# EXPLANATORY STATEMENT

## Issued by authority of the Treasurer

*Competition and Consumer Act 2010*

*Competition and Consumer Amendment (Competition Policy Review) Regulations 2017*

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Competition and Consumer Amendment (Competition Policy Review) Regulations 2017* (the Regulations) is to make consequential amendments to the *Competition and Consumer Regulations 2010* (the CCA Regulations) following amendments made to the Act by the *Competition and Consumer Amendment (Misuse of Market Power) Act 2017* and the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (the amending Acts).

In 2014, the Government commissioned a ‘root and branch’ review of Australia’s competition laws and policy to ensure Australia continued to experience long-term productivity growth. The Final Report of the Competition Policy Review, released on 31 March 2015, made 56 recommendations on competition law, policy and institutions. The Government Response, released on 24 November 2015, supported 40 recommendations in full or in principle and 5 recommendations in part, and noted or remained open to the remaining 11 recommendations subject to further review and consultation. In relation to the National Access Regime, the Government adopted the recommendations made by the Productivity Commission in its 2013 inquiry report into the Regime.

The amending Acts implement a significant number of the reforms to competition law which the Government supported in its response to the Competition Policy Review, including:

* strengthening the prohibition against the misuse of market power (section 46 of the Act);
* replacing the price signalling provisions with a general prohibition on concerted practices with the purpose, effect or likely effect of substantially lessening competition;
* abolishing the merger clearance process and providing for merger authorisation applications to be heard in the first instance by the Australian Competition and Consumer Commission (ACCC) instead of the Australian Competition Tribunal, which would become the review body;
* significantly simplifying complex provisions in the Act governing the authorisation process;
* introducing class exemptions for conduct that the ACCC determines does not raise competition concerns;
* broadening the joint venture exemption to cartel prohibitions, while strengthening safeguards around this exemption; and
* amending Part IIIA of the Act (the National Access Regime) to ensure it better targets the lack of competition in markets for infrastructure services where third party access is required.

The Regulations make a number of consequential amendments to the CCA Regulations, following changes made to the Act by the amending Acts. Key amendments to the CCA Regulations include:

* removing references to repealed provisions of the Act;
* repealing prescribed forms for authorisation and notification, which are now to be approved by the Australian Competition and Consumer Commission (the ACCC);
* introducing a new form for applications to the Australian Competition Tribunal, for review in relation to new decisions which the ACCC or the Minister can make (such as a decision of the ACCC to extend a stop notice for collective boycotts beyond 90 days);
* amending or introducing requirements for existing and new applications under Part IIIA of the Act; and
* prescribing details for new procedures under the Act (such as a time after which resale price maintenance notifications commence and a fee for such notifications).

Further details of the Regulations are set out in Attachment A.

The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003.*

Except for Schedule 1, the Regulations commence on the day they are registered. Schedule 1 commences immediately after Schedule 1 to the Competition and Consumer Amendment (Competition Policy Review) Act 2017 commences.

**ATTACHMENT A:**

**Details of the *Competition and Consumer Amendment (Competition Policy Review) Regulations 2017***

This attachment sets out further details of the *Competition and Consumer Amendment (Competition Policy Review) Regulations 2017* (the Regulations).

All references are to provisions of the *Competition and Consumer Regulations 2010* (the CCA Regulations) unless provided otherwise.

**Section 1 – Name of Regulations**

This section provides that the title of the Regulations is the *Competition and Consumer Amendment (Competition Policy Review) Regulations 2017*.

**Section 2 – Commencement**

This section provides that the Regulations commence as follows:

* Sections 1 to 4 commence on the day the Regulations are registered.
* Schedule 1 commences immediately after Schedule 1 to the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* commences.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Competition and Consumer Act 2010.*

**Section 4 – Schedules**

**Schedule 1 – Amendments**

***Part 1 – Main amendments***

*Item 1*

Item 1 repeals paragraphs (f) to (k) of regulation 6A. These paragraphs reflected the declaration criteria in the former section 44G which was repealed by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (the CPR Act) and replaced with the new sections 44G and 44CA. Item 1 substitutes a new regulation 6A(f) which simplifies the regulation by making reference to all the declaration criteria together rather than individually.

