit 1, is withdrawn from the market, it is likely that an extremely high priced bid from other generators will set the market price during these two hours and as a result it will receive a very high price for the output of its three remaining units. Generator A anticipates that this would be more profitable than having all four of its units operating.

Generator A decides to claim that Unit 1 is unavailable from 1 pm because of a technical issue even though this is not actually the case. It therefore declares the unit unavailable, and withdraws it from the market. Generator A does so with the intention of causing a high price for its other three units.

Generator A's failure to bid Unit 1 as a result of its false claim of technical issues would be considered fraudulent, dishonest or in bad faith. Further, its failure to bid has been undertaken for the purpose of distorting or manipulating prices. Generator A has likely breached s. 153H.

5. ACCC investigation and enforcement

- 5.1. The prohibitions come into effect on 10 June 2020 and the ACCC will expect participants to be compliant with the prohibitions from that date.
- 5.2. The ACCC's primary objective is to ensure compliance with the CCA. The ACCC uses a variety of tools and approaches to encourage compliance and prevent breaches of the CCA, including industry engagement and monitoring, education initiatives and enforcement action when appropriate.
- 5.3. The CCA provides for a range of enforcement remedies, a number of which are available in respect of the Part XICA prohibitions. Part XICA also provides for some new, specific remedies in certain circumstances. The remedies available under Part XICA are discussed in further detail below.
- 5.4. The ACCC exercises its enforcement and compliance powers independently, in the public interest and with integrity and professionalism. Further information is available in the ACCC's Accountability Framework for Investigations.⁶⁴
- 5.5. The ACCC regularly receives reports or complaints from businesses, consumers and other interested stakeholders about conduct that may contravene the CCA. The ACCC assesses these allegations in accordance with our Compliance and Enforcement Policy and Priorities. This Policy is reviewed annually and new priority areas of focus are identified. For 2020, one of ACCC's priorities is to deal with consumer and small business issues relating to pricing and selling practices in the energy sector.

⁶⁴ ACCC, *Accountability Framework for Investigations*, April 2019. Available at <https://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations>.

- 5.6. In addition, the ACCC is currently conducting an inquiry into the NEM under Part VIIA of the CCA. Subject to confidentiality requirements, information obtained in the course of the ACCC's inquiry may be considered by the ACCC as part of investigations into possible breaches of the prohibitions in Part XICA.
- 5.7. The ACCC's first priority is always to achieve the best possible outcome for the broader community. In pursuing enforcement action, the ACCC seeks to maximise the impact of this enforcement action by seeking widespread industry change and compliance.
- 5.8. In making decisions on the level of any compliance or enforcement action the ACCC considers the following factors:
- conduct that is of significant public interest or concern
 - conduct resulting in substantial consumer or small business detriment
 - national conduct by larger traders
 - conduct involving a significant new or emerging market issue or where our action is likely to have an educative or deterrent effect
 - where our action will assist to clarify aspects of the law.
- 5.9. In addition to these matters, when considering its response to possible breaches of the Part XICA prohibitions, the ACCC will consider:
- the nature and extent of the alleged conduct, including the willingness of the business to take action to address the conduct
 - the extent to which the business has taken reasonable steps to ensure compliance with the prohibitions
 - the nature of the alleged conduct and the extent to which it has caused or is likely to cause significant harm to consumers, businesses and the integrity of the market
 - the likely impact of the conduct on competition in the market and outcomes in the market.
- 5.10. In addition to considering whether conduct raises concerns under Part XICA, the ACCC will also consider the application of other provisions in the CCA, including the competition provisions in Part IV.
- 5.11. Before undertaking any enforcement or compliance action, the ACCC considers whether the proposed action is proportionate to the conduct and resulting harm. Additionally, the ACCC follows the principles and binding rules as established by the Australian Government's Legal Services Directions and Model Litigant Policy.

