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COMPETITION AND CONSUMER AMENDMENT (GAS MARKET) BILL 2022

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# Glossary

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This Explanatory Memorandum uses the following abbreviations and acronyms.

<b>Abbreviation</b>	<b>Definition</b>
ACCC	Australian Competition and Consumer Commission
ACL	Schedule 2 of the CCA (Australian Consumer Law)
AIA	<i>Acts Interpretation Act 1901</i>
Bill	Competition and Consumer Amendment (Gas Market) Bill 2022
CCA	<i>Competition and Consumer Act 2010</i>
Criminal Law Guide	A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Attorney General's Department, September 2011)
Legislation Act	<i>Legislation Act 2003</i>
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
Voluntary Code of Conduct	Voluntary Code of Conduct for the Negotiation and Development of Gas Supply Agreements Between Gas Suppliers and Gas Customers in Australia, dated 8 August 2022, contained in Annex C of the Heads of Agreement: The Australian East Coast Domestic Gas Supply Commitment <sup>1</sup>

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<sup>1</sup> [https://www.industry.gov.au/sites/default/files/2022-09/heads\\_of\\_agreement\\_the\\_australian\\_east\\_coast\\_domestic\\_gas\\_supply\\_commitment.pdf](https://www.industry.gov.au/sites/default/files/2022-09/heads_of_agreement_the_australian_east_coast_domestic_gas_supply_commitment.pdf)



# ***General outline and financial impact***

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## Schedule 1—Amendments

### Outline

The Bill establishes a new legislative framework to enhance the welfare of Australians through the regulation of the Australian gas market, including through limitations on increases in gas prices.

### **Date of effect**

Schedule 1 to the Bill commences on the day after Royal Assent.

### **Financial impact**

Nil.

### **Compliance cost impact**

The Bill has a negligible compliance cost.





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# **Gas Market**

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## Outline of chapter

- 1.1 The Bill amends the CCA to establish a new legislative framework to enhance the welfare of Australians through the regulation of the Australian gas market, including through limitations on increases in gas prices caused by disruptions in global energy markets.
- 1.2 All references in this Chapter are to the CCA unless otherwise stated.

## Context of amendments

- 1.3 The Government is committed to reducing the impact of the global energy shock on Australian households and businesses caused by Russia's invasion of Ukraine. Over the course of 2022, the war in Ukraine has resulted in significant volatility and record prices for gas on international markets. The current energy crisis was unforeseen and its economic impact on Australia is severe.
- 1.4 Due to the links between the domestic gas market and export markets, wartime prices for gas are driving high wholesale gas prices in Australia that affect

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domestic customers and the wider economy. Energy price shocks affect economic activity through a variety of direct and indirect channels, including inflation and cost of living pressures. As a result, Australian households and businesses (including manufacturers and commercial enterprises) are paying significantly more for energy and energy-intensive goods and services.

- 1.5 As an emergency measure to address the current energy crisis, the Government intends to implement a temporary price cap through a gas market emergency price order as provided in the Bill. The order would apply to uncontracted gas offered on the wholesale market from currently operational fields capable of supply during the period in which the emergency price order is in force. This measure is intended to ensure that wholesale gas is offered at prices that are affordable for domestic customers while still maintaining a reasonable return for suppliers and maintaining incentives for investment.
- 1.6 The Government is also addressing longer-term issues in the wholesale gas market to ensure that there is a reliable and affordable supply of gas to the domestic market. The Bill allows mandatory codes (known as gas market codes) to be made to regulate conduct in relation to the supply and acquisition of gas. The Government intends to implement a gas market code in relation to wholesale gas to address bargaining power imbalances and systemic issues which may limit buyers' ability to negotiate gas supply contracts on reasonable terms.
- 1.7 The proposed gas market code for the wholesale gas market will be mandatory and improve upon the current Voluntary Code of Conduct. It is intended that the gas market code will place obligations on both suppliers and purchasers in the wholesale gas market to increase transparency, ensure a more robust pricing framework centred on reasonable price, and provide a pathway for binding dispute resolution. Greater obligations will be placed on suppliers to address imbalances in bargaining power in current market conditions.
- 1.8 This measure, together with several measures announced in the October 2022-23 Budget, will strengthen the framework available to meet the challenges that arise in energy markets. These Budget measures include a package of reforms to modernise energy market regulation, increase monitoring and oversight of gas markets, improve the functioning of the AGDSM and an ACCC review of the current industry-led Voluntary Code of Conduct for gas producers and exporters.

## Summary of new law

- 1.9 The Bill inserts Part IVBB into the CCA to create an overarching framework to enable the Government to regulate the gas market. Two kinds of legislative instruments will underpin the new framework: gas market codes and gas market emergency price orders. These instruments are collectively referred to as gas market instruments.

- 1.10 First, the Governor-General may, through regulations, make gas market codes. Gas market codes may prescribe a broad range of matters relating to the supply and acquisition of gas commodities, including:
- regulating dealings between persons who supply or acquire a gas commodity, including negotiations between them;
  - requiring a person to supply a gas commodity in particular circumstances;
  - dealing with and resolving disputes or complaints between persons who supply or acquire a gas commodity.
- 1.11 Second, the Minister may make gas market emergency price orders regulating the terms on which gas commodities are supplied or acquired, specifically including price. A gas market emergency price order is designed to provide short-term relief from the current energy crisis. The Minister’s power to make gas market emergency price orders sunsets 12 months after the commencement of any order, or 12 months after commencement of the Bill if no order is made. The Minister must consult the ACCC prior to making a gas market emergency price order, and an order is automatically repealed after 12 months. Gas market emergency price orders provide the basis for emergency price regulation of gas, primarily to reduce domestic prices and address the current energy crisis.
- 1.12 The Bill includes a range of mechanisms that are aimed at detecting, deterring and addressing non-compliance with Part IVBB and gas market instruments. The ACCC has the power to require the production of certain information and documents, investigate suspected non-compliance and utilise a range of sanctions that are appropriate and proportionate to the non-compliance.
- 1.13 The consequences of contravening relevant provisions of Part IVBB or a gas market instrument include civil penalties, infringement notices, warning notices and orders under Part VI.
- 1.14 The Bill prohibits avoidance schemes that are designed to avoid the application of a civil penalty provision of a gas market instrument.

## Detailed explanation of new law

### Preliminary

#### Object and simplified outline

- 1.15 The Bill outlines the object of the new Part IVBB to establish a new legislative framework to enhance the welfare of Australians through the regulation of the Australian gas market, including through limitations on increases in gas prices.  
*[Schedule 1, item 2, section 53]*

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- 1.16 As section 15AA of the AIA provides that statutes should be interpreted in accordance with their objects, all other provisions of the Bill are to be read, as far as is possible, as being designed to carry out its object.
- 1.17 The Bill provides a simplified outline of the Bill, including an outline of gas market codes and gas market emergency price rules orders that may be made under new Part IVBB.  
*[Schedule 1, item 2, section 53A]*

## Gas market provision

- 1.18 Each of the following provisions is a ‘gas market provision’:
- a provision of new Part IVBB;
  - a provision of regulations made for the purposes of a provision of Part IVBB (including a gas market code);
  - a provision of a gas market emergency price order;
  - another provision of the CCA to the extent that it relates to one of the above provisions.
- [Schedule 1, item 1, subsection 4(1) (definition of ‘gas market provision’)]*

## Gas commodity

- 1.19 A gas commodity is gas (including gas in a liquid state) or goods or services relating to supplying or acquiring gas.  
*[Schedule 1, item 2, section 53B (definition of ‘gas’ and ‘gas commodity’)]*

## Gas market instruments

### What are gas market instruments?

- 1.20 A gas market instrument is a gas market code or gas market emergency price order. A gas market instrument may deal with the matters outlined below under the heading ‘What may a gas market instrument deal with?’.  
*[Schedule 1, item 1, subsection 4(1) (definition of ‘gas market instrument’)]*

### Gas market emergency price orders

- 1.21 The Minister may, by legislative instrument, make a gas market emergency price order. The order may prescribe matters required or permitted by the CCA to be prescribed by a gas market emergency price order. Subdivision C of Division 2 of Part IVBB sets out matters that a gas market emergency price order may deal with. This primarily allows an order to regulate the terms (including prices) on which gas is supplied or acquired. Subdivision D of

Division 2 of Part IVBB also sets out incidental matters that a gas market emergency price order may deal with

***[Schedule 1, item 1, subsection 4(1) (definition of ‘gas market emergency price order’); item 2, subsection 53M(1)]***

- 1.22 If a gas market emergency price order is inconsistent with the regulations, the order has no effect to the extent of the inconsistency. An order, however, is taken to be consistent with the regulations to the extent that the order is capable of operating concurrently with the regulations.
- [Schedule 1, item 2, subsection 53M(3)]***

## **Gas market code**

- 1.23 The Governor-General may make regulations prescribing matters required or permitted by the CCA to be prescribed by a gas market code. Subdivision B of Division 2 of Part IVBB sets out matters that a gas market code may deal with. Subdivision D of Division 2 of Part IVBB also sets out incidental matters that a gas market emergency price order may deal with.
- 1.24 This does not limit the regulation-making power in section 172.
- [Schedule 1, item 1, subsection 4(1) (definition of ‘gas market code’); item 2, section 53L]***

## **What may a gas market instrument deal with?**

### **Gas market code**

- 1.25 Subdivision B of Division 2 of Part IVBB sets out matters that may be prescribed in a gas market code.