Regulation 6A is supported by section 172(1) as it is necessary and convenient to give effect to section 44F of the CCA, as amended by the CPR Act. It prescribes content of an application to the National Competition Council for a declaration recommendation, to assist the Council to undertake its function under s44F.

*Item 2*

Item 2 inserts a new regulation 6BA, to outline prescribed content for an application to the National Competition Council for a recommendation to revoke a decision that a regime is an effective access regime.

This reflects the new Subdivision CA of Part IIIA of the CCA, introduced by the CPR Act. Subdivision CA allows for revocation of the Commonwealth Minister’s decision that a regime is an effective access regime, on recommendation of the Council.

Regulation 6BA is supported by section 172(1) as it is necessary and convenient to give effect to section 44NBA(3) of the CPR Act. It prescribes content of an application to the Council for a recommendation to revoke a decision that a regime is an effective access regime. This assists the Council to undertake its function under s44NBA(3) of the CPR Act.

*Item 3*

Item 3 repeals regulation 9, which previously prescribed commencement periods and applicable forms for use in relation to notification of exclusive dealing and private disclosure of pricing information (price-signalling).

The previous regulation 9 was made redundant by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (the CPR Act), which: repealed provisions related to price-signalling; replaced references to ‘prescribed forms’ for notification and authorisation with references to ‘forms approved by the Commission’; and placed the prohibition on third-line forcing under the same competition test as other forms of exclusive dealing.

The repeal of the previous regulation 9 means that notifications for third-line forcing will now commence immediately, consistently with notifications for other forms of exclusive dealing.

The CPR Act also made notification available for resale price maintenance conduct, as an alternative to seeking authorisation. Under subsection 93(7A) of the Act, resale price maintenance notifications commence after 60 days, unless otherwise prescribed in the CCA Regulations.

The previous regulation 9 is replaced with a new regulation 9, which provides that a notification of resale price maintenance comes into force:

* after 28 days, if it is given during the 12 months after Schedule 1 to the CPR Act commences; or
* after 14 days, if it is given at another time.

*Item 4*

Item 4 removes reference to ‘Division 3 of Part VII’ from regulation 13, as that Division was repealed by the CPR Act and therefore there will no longer be any applications under that Division.

*Item 5*

Item 5 amends subregulations 20(2) and 20(3) to include reference to applications under section 101B of the *Competition and Consumer Act 2010* (the CCA). The CPR Act added ‘class exemptions’ to the CCA, which allows the ACCC to create an effective ‘safe harbour’ for business practices that are unlikely to generate competition concerns or are likely to generate a net public benefit. The CPR Act also added to the CCA:

* section 95AB, which allows the ACCC to give a person a notice withdrawing the benefit of a class exemption in a particular case; and
* section 101B, which allows a person who is dissatisfied with the giving of the notice to apply to the Tribunal for review of the ACCC’s decision, within the time prescribed by the Regulations.

As amended, regulation 20 provides that a person dissatisfied with a section 101B notice must apply for review within 21 days of the date of the notice, and must make their application in accordance with Form J.

Subregulations 20(2) and 20(3) are also re-written for simplification.

*Item 6*

Item 6 inserts a new subregulation 20A(2A), to outline requirements for an application to the Tribunal under subsection 44O(1A) of the CCA for review of a decision of the Commonwealth Minister made under section 44NBC of the CCA.

This reflects that the new Subdivision CA of Part IIIA of the CCA, introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (the CPR Act), provides for the Commonwealth Minister to decide to revoke or not to revoke a decision that a regime is an effective access regime, and the new subsection 44O(1A) provides for relevant parties to apply to the Tribunal for review of the decision made by the Commonwealth Minister.

Item 6 is supported by section 172(1)(a) of the *Competition and Consumer Act 2010* (CCA), as it is in connexion with the procedure of the Tribunal. It ensures that the procedure for application to the Tribunal reflects the CCA as amended by the CPR Act. Item 6 is also supported by s44ZZP(1)(e) of the CCA as it relates to procedures of the Tribunal.