6. Enforcement and remedies

- 6.1. The ACCC will investigate alleged contraventions of the CCA in accordance with our published procedures and guidelines. This may include obtaining information, documents and evidence through the issuing of compulsory s. 155 notices. Further information about this process is available in our Section 155 Guidelines⁶⁵ and Information Policy.⁶⁶
- 6.2. Where the ACCC considers that a person has engaged in conduct that contravenes Part XICA, it has a number of enforcement options available.
- 6.3. In appropriate circumstances, the ACCC may:
 - resolve the matter administratively
 - issue public warning notices (s. 153M)
 - issue infringement notices (s. 153N)
 - accept court enforceable undertakings (s. 87B).
- 6.4. As is the case in respect of conduct that might breach other provisions of the CCA, the ACCC may consider taking legal proceedings in the Federal Court to seek orders including:
 - injunctions (s. 80)
 - pecuniary penalties (s. 76).
- 6.5. In addition to the above remedies, in appropriate circumstances and upon recommendation by the ACCC, under Part XICA of the CCA, the Treasurer can:
 - make contracting orders (s. 153X)
 - apply to the Federal Court for a divestiture order (s. 153ZA).
- 6.6. The ACCC will have regard to its obligations to provide procedural fairness when exercising powers in relation to the Part XICA prohibitions.
- 6.7. More information in relation to each of the enforcement options available to the ACCC in respect of Part XICA conduct is set out below.

Administrative resolution

- 6.8. In some instances the ACCC will choose to resolve an enforcement investigation through an administrative resolution, without drawing on the formal remedies available under the CCA.
- 6.9. The ACCC chooses to resolve matters via an administrative resolution in circumstances where the potential detriment from the conduct is low. In these circumstances the ACCC will accept from the parties a commitment that the conduct has ceased and, where appropriate, compensation or other remedial steps are undertaken to address the ACCC's concerns.

⁶⁵ ACCC, *ACCC guidelines—use of s. 155 powers*, June 2019. Available at <https://www.accc.gov.au/publications/accc-guidelines-use-of-s-155-powers>.

⁶⁶ ACCC/AER, *ACCC and AER information policy: collection and disclosure of information*, June 2014. Available at <https://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information>.

Public warning notices

- 6.10. Section 153M gives the ACCC the power to issue public warning notices in respect of conduct that may contravene the provisions of Part XICA. While this is similar to the ACCC's power to issue public warning notices under s. 51ADA of the CCA and s. 223 of the Australian Consumer Law (**ACL**), there are some important differences in the process for doing so, most significantly, the requirement under s. 153L to provide a draft public warning notice to the corporation as described below.
- 6.11. Before issuing a public warning notice, the ACCC must also have followed the process set out in ss. 153L and 153M, which requires it to have given the corporation a draft public warning notice at least 21 days and no more than 90 days prior to issuing the final public warning notice. The draft public warning notice must include all of the matters set out in s. 153L(2), including an explanation of the reasons why the ACCC reasonably believes that:
- the corporation has engaged in or is engaging in the prohibited conduct
 - one or more persons has suffered or is likely to suffer detriment as a result of the prohibited conduct, and
 - it is in the public interest to issue the notice.
- 6.12. The corporation may make representations to the ACCC about those matters within 21 days after being given the draft public warning notice.⁶⁷ The ACCC will consider the corporation's representations when it decides whether or not to issue a final public warning notice.⁶⁸

Infringement notices

- 6.13. In broad terms, the ACCC has the power to issue an infringement notice under the CCA where it reasonably believes that a person has contravened a relevant provision of the CCA or ACL. The ACCC is most likely to issue infringement notices where it considers that conduct requires a more formal sanction than an administrative resolution, but that the matter is appropriately resolved without legal proceedings. Further information about the ACCC's use of infringement notices under other parts of the CCA can be found in the ACCC's Guidelines on the use of infringement notices.⁶⁹
- 6.14. Section 153N extends the ACCC's power to issue infringement notices under Division 5 of Part V to a corporation if the ACCC has reasonable grounds to believe that the corporation has engaged in or is engaging in prohibited conduct under Part XICA.⁷⁰
- 6.15. By virtue of s. 153N(2), an infringement notice issued by the ACCC in respect of an alleged breach of a Part XICA prohibition, to a corporation (whether listed or not) must specify a penalty of 600 penalty units (currently \$126 000).

