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Review of the effectiveness of the *Prohibiting Energy Market Misconduct (PEMM) Act 2019* (Cth) – ACCC submission to consultation paper

Thank you for the opportunity to respond to the consultation paper for the review of the *Prohibiting Energy Market Misconduct (PEMM) Act 2019* (Cth). In preparing this submission, the Australian Competition and Consumer Commission (ACCC) has drawn on its experience and learnings from its role in monitoring and enforcing the PEMM provisions, as well as from its role in conducting the National Electricity Market (NEM) inquiry.

Overview of ACCC submission

The ACCC's submission to the review sets out:

- the context that led to the introduction of PEMM, including relevant findings and recommendations from the ACCC's Retail Electricity Pricing Inquiry 2017–18
- an overview of the ACCC's role and learnings in the context of PEMM, including monitoring and enforcement learnings
- the role and function of the ACCC's NEM Inquiry.

The ACCC supports amendments to the drafting of the PEMM provisions where they improve the monitoring and enforcement of the provisions to provide better outcomes for consumers, including the efficient and effective administration of the PEMM provisions.

In the meantime, the ACCC continues to monitor compliance and assess conduct by market participants against the PEMM provisions.

The ACCC's role in electricity

The ACCC is Australia's national competition and consumer regulator. The ACCC's purpose is to make markets work for consumers. The ACCC is responsible for enforcing compliance with the competition and consumer provisions of the *Competition and Consumer Act 2010* (CCA) across the economy, including the electricity sector.

In addition to applying the economy-wide legislation to the electricity sector, the ACCC has had an active role in the Australian electricity sector, through its responsibilities for:

- undertaking an inquiry into the NEM since 2018.
- monitoring and enforcing the PEMM provisions in Part XICA of the CCA.
- monitoring and enforcing compliance with the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019* (Cth).

The ACCC looks forward to seeing the outcomes of this review. Please contact Mark McLeish at mark.mcleish@accc.gov.au or 03 9290 1834 should you wish to discuss any matters concerning this submission or ACCC engagement with the review.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Anna Brakey'. The signature is fluid and cursive, with the first letter 'A' being particularly large and stylized.

Anna Brakey
Commissioner



Review of the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019 (Cth)*

ACCC submission

January 2025

Executive Summary

In this submission, the ACCC provides insight into its monitoring and enforcement activities of the *Prohibiting Energy Market Misconduct (PEMM) Act 2019* (Cth) pursuant to Part XICA of the *Competition and Consumer Act 2010* (Cth) (CCA), to assist government in determining the effectiveness of Part XICA. This submission provides an overview of the following:

- the ACCC's role as an economy-wide competition regulator with responsibility for administering the electricity-specific PEMM provisions
- context for the introduction of the Default Market Offer (DMO) and the PEMM Act
- overview of each of the PEMM provisions relating to retail pricing, spot market and contracts
- how the PEMM provisions complement Part IV competition provisions, and
- overview of the ACCC's National Electricity Market (NEM) inquiry function.

Overall effectiveness of the PEMM provisions

One of the key objectives of the PEMM review is to ascertain the effectiveness of the provisions and the extent to which PEMM, widely known as the 'big stick' legislation,¹ operates as a behavioural constraint which is likely to encourage pro-competitive outcomes for the benefit of consumers.

In the ACCC's December 2024 electricity inquiry report, the ACCC observed that the PEMM retail prohibition has had an impact on the way retailers operate their businesses, and is considered by retailers as part of their price setting policies and procedures.²

Through our compliance monitoring of the PEMM retail prohibition, we have also recently observed that changes in retail prices generally mirror trends in the underlying cost of procuring electricity where costs are declining. However, retailers tend to raise their prices by proportionally greater amounts, compared to underlying costs and relevant default offers, where there have been increases in underlying costs.

One potential explanation for this trend is that the PEMM retail prohibition operates as a constraint on retail prices when it is enlivened. This may be attributed to the significant 'big stick' penalties it attracts and indicates retailers are attentive to their obligations under the PEMM retail prohibition to pass through cost reductions.

The ACCC considers it likely that the contract and spot prohibitions have also had an impact on market participant conduct, given the graduated set of penalties that apply in the event of a breach. For the most serious conduct, the ACCC is able to recommend that the Treasurer either issue a contracting order or pursue a divestiture order in the Federal Court. These powerful remedies are without precedent and are held in reserve for only the most egregious conduct.

In the ACCC's view the PEMM provisions, by virtue of the specific remedies and significant penalties they impose, coupled with the ACCC's ability to use investigative powers under section 155 and compulsory information gathering powers under section 95ZK to inform compliance monitoring, enables PEMM to operate as a behavioural constraint on market participants.

¹ J Frydenberg and A Taylor, [New laws are a win for energy users](#) [media release], Treasury, Australian Government, 12 November 2019, accessed 30 January 2025.

² ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 24.

Future market design

The current contract and spot market prohibitions were developed within the context of the current market design. If there are material changes to the design of the wholesale market, we consider that the role of spot and contract markets and the associated need for, or design of, the contract and spot market prohibitions would need to be reviewed accordingly.

The ACCC notes that an independent expert panel is currently undertaking a review of the NEM wholesale market settings, and that the expert panel is also supported by the Department of Climate Change, Energy, the Environment and Water. We therefore recommend that the expert panel consider the need and design of the PEMM provisions as part of the wholesale market review.