### ***Gas market code may regulate conduct***

- 1.26 A gas market code may include rules regulating (including prohibiting) gas market conduct. This provision is not limited by other provisions that set out matters that a gas market instrument may deal with.
- [Schedule 1, item 2, sections 53B (definitions of ‘regulating’ and ‘gas market conduct’) and 53P]***
- 1.27 The Bill outlines specific conduct that is ‘gas market conduct’, which may occur inside or outside Australia and relates to supplying or acquiring a gas commodity, or to the potential supply of acquisition of a gas commodity. Gas market conduct includes (but is not limited to) the following:
- supplying or acquiring a gas commodity;
  - issuing or receiving an expression of interest in relation to supplying or acquiring a gas commodity;
  - responding to an expression of interest in relation to supplying or acquiring a gas commodity, or receiving such an offer;

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- offering, or responding to an offer, to supply or acquire a gas commodity;
  - agreeing to supply or acquire a gas commodity;
  - refusing to do anything mentioned above;
  - operating a gas exchange;
  - conduct prescribed by the regulations as ‘gas market conduct’.

Conduct has an extended meaning given by subsection 4(2).

***[Schedule 1, item 2, subsections 53C(1) and (4)]***

- 1.28 Conduct engaged in by the Minister, the ACCC or a member of the ACCC, or the exercise of a power or performance of a function conferred by a gas market provision, or conduct engaged in by a mediator or arbiter of a dispute between participants is not ‘gas market conduct’. The regulations may also prescribe conduct to not be ‘gas market conduct’ (including conduct that would otherwise be gas market conduct as mentioned above).

***[Schedule 1, item 2, subsections 53C(2) and (3)]***

### ***Gas market code may regulate participants***

- 1.29 A gas market code may regulate gas market participants. A ‘gas market participant’ is any of the following:

- a person who engages, or is capable of engaging, in gas market conduct;
- a body corporate that is related (within the meaning of section 4A) to a body corporate that is a gas market participant;
- any of the persons who carry on a joint venture carried on jointly by two or more persons (whether or not in partnership) if the joint venture is, or includes, gas market conduct.
- a person who has previously been a gas market participant in any of the scenarios described above.

***[Schedule 1, item 2, section 53B (definition of ‘gas market participant’) and paragraphs 53D(1)(a) to (d)]***

- 1.30 The regulations may also:

- provide that a person or body is a gas market participant, and
- provide that a person or body is not a gas market participant (including a person or body mentioned above).

***[Schedule 1, item 2, subsections 53D(2) and (3) and paragraph 53D(1)(e)]***

### ***Dealing, negotiating and reaching agreements***

- 1.31 The Bill provides that a gas market code may outline obligations for gas market participants when dealing, negotiating or reaching agreements with other participants in a gas market. These obligations are designed to ensure that

there is a fair and transparent process for participants entering into commercial arrangements for the supply or acquisition of a gas commodity.

### Dealings

- 1.32 A gas market code may include rules about dealings between participants. The rules may require a participant to deal with other participants in a specified manner, which includes dealing in good faith. The rules may set out matters that must, may or must not be taken into account to determine whether a participant is dealing in good faith. A gas market code may also include rules about the period within which a participant does something when dealing with another participant (including responding to a request).

***[Schedule 1, item 2, section 53Q]***

### Expressions of interest and offers

- 1.33 A gas market code may include rules about negotiations relating to supplying or acquiring a gas commodity, including rules about expressions of interest or offers. The rules may require a participant to make, or not to make, an expression of interest or an offer in specified circumstances.

***[Schedule 1, item 2, subsection 53R(1) and paragraphs 53R(2)(a) and (3)(a)]***

- 1.34 The rules may also set out requirements about any of the following matters:

- the matters to which a participant has regard before issuing an expression of interest or making an offer;
- the manner in which an expression of interest is issued or an offer is made, both of which may be in writing;
- information that is included in an expression of interest or an offer, or made available in connection with an expression of interest or an offer (including the manner in which the information is made available);
- the content of an expression of interest or an offer;
- the period during which an expression of interest or an offer is open;
- responding to an expression of interest or an offer;
- dealing with a response to an expression of interest or an offer (including by providing information), making an offer or entering into an agreement;
- withdrawing an expression of interest or an offer.

***[Schedule 1, item 2, paragraphs 53R(2)(b) and (3)(b)]***

- 1.35 An ‘expression of interest’ is a non-binding expression of interest or invitation issued for the purpose of ascertaining whether a person is interested in acquiring or supplying a gas commodity.

***[Schedule 1, item 2, section 53B (definition of ‘expression of interest’)]***

- 1.36 An ‘offer’ includes a counter-offer and a bid on a gas exchange.

***[Schedule 1, item 2, section 53B (definition of ‘offer’)]***

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## Agreements

- 1.37 A gas market code may include rules about agreements (including contracts) relating to supplying or acquiring a gas commodity, including rules requiring a participant to enter, or not to enter, into an agreement in specified circumstances. The rules may set out the manner in which an agreement is made, the matters dealt with in an agreement and withdrawing from or ending an agreement. The rules may specify that an agreement must be in writing.  
***[Schedule 1, item 2, section 53B (definition of ‘agreement’) and paragraphs 53S(1)(a) and (b)]***
- 1.38 For an agreement for the supply or acquisition of a gas commodity, the Bill outlines the following requirements that may be set out in the rules:
- how much of the gas commodity to be supplied or acquired;
  - flexibility of the volume of the gas commodity to be supplied or acquired;
  - where or when the gas commodity is to be supplied or acquired;
  - payment terms;
  - a communication protocol for major interruptions to the supply of the gas commodity;
  - the period of the agreement;
  - the consequences of a breach of the agreement;
  - dispute resolution.
- [Schedule 1, item 2, subparagraph 53S(1)(b)(ii) and subsection 53S(2)]***
- 1.39 Further information on rules about terms (including terms relating to price) is covered in paragraphs 1.40 to 1.44.

## *Terms and price*

- 1.40 A gas market code may include rules about the terms on which a person offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity. This includes rules about how such terms are expressed, fees payable in relation to an offer, agreement, supply or acquisition, and terms relating to price (including price structure).  
***[Schedule 1, item 2, section 53B (definition of ‘price’) and subsection 53T(1)]***
- 1.41 A gas market order may include rules setting a price, including a maximum price, minimum price, or maximum and minimum price. The rules may also require a price to be reasonable and provide for matters that must, may or must not be taken into account in determining whether a price is reasonable. The rules may provide for determining a price (including matters to be taken into account in determining a price) and how a price is expressed. In setting a price, the rules may refer to the price of any gas commodity inside or outside Australia or any published information about any market; or require a price to



be equal to the amount worked out by using a specified formula or method.

***[Schedule 1, item 2, subsection 53T(2) and 53ZE(3)]***

- 1.42 A gas market code may also include rules requiring a gas market participant not to offer to supply or acquire, not to agree to supply or acquire or not to supply or acquire a gas commodity if certain rules are not complied with in relation to the offer, agreement, supply or acquisition.

***[Schedule 1, item 2, sections 53R, 53S and 53V and subsection 53X(3)]***

- 1.43 A gas market code may confer on the Minister, the Commission or any other person or body the function of setting a price. Further information on powers in the rules to give a person or body the function of determining a price is outlined below at paragraphs 1.77 to 1.81.

- 1.44 It is intended that a gas market code will place obligations on both suppliers and purchasers in the wholesale gas market to adhere to a reasonable price framework and provide a pathway for binding dispute resolution in relation to a reasonable price. Greater obligations will be placed on suppliers to address imbalances in bargaining power in current market conditions

### ***Regulating exchanges***

- 1.45 A gas market code may include rules regulating (including prohibiting) the operation of a gas exchange. A gas exchange is an exchange or other trading system, platform or facility (including an electronic exchange, system, platform or facility) on which:

- expressions of interest are issued, received or responded to;
- offers are made, received or responded to; or
- agreements are entered into;

in relation to supplying or acquiring gas commodities.

***[Schedule 1, item 2, sections 53B (definitions of ‘regulating’ and ‘gas exchange’) and 53U]***

### ***Regulating supply***

- 1.46 To ensure that there is a reliable supply of a gas commodity, the Bill provides that a gas market code may contain rules requiring a participant to supply, or not to supply, gas commodities in specified circumstances.

***[Schedule 1, item 2, subsection 53V(1)]***

- 1.47 These rules have broad application and would apply to a participant even if the participant:

- is only a participant because they were previously a participant or a person or body prescribed by the regulations to be a participant; or
- would not supply a gas commodity in Australia or at all, or would not supply the gas commodity in or from Australia, apart from the rule.