⁶⁷ *Competition and Consumer Act 2010* (Cth), s. 153L(2)(d).

⁶⁸ *Competition and Consumer Act 2010* (Cth), s. 153M.

⁶⁹ ACCC, *Infringement Notices—Guidelines on the use of infringement notices by the ACCC*, April 2013. Available at <https://www.accc.gov.au/publications/guidelines-on-the-use-of-infringement-notices>.

⁷⁰ Section 153N(1) of the CCA states, 'Division 5 of Part V applies (...) in the same way in which it applies in relation to an alleged contravention of an infringement notice provision.'

Court enforceable undertakings

- 6.16. The ACCC can accept court enforceable undertakings under s. 87B of the CCA, including in relation to possible breaches of the Part XICA prohibitions. In these undertakings, which are on the public record, corporations or individuals generally agree to remedy the harm caused, accept responsibility for their actions and establish or review and improve processes and procedures to improve compliance with the CCA.
- 6.17. More information about s. 87B court enforceable undertakings and the circumstances in which the ACCC will consider accepting them, can be found in the ACCC's Guidelines on the use of enforceable undertakings.⁷¹

Civil proceedings

- 6.18. Under Part XICA, the ACCC can bring civil proceedings in the Federal Court seeking the imposition of a civil pecuniary penalty or injunctions in respect of alleged breaches of:
- s. 153E—Prohibited conduct—retail pricing
 - s. 153F—Prohibited conduct—electricity financial contract liquidity
 - s. 153G—Prohibited conduct—electricity spot market (basic case)
 - s. 153H—Prohibited conduct—electricity spot market (aggravated case).
- 6.19. The factors that the ACCC will consider when investigating and considering its enforcement options in respect of conduct that may contravene the provisions of Part XICA are set out above.
- 6.20. The ACCC is more likely to use litigation where the conduct is by a large corporation or results, or has the potential to result, in competitive harm or substantial consumer or small business detriment.
- 6.21. The ACCC will consider litigation in accordance with its Compliance and Enforcement Policy, taking into account the conduct of the parties and whether the imposition of a pecuniary penalty will address the detriment and provide specific and general deterrence.

Injunctions

- 6.22. The ACCC can seek injunctions in any civil proceedings it takes in respect of alleged breaches of the prohibitions in Part XICA.
- 6.23. Section 80 of the CCA provides that, where there has been an application for an injunction and the Court is satisfied that a person has contravened or is contravening the CCA (including the provisions of Part XICA), it may grant an injunction.⁷²
- 6.24. Under s. 80(2), the Court also has the power to grant interim injunctions, pending its determination of an application for a final injunction.

⁷¹ ACCC, *Section 87B of the Competition and Consumer Act—Guidelines on the use of enforceable undertakings by the ACCC*, April 2014. Available at <https://www.accc.gov.au/publications/section-87b-of-the-competition-consumer-act>.

⁷² *Competition and Consumer Act 2010* (Cth), s. 80. Section 80 will apply in relation to a corporation's contravention of a prohibition, but an individual may also be the subject of an application for an injunction in relation to 'ancillary' conduct (such as aiding, abetting, counselling, procuring, or being knowingly concerned etc. in a corporation's contravention).

Pecuniary penalty

- 6.25. The ACCC may apply to the Court for a pecuniary penalty in relation to conduct that contravenes any of the prohibited conduct provisions in Part XICA.⁷³
- 6.26. Section 76(1A) of the CCA provides that the maximum pecuniary penalty which may be ordered by a court for a contravention of ss. 153E to 153H will be the greater of \$10 million, three times the value of the benefit obtained, or 10 per cent of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined.