1. Role of the ACCC

The ACCC is Australia's national competition and consumer regulator. The ACCC's purpose is to make markets work for consumers. The ACCC is responsible for enforcing compliance with the competition and consumer provisions of the CCA across the economy, including the electricity sector.

The CCA (and competition policy more generally) is designed to prevent competitors' behaviour from damaging the competitive process to the detriment of consumers.

Part IV of the CCA applies to all sectors of the economy and prohibits a range of anti-competitive conduct. This includes cartel conduct; mergers/acquisitions; unilateral conduct (including misuse of market power); and anti-competitive agreements, arrangements and understandings. The ACCC is responsible for enforcing compliance with the competition provisions in Part IV of the CCA.

The ACCC has electricity-specific functions under Part XICA (introduced by the PEMM Act) of the CCA. The ACCC is responsible for monitoring, investigating and enforcing compliance with the PEMM provisions. The PEMM provisions are electricity sector-specific and were designed to complement existing CCA provisions, particularly those in Part IV of the CCA, as well as the National Electricity Law.³

In 2020, the ACCC published the Guidelines on Part XICA – Prohibited conduct in the energy market⁴ (ACCC Guidelines). The ACCC Guidelines set out further details on:

- the ACCC's approach to interpreting the PEMM provisions
- the ACCC's approach to investigating alleged contraventions
- examples of the types of conduct the ACCC considers are likely or unlikely to contravene the PEMM provisions.

The ACCC also has other active roles in the Australian electricity sector, including:

- undertaking an inquiry into the NEM since 2018.
- monitoring and enforcing compliance with the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019* (Cth) (Electricity Retail Code).
- monitoring and enforcing economy-wide provisions which apply to the electricity sector, including the Australian Consumer Law and the general competition law under Part IV of the CCA.

The ACCC's 2024–25 enforcement and compliance priorities include:

- promoting competition in essential services with a focus on telecommunications, electricity, gas and financial services.
- misleading pricing and claims in relation to essential services, with a particular focus on energy and telecommunications.

³ Parliament of Australia, [Revised Explanatory Memorandum to the Treasury Laws Amendment \(Prohibiting Energy Market Misconduct\) Bill 2019](#), Parliament of Australia, Australian Government, 2019, paragraph 1.6.

⁴ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020.

2. Context for introduction of the Default Market Offer and the PEMM Act

In 2017, the Treasurer directed the ACCC to hold an inquiry into the supply of retail electricity and the competitiveness of retail electricity prices in the NEM. The inquiry was held in response to electricity affordability becoming a significant issue for households and small businesses.

In June 2018, the ACCC delivered the Retail Electricity Pricing Inquiry (REPI) final report. The ACCC found:

- the electricity market was experiencing significant challenges leading to high prices and bills for small consumers.
- the regulatory framework and supporting policies designed to protect consumers and promote competition were not working well, resulting in poor outcomes for consumers. This was particularly the case for consumers on standing offers that were priced significantly above market offers, imposing unreasonably high costs on consumers who were unable to effectively engage in the electricity market.
- the average residential customer bill had increased by more than 35% in real terms between 2007–08 and 2017–18, with the average residential electricity prices increasing by 56% in real terms over the same period. Small businesses had also experienced similar increases.

In response to the ACCC's findings and recommendations,⁵ the Australian Government announced its 'A fair deal on energy' package in October 2018. Measures introduced in this package included the introduction of the inquiry into the NEM which commenced in 2018, the DMO that came into effect on 1 July 2019 and the PEMM provisions which commenced on 10 June 2020.

3. Overview of the PEMM provisions

The PEMM provisions are in Part XICA of the CCA. The provisions are:

- Retail pricing prohibition (section 153E): requires retailers to make reasonable adjustments to the price of electricity market offers for small consumers (residential and small business) when they experience a sustained and substantial reduction in their underlying cost of procuring electricity, to reflect those reductions.
- Financial contract prohibition (section 153F): prohibits electricity generators from refusing to offer or supply electricity financial contracts to another retailer in order to substantially lessen competition (SLC).
- Spot market prohibitions (sections 153G and 153H): prohibits generators from engaging in bidding and non-bidding conduct that is fraudulent, deceptive or in bad faith and/or seeks to distort or manipulate prices in electricity spot markets.

Part XICA also provides for the ACCC's role in monitoring compliance with each provision and investigating any potential contraventions. When the ACCC identifies a possible contravention of a PEMM provision, it is considered through the ACCC's established escalation process which involves an initial assessment that may progress to an initial investigation, followed by in-depth investigation. As part of this process, the ACCC may seek

⁵ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, pp i – xvi.

information, documents and evidence through voluntary requests and compulsory notices. In general, investigations are conducted confidentially and the ACCC does not ordinarily comment on matters it may or may not be investigating. The ACCC does publicise court proceedings and other enforcement outcomes.

4. The retail pricing prohibition

The consultation paper raised a number of questions relating to the retail prohibition, including the following:

7. Has the retail prohibition in the PEMM Act affected electricity market performance? If so, how?
8. Has the retail prohibition resulted in consumer prices better reflecting the underlying costs of procuring electricity? If so, how?
9. Has the retail prohibition influenced retailer pricing strategies in the market, observed or otherwise?

Section 153E of the CCA (retail prohibition) requires retailers to make reasonable adjustments to the prices of electricity market offers for small consumers (residential and small business) when they experience a sustained and substantial reduction in their underlying cost of procuring electricity, this being wholesale, network and environmental costs, to reflect those reductions.