***[Schedule 1, item 2, subsection 53V(2)]***

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- 1.48 If a gas market code contains a rule requiring a participant to supply a gas commodity, the code may include rules about the following matters:
- how much of the commodity is to be supplied;
  - where or when the commodity is to be supplied;
  - agreements relating to the supply of the commodity;
  - the terms (including terms relating to price) on which the commodity is to be supplied.
- [Schedule 1, item 2, subsection 53V(3)]***
- 1.49 A gas market code may also include rules requiring a participant to not acquire gas commodities in specified circumstances.
- [Schedule 1, item 2, subsection 53V(4)]***

### *Disputes and complaints*

- 1.50 The Bill provides a framework for resolving disputes between participants. This framework is intended to address the imbalance in bargaining power between suppliers and purchasers of gas commodities and provide a formal mechanism for the efficient resolution of pre-contractual disputes.
- 1.51 A gas market code may contain rules about disputes or complaints arising under, or in relation to, a gas market code. A code may also contain rules about disputes arising during negotiations between participants including disputes relating to a prospective agreement between participants or price disputes. A price dispute arises if a participants do not agree to the terms (including terms relating to price) on which they are to supply or acquire gas commodities.
- [Schedule 1, item 2, section 53B (definition of ‘price dispute’) and subsection 53W(1)]***
- 1.52 A gas market code may include rules requiring a participant to have internal or external dispute resolution processes and require those processes to meet specified criteria.
- [Schedule 1, item 2, subsection 53W(2)]***

### Mediation

- 1.53 A gas market code may provide for the mediation of disputes between participants. To ensure that mediation of disputes is fit-for-purpose, the Bill outlines a comprehensive list of matters that may be covered in a code in relation to mediation.
- [Schedule 1, item 2, paragraphs 53W(4)]***
- 1.54 A gas market code may determine that mediation is compulsory and provide for consequences of not participating in mediation. The powers and functions of a mediator and process for appointing a mediator may be set out in a code.
- [Schedule 1, item 2, paragraphs 53W(4)(a), (b), (e) and (f)]***

- 1.55 A gas market code may establish a process for commencing mediation, including rules about a party giving information to another party (including on request) or a mediator and terminating a mediation. A code may provide an express requirement for a mediator to provide a party with an opportunity to be heard.  
***[Schedule 1, item 2, paragraphs 53W(4)(c) and (d)]***
- 1.56 A gas market code may provide for administrative matters related to mediation including reporting, generating and keeping records, confidentiality and the costs of mediation (including determining costs or liability for paying costs).  
***[Schedule 1, item 2, paragraphs 53W(4)(g)–(j)]***

### Arbitration

- 1.57 A gas market code may provide for the arbitration of disputes between participants. To ensure that arbitration of disputes is fit-for-purpose, the Bill specifies a non-exhaustive list of matters that may be covered in a code in relation to arbitration.  
***[Schedule 1, item 2, subsection 53W(5)]***
- 1.58 A gas market code may determine that arbitration is compulsory and how the decisions of an arbiter bind a party to an arbitration. A code may also provide for consequences of not participating in an arbitration or not complying with a decision of an arbiter.  
***[Schedule 1, item 2, paragraphs 53W(5)(f), (g), (i) and (j)]***
- 1.59 A gas market code may set out the powers and functions of an arbiter and decision-making by an arbiter, including decision-making processes. This could include a requirement for an arbiter to adhere to price guidelines set by experts. The powers or functions conferred on an arbiter by a code must not involve the exercise of judicial power.  
***[Schedule 1, item 1, subsection 4(1) (definition of ‘judicial power’); item 2, paragraphs 53W(5)(c) and (h) and subsection 53W(6)]***
- 1.60 A gas market code may establish a process for commencing arbitration, including rules requiring a party to a dispute to take reasonable steps (such as mediation) to resolve a dispute before proceeding to arbitration, and terminating an arbitration. The rules may also provide for how a party gives information to another party or to an arbiter (including on request). The rules may provide an express requirement for an arbiter to provide a party with an opportunity to be heard.  
***[Schedule 1, item 2, paragraphs 53W(5)(d) and (e)]***
- 1.61 A gas market code may provide for administrative matters related to arbitration including the process for appointing an arbiter, establishing or maintaining a register of arbiters, reporting, generating and keeping records, confidentiality and the costs of arbitration (including determining costs or liability for paying costs).  
***[Schedule 1, item 2, paragraphs 53W(5)(a), (b) and (k)–(n)]***

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## Complaints to Minister or ACCC

- 1.62 A gas market code may allow a participant to make complaints to the Minister or ACCC about a contravention of a gas market instrument or dispute between participants. The rules in a code may set out the manner in which such complaints are made and how the Minister or ACCC deals with them.  
*[Schedule 1, item 2, subsection 53W(3)]*

## **Gas market emergency price instrument**

- 1.63 Subdivision C of Division 2 of Part IVBB sets out matters that may be prescribed in a gas market emergency price instrument.

### *Terms and price*

- 1.64 A gas market emergency price order may include rules about the terms on which a person offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity. This includes rules about how such terms are expressed, fees payable in relation to an offer, agreement, supply or acquisition, and terms relating to price (including price structure).  
*[Schedule 1, item 2, section 53B (definition of ‘price’) and subsection 53X(1)]*
- 1.65 A gas market emergency price order may include rules setting a price, including a maximum price, minimum price, or maximum and minimum price. The rules may also require a price to be reasonable and provide for matters that must, may or must not be taken into account in determining whether a price is reasonable. The rules may provide for determining a price (including matters to be taken into account in determining a price) and how a price is expressed. In setting a price, the rules may refer to the price of any gas commodity inside or outside Australia or any published information about any market; or require a price to be equal to the amount worked out by using a specified formula or method.  
*[Schedule 1, item 2, subsections 53X(2) and 53ZE(3)]*
- 1.66 A gas market emergency price order may confer on the Minister, the Commission or any other person or body the function of setting a price. Further information on powers in the rules to give a person or body the function of determining a price is outlined below at paragraphs 1.77 to 1.81.  
*[Schedule 1, item 2, subsection 53ZB]*
- 1.67 A gas market emergency price order may require a participant not to offer to supply or acquire, or not to agree to supply or acquire or not to supply or acquire a gas commodity if rules relating to terms and price are not complied with in relation to the offer, agreement, supply or acquisition. This is an avoidance of doubt provision, due to the limited scope of matters a gas market emergency price order may prescribe compared to a gas market code.  
*[Schedule 1, item 2, subsection 53X(3)]*

- 1.68 Matters relating to price are central to gas market emergency price orders, as they are designed to provide the basis for emergency price regulation of gas, primarily to reduce domestic prices and address the current energy crisis.

### *Regulating exchanges*

- 1.69 A gas market emergency price order may include rules regulating (including prohibiting) the operation of a gas exchange. A gas exchange is an exchange or other trading system, platform or facility (including an electronic exchange, system, platform or facility) on which:

- expressions of interest are issued, received or responded to;
- offers are made, received or responded to; or
- agreements are entered into;

in relation to supplying or acquiring gas commodities.

***[Schedule 1, item 2, sections 53B (definitions of ‘regulating’ and ‘gas exchange’) and 53Y]***

### **Incidental matters – gas market code and gas market emergency price order**

- 1.70 Subdivision D of Division 2 of Part IVBB sets out matters that may be prescribed in a gas market instrument (that is, a gas market code or gas market emergency price order).

### *Transparency*

- 1.71 A gas market instrument may include rules about gas market participants, the Minister or the ACCC publishing information that relates to a gas market matter, including about the type of information and the circumstances and manner of publication. For example, a rule may require certain information to be published periodically.

***[Schedule 1, item 2, subsection 53Z(1)]***

- 1.72 The rules in an instrument may require a participant to give to another person information or documents relevant to a gas market matter.

***[Schedule 1, item 2, subsection 53Z(2)]***

- 1.73 A gas market matter includes:

- gas market conduct;
- the operation, application or administration of a gas market instrument;
- compliance (including non-compliance) with a gas market instrument;
- a failure to supply a gas commodity; or
- a matter prescribed by the regulations as being or not being a gas market matter.

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*[Schedule 1, item 2, section 53B (definition of ‘gas market matter’)]*

*Reporting, record keeping and auditing*

- 1.74 A gas market instrument may include rules about reporting, generating and keeping records or auditing in relation to a gas market matter.  
*[Schedule 1, item 2, subsection 53ZA(1)]*
- 1.75 The rules in an instrument may require a participant to give financial or other reports, records or documents, or information, relating to a gas market matter to the Minister or ACCC, including requiring such reports, records, documents or information to be given periodically or on request.  
*[Schedule 1, item 2, subsection 53ZA(2)]*
- 1.76 The rules in an instrument may also may require a participant to report to the Minister or the ACCC the occurrence of a specified event relating to a gas market matter or a price dispute and give to the Minister or the ACCC specified information about that event.  
*[Schedule 1, item 2, subsection 53ZA(3)]*

*Conferral of powers or functions on a person or body*

- 1.77 A gas market instrument may confer on a person or body a power to do, or function of doing, any of the following:
- monitoring compliance with a gas market instrument;
  - conducting investigations under, or in relation to a gas market matter;
  - providing exemptions from a gas market instrument or a specified provision of, or specified rule included in, a gas market instrument;
  - reviewing or reporting on, the operation, application or administration of a gas market instrument or activities under or in relation to a gas market instrument;
  - reviewing a decision under a gas market instrument, or in the exercise or performance of a power or function conferred by a gas market instrument.
- [Schedule 1, item 2, subsection 53ZB(1)]*
- 1.78 A gas market code or gas market emergency price order may confer on a person or body any of the following powers or functions:
- a power to determine, or a function of determining, any matters that made be dealt with by a code or an order;
  - a power or function relating to the operation, application or administration of a code or an order.
- [Schedule 1, item 2, subsections 53ZB(2) and (3)]*
- 1.79 If a gas market code or a gas market emergency price order confers these powers or functions, the code or order may provide that the power is to be exercised, or the functioned performed, by legislative instrument, notifiable

instrument or other kind of written instrument. The power or function may be delegate subject to the limitations discussed below.