Contracting and divestiture orders

- 6.27. Part XICA introduces two new remedies, available only in respect of specific breaches of Part XICA provisions:

- Contracting orders: under s. 153X, following recommendation by the ACCC, the Treasurer may make a 'contracting order' in respect of conduct under ss. 153F (electricity financial contract liquidity) and 153H (electricity spot market (aggravated case)).

Broadly speaking, in a contracting order the Treasurer may order a body corporate to make offers to enter into electricity financial contracts.

- Divestiture orders: under s. 153ZA, following recommendation by the ACCC, the Treasurer may apply to the Federal Court for a 'divestiture order' in respect of conduct under s. 153H (electricity spot market (aggravated case)).

In broad terms, in a divestiture order the Court may, on application of the Treasurer, order a body corporate to divest some or all of its assets.⁷⁴ As described below, there are a number of steps that the ACCC must follow, and matters it must consider, before making a recommendation to the Treasurer to make a contracting order or to apply for a divestiture order.

- 6.28. The ACCC will consider making such a recommendation only for the most serious conduct. Factors which the ACCC will consider in this regard will include, but will not be limited to:

- a blatant disregard for the law through repeated misconduct
- the conduct caused, or could have caused, large and widespread detriment to consumers and businesses
- the conduct caused, or could have caused, significant impact on the market
- the risk that the conduct will continue without intervention.

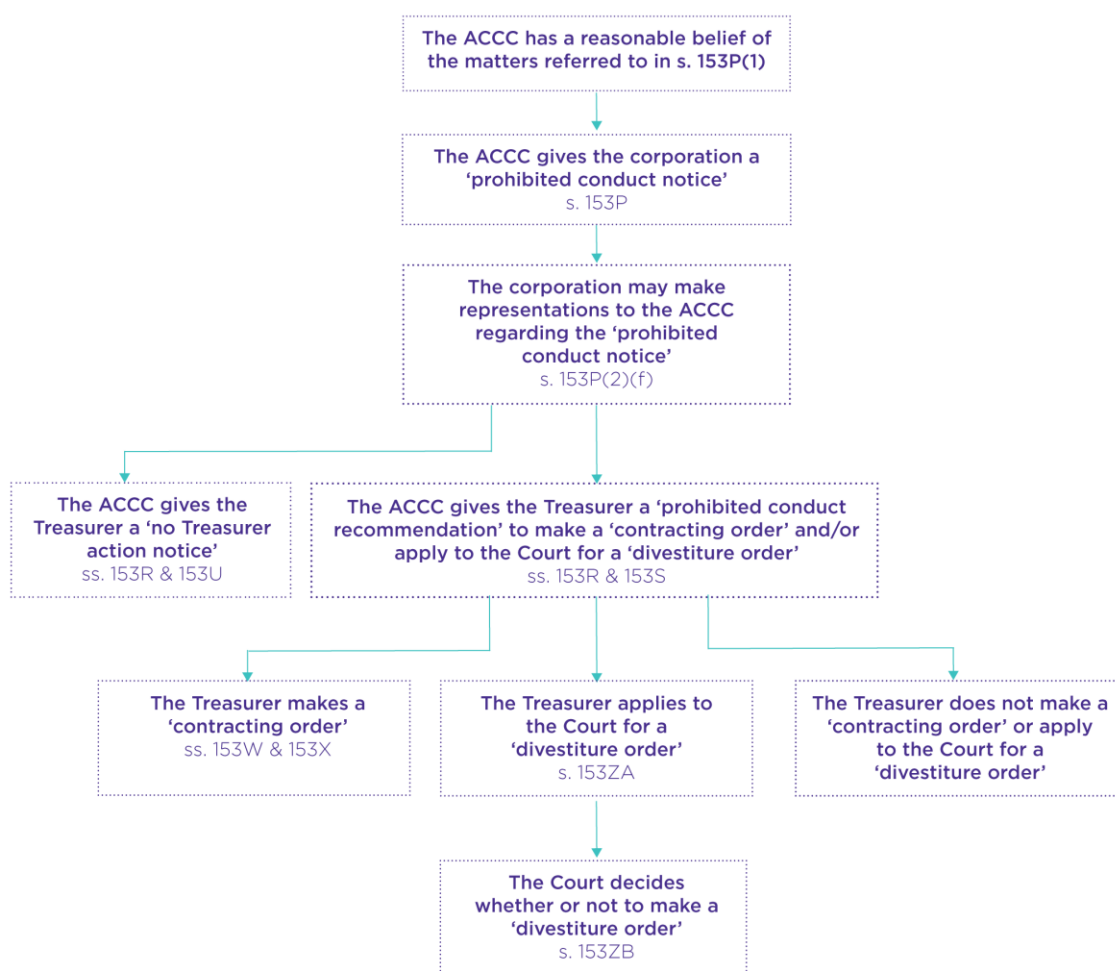
Procedure before contracting order or divestiture order