Sanctions available for contraventions of the retail prohibition include issuing a public warning or infringement notice, a court-enforceable undertaking, an injunction, and pecuniary penalties.

The retail prohibition was designed to address competition concerns highlighted in the ACCC's 2018 REPI report, which reported that several factors had led to ineffective competition in the electricity retail market.⁶ These factors included a concentrated, vertically integrated market, where 3 big retailers (AGL, Origin Energy and EnergyAustralia) held the largest market shares of consumers and enjoyed the advantages of being a large retailer (i.e. economies of scale, loyal and disengaged customer base) as well as retail pricing structures that made comparing offers difficult and had the potential to confuse consumers.

The ACCC stated in the 2018 REPI report that effective competition between retailers was crucial for maintaining downward pressure on costs throughout the supply chain and for passing through cost reductions to consumers.⁷ The ACCC's view is that the retail prohibition is intended to support competitive forces by ensuring that cost reductions are passed onto customers.

The ACCC's electricity inquiry reports provide commentary on competitive conditions in the retail electricity market. In our most recent report in December 2024, we observed some early signs of improvement in competitive conditions following consecutive years when the number of retailers declined following the energy crisis.⁸

These improvements were observed through some reductions in market concentration across all NEM regions, with Victoria remaining the most competitive.⁹ Further, moderating

⁶ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, pp i–xvi.

⁷ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, p 134.

⁸ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, pp 1–7.

⁹ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 61.

wholesale market conditions since the energy crisis has facilitated increased price competition, with retailers making greater efforts to compete for new customers as at July 2024. Small retailers have increased their expenditures for customer acquisition and have made more acquisition offers available.¹⁰ Many of these new acquisition offers are priced below the DMO and Victorian Default Offer (VDO).¹¹

However, the same big 3 retailers (AGL, Origin Energy and EnergyAustralia) as identified in the ACCC's 2018 REPI report still hold a significant combined market share of 62% as of June 2024.¹² In several smaller regions where the big 3 have no, or limited, presence, there is usually only one retailer which dominates the market. Further, although the number of retailers entering the market exceeded the number of exiting retailers, the number of active retailers (defined as retailers with more than 50 customers) across the NEM continued to decline as new retailers take time to establish.¹³

In the December 2024 electricity inquiry report, it was also noted that higher rates of customer switching combined with retailer-initiated price decreases have put downward pressure on the offer prices of existing customers.¹⁴ Calculated annual prices have decreased from 1 August 2023–24 and more customers are on offers priced below the default offers. However, recent price decreases have not been enough to reverse price increases observed in 2023, and a substantial proportion of customers remain on prices at or above the default offers. This includes 38% of customers on flat rate offers and 27% of time of use customers.¹⁵

We also observed that calculated annual prices rose sharply in the year to 1 August 2023, reflecting retailers' higher costs to supply electricity. Wholesale market volatility in the middle of 2022 continued to impact wholesale costs in 2023 through retailers' contracting arrangements.¹⁶

Relationship with default offers and other electricity regulation

In addition to the retail prohibition, there are other regulatory interventions that apply to the retail electricity market, aimed at supporting consumer access to cost-reflective prices that would occur with effective competition.

One such intervention is the introduction of default offers through the DMO and VDO. The DMO and VDO provide consumer protections to customers on standing offers (approximately 10% of residential and 19% of small business customers for the DMO).¹⁷

The DMO and VDO also serve as a reference point in price change communications and advertising for all offers, allowing consumers to more easily compare offers, be confident

¹⁰ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 80.

¹¹ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 1.

¹² ACCC, [Inquiry into the National Electricity Market: June 2024 report](#), ACCC, Australian Government, 28 June 2024, p 59.

¹³ ACCC, [Inquiry into the National Electricity Market: June 2024 report](#), ACCC, Australian Government, 28 June 2024, pp 60–64.

¹⁴ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 12.

¹⁵ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 1.

¹⁶ ACCC, [Inquiry into the National Electricity Market: December 2023 report](#), ACCC, Australian Government, 15 December 2023, p 4.

¹⁷ Note, the ACCC's June 2024 electricity report found that approximately 90% of residential and 81% of small business customers across all regions, based on the retailer sample, were on market offers. ACCC, [Inquiry into the National Electricity Market: June 2024 report](#), ACCC, Australian Government, 28 June 2024, pp 53–54.

that information is not misleading, and see clearly on their bills how they can get a better outcome. These requirements facilitate consumer switching which places competitive pressure on retailers to offer more competitive and cost-reflective prices, as any consumer can switch to a standing offer when their market offer is priced above a standing offer. However, as detailed above, many customers remain on prices above the default offers.

Where the retail prohibition differs is that it affects market offer prices by ensuring retailers pass through certain cost reductions to be more cost-reflective, or face penalties if they are in breach of the prohibition. Without the retail prohibition, consumers on market offers may have fewer protections in place.

The retail prohibition, the DMO and VDO, and their intent to bring about cost-reflective prices in the retail electricity market are complemented by other regulatory mechanisms such as the Better Bills Guidelines, the Electricity Retail Code and Victoria's Energy Retail Code of Practice.

Monitoring and enforcement

The ACCC proactively monitors for potential contraventions of the retail prohibition. Investigations into potential contraventions have stemmed from 2 methods:

1. sector-wide monitoring; and
2. assessing the costs retailers face across the supply chain.