***[Schedule 1, item 2, subsections 53ZB(4) and (5)]***

- 1.80 If a gas market instrument confers a power to make a legislative instrument, the instrument-making power can only be conferred on a Minister, the ACCC, a member of the staff of the ACCC, an APS employee or certain Commonwealth government entities.

***[Schedule 1, item 2, subsection 53ZI(1)]***

- 1.81 A gas market instrument must not confer a power to delegate a power to make a legislative instrument.

***[Schedule 1, item 2, subsection 53ZI(2)]***

### ***Fees***

- 1.82 A gas market instrument may provide for a fee to be charged for anything done by or in relation to the Commonwealth, the ACCC or any other person or body in relation to a gas market instrument, including in the exercise of a power or the performance of a function conferred by a gas market instrument. Such a fee must not be such as to amount to taxation.

***[Schedule 1, item 2, subsection 53ZC(1) and section 53ZH]***

- 1.83 An instrument may provide for the amount of the fee (including a method to work out the amount of the fee), who is liable to pay the fee, the consequences of not paying the fee, when the fee becomes due and payable, and waiving and refunding of a fee.

***[Schedule 1, item 2, subsection 53ZC(2)]***

### ***Incidental or related matters***

- 1.84 A gas market instrument may include rules on any of the following matters:
- rules about circumstances in which persons are, or may be, relieved from complying with the requirements in a gas market instrument that would otherwise apply to them;
  - if a gas market instrument requires information or a document to be given or published—exceptions to that requirement, including exceptions when publishing the information would prejudice the commercial interests of a person or is not in the public interest, or the circumstances involve personal information;
  - rules about the use, disclosure or publication of information or a document by a person to whom the information or document is given under a gas market instrument;
  - rules about the manner or form in which persons or bodies may exercise powers or perform functions conferred by a gas market instrument or must comply with requirements of a gas market instrument (including requiring

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use of a form approved by the Minister, the ACCC or another person or body);

- rules providing for internal or external review of a decision made under a gas market instrument, or in the exercise or performance of a power or function conferred by a gas market instrument, including review by the Australian Competition Tribunal or the Administrative Appeals Tribunal;
- rules requiring agents of a gas market participant to do or not to do specified things when acting on behalf of the participant and within the agent's actual or apparent authority;
- rules providing that, in specified circumstances, a partner in a partnership is taken to contravene a specified provision of a gas market instrument if another partner in the partnership contravenes that provision;
- rules providing that, in specified circumstances, a person who carries on a joint venture is taken to contravene a specified provision of a gas market instrument if another person who carries on the joint venture contravenes that provision.

***[Schedule 1, item 2, subsection 53ZD(1)]***

- 1.85 A gas market code or gas market emergency price order may deal with matters incidental or related to any matter that is or may be included in, or dealt with by, a code or an order. A code or an order may also deal with transitional matters related to the making of a code or an order. A code may include transitional matters relating to the repeal of an order.

***[Schedule 1, item 2, subsections 53ZD(2) and (3)]***

- 1.86 A gas market instrument may make provision in relation to any matter in a way that depends on a person being satisfied of one or more specified matters.

***[Schedule 1, item 2, subsection 53ZD(4)]***

***Incorporation by reference***

- 1.87 Legislative instruments made under the new Part IVBB will deal with technical matters related to the gas market. This may include the price of gas commodities on domestic and international markets, which is likely to change at regular intervals, and technical standards, procedures and processes related to the supply or acquisition of gas commodities. For this reason, it is necessary for these instruments to refer to other documents so that the framework is flexible and able to adapt to changing market conditions.

- 1.88 The Bill provides that a gas market code, gas market emergency price order and regulations made under the new Part IVBB (other than a gas market code) may apply, adopt or incorporate (with or without modification) any matter contained in any other instrument or writing as in force or existing at a particular time or from time to time. The Bill disapplies subsection 14(2) of the Legislation Act, which ordinarily restricts the ability of a legislative or notifiable instrument to incorporate material as in force or existing from time



to time.

**[Schedule 1, item 2, subsections 53ZE(1) and (2) and section 53ZZC]**

- 1.89 A gas market instrument may refer to the price of a gas commodity or other goods or services anywhere inside or outside Australia, or any published information about any market whether inside or outside Australia. An instrument may also refer to or provide a formula or method. A reference may be made to any of these matters for the purpose of setting a price for a gas commodity.

**[Schedule 1, item 2, subsection 53ZE(3)]**

- 1.90 Additionally, in order to comply with paragraph 15J(2)(c) of the Legislation Act, the explanatory statements for the instruments must contain a description of the relevant incorporated material and indicate how it may be obtained. While it is not known precisely what material may be necessary to incorporate into regulations, it is intended that any external material incorporated by reference, as existing from time to time, will be freely available, where possible, and that the relevant explanatory material for regulations in those circumstances will provide clear information about the document and how it may be obtained.

## **Safeguards on gas market instruments**

- 1.91 The Bill places safeguards on the making of gas market instruments to ensure that there is an appropriate delegation of legislative power. This helps to maintain the rule of law and ensure appropriate accountability.

### *Tabling and disallowance*

- 1.92 A gas market code and a gas market emergency price order are legislative instruments subject to tabling, disallowance and sunseting under the Legislation Act. This ensures that Parliament can exercise an appropriate level of scrutiny and oversight over the instruments. Such instruments are also subject to consultation requirements under the Legislation Act (in addition to the specific consultation requirements provided for in the Bill).

**[Schedule 1, item 2, subsections 53L(1) and 53M(1)]**

### *Limits on content of delegated legislation*

- 1.93 The Bill provides that a gas market emergency price order may not deal with certain matters that are more appropriately enacted in primary legislation. This includes the creation of offences, provision of coercive powers, imposition of taxes, setting amounts to be appropriated from the Consolidated Revenue Fund and direct amendments of the CCA. Regulations making a gas market code would also not deal with these matters that are more appropriately enacted in primary legislation, in the absence of a specific power in the Act for the regulations to do so. These limitations are consistent with the guidance of the Senate Standing Committee for the Scrutiny of Bills and Senate Standing

### *Sunsetting of gas market emergency price order*

- 1.94 A gas market emergency price order is repealed 12 months after the earliest time any provision of any gas market emergency price order commences, provided that the relevant provision commences during the 12 months starting on the commencement of the Bill. Otherwise, an order is repealed 12 months after the commencement of the Bill. The Minister may not make a gas market emergency price order after the applicable period.  
*[Schedule 1, item 2, subsections 53M(6)–(8)]*
- 1.95 This is appropriate as gas market emergency price orders are designed to provide short-term relief from the current energy crisis.

### *Consultation before making gas market emergency price order*

- 1.96 A gas market emergency price order may deal with technical or detailed matters, many of which require expert advice from the ACCC to make the relevant order and are likely to be subject to change on a regular basis. For this reason, the Minister must consult with the ACCC before making a gas market emergency price order. The consultation requirements for rule-makers in the Legislation Act also apply to making a gas emergency price order and a gas market code.  
*[Schedule 1, item 2, subsections 53M(4) and (5)]*

## **Other matters relating to gas market instruments**

### *Geographical application of gas market provisions*

- 1.97 The gas market provisions extend to every external Territory and a reference in those provisions to Australia is taken to include a reference to the external Territories. The provisions also extend to acts, omissions, matters and things outside of Australia.  
*[Schedule 1, item 2, sections 53B (definition of ‘Australia’), 53E and 53F]*
- 1.98 Division 14 (Standard geographical jurisdiction) of the Criminal Code (Schedule to the *Criminal Code Act 1995*) does not apply in relation to an offence against the gas market provisions. The extended geographical application of the gas market provisions in relation to acts, omissions, matters and things outside Australia, applies to the offences against those provisions.  
*[Schedule 1, item 2, section 53G]*
- 1.99 The gas market provisions apply in relation to supplying a gas commodity if the supply occurs in Australia, is to a person in Australia (including by means of importing the gas commodity into Australia) or is by means of exporting the gas commodity from Australia.  
*[Schedule 1, item 2, subsection 53H(1)]*

- 1.100 The gas market provisions apply in relation to acquiring a gas commodity if the acquisition occurs in Australia or is the result of a supply mentioned in paragraph 1.99.  
***[Schedule 1, item 2, subsection 53H(2)]***

***Application of gas market provisions to government entities***

- 1.101 The gas market provisions bind the Crown in each of its capacities. That is, the provisions bind the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory. However, the provisions do not make the Crown:

- liable to a pecuniary penalty or to be prosecuted for an offence;
- subject to a remedy under Part VI (about enforcement) other than section 87B (about enforceable undertakings); or
- subject to the search and seizure provisions in Part XIV.