*Item 7*

Item 7 amends subregulation 22(2), to provide that the Tribunal’s powers to give directions, under subregulation 22(1), is subject to subsections 102(8) to 102(10) of the CCA. Those subsections were added to the CCA by the CPR Act, and relate to Tribunal review in relation to a merger authorisation determination of the ACCC. Broadly, when conducting such a review, the Tribunal is to have regard only to the information, documents and evidence listed in subsection 102(10), unlike a review in relation to a non-merger authorisation which is conducted as a full rehearing. Subsection 102(9) also provides that the Tribunal may allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time of the ACCC’s decision.

Item 7 ensures that any directions made by the Tribunal, as part of a review of a merger authorisation determination, are consistent with the CCA’s limitations on how such reviews are to be conducted.

This amendment is made pursuant to subsection 44ZZP(1) of the CCA, which allows the regulations to prescribe matters related to procedure and evidence in relation to review by the Tribunal. Item 7 is further supported by paragraph 172(1)(a) of the CCA, which provides that regulations may prescribe matters in connexion with the procedure of the Tribunal, as item 7 is necessary to ensure that where the CCA provides for a limited merits review, this is reflected in, and not circumvented by, the regulations.

*Item 8*

Item 8 adds a new subregulation 22A(4), to provide that the Tribunal’s power to permit persons to tender evidence by written statement is subject to subsections 102(8) to 102(10) of the CCA.

Item 8 ensures that, where the Tribunal permits a person to tender evidence by written statement, as part of a review of a merger authorisation determination, this power is exercised consistently with the CCA’s limitations on how such reviews are to be conducted.

This amendment is made pursuant to subsection 44ZZP(1) of the CCA, which allows the regulations to prescribe matters related to procedure and evidence in relation to review by the Tribunal. Item 8 is further supported by paragraph 172(1)(a) of the CCA, which provides that regulations may prescribe matters in connexion with the procedure of the Tribunal (among others), as item 8 is necessary to ensure that where the CCA provides for a limited merits review, this is reflected in, and not circumvented by, the regulations.

*Item 9*

Item 9 removes reference to the Tribunal from subregulation 24(1), as regulation 24 relates to the confidentiality of documentation contained on a register, and the Tribunal will no longer be keeping a register as it will no longer be the first-instance decision-maker for merger authorisations.

*Item 10*

Item 10 removes table items 3 and 4 from subregulation 24(1), as those table items refer to provisions of the CCA which have been repealed by the CPR Act.

*Item 11*

Item 11 removes reference to paragraph 22(1)(b) of the CCA from subregulation 24(5). This reflects the fact that section 22 of the CCA was repealed in 1977.

*Item 12*

Item 12 repeals subregulations 24(6) and 24(7), as they are made redundant by the fact that the Tribunal will no longer be keeping a register. Subregulation 24(6) only exists to provide a trigger for certain consequences under subregulation 24(7). Subregulation 24(7) is made redundant by the fact that the Tribunal will no longer be keeping a register, which means that the trigger in subregulation 24(6) is also redundant.

*Item 13*

Item 13 repeals paragraph 26(2)(ab), as it refers to regulation 74 (which is repealed by item 24) and section 111 of the CCA (which was repealed by the CPR Act), and is therefore redundant.

*Item 14*

Item 14 amends paragraph 26(2)(b), to reflect the fact that many of the forms previously prescribed by the CCA Regulations and listed under paragraph 26(2)(b) are now to be forms approved by the ACCC. The amendment ensures that a failure to state an address for service, in the appropriate place on a form approved by the ACCC, is appropriately excluded from subregulation 26(1) (which broadly provides that proceedings may continue despite non-compliance with a provision of the Regulations).

Item 14 is supported by paragraph 172(1)(a) of the CCA, which provides that regulations may prescribe matters in connexion with the procedure of the Tribunal, the Commission and the AER. Item 14 is necessary to ensure that the requirement to provide an address for service, which is a crucial element of any legal proceedings, is not undermined by the move from prescribed forms to forms approved by the ACCC.

*Item 15*

Item 15 removes reference to the Tribunal from subregulation 28(5), as the Tribunal will no longer be receiving applications for merger authorisation and therefore all of the fees listed at Schedule 1B will be payable to the ACCC and not the Tribunal.

