



Competition and Consumer Amendment (Misuse of Market Power) Act 2017

No. 87, 2017

An Act to amend the *Competition and Consumer Act 2010*, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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No. 87, 2017

An Act to amend the *Competition and Consumer Act 2010*, and for related purposes

[Assented to 23 August 2017]

The Parliament of Australia enacts:

1 Short title

This Act is the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017*.

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2017

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	At the same time as Schedule 1 to the <i>Competition and Consumer Amendment (Competition Policy Review) Act 2017</i> commences. However, the provisions do not commence at all if that Schedule does not commence.	6 November 2017

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Misuse of market power

Competition and Consumer Act 2010

1 Section 46

Repeal the section, substitute:

46 Misuse of market power

- (1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
 - (a) that market; or
 - (b) any other market in which that corporation, or a body corporate that is related to that corporation:
 - (i) supplies goods or services, or is likely to supply goods or services; or
 - (ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or
 - (c) any other market in which that corporation, or a body corporate that is related to that corporation:
 - (i) acquires goods or services, or is likely to acquire goods or services; or
 - (ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.
- (3) A corporation is taken for the purposes of this section to have a substantial degree of power in a market if:
 - (a) a body corporate that is related to that corporation has, or 2 or more bodies corporate each of which is related to that corporation together have, a substantial degree of power in that market; or
 - (b) that corporation and a body corporate that is, or that corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in that market.

- (4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:
- (a) regard must be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
 - (ii) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market; and
 - (b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:
 - (i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or
 - (ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.
- (5) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:
- (a) the body corporate does not substantially control that market; or
 - (b) the body corporate does not have absolute freedom from constraint by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate in that market; or
 - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.
- (6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.
- (7) To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.
- (8) In this section:
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- (a) a reference to power is a reference to market power; and
- (b) a reference to a market is a reference to a market for goods or services; and
- (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

2 Section 46 of Schedule 1

Repeal the section, substitute:

46 Misuse of market power

- (1) A person who has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in:
 - (a) that market; or
 - (b) any other market in which that person, or a body corporate that is related to that person:
 - (i) supplies goods or services, or is likely to supply goods or services; or
 - (ii) supplies goods or services, or is likely to supply goods or services, indirectly through one or more other persons; or
 - (c) any other market in which that person, or a body corporate that is related to that person:
 - (i) acquires goods or services, or is likely to acquire goods or services; or
 - (ii) acquires goods or services, or is likely to acquire goods or services, indirectly through one or more other persons.
- (3) A person (the ***first person***) is taken for the purposes of this section to have a substantial degree of power in a market if:
 - (a) a body corporate that is related to the first person has, or 2 or more bodies corporate each of which is related to the first person together have, a substantial degree of power in that market; or

- (b) the first person and a body corporate that is, or the first person and 2 or more bodies corporate each of which is, related to the first person, together have a substantial degree of power in that market.
- (4) In determining for the purposes of this section the degree of power that a person (the *first person*) or bodies corporate have in a market:
- (a) regard must be had to the extent to which the conduct of the first person or of any of those bodies corporate in that market is constrained by the conduct of:
 - (i) competitors, or potential competitors, of the first person or of any of those bodies corporate in that market; or
 - (ii) persons to whom or from whom the first person or any of those bodies corporate supplies or acquires goods or services in that market; and
 - (b) regard may be had to the power the first person or bodies corporate have in that market that results from:
 - (i) any contracts, arrangements or understandings that the first person or bodies corporate have with another party or other parties; or
 - (ii) any proposed contracts, arrangements or understandings that the first person or bodies corporate may have with another party or other parties.
- (5) For the purposes of this section, a person may have a substantial degree of power in a market even though:
- (a) the person does not substantially control that market; or
 - (b) the person does not have absolute freedom from constraint by the conduct of:
 - (i) competitors, or potential competitors, of the person in that market; or
 - (ii) persons to whom or from whom the person supplies or acquires goods or services in that market.
- (6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a person or bodies corporate have in a market.
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- (7) To avoid doubt, for the purposes of this section, more than one person may have a substantial degree of power in a market.
- (8) In this section:
- (a) a reference to power is a reference to market power; and
 - (b) a reference to a market is a reference to a market for goods or services; and
 - (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

Schedule 2—Telecommunications industry

Competition and Consumer Act 2010

1 Paragraph 151AJ(3)(a)

Omit “45B, 46,”.

2 Subsections 151AJ(4) and (5)

Omit “45B, 46,”.

3 Paragraph 151AJ(5)(a)

Repeal the paragraph, substitute:

- (a) the assumption that subparagraphs 45(3)(a)(ii) and (b)(ii) had not been enacted;

4 Paragraphs 151AJ(5)(c) and (d)

Repeal the paragraphs.

5 Subsection 151AJ(7)

Omit “45B, 46,”.

6 Paragraph 151AJ(7)(d)

Repeal the paragraph.

7 Subsections 151BC(4) and (5)

Repeal the subsections.

*[Minister’s second reading speech made in—
House of Representatives on 1 December 2016
Senate on 29 March 2017]*

(196/16)