***[Schedule 1, item 2, subsections 53J(1) and (2)]***

- 1.102 The gas market provisions apply to certain government entities as if the entity were a person. The regulations may modify the way the gas market provisions apply to government entities.

***[Schedule 1, item 2, subsections 53K(1)]***

- 1.103 The gas market provisions apply to an entity that:

- is part of the Commonwealth;
- is a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*);
- is a body (whether or not incorporated) established for a public purpose by or under a law of the Commonwealth;
- is holding or performing the duties of an office established by or under a law of the Commonwealth or holding an appointment made under a law of the Commonwealth; or
- is prescribed by the regulations.

***[Schedule 1, item 2, subsection 53K(3)]***

- 1.104 The gas market provisions apply to an entity that:

- is part of a State or Territory;
- is a body (whether or not incorporated) established for a public purpose by or under a law of a State or Territory;
- is holding or performing the duties of an office established by or under a law of a State or Territory, or holding an appointment made under a law of a State or Territory;
- is prescribed by the regulations in relation to a State or Territory.

***[Schedule 1, item 2, subsection 53K(4)]***

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- 1.105 A gas market instrument may limit the application of the instrument, a provision of the instrument or a rule included in the instrument in relation to a Commonwealth government entity or a State or Territory government entity.  
*[Schedule 1, item 2, subsection 53K(2)]*

### *Treatment of States*

- 1.106 The Bill provides that a gas market instrument must not give preference to one State or any part of a State within the meaning of section 99 of the Constitution. A power or function conferred by a gas market instrument must not be excised or performed in a way that would give such a preference.  
*[Schedule 1, item 2, section 53ZG]*

### *Gas market instruments may limit application*

- 1.107 A gas market instrument may limit its application (or that of a specified provision of, or rule in, the instrument) such that the instrument, provision or rule applies only in relation to supplying or acquiring specified gas commodities.  
*[Schedule 1, item 2, subsection 53N(1)]*
- 1.108 A gas market instrument may also limit its application (or that of a specified provision of, or rule in, the instrument) such that the instrument, provision or rule applies only in relation to parts of Australia in relation to which specified requirements are met, or in relation to all parts of Australia other than those parts in relation to which specified requirements are met, subject to the rule that an instrument must not give preference to a State or part of a State.  
*[Schedule 1, item 2, subsections 53N(2) and (3)]*
- 1.109 A gas market instrument may also provide that its application (or that of a specified provision of, or rule in, the instrument) applies at a specified time, during a specified period or on an ongoing basis. This provision does not limit the operation of the provisions of the Legislation Act governing the automatic repeal (sunsetting) of legislative instruments.  
*[Schedule 1, item 2, subsections 53N(4) and (5)]*
- 1.110 The provisions that allow for limited application of a gas market instrument (or that of a specified provision of, or rule in, the instrument) do not limit the operation of subsection 33(3A) of the AIA (which allows an instrument to make different provision with respect to different matters or different classes of matter).  
*[Schedule 1, item 2, subsection 53N(6)]*
- 1.111 The Bill provides that certain provisions do not limit each other.  
*[Schedule 1, item 2, section 53ZF]*

## Compliance

### Civil penalties

- 1.112 Civil penalties apply to contraventions of specified provisions of the new Part IVBB and a civil penalty provision (as defined in the Regulatory Powers Act) of a gas market instrument. The civil penalty regime established in the CCA applies to those contraventions.  
*[Schedule 1, item 2, subsections 4(1) (definition of ‘civil penalty provision of a gas market instrument’) and 53ZJ(1)]*
- 1.113 A person involved in a contravention of the new Part IVBB or a civil penalty provision of a gas market instrument includes a person who:
- aids, abets, counsels or procures the contravention;
  - induces the contravention (e.g. by threats or promises);
  - is directly or indirectly, knowingly concerned in, or party to, the contravention in any way; or
  - conspires with others to effect the contravention.
- [Schedule 1, items 8 and 9, subsection 75B(1)]*
- 1.114 A court may order a person to pay a pecuniary penalty for a contravention. The maximum pecuniary penalties are set out in the table below.

**Table: Maximum pecuniary penalties for a body corporate and person other than a body corporate**

Item	Provision	Maximum pecuniary penalty for a body corporate	Maximum pecuniary penalty for a person other than a body corporate
1	Subsections 53ZQ(1), (2) or (3)—anti-avoidance schemes; or a civil penalty provision of a gas market instrument (other than a civil penalty provision of a gas market instrument that sets out at its foot a pecuniary penalty)	The greater of: (a) \$50 million; (b) if the court can determine the value of the benefit obtained—three times the value of that benefit; and (c) if the court cannot determine the value of the benefit obtained—30% of the body corporate’s	\$2,500,000

		adjusted turnover during the breach turnover period for the offence, act or omission	
2	Section 53ZV—false or misleading information, or subsection 53ZW(1)—compliance with notices	3,000 penalty units	600 penalty units
3	A civil penalty provision of a gas market instrument that sets out at its foot a pecuniary penalty	The lesser of: (a) the amount of the pecuniary penalty for a body corporate set out at the foot of the provision; and (b) the greater of: (i) \$50 million; (ii) if the court can determine the value of the benefit obtained—three times the value of that benefit; and (iii) if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence, act or omission	The lesser of: (a) the amount of the pecuniary penalty for a person other than a body corporate set out at the foot of the provision; and (b) \$2,500,000

***[Schedule 1, items 10 to 13, subparagraph 76(1)(a)(iab), subsections 76(1A) and 76(1B) and paragraph 76(1B)(c)]***

1.115 Further detail on the justification for the civil penalty provisions in sections 53ZQ, 53ZW and 53ZV of Part IVBB are set out below (see paragraphs 1.158, 1.167 and 1.174).

## Civil penalty of gas market instrument

1.116 A gas market instrument may specify that a civil penalty applies to breaches of the rules. Where a civil penalty does apply to a breach of the rules, a gas market instrument may also specify a lower penalty amount than the default maximum (see Table, item 3). If the rules do not specify an amount, then the default maximum civil penalty for an individual is \$2,500,000, while the maximum for a body corporate is:

- 50 million;
- if the court can determine the value of the benefit obtained—three times the value of that benefit; and
- if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence, act or omission (see Table, item 1).

1.117 This approach is necessary because gas market instruments are the key mechanism through which the gas market is regulated, and the welfare of Australians is protected. The maximum penalty available for breach of a civil penalty provision of a gas market instrument aligns with the maximum penalty for anti-competitive conduct and breaches of the ACL under the CCA. The maximum penalty reflects the potential consequences that contravening conduct could have on other gas market participants and Australian consumers more broadly, and the need for a strong deterrent to ensure compliance with the new framework. The maximum penalty has been designed to provide an effective deterrent to breaches of the law, whilst ensuring a penalty cannot be considered an acceptable cost of doing business. It is expected that the maximum penalty would only be made available if appropriate; otherwise, a lower penalty will be prescribed for a civil penalty provision in a gas market instrument.

1.118 If an act or thing is required under a civil penalty provision of a gas market instrument to be done within a particular period or before a particular time, then the obligation to do that act or thing continues until the act or thing is done. The obligation applies even if the period has expired or the time has passed. A person commits a contravention of the relevant provision in respect of each day during which the contravention occurs including the day that the relevant order is made under subsection 76(1).

***[Schedule 1, item 2, subsections 53ZJ(2) and (3)]***

1.119 If a court considers that it is appropriate to order a person to pay a pecuniary penalty due to a contravention of a gas market instrument, and also to pay compensation to a person who has suffered loss or damage due to the contravention, the court must preference an order for compensation if the defendant does not have the financial resources to pay both the penalty and compensation.

***[Schedule 1, item 15, paragraph 79B(a)]***

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## Infringement notices

- 1.120 The infringement notice regime in Division 5 of Part XI applies to certain provisions of the new Part IVBB or a gas market instrument in the same way as it does to a provision of Part 2-2 of the ACL. Specifically, infringement notices may be issued by the ACCC as an alternative to commencing proceedings in relation to alleged contraventions of:
- the general prohibition against entering into an anti-avoidance scheme by a person, constitutional corporation or a person in the course of constitutional trade or commerce (see paragraph 1.150);
  - the requirement to comply with a notice given to a person by the ACCC to give information or produce a document (see paragraph 1.165);
  - the prohibition against giving false or misleading information to the ACCC in response to a notice to give information or produce a document (see paragraph 1.171); or
  - a civil penalty provision of a gas market instrument (other than a provision requiring a participant to deal with another participant in good faith).