Sector-wide monitoring involves an initial screening phase, where the ACCC collects and compares retailers' offers to the underlying cost of procuring electricity.

Retailers' offers are collected from publicly available and confidential sources. For acquisition offers, the ACCC uses the government-run, independent energy price comparison websites, Energy Made Easy and Victorian Energy Compare. For existing offers, retail prices and price changes are sourced from responses to compulsory notices issued by the ACCC under its electricity price monitoring inquiry function. Customer bills are calculated based off these offers and the relevant model annual usage.

The underlying cost of procuring electricity is composed of wholesale, network and environmental costs. The 3 cost components are measured in \$/MWh and while they are each calculated separately, their sum is taken to represent underlying cost of procuring electricity.

- Wholesale costs are estimated on a monthly basis as the volume-weighted average price of relevant electricity derivatives – swaps, caps and options – using all transactions from ASX Energy's Tradelog, which is a detailed record of every trade for ASX energy products and includes over-the-counter (OTC) transactions. We also have regard to retailers' costs that are reported as part of the electricity inquiry.
- Network costs are provided by the Australian Energy Regulator (AER) and Essential Services Commission Victoria for each distribution region and are segmented by customer and tariff type.
- Environmental costs are calculated from the Clean Energy Regulator's Large-scale Generation and Small-scale technology certificate prices, and the percentages of energy load for which certificates are required.

We compare price movements in offers for each relevant region, customer type and tariff type with movements in underlying cost of procuring electricity over the same period. We screen for declines in underlying cost and if there are declines, consider whether they can be characterised as 'sustained' or 'substantial', and then consider whether changes in retailers'

offers reflect these declines. If the results suggest a potential contravention, monitoring efforts can move to the second phase where we may seek further information from the retailer.

Monitoring results indicate that, in general, trends in acquisition offers mirror trends in the underlying cost of procuring electricity. Similarly, changes in prices for existing customers generally also mirror trends in the underlying cost of procuring electricity where there are declines. However, retailers tend to raise their prices by proportionally greater amounts, compared to underlying costs and relevant default offers, where there has been increases in underlying costs.

In the ACCC's December 2024 electricity inquiry report, we observed that the PEMM prohibitions have had an impact on the way retailers operate their businesses.¹⁸ Most retailers' price setting policies or processes intentionally treated the setting and adjustment of acquisition and existing offers differently. The ACCC's Guidelines allow retailers to vary how they allocate price reductions among their offers and different tariff types, but these variations need to reflect genuine product differences.¹⁹

The ACCC has undertaken 11 assessments of potential non-compliance with the retail prohibition since PEMM commenced, with 6 being escalated to further in-depth investigations involving coordination with multiple ACCC business areas. This work is generally confidential.

Observations on the retail prohibition

Through the ACCC's monitoring of the retail prohibition and experience with investigations of potential breaches of PEMM, we have identified changes which may improve the effectiveness of the prohibition if it were to continue to apply in the retail electricity market. These improvements are covered in the following sections.

What is a reasonable adjustment?

To establish a contravention of the retail prohibition, the ACCC is required to prove, on the balance of probabilities, that a retailer has failed to make 'reasonable adjustments' to the price of its offers to reflect 'sustained and substantial' reductions in its underlying costs of procuring electricity. In considering whether we can prove contraventions, the ACCC considers that there are evidentiary challenges in proving adjustments to prices are not reasonable.

In the ACCC's experience, resolving the matter of what is a 'reasonable adjustment' in a retailer's price setting decision is a complex evaluative task, that has been difficult to implement in practice.

Establishing what is a reasonable adjustment is complex because of the forward looking and opaque nature of retailers' pricing approaches, their decisions and adjustments. Additionally, there are many legitimate reasons for retailers adopting different pricing approaches for different plans and offers. For example most retailers' price setting policies intentionally treat the setting and adjustment of acquisition and existing offer prices differently, reflecting that retailers compete for customers at the point of acquisition.²⁰ In

¹⁸ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, pp 22–25.

¹⁹ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020.

²⁰ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, pp 18–22.

addition retailers exercise discretion in how they adjust prices (and pass through cost changes) across their portfolio of offers.

In the ACCC's experience, the challenge of ascertaining what adjustments retailers had made in practice was a significant barrier to progressing matters under the retail prohibition, notwithstanding a significant outlay of investigative and agency resources.

To address these challenges, government may wish to consider introducing a provision (similar in form to section 4 of the ACL relating to representations as to future matters) which would provide that in any proceeding by the ACCC alleging a contravention by a retailer of section 153E of the CCA, there is a presumption that the retailer has failed to make a reasonable adjustment for the purposes of that section unless evidence is adduced to the contrary. This would have the effect of placing an onus upon the retailer to adduce evidence of having made reasonable adjustments where the ACCC has established sustained and substantial reductions in the underlying cost of procuring electricity.

Government may wish to consider an amendment which would require a retailer to produce evidence that the adjustment is reasonable, and the ACCC must prove that it has failed to make a reasonable adjustment.

Applicability

As already noted, there are 3 cost components of the underlying cost of procuring electricity. Each of these components' trajectory and weighting can fluctuate independent of the other components. The ACCC's recent observations indicate broadly decreasing wholesale costs, increasing network costs and relatively stable environmental costs, however this varies across regions.

The prohibition is only enlivened when the aggregate of the 3 cost components is decreasing, so it may be that a large increase in one cost component outweighs a decrease in another.