*Item 16*

Item 16 repeals paragraph 28(6A)(a), as it deals with when concessional fees are payable for additional notices given before 31 December 2008. As that date has long since passed, paragraph 28(6A)(a) is redundant. Paragraph 28(6A)(b) is renumbered following the repeal of paragraph 28(6A)(a), but is otherwise unchanged.

*Item 17*

Item 17 repeals subparagraph 28(7)(a)(i) of the definition of ‘additional notice’ (when given by a person who is an individual or a proprietary company), as it is redundant following the repeal of the price‑signalling provisions by the CPR Act.

*Item 18*

Item 18 adds reference to section 48 of the CCA to the definition of an ‘additional notice’ given by a person who is an individual or a proprietary company (subparagraph 28(7)(a)(v)). This amendment reflects the fact that the CPR Act made notification available for resale price maintenance conduct, as an alternative to seeking authorisation. This amendment ensures that an additional notice for resale price maintenance attracts a concessional fee under Schedule 1B.

*Item 19*

Item 17 repeals subparagraph 28(7)(b)(i) of the definition of ‘additional notice’ (when given by a person who is not an individual or a proprietary company), as it is redundant following the repeal of the price‑signalling provisions by the CPR Act.

 *Item 20*

Item 20 adds reference to section 48 of the CCA to the definition of an ‘additional notice’ given by a person who is not an individual or a proprietary company (subparagraph 28(7)(b)(v)). This amendment reflects the fact that the CPR Act made notification available for resale price maintenance conduct, as an alternative to seeking authorisation. This amendment ensures that an additional notice for resale price maintenance attracts a concessional fee under Schedule 1B.

*Item 21*

Item 21 amends subregulation 28(7) (the definition of ‘first application’), to reflect the fact that all authorisations will now be granted under a single provision (section 88 of the CCA), rather than multiple provisions for authorising various forms of conduct.

This amendment is supported by paragraph 172(1)(d) of the CCA, as it relates to the fees payable to the ACCC on the making of a prescribed application.

*Item 22*

Item 22 repeals Part 4 of the CCA Regulations, as the whole of Part 4 deals with price‑signalling and is therefore redundant following the repeal of the price‑signalling provisions of the CCA by the CPR Act.

*Item 23*

Item 23 repeals regulations 70 and 71, as they respectively prescribe the forms for use in applications for non-merger authorisation and notifications. The CPR Act provides for each of the listed forms to be forms approved by the ACCC, rather than prescribed forms, which makes regulations 70 and 71 redundant.

*Item 24*

Item 24 repeals regulations 72, 73 and 74.

Regulation 72 relates to when collective bargaining notices commence, but is now redundant as it only deals with collective bargaining notices given before 1 January 2009. This amendment does not change the period for commencement of collective bargaining notices given after 1 January 2009.

Regulation 73 prescribes the forms for use in relation to merger authorisations and clearances. The CPR Act repealed the merger clearance process (which renders the respective forms redundant), and also provides for the forms related to merger authorisations to be forms approved by the ACCC, rather than prescribed, which makes regulation 73 redundant.

Regulation 74 prescribes the period in which an application for Tribunal review in relation to a merger clearance must be made, and is also made redundant following the repeal of the merger clearance process by the CPR Act.

*Item 25*

Item 25 repeals the explanatory note at regulation 83, to align with current drafting practices. The repeal of the note is not intended to alter the operation of regulation 83.

*Item 26*

Item 26 inserts a new Part 8 into the CCA Regulations, which contains transitional and application provisions.

New regulation 96 inserts a definition of ‘amending Schedule’ (defined as Schedule 1 to the Regulations).

New subregulation 97(1) provides that the amendment to regulation 6A (by item 1) only applies in relation to applications made on or after Part 1 of the amending Schedule commences.

New subregulation 97(2) provides that, despite the amendment made by the amending Schedule, regulation 13 continues to apply, in relation to applications made before the day Part 1 of the amending Schedule commences, as if regulation 13 had not been amended.

*Item 27*

Item 27 amends Form AA of Part 1 of Schedule 1 to the CCA Regulations