***[Schedule 1, item 2, subsections 53ZK(1) to (2)]***

- 1.121 Infringement notices are an alternative to civil penalties. They allow the ACCC to select from wider range of enforcement options to deter misconduct. This approach is consistent with the Criminal Law Guide. If an infringement notice is complied with, including payment of the penalty, no further action will be taken against the person. The payment is not considered an admission of criminal guilt. If an infringement notice is not complied with, the ACCC may seek to enforce a civil penalty.

- 1.122 The Bill provides for a maximum of 600 penalty units for a body corporate and 60 penalty units for a person that is not a body corporate in an infringement notice. While this amount is higher than the maximum amount recommended in the Criminal Law Guide, the higher amount is appropriate and necessary in these circumstances given the significant possible financial benefit that corporations stand to gain from potential breaches. An infringement notice needs to deter large companies from non-compliance with the provisions to which the infringement notice regime applies. The breach of these provisions is likely to cause significant harm to Australian businesses and consumers, and the functioning of the new gas market regime.

***[Schedule 1, item 2, subsection 53ZK(3)]***

- 1.123 It is appropriate that infringement notices are an available tool for use by the ACCC in relation to contraventions against the general prohibition against entering into schemes for avoidance purposes because an infringement notice will provide an efficient and timely means to deter and respond to non-compliance and may assist in efficient and timely outcomes where there is an immediate need for gas to be available at the required price in circumstances



where, for example, there is available evidence of an anti-avoidance purpose or admission of a contravention.

- 1.124 In relation to a failure to comply with a notice to provide information or provision false or misleading information in response to such a notice, an infringement notice with higher penalties is appropriate because it is crucial for the ACCC to be able to access information in a timely way in order to prevent avoidance behaviour or breaches of a civil penalty provision of a gas market instrument. The use of higher penalties in respect of infringement notices has also been used as a tool by the ACCC in relation to a failure to supply information relating to scheme vehicles prepared by or for manufacturers for use in diagnosing faults, within a certain period as contained in item 4 in the table in subsection 57GB(2).
- 1.125 Division 2 of Part XI is not intended to limit the application of section 53ZZA (dealing with the constitutional support for new Part IVBB) to the extended application of Division 5 of Part XI, as described in that section.  
*[Schedule 1, item 2, subsection 53ZK(4)]*

## Public warning notices

- 1.126 The ACCC may issue a public warning notice to a corporation for engaging in prohibited conduct after providing the corporation with an opportunity to make representations in relation to specified matters including the alleged conduct.
- 1.127 ‘Prohibited conduct’ is conduct that contravenes the obligation to comply with a notice, the prohibition on giving false or misleading information, or producing documents that contain false or misleading information, in response to a notice, or a civil penalty provision of a gas market instrument.]  
*[Schedule 1, item 2, section 53B (definition of ‘prohibited conduct’)]*

## Draft notice

- 1.128 The ACCC may give a person a draft public warning notice if it reasonably believes that:
- the person has engaged in, or is engaging in, conduct that contravenes a gas market instrument (prohibited conduct);
  - one or more persons has suffered, or will likely suffer, a detriment due to the conduct; and
  - it is in the public interest to issue the notice.
- [Schedule 1, item 2, subsection 53ZL(1)]*
- 1.129 The notice must identify the alleged prohibited conduct and explain the reasons why the ACCC reasonably believes that the person has engaged in the prohibited conduct, that the conduct has resulted in detriment or likely detriment to one or more persons, and that it is in the public interest to issue

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the notice.

***[Schedule 1, item 2, paragraphs 53ZL(2)(a)–(c)]***

1.130 The notice must also state that the person has 21 days to make representations to the ACCC regarding the prohibited conduct, the detriment identified, and whether it is in the public interest to publish the notice.

***[Schedule 1, item 2, paragraph 53ZL(2)(d)]***

1.131 A draft notice is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act.

***[Schedule 1, item 2, subsection 53ZL(3)]***

## **Final notice**

1.132 The ACCC may issue a public warning notice if 21 days have passed after issuing a draft notice and the ACCC still reasonably believes that:

- the person has engaged in, or is engaging in, conduct that contravenes a gas market instrument (prohibited conduct);
- one or more persons has suffered, or will likely suffer, a detriment due to the conduct; and
- it is in the public interest to issue the notice.

***[Schedule 1, item 2, subsections 53ZM(1) and (3)]***

1.133 The public warning notice cannot be issued if more than 90 days have passed since the ACCC gave the person the draft notice.

***[Schedule 1, item 2, paragraph 53ZM(1)(c)]***

1.134 The ACCC may issue a public warning notice without first issuing a draft notice if it reasonably believes that:

- the person has engaged in, or is engaging in, prohibited conduct;
- there is a significant risk of imminent, serious harm to the welfare of Australians as a result of the prohibited conduct;
- it is reasonably necessary to issue a public warning notice without first issuing a draft notice in order to prevent or reduce that harm or risk; and
- it is in the public interest to issue the notice.

***[Schedule 1, item 2, subsections 53ZM(2) and (3)]***

1.135 The public warning notice must state the date of issue and identify the person and prohibited conduct.

***[Schedule 1, item 2, subsection 53ZM(4)]***

1.136 A public warning notice is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act.

***[Schedule 1, item 2, subsection 53ZM(5)]***

## Reasonable belief

- 1.137 The provisions require the ACCC to form a reasonable belief of the matters detailed above. This is the standard ‘reasonable belief’ test that requires both an objective and subjective assessment of the belief held.

## Defamation

- 1.138 No defamation proceedings may lie against the Commonwealth, the ACCC or ACCC staff due to the issuing of a public warning notice.  
*[Schedule 1, item 2, section 53ZN]*

## Redress orders

- 1.139 The ACCC may apply to the court to seek redress for persons who are not identified as a party to proceedings, to receive redress such as variation of contract.

- 1.140 If:

- a person has engaged in conduct that constitutes a contravention or related contravention of a civil penalty provision of a gas market instrument;
- the contravening conduct caused, or is likely to cause, a class of persons loss or damage; and
- the class includes persons who are not, or have not been, parties to a proceeding instituted under Part VI in relation to the contravening conduct;

then any court with jurisdiction on the matter may make such orders as the court thinks appropriate, on the application of the ACCC.

*[Schedule 1, item 2, subsection 53ZO(1)]*

- 1.141 A person engages in a related contravention of a civil penalty provision of a gas market instrument if the person:

- aids, abets, counsels or procures another person to contravene the provision;
- induces another person to contravene the provision (e.g. by threats or promises);
- is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of the provision by another person; or
- conspires with others to effect a contravention of the provision.

*[Schedule 1, item 2, section 53B (definition of ‘related contravention’) and subsection 53ZO(9)]*

- 1.142 Such an order may be against the person who engaged in the contravening conduct or a person involved in the contravening conduct.

*[Schedule 1, item 2, subsection 53ZO(2)]*

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- 1.143 The court may make all or any of the following orders:
- an order declaring the whole or part of a contract made between the respondent and a non-party, or collateral arrangements relating to such a contract, to be void and, if the court thinks fit, to have been void ab initio or void at all times on and after such a date as specified in the order;
  - an order varying a contract or arrangement and, if the court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such a date as is specified in the order;
  - an order refusing to enforce any or all of the provisions of a contract or arrangement;
  - an order directing the respondent to refund money or return property to a non-party;
  - an order directing the respondent, at the respondent's own expense, to supply specified services to a non-party.
- [Schedule 1, item 2, section 53ZP]***
- 1.144 The court must not make an order unless it considers that the order will redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct, or prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct.
- [Schedule 1, item 2, subsection 53ZO(3)]***
- 1.145 The ACCC may apply for such an order at any time within 6 years after the day on which the relevant cause of action accrues. The ACCC can make an application even if it has not begun enforcement proceedings in relation to the conduct.
- [Schedule 1, item 2, subsections 53ZO(4) and (5)]***
- 1.146 In determining whether to make an order, a court may have regard to the conduct of the contravening person and the non-parties since the contravention occurred.
- [Schedule 1, item 2, subsection 53ZO(6)]***
- 1.147 The court does not need to make a finding about either which persons are non-parties or the nature of the loss or damage suffered, or likely to be suffered, by non-parties.
- [Schedule 1, item 2, subsection 53ZO(7)]***
- 1.148 A non-party is bound by an order if they accept the redress, prevention or reduction that has been ordered. The non-party may not make any claim, action or demand against the contravening person in relation to the same loss or damage. Any other order relating to that loss or damage has no effect in relation to the non-party.
- [Schedule 1, item 2, subsection 53ZO(8)]***

- 1.149 As an order under this provision can void, alter, or render unenforceable any or all of the provisions of a contract, an order under this provision can be an exception to the general rule of severability in the Act.  
*[Schedule 1, item 4, section 4L]*

## Avoidance schemes

- 1.150 The Bill prohibits schemes that are designed to avoid the application of a civil penalty provision in a gas market instrument.