Since PEMM's commencement in June 2020, the underlying cost of procuring electricity has broadly experienced reductions that could be characterised as 'sustained' or 'substantial' for less than 2 years.

The retail prohibition was designed to address pricing conduct in an environment of declining costs. Government may wish to consider if there is merit in making the prohibition apply in an environment where costs are increasing so that the prohibition has greater applicability. This could include government considering enlivening the prohibition at all times where retailers are obliged to ensure that adjustments in prices reflect changes in retailers' underlying cost of procuring electricity (increases or decreases). However, expanding the prohibition to operate symmetrically would require careful consideration as it is a stronger form of intervention that could resemble aspects of ongoing price regulation.

Particular consideration would need to be given to the expected pass-through of cost increases as, in a competitive market, retailers acting rationally may seek to immediately raise their prices when costs rise to reflect their higher costs of supply. This may occur regardless of whether cost increases are substantial or expected to be sustained.

However, the risk of prescriptive regulation is that it may effectively prescribe a business model for retailers and discourage innovation and dynamism.

Ultimately, the decision for government is to determine whether electricity market pricing should reflect market forces or be prescribed. If government considers a form of price regulation, the ACCC considers there is merit in looking at the AER's role in its

implementation and enforcement, and the interaction between the PEMM retail pricing provisions and the DMO and VDO.

5. Financial contract prohibition

The consultation paper raised a number of questions relating to the contract prohibition, including the following:

13. Have retailers, particularly small standalone retailers, observed improved access to financial contracts? If not, why?
14. How important is it for retailers to access Australian Stock Exchange (ASX) traded contracts, or other types of financial contracts for risk management, and how does this impact the underlying costs of procuring electricity?
16. Are the remedies available in the *Competition and Consumer Act 2010* (CCA) – including contracting orders under the PEMM Act – appropriate and effective in addressing electricity financial contract misconduct?

Section 153F of the CCA (contract prohibition) targets conduct whereby electricity generators, including vertically integrated generation and retail businesses (gentailers), refuse to offer or supply electricity financial contracts to another retailer in order to SLC. The provision also provides for other types of counterparties such as large end-users, financial intermediaries or speculators.

At the time this prohibition was introduced, there were concerns about the levels of electricity contract liquidity, as identified in the ACCC's 2018 REPI report.²¹ In particular, the ACCC was concerned about the market power of 'gentailers' as they have the opportunity and ability to withhold contracts from other retailers or to discriminate against them via pricing.²² This may have contributed to small retailers and new entrants experiencing difficulty in entering the market and attracting customers, with hedging contracts being an important tool retailers (and generators) use to manage price risk and ensure their financial stability.

Section 46 of the CCA captures similar conduct under the contract prohibition. Section 46 prohibits a firm with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of SLC in a market.

However, there are some differences between section 46 and the contract prohibition.

- The contract prohibition does not require establishing that a corporation has a substantial degree of market power in the electricity financial contracts market.
- The contract prohibition requires the conduct to have the purpose of SLC. In contrast, section 46's scope covers corporations engaging in conduct which has the purpose, effect, or likely effect of SLC.

The contract prohibition provides that a corporation may engage in conduct with the purpose of SLC by:

- failing to offer electricity financial contracts
- limiting or restricting offers to enter into electricity financial contracts

²¹ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, pp 113–114.

²² The liquidity of the contract market is reflected by the number of contracts being traded and the relative availability of those contracts to retailers.

- 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 remedies available under the contract prohibition are specific to the PEMM Act and include the ability for the ACCC to recommend to the Treasurer to make a 'contracting order' in respect of a contravention of the contract prohibition. This order is issued to the corporate entities identified in the recommendation and requires them to make offers to enter into electricity financial contracts with particular kinds of third-party entities.

Monitoring and enforcement

The ACCC responds to complaints or reports of alleged misconduct in contravention of the contract prohibition. These reports can be received from sources that include market participants and bodies, such as the AER.

The AER has insight into market conduct due to its wholesale electricity market monitoring function as well as new contract market monitoring powers under the *National Electricity Laws Amendment (Wholesale Market Monitoring) Act 2023*. The AER's enhanced powers provide more visibility of contracts and contract-related information, including OTC contracts. The AER's powers allow it to have visibility over data such as a scheduled generator's average contracted energy sales, including options, as a percentage of the average available capacity.

In its *Wholesale electricity market performance report* released on 20 December 2024, the AER considered its recent observations of the contract market and specifically noted that the level of contract liquidity is a concern in South Australia.²³ Where the number of contracts offerings is low, coupled with the existing issue of smaller retailers lacking access to the ASX and market volatility, it may make it easier for market participants in South Australia to engage in misconduct.

To establish a breach of this prohibition, however, the ACCC must ascertain whether the corporation's conduct had the *substantial purpose of substantially lessening competition* in any electricity market. It must also distinguish between contracting decisions genuinely intended to manage risk from contracting decisions with an anti-competitive purpose.

It is challenging to establish a counter-factual to evaluate the state of competition in the market without the contract prohibition. However, this prohibition provides an unprecedented remedy by granting the Treasurer with powers to intervene in the contract market through a contracting order to address egregious anti-competitive conduct. This may occur if the ACCC identifies prohibited conduct and gives the Treasurer a prohibited conduct recommendation that a contracting order should be used. Following this, the Treasurer can make an order that the corporation offer electricity financial contracts to unrelated parties, and specify the terms of the contract.