- 6.29. There are a number of steps that must be taken before a contracting order or divestiture order can be made. These are set out at a high level in figure 1.

⁷³ *Competition and Consumer Act 2010* (Cth), ss. 76 and 153ZD. Section 76 will apply in relation to a corporation's contravention of a prohibition but a director, secretary or senior manager of a corporation may also be the subject of an application for a pecuniary penalty for 'ancillary' conduct (such as aiding, abetting, counselling, procuring, or being knowingly concerned etc. in a corporation's contravention).

⁷⁴ Or for a 'connected body corporate', as defined in s. 153D, if identified in the ACCC's prohibited conduct recommendation (see ss. 153S(2)(c)(iii), 153W(b), 153ZA(b) and 153ZB(1)).

Figure 1: Process for contracting and divestiture orders



Prohibited conduct notice

6.30. The first step that must be taken before a contracting order or divestiture order can be issued is for the ACCC to give a 'prohibited conduct notice' to the corporation. The ACCC may issue this notice where it reasonably believes that:

- the corporation has engaged in or is engaging in conduct that constitutes a breach of ss. 153F (electricity financial contract liquidity) and 153H (electricity spot market (aggravated case))
- the making of a contracting order by the Treasurer or a divestiture order by the Court would be a proportionate means of preventing the corporation or any related body corporate from engaging in that kind of prohibited conduct in the future
- if the notice relates to a divestiture order, that it will result or is likely to result in a benefit to the public or, if it is likely to result in a detriment to the public, that the public benefit would or is likely to outweigh that detriment.

6.31. A prohibited conduct notice must include the information set out in s. 153P(2), including the reasons why the ACCC reasonably believes the requirements for such an order are met. It must also state details of the period in which the corporation must respond to the ACCC about the conduct and the recommendations.

- 6.32. The corporation may make representations to the ACCC regarding the conduct within 45 days, or a later day if the ACCC allows.⁷⁵ This gives the corporation the opportunity to provide the ACCC with information about the alleged prohibited conduct, including information that does not support the allegation.
- 6.33. The ACCC may vary or revoke a prohibited conduct notice.⁷⁶
- 6.34. The ACCC must give the Treasurer either a ‘prohibited conduct recommendation’ or a ‘no Treasurer action notice’ within 45 days of the end of the period during which the corporation may make representations in relation to the alleged conduct in a prohibited conduct notice.⁷⁷