### Prohibition on avoidance schemes

- 1.151 The general prohibition provides that a person must not enter into a scheme, begin to carry out a scheme, or carry out a scheme if it would be reasonable to conclude that the purpose of the person engaging in that conduct was to avoid the application of a civil penalty provision of a gas market instrument.  
*[Schedule 1, item 2, subsection 53ZQ(1)]*
- 1.152 In addition to the general prohibition on persons, the Bill introduces prohibitions in similar terms that apply to:
- any constitutional corporations (either alone or with others) that enter into a scheme, begin to carry out a scheme or carry out a scheme; and
  - any person (either alone or with others) who enters into a scheme, begins to carry out a scheme or carries out a scheme in the course of constitutional trade or commerce.
- [Schedule 1, item 2, subsections 53ZQ(2) and (3)]*
- 1.153 A ‘scheme’ for new Part IVBB is defined broadly to capture:
- any agreement (including a contract), arrangement, understanding, promise or undertaking whether express or implied; or
  - any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise; or
  - any combination of the above.
- [Schedule 1, item 2, section 53B (definition of ‘scheme’ and definition of ‘agreement’)]*
- 1.154 The prohibitions are independent from and do not limit each other. While the same conduct may engage more than one prohibition, a person can only be ordered to pay one pecuniary penalty in respect of the same conduct.  
*[Schedule 1, items 2 and 14, subsections 53ZQ(4) and 76(3)]*
- 1.155 The provisions dealing with avoidance schemes do not limit the provisions dealing with gas market instruments (Division 2 of Part IVBB).  
*[Schedule 1, item 2, section 53ZS]*

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## *Non-compliance*

- 1.156 The ACCC may issue an infringement notice in relation to any of the avoidance prohibitions (see paragraph 1.120). An infringement notice will be an important tool to ensure timely outcomes, including in relation to gas commodity price requirements set out in gas market instruments, particularly where there is clear evidence of purpose or where a party admits the contravention.
- 1.157 Breach of an anti-avoidance provision attracts a maximum civil penalty of \$2,500,00 for an individual or, for a body corporate, the greater of:
- \$50 million;
  - if the court can determine the value of the benefit obtained—three times the value of that benefit; or
  - if the court cannot determine the value of the benefit obtained—30% of the body corporate’s adjusted turnover during the breach turnover period for the offence, act or omission (see Table, item 1).
- 1.158 The maximum penalty for breach of an anti-avoidance provision aligns with the maximum penalty for anti-competitive conduct and breaches of the ACL under the CCA. The maximum penalty reflects the seriousness engaging in avoidance behaviour and the potential consequences that behaviour could have on other gas market participants and Australian consumers more broadly. The maximum penalty has been designed to provide adequate an effective deterrent to breaches of the law, whilst ensuring a penalty cannot be considered an acceptable cost of doing business.

## *Standard of reasonableness*

- 1.159 The reference to whether it would be ‘reasonable’ to draw the conclusion that a person has a relevant avoidance purpose ensures that the prohibition applies objectively. Having to prove the subjective intention of the person in question would otherwise not be feasible in many cases or would allow a person to artificially document the purpose of a scheme as being other than for avoidance. Using reasonableness ensures that the effectiveness of the anti-avoidance provisions is not undermined.
- 1.160 The regulations may prescribe matters that must be considered in determining whether it would be reasonable to conclude that the purpose of a person entering into or carrying out a scheme was to avoid the application of a civil penalty provision of a gas market instrument. This does not limit the matters to which regard may be had in determining whether it would be reasonable to conclude that a person entering into or carrying out a scheme did so in order to avoid the application of a civil penalty provision of a gas market instrument.  
***[Schedule 1, item 2, section 53ZR]***

## Investigation powers

- 1.161 The investigation powers in Division 4 of Part IVBB do not limit the provisions dealing with gas market instruments (Division 2 of Part IVBB) or the general information-gathering powers of the ACCC under section 155.  
*[Schedule 1, item 2, section 53ZX]*

## Notice to provide information

- 1.162 The ACCC may, by written notice, require a person who is required to keep, to generate or to publish information or a document under a gas market instrument to give the information, or produce the document, to the ACCC. The notice may require the person to give the information, or produce the document, within a specified period and in a specified manner.  
*[Schedule 1, item 2, subsections 53ZT(1) and (2)]*

- 1.163 The notice must:

- name the person to which it is given;
- specify the information or document which is being sought by the ACCC;
- specify the provisions of the gas market instrument which require the person to keep, to generate or to publish the information or document; and
- explain the person's right to apply for an extension of time to comply with the notice, obligation to comply with the notice and the prohibition on providing false or misleading information.

*[Schedule 1, item 2, subsection 53ZT(3)]*

- 1.164 A single notice may require the person to provide more than one piece of information or relate to more than one document.  
*[Schedule 1, item 2, subsection 52ZT(4)]*

## Compliance with notices

- 1.165 A person that is given a notice must comply with the notice within a specified period and in a specified manner, or within such longer time as agreed in writing by the ACCC.  
*[Schedule 1, item 2, section 53ZV]*

- 1.166 A person that fails to comply with a notice within the specified period is subject to a maximum civil penalty of 3,000 penalty units (for a body corporate) and 600 penalty units (for any other person) (also see Table, item 2).  
*[Schedule 1, items 2, 10 and 11, section 53ZV and subsections 76(1) and 76(1A)]*

- 1.167 This penalty reflects the impact that failure to comply with a notice within a specified period could have on the ability of the ACCC to investigate and monitor obligations under a gas market instrument. The penalties reflect the

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need for a strong deterrent and support the ACCC's ability to take effective enforcement action in respect of these matters.

- 1.168 The ACCC may also issue an infringement notice if a person fails to comply with a notice within a specified period (see paragraph 1.120).

### **Extending period for complying with notices**

- 1.169 A person may apply in writing to the ACCC, within the specified period, for an extension of time to comply. The ACCC may extend the time for compliance with the notice by written notice to the person and has a discretion as to the length of extension granted. This power to extend the period of compliance may be delegated by an ACCC member in writing to an SES employee or an acting SES employee, who must comply with any directions of the ACCC member in exercising the delegated power.

*[Schedule 1, item 2, section 53ZU]*

- 1.170 The ability to extend the period for compliance with a notice to provide information or documents, as described above, does not affect any operation that subsection 33(3) of the AIA has in relation to a notice. That subsection provides that the power to make, grant or issue any instrument includes the power to vary or revoke the instrument.

*[Schedule 1, item 2, subsection 53ZU(3)]*

### **False or misleading information**

- 1.171 A person must not give false or misleading information, or produce documents containing false or misleading information, in purported compliance with a notice.

- 1.172 A person does not contravene the prohibition on false or misleading information if the person could not have known the information was false or misleading or, if the person provides a document containing false or misleading information, the document is accompanied by a statement of the person that the information is false or misleading.

*[Schedule 1, item 2, subsection 53ZW(2)]*

- 1.173 A person that gives false or misleading information, or produce documents containing false or misleading information in purported compliance with a notice, is subject to a maximum civil penalty of 3,000 penalty units (for a body corporate) and 600 penalty units (for any other person) (also see Table, item 2).

*[Schedule 1, items 2, 10 and 11, subsections 53ZW(1), 76(1) and 76(1A)]*

- 1.174 This penalty reflects the impact that the provision of false or misleading information or documents in response to a notice, could have on the ability of the ACCC to investigate compliance with obligations under a gas market instrument. They reflect the need for a strong deterrent and also support the ACCC's ability to take effective enforcement action in respect of these matters.



1.175 The ACCC may also issue an infringement notice if a person that gives false or misleading information, or produce documents containing false or misleading information, in purported compliance with a notice (see paragraph 1.120).

## Other matters

### Concurrent operation of certain provisions of the CCA

1.176 The gas market provisions operate concurrently and without limiting the following provisions (and vice versa):

- Part IIIAA (the Australian Energy Regulator (AER));
- Part IIIA (Access to Services);
- Part IVB (Industry Codes);
- Part V (Carbon Tax Price Reduction Obligation);
- Part VIIA (Prices Surveillance);
- Part XICA (the Electricity Industry).

***[Schedule 1, item 2, section 53ZY]***

### Concurrent operation of State and Territory laws

1.177 The gas market provisions are not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the gas market provisions. However, a gas market instrument may provide that a gas market instrument, or a specified provision, excludes or limits the operation of a law of a State or Territory.

***[Schedule 1, item 2, section 53ZZ]***

### Application of gas market provisions

1.178 The gas market provisions (other than provisions in relation to schemes for avoidance purposes) apply in relation to gas market conduct if the conduct:

- is engaged in by a constitutional corporation;
- is engaged in by a person who is not a constitutional corporation, in a way that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutional corporation;
- occurs in the course of, or in relation to, constitutional trade or commerce;  
or
- is engaged in by a Commonwealth government entity.