Due to the potential impact of a contracting order to a market participant, it is likely that the significant and unprecedented 'big stick' measure of the contracting order has had a deterrent effect on market participants.

Since the PEMM prohibitions commenced, the ACCC has conducted an assessment and initial investigation on one potential contravention of section 153F. The ACCC determined no further action was required for this case and to date, there have been no public outcomes.

²³ AER, [Wholesale electricity market performance report](#), AER, Australian Government, 20 December 2024, p 47.

Improving the effectiveness of the contract prohibition

As noted above, the AER has a wholesale electricity market monitoring function and new contract monitoring powers, while the ACCC is responsible for enforcing the contract prohibition. Government may wish to consider shifting the responsibility of monitoring and enforcing the prohibition to the AER as the energy sector regulator.

However, if government shifts the responsibility away from the ACCC, it should consider whether the SLC test that is currently fundamental to the contract prohibition is appropriate.

The SLC test is a feature of the competition provisions enforced by the ACCC, including section 46 of the CCA. The SLC test is a well-established standard that has been subject to judicial consideration for decades. The ACCC seeks to maintain a consistent approach to applying the concept of SLC in its consideration of potential contraventions of the CCA, including the contract prohibition. In the ACCC's view it is important that the SLC test continues to be consistently applied and enforced.

Rather than shift responsibility to the AER for monitoring and enforcing the prohibition in its current form, government may wish to consider developing electricity-specific regulation that does not rely on the SLC test

Regardless of whether the role is shifted to the AER or not, the ACCC will retain economy-wide functions under the CCA, including section 46. If a shift of the contract prohibition to the AER does occur, it would be beneficial to establish a structured and formalised referral process from the AER to the ACCC if it identifies conduct that could potentially breach Part IV of the CCA.

Separately, the ACCC noted in both its November 2022 and December 2023 electricity inquiry reports, that limited access to the ASX via brokers and clearing participants was a critical issue for smaller retailers.²⁴ The ACCC anticipates that the challenges of finding sufficient financial hedging contracts will increase during the transition to net zero. The contract prohibition was not drafted to resolve this issue but is a relevant factor in assessing whether the prohibition is appropriate and sufficiently flexible. In considering how to revise the prohibition, government could also consider whether the contract prohibition is able to address the critical issue of limited access to the ASX via brokers and clearing participants.

6. Spot market prohibitions

The consultation paper raised a number of questions relating to the spot prohibitions, including the following:

19. Do electricity spot market bidding provisions in the PEMM Act and bidding and rebidding provisions in s 3.8.22A of the National Electricity Rules (NER) overlap or address different generator behaviours? If so, how?

Sections 153G and 153H of the CCA (spot prohibitions) target generators' bids and failures to bid in electricity spot markets that are fraudulent, deceptive or in bad faith and/or seek to distort or manipulate prices. In this manner, the prohibition is intended to prevent generators from engaging in conduct that undermines the effective operation of supplying electricity in the electricity spot market.

²⁴ ACCC, [Inquiry into the National Electricity Market: December 2023 report](#), ACCC, Australian Government, 15 December 2023, pp 94–100.

ACCC, [Inquiry into the National Electricity Market: November 2022 report](#), ACCC, Australian Government, 23 November 2022, p 37.

In the ACCC's 2018 REPI report, the ACCC considered whether the NEM should have additional rules or other mechanisms to mitigate the impact of the exercise of market power and address concerns about the potential for market manipulation.²⁵

In the report, we found a general lack of competitive constraint in wholesale electricity markets. This was reflected in high levels of market concentration. This resulted in an ineffective competitive process and increased the prices being passed through the supply chain to consumers.²⁶

While we did not consider that market manipulation was a major feature of the market at that time, we also recommended provisions against market manipulation, together with powers to prevent participants from exploiting cross-market positions across physical and financial markets.²⁷

The spot prohibitions are intended to cover all forms of generator bidding behaviour on an electricity spot market, including initial bidding/offers, rebidding (whereby initial bids are re-submitted), or a generator's failure to bid.

The second element of the spot prohibitions is whether the spot market behaviour has a particular character or purpose to either:

- act fraudulently, dishonestly or in bad faith in carrying out the spot market behaviour; or
- the behaviour has been carried out for the purpose of distorting or manipulating prices in the electricity spot market.

With this prohibition, there are 2 types of cases: 'basic' (section 153G) and 'aggravated' (section 153H). The aggravated case requires establishing the fraudulent, deceptive or in bad faith element, as well as the distorting or manipulating prices element.

Similarly to the contract prohibition, there are additional remedies available in relation to the spot prohibitions, these being divestiture and contracting orders for aggravated cases. The ACCC has a role in making a recommendation to the Treasurer under sections 153ZA and 153X of the CCA to permit the Treasurer to apply for these orders to the Federal Court.

Monitoring and enforcement

Since Part XICA's commencement, the ACCC has undertaken initial assessments of 3 potential contraventions of the spot market prohibitions. To date, there have been no public outcomes, with the first 2 assessments not progressing to further investigation, and the third still under consideration.

The ACCC considers it likely that the spot prohibitions and their significant penalties have had an impact on participant conduct to some extent, particularly as a form of deterrence. The ACCC's December 2024 electricity inquiry report found most retailers sampled sought to manage their obligations for the spot prohibitions through training packages. This training was provided on a regular basis to existing staff and through induction programs for new staff.²⁸

²⁵ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, p 94.

²⁶ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, p 39.