Prohibited conduct recommendation

- 6.35. The ACCC may give a ‘prohibited conduct recommendation’ to the Treasurer if, after considering the corporation’s response to the prohibited conduct notice, the ACCC reasonably believes⁷⁸:
- the corporation has engaged in or is engaging in prohibited conduct of the kind specified in the prohibited conduct notice
 - the making of a contracting order by the Treasurer or a divestiture order by the Court would be a proportionate means of preventing the corporation or any related body corporate from engaging in that kind of prohibited conduct in the future
 - if the recommendation relates to a divestiture order, that it will result or is likely to result in a benefit to the public or, if it is likely to result in a detriment to the public, that the public benefit would or is likely to outweigh that detriment.
- 6.36. A prohibited conduct recommendation must include the reasons for the ACCC’s reasonable belief.⁷⁹
- 6.37. The net public benefits test referred to above is applied in relation to other ACCC responsibilities, such as the Authorisation process. Information about the types of benefits and detriments the ACCC will incorporate in its net public benefits assessment is provided in chapter 8 of the ACCC’s Authorisations Guidelines.⁸⁰
- 6.38. The ACCC may, within certain time limits, also vary or revoke a prohibited conduct recommendation, if specific conditions are met. The ACCC may only make a variation or revocation if the Treasurer has not made a contracting order or applied to the Court for a divestiture order in relation to the prohibited conduct recommendation.⁸¹

⁷⁵ *Competition and Consumer Act 2010* (Cth), s. 153P(3). In the case of a variation, s. 153Q(2)(b) provides that the corporation again may make representations to the ACCC within 45 days, or a later day if the ACCC allows.

⁷⁶ *Competition and Consumer Act 2010* (Cth), s. 153Q(1).

⁷⁷ *Competition and Consumer Act 2010* (Cth), s. 15R(1).

⁷⁸ *Competition and Consumer Act 2010* (Cth), s. 153S(1).

⁷⁹ *Competition and Consumer Act 2010* (Cth), s. 153S(2)(e).

⁸⁰ ACCC, *Guidelines for Authorisation of Conduct (non-merger)*, March 2019. Available at <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>. The rest of the Authorisation Guidelines (that is, the content other than chapter 8), which covers processes and other considerations relevant to the ACCC’s assessment of applications for authorisation, are not likely to be relevant in the context of the divestiture order. In particular, the authorisation process is public and conducted over a six-month timeframe. For divestiture orders, the ACCC will have 45 days to assess net public benefits and is likely to undertake that assessment confidentially.

⁸¹ *Competition and Consumer Act 2010* (Cth), s. 153T(3).

- 6.39. The ACCC may only vary a prohibited conduct recommendation if it is satisfied that the variation is minor or insubstantial or the variation is reasonably necessary to address:
- information that is false or misleading in a material particular provided by the corporation or its related body corporate, or a failure by them to give the ACCC information relevant to a prohibited conduct notice that is not publicly available; or
 - information that was not in existence or that the ACCC did not have when the prohibited conduct notice was given.⁸²

No Treasurer action notice

- 6.40. The ACCC will give the Treasurer a ‘no Treasurer action notice’ if it considers a prohibited conduct recommendation is not appropriate.⁸³ The notice will include the reasons why the ACCC considers it is not appropriate to give the Treasurer a prohibited conduct recommendation in respect of the prohibited conduct notice. In these circumstances, a contracting order or divestiture order will not be available.
- 6.41. The ACCC may, within certain time limits, also vary or revoke a no Treasurer action notice, if specific conditions are met. The ACCC may only vary a no Treasurer action notice if it is satisfied that the variation is minor or insubstantial.⁸⁴
- 6.42. To revoke a no Treasurer action notice, the ACCC must be satisfied that the conditions in s. 153V(5) and (6) are met. A no Treasurer action notice can only be revoked if the ACCC reasonably believes that:
- it is appropriate to give the Treasurer a prohibited conduct recommendation, or to give the corporation a new prohibited conduct notice, and
 - the ACCC reasonably believes that either of the following conditions are met:
 - a revocation is reasonably necessary to address information that is false or misleading in a material particular provided by the corporation or its related body corporate, or a failure by them to give the ACCC information relevant to a prohibited conduct notice that is not publicly available, or
 - the revocation is reasonably necessary to address information that was not in existence or that the ACCC did not have when the prohibited conduct notice was given.⁸⁵
- 6.43. If the ACCC is satisfied that the tests for revocation are met and revokes a no Treasurer action notice, it must then give a new prohibited conduct notice to the corporation, or a prohibited conduct recommendation to the Treasurer within 45 days of revocation.⁸⁶

⁸² *Competition and Consumer Act 2010* (Cth), s. 153T(4).