***[Schedule 1, item 2, subsection 53ZZA(1)]***

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- 1.179 A ‘constitutional corporation’ is a corporation to which paragraph 51(xx) of the constitution applies. ‘Constitutional trade or commerce’ is trade or commerce among the States, trade or commerce between Australia and places outside of Australia, or trade or commerce within a Territory, between a State and a Territory, or between two Territories.  
***[Schedule 1, item 2, section 53B (definitions of ‘constitutional corporation’ and ‘constitutional trade or commerce’)]***
- 1.180 Section 6 of the CCA, which extends the application of the CCA to persons who are not corporations, does not apply in relation to the gas market provisions.  
***[Schedule 1, item 2, subsection 53ZZA(2)]***

## Acquisition of property

- 1.181 Paragraph 51(xxxi) of the Constitution provides that the Commonwealth Parliament may only legislate with respect to the acquisition of property by the Commonwealth on just terms.
- 1.182 The gas market provisions have no effect to the extent (if any) to which they would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) other than on just terms (within the meaning of that paragraph).  
***[Schedule 1, item 2, section 53ZZB]***

## Application of Part IVBB in relation to agreements

- 1.183 The provisions in new Part IVBB apply in relation to agreements entered into before, on or after commencement.  
***[Schedule 1, item 3]***

## Information gathering powers

- 1.184 The Bill extends the ACCC’s existing information gathering powers. Section 155 of the CCA is extended to apply to matters that may constitute or that constitute contraventions of a gas market instrument, or to matters relevant to a gas market instrument matter.  
***[Schedule 1, items 48 to 51, subsection 155(1), subparagraphs 155(2)(a)(iia) and 155(2)(b)(iaa) and subsection 155(9AAA)]***
- 1.185 A ‘gas market instrument matter’ is defined as a reference to the performance of a function or exercise of a power conferred on the ACCC by Part IVBB, regulations made for the purposes of that Part (including a gas market code) or a gas market emergency price order.  
***[Schedule 1, item 51, subsection 155(9AAA)]***

- 1.186 The amendments also clarify that any written notice served on a person under subsection 155(1) may be served in Australia or outside Australia (this is a general clarification and not specific to new Part IVBB).  
*[Schedule 1, item 48, subsection 155(1)]*
- 1.187 Information given in confidence to the ACCC in relation to Part IVBB or a gas market instrument cannot be disclosed except in limited circumstances. These circumstances are where an ACCC official is performing their duties or functions, or where an ACCC official or the ACCC is required by law to disclose the information.  
*[Schedule 1, items 52 and 53, subsection 155AAA(21)]*

## Extension of existing enforcement provisions

- 1.188 In addition to the pecuniary penalties that may be applied for breach of the CCA, the Bill extends existing enforcement and remedy provisions and associated powers of the ACCC to Part IVBB, a gas market instrument, or both.

## Court orders and remedies

### *Injunctions*

- 1.189 A person, including the ACCC, may apply to the court for an injunction where another person is undertaking, or proposing to undertake, conduct which would contravene parts of the CCA.
- 1.190 This provision has been extended to apply to contraventions of:
- the prohibition against entering into schemes for avoidance purposes by a person, constitutional corporation or a person in the course of constitutional trade or commerce;
  - the requirement to comply with notices given to a person by the ACCC to provide information;
  - the prohibition on giving false or misleading information, or producing documents that contain false or misleading information, in response to a notice; and
  - a civil penalty provision of a gas market instrument.
- [Schedule 1, item 16, subsection 80(1)]*

### *Action for damages*

- 1.191 A person who suffers damage or loss as a result of a breach of the new Part IVBB, or a civil penalty provision of a gas market instrument, is able to recover the amount of the damage or loss sustained against that person or any person involved in the contravention.  
*[Schedule 1, items 17 and 18, paragraph 82(1)(a) and (ca)]*

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### *Findings and omissions of fact in proceedings to be evidence*

1.192 A finding of fact established in earlier proceedings may be used in proceedings by private litigants. This is extended to include where direct action is taken as a result of a breach or contravention of the new Part IVBB or a civil penalty provision of a gas market instrument.

***[Schedule 1, items 19 to 21, subsection 83(1) and subparagraphs 83(1)(b)(i) and (ii)]***

### *Conduct of directors, employees or agents*

1.193 If it is necessary to establish the state of mind of a body corporate or a person other than a body corporate in proceedings under Part VI for conduct covered by the new Part IVBB or a civil penalty provision of a gas market instrument, it is sufficient to show that:

- a director, employee or agent of the body corporate or the person engaged in that conduct;
- the director, employee or agent, in engaging in that conduct, was acting within the scope of their actual or apparent authority; and
- the director, employee or agent had that statement of mind.

***[Schedule 1, items 22, 23, 25 and 26, paragraphs 84(1)(b) and 84(3)(b)]***

1.194 Any conduct engaged in on behalf of a body corporate or a person other than a body corporate by a director, employee or agent, or any other person at the direction or with the consent or agreement of a director, employee or agent of the body corporate or the person, is deemed for the purposes of the CCA and a gas market instrument to have been engaged in by the body corporate or the person.

***[Schedule 1, items 24 and 27, subsections 84(2) and (4)]***

### *Non-punitive orders*

1.195 Non-punitive orders are extended to enable the ACCC to seek application of a non-punitive order for a breach of new Part IVBB or a civil penalty provision of a gas market instrument.

***[Schedule 1, items 35 and 36, subsection 86C(4)]***

### *Order disqualifying a person from managing corporations*

1.196 The ability to apply for an order disqualifying a person from managing corporations is extended to contraventions of a civil penalty provision of a gas market instrument.

***[Schedule 1, item 37, paragraph 86E(1)(a)]***

1.197 In a civil or criminal proceeding arising out of the CCA or a civil penalty provision of a gas market instrument, a person is not entitled to refuse to comply with a requirement to answer a question or provide information on the basis that it might expose the person to a penalty by way of an order under

section 86E.

***[Schedule 1, item 38, subsections 86F(1) and (3)]***

### **Other orders**

1.198 There are a variety of orders that a court can make in proceedings relating to an alleged contravention of the CCA. This list is extended to contraventions of a civil penalty provision of a gas market instrument.

***[Schedule 1, items 39 to 43, subsections 87(1) and 87(1A), paragraphs 87(1A)(a), (b) and (baa) and subsection 87(1C)]***

### **Declarations**

1.199 A person or the ACCC may, in relation to a matter arising under a gas market instrument, institute a proceeding seeking a court to make a declaration.

***[Schedule 1, items 56 to 59, subsection 163A(1), paragraphs 163A(1)(a) and (aa), subsection 163A(3) and paragraph 163A(4)(a)]***

### **Jurisdiction of courts**

1.200 Jurisdiction is given to the following courts:

- in relation to the new Part IVBB and a gas market instrument—the Federal Court;
- in relation to civil proceedings instituted by a person other than the Minister—the Federal Circuit and Family Court;
- in relation to civil proceedings instituted by a person other than the Minister or ACCC—courts of the States or Territories.

***[Schedule 1, items 28 to 32, subsections 86(1), 86(1A) and 86(2)]***

1.201 A civil proceeding under the new Part IVBB or a civil penalty provision of a gas market instrument instituted by a person other than the Minister or ACCC which is pending in the Federal Court may be transferred to a court of a State or Territory.

***[Schedule 1, items 33 and 34, paragraph 86A(1)(b)]***

## **ACCC powers**

### **Enforcement of undertakings**

1.202 The ACCC can accept written undertakings relating to a gas market instrument.

***[Schedule 1, item 44, subsection 87B(1)]***

### **Search and seizure powers**

1.203 The ACCC's search and seizure powers are extended to contravention of a gas market instrument.

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***[Schedule 1, items 45 to 47, sections 154 and 154A (paragraph (a) of the definition of ‘evidential material’) and paragraph 154V(2)(a)]***

### ***Disclosure of documents and information***

1.204 If an application is made under section 53ZO for an order against a person, the ACCC must, at the request of that person, provide them with a copy of any relevant documents (other than those obtained from the person).

***[Schedule 1, item 54, paragraph 157(1)(d)]***

1.205 To assist the functions and powers of the Australian Energy Regulator and Australian Energy Market Commission, the ACCC may disclose any information obtained under the CCA or a gas market instrument to the Australian Energy Regulator, Australian Energy Market Commission or any staff or consultant assisting these regulators in their functions.

***[Schedule 1, item 55, subsection 157A(1)]***

## **Consequential amendments**

### **Amendments relating to enforcement and compliance**

1.206 Schedule 1 to the Bill makes minor amendments to the CCA to implement the new framework in relation to enforcement and compliance.

1.207 The term ‘gas market instrument’ is added to several provisions in the CCA to reflect that certain powers or functions under the CCA should also refer to powers and functions in a gas market instrument due to the insertion of Part IVBB.

1.208 In particular:

- the Chairperson of the ACCC may, for the purposes of exercising the powers of the ACCC under a gas market instrument, direct that an associate member of the ACCC be deemed to be a member of the ACCC;

***[Schedule 1, item 5, subsection 8A(4)]***

- the Chairperson may direct that the powers of the ACCC under a gas market instrument be exercised by a Division of the ACCC (more than one Division may exercise powers of the ACCC under a gas market instrument at the same time);

***[Schedule 1, item 5, subsections 19(1) and (7)]***

- the ACCC may delegate any of its powers under a gas market instrument to a member of the ACCC, except the power to delegate powers and to grant, revoke or vary an authorisation.

***[Schedule 1, item 6, subsection 25(1)]***

- 1.209 The Minister cannot use the general directions power under the CCA to direct the ACCC regarding the performance of its functions or the exercise of its powers under new Part IVBB.

***[Schedule 1, item 7, paragraph 29(1A)(a)]***