²⁷ ACCC, [Retail Electricity Pricing Inquiry – Final Report June 2018](#), ACCC, Australian Government, 1 June 2018, pp 96–98.

²⁸ ACCC, [Inquiry into the National Electricity Market: December 2024 report](#), ACCC, Australian Government, 3 December 2024, p 25.

Effectiveness of the spot prohibitions

The spot prohibitions and clause 3.8.22A of the NER (the NER provision) are concerned with similar types of behaviour and there is potential for cross-jurisdictional applications.

Clause 3.8.22A(a) of the NER states that generators must not make a dispatch offer, dispatch bid or rebid that is false, misleading or likely to mislead.

Clause 3.8.22A(b) states a bid or rebid is deemed to be false or misleading if the market participant:

- does not have a genuine intention to honour the offer, or
- does not have a reasonable basis to make the representation.

In contrast, the spot prohibitions concern bidding behaviour which is done:

- fraudulently, dishonestly or in bad faith and/or
- for the purpose of distorting or manipulating prices in a spot market.

The ACCC considers that this first limb of the spot prohibitions concerns the type of behaviour contemplated by the NER provision.²⁹ However, the spot prohibitions capture wider conduct than the NER provision, as conduct that the ACCC considers to be in breach of sections 153G and 153H may not contravene the NER provision.³⁰

Additionally, the remedies available under the spot prohibitions are more significant than the NER provision. For an aggravated spot market prohibition case (where both elements listed above are proven), the Treasurer can seek a contracting or divestiture order on the ACCC's recommendation. Both remedies are only available under the PEMM Act.³¹

As discussed under the contract prohibition, the contracting order remedy is significant as it enables the Treasurer to order a body corporate to make offers to enter financial contracts.³²

Likewise, the divestiture remedy is unprecedented as it allows the Federal Court to make a divestiture order upon the receipt of a prohibited conduct recommendation from the ACCC and an application from the Treasurer.³³ A prohibited conduct recommendation for a divestiture order must meet requirements such as a net public benefit test, conditions on proportionality, and a reasonable belief held by the ACCC that the corporation has engaged in the prohibited conduct. While the Court has to be satisfied that such an order is proportionate and that the conduct identified in the recommendation is prohibited under section 153H, a hearing of the underlying facts is not required.³⁴ In other words, the pathway for a divestiture order is designed to enable a rapid response to address existing competition issues in the market.

²⁹ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraph 4.15.

³⁰ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraph 4.16.

³¹ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraph 6.27.

³² ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraph 1.4.

³³ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraphs 1.4 and 6.35.

³⁴ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraph 6.49.

Both measures are sanctions of last resort to target specific issues in the electricity spot market and facilitate competition. While it is challenging to establish a counter-factual of the NEM without the PEMM prohibitions, it is likely that the severity of these measures has a deterrent effect on market participants. If the spot prohibitions lapse, so does the deterrent effect of these remedies.

Spot market behaviour and the contracts market

Conduct in the spot market may be intended to influence the contracts market. The ACCC Guidelines note that late rebidding in particular, which is covered by the spot prohibitions, may increase the price volatility in the spot market, and decrease confidence in forward market information, such as the pre-dispatch forecast. In cases of (deliberate) late rebidding, the resulting price volatility has the potential to inflate the value of both wholesale spot prices and financial hedge contracts.³⁵ Government may wish to consider whether bidding conduct in the spot market, with a purpose to influence price outcomes in the contracts market, should be more explicitly addressed by the PEMM provisions.

Additionally, a formal and structured referral process should be considered for the spot market prohibition, similar to the contract prohibition above. This may assist in instances where agencies monitoring the wholesale market become aware of conduct that could potentially enliven the spot market prohibitions. Clearer roles and responsibilities, and appropriate information sharing powers should likewise be considered to facilitate this.

Spot market behaviour and future market design

While not strictly relevant to the PEMM Review, the ACCC recommends further consideration be given to withholding conduct in the context of Future market design. Neither economic nor physical withholding are proscribed under the NER and the National Electricity Law.³⁶ However, both forms of withholding can inflict consumer harm.

Where withholding reflects a sufficiently severe or repeated exercise of market power, long-term wholesale prices may significantly exceed those expected in an effectively competitive electricity spot market. Such market outcomes inflict consumer harm through increased wholesale and hedging contract costs being passed through to retail prices.

In relation to the current market, the AER's *Wholesale electricity market performance report* released on 20 December 2024 observed that participants in South Australia may have greater opportunities to exercise market power in the future. In particular, as more thermal plants exit the market and the remaining participants' share of dispatchable generation is likely increasing, additional firming capacity will be needed.³⁷ This means generators who are able to provide firming capacity may have a greater ability to economically withhold profitably.

The NEM wholesale market settings review might consider whether economic and physical withholding should be permitted in the future.

³⁵ ACCC, [Guidelines on Part XICA – Prohibited conduct in the energy market](#), ACCC, Australian Government, May 2020, paragraph 4.9.

³⁶ The AER defines economic withholding as a participant offering capacity at prices materially higher than efficient costs to increase prices and physical withholding as reducing the amount of capacity offered to the market or not offering capacity at all. The AER considers economic and physical withholding as forms of the exercise of market power.

Source: AER, [Wholesale electricity market performance report](#), AER, Australian Government, 20 December 2024, p 57.

³⁷ Source: AER, [Wholesale electricity market performance report](#), AER, Australian Government, 20 December 2024, pp 159–160.