⁸³ *Competition and Consumer Act 2010* (Cth), s. 53U(1).

⁸⁴ *Competition and Consumer Act 2010* (Cth), s. 153V(3).

⁸⁵ *Competition and Consumer Act 2010* (Cth), ss. 153V(4) to (6).

⁸⁶ *Competition and Consumer Act 2010* (Cth), ss. 153R(4) and (5).

Contracting order

- 6.44. The Treasurer may only make a contracting order, requiring a corporation to make offers to enter into financial contracts, if the ACCC has given the Treasurer a prohibited conduct recommendation stating a contracting order should be used.⁸⁷
- 6.45. This new remedy is only available for prohibited conduct under ss. 153F (electricity financial contract liquidity) or 153H (electricity spot market (aggravated case)).⁸⁸
- 6.46. In making a recommendation to the Treasurer that a contracting order should be used, the ACCC will seek to provide sufficient information, data and evidence to support its recommendation. A prohibited conduct recommendation to the Treasurer relating to a contracting order will include the ACCC's views on the appropriate terms and conditions that the Treasurer should include in any contracting order(s).
- 6.47. Section 153X sets out the process for the Treasurer to make a contracting order, and s. 153W provides for the conditions which must be met before the Treasurer may exercise that power.

Divestiture order

- 6.48. Section 153ZA sets out the process for the Treasurer to consider the recommendation from the ACCC and if appropriate apply to the Court for a divestiture order.
- 6.49. The Court may make a divestiture order if:
- the Court finds (or has found in another proceeding instituted under the CCA) that the conduct identified in the prohibited conduct recommendation is or includes conduct that is prohibited under s. 153H (electricity spot market (aggravated case))
 - the Court is satisfied that a divestiture order is a proportionate means of preventing the relevant corporation, or any related body corporate, from engaging in that kind of conduct in the future.⁸⁹
- 6.50. Section 153ZB(2) provides that the Court may order a body corporate that is not an authority of the Commonwealth, state or a territory to dispose of some or all of its interests in securities or assets to anyone except a body corporate that is related to the body corporate or an associate of the body corporate.⁹⁰ The order must specify the interests in the securities and assets, or the kinds of interests in the securities or assets, that the body corporate must dispose of and the day by which the disposal must be made, and any other matter that the Court considers necessary for the order to be effective.⁹¹
- 6.51. Section 153ZB(3) provides that the Court may order a body corporate that is an authority of the Commonwealth to dispose of some or all of its interests in securities or assets to another authority of the Commonwealth. And similarly, the Court may order a body corporate that is an authority of a state or territory to dispose of some or all of its interests in securities or assets to another authority of the same state or

⁸⁷ *Competition and Consumer Act 2010* (Cth), s. 153W(d).

⁸⁸ *Competition and Consumer Act 2010* (Cth), s. 153W(e)(ii).

⁸⁹ *Competition and Consumer Act 2010* (Cth), s. 153ZB.

⁹⁰ *Competition and Consumer Act 2010* (Cth), s. 153ZB(2).

⁹¹ *Competition and Consumer Act 2010* (Cth), s. 153ZB(5).

territory. In both cases, the authority that receives the interests in securities or assets must be in genuine competition with the authority that has received the divestiture order.⁹²

⁹² *Competition and Consumer Act 2010* (Cth), s. 153ZB(3).