7. ACCC's NEM Electricity Inquiry Function

The consultation paper raised a number of questions relating to the NEM electricity inquiry function, including the following:

24. Does the NEM Inquiry support improved outcomes for customers?

25. Does the NEM Inquiry provide value beyond supporting monitoring and compliance with the PEMM Act provisions? If so, how?

26. Is the scope and the types of information gathered through the current NEM Inquiry appropriate? If not, how?

The ACCC was directed by the Treasurer to hold an inquiry into prices, profits, and margins in the supply of the NEM in August 2018. The inquiry is set to run for seven years according to its Terms of Reference, ending on 31 August 2025. The first report was required by 31 March 2019, with the ACCC required to report no less frequently than every 6 months thereafter. The ACCC is to also provide information to the market as appropriate.

Matters monitored and taken into consideration in the inquiry included but are not limited to:

- electricity prices faced by customers in the national electricity market, including both the level and the spread of price offers.
- analysing how wholesale prices are influencing retail prices and whether any wholesale cost savings are being passed through to retail customers.
- wholesale market prices including the contributing factors, such as input costs, bidding behaviour and any other relevant factors.
- the profits being made by electricity generators and retailers and the factors that have contributed to these.
- contract market liquidity, including assessing whether vertically integrated electricity suppliers are restricting competition and new entry.
- the effect of policy changes in the NEM resulting from recommendations made by the ACCC in its Retail Electricity Pricing Inquiry report of July 2018.

Where appropriate, the inquiry is to make recommendations to government(s) to take any proportional and targeted action considered necessary to remedy any failure by market participant(s) (or the market as a whole) to deliver competitive and efficient electricity prices for customers.

The ACCC released a Discussion Paper consulting on the approach to take for this inquiry and received 25 submissions. There was strong support from stakeholders to continue the types of analysis undertaken in the REPI over 2017 and 2018.

In response to the consultation, the ACCC has focused its inquiry reporting on retailer profitability and customer outcomes. However, the broad scope of its direction has allowed the ACCC to explore other areas of concern in the market, including:

- how electricity retailers and generators are using contracts to manage the risk of large fluctuations in spot market prices.
- how retailers are changing prices for their existing market offer customers on both flat rate and complex offers.
- how the billing outcomes of embedded network customers served by authorised retailers compare with regular customers.

- the billing outcomes of customers on 'new energy services' such as virtual power plants and electric vehicle related plans (a focus of the ACCC's next report).

Over the course of the inquiry, the ACCC has made 10 recommendations (in addition to the 56 recommendations of the REPI report) and supported several rule change requests made to the Australian Energy Market Commission. These have aimed to assist competition in both the retail and wholesale markets and deliver more protections for consumers.

The ACCC has also used the information gathered as part of the inquiry to support its PEMM compliance monitoring program. Inquiry data collected on the prices, costs and margins of retailers is used as input for compliance monitoring models, which compare changes in retailer costs to changes in their prices. This process and the importance of using this data is detailed under the 4. The retail pricing prohibition section above.

Table 1 List of reports prepared through the ACCC's NEM Electricity Inquiry Function

Report number	Date provided	Report link	Report focus
1	15 March 2019	March 2019 report	Analytical framework for monitoring electricity market and expectations of market outcomes and participant behaviour.
2	20 August 2019	August 2019 report	Progress of REPI recommendations, impact of recent reforms to retailer pricing and advertising and cost stack analysis for 2017–18.
3	29 November 2019	November 2019 report	Cost stack analysis for 2018–19 and retail pricing (publicly available information).
4	21 September 2020	September 2020 report	Billing analysis for 1 July 2018 to 31 December 2019.
	21 September 2020	Supplementary report – impact of COVID-19 and ACCC monitoring and enforcement activities	The effects of the COVID-19 pandemic on electricity consumption and affordability, the response of market bodies and participants to the pandemic, and updates on our monitoring and enforcement work.
5	27 May 2021	May 2021 report	Updated billing analysis, with a focus on the impact of COVID-19 on customers' usage patterns and bills.
6	22 November 2021	November 2021 report	Cost stack analysis for 2019–20 and 2020–21.
7	23 May 2022	May 2022 report	Updated billing analysis, with a focus on smart meters and solar customers. Included an addendum to explain the drivers of unprecedented changes occurring in electricity markets in mid-2022, the observed price impacts, and the ACCC's role.

Report number	Date provided	Report link	Report focus
8	23 November 2022	November 2022 report	Hedging contract analysis and cost stack analysis for 2021–22, with a focus on the impact of June 2022 events on competition in the financial and retail electricity markets.
9	2 June 2023	June 2023 report	Overview of wholesale market conditions and updated billing analysis, with a focus on hardship customers, and how different energy plan features affect bills.
10	1 December 2023	December 2023 report	Retail pricing analysis, hedging contract analysis and cost stack analysis, with a focus on large retail price increases in July 2023 and future financial risk management in the market.
11	3 June 2024	June 2024 report	Updated billing analysis with a focus on government rebates and outcomes for embedded network customers.
12	3 December 2024	December 2024 report	Retail pricing analysis extended to include time of use and demand offers. Cost stack analysis for 2023–24 also reported.
13	July 2025	N/A	<p>The report also included an overview of retailer pricing strategies, and how PEMM is complied with.</p> <p>Will continue the analysis of customer billing outcomes with extended analysis to focus on ‘new energy services’.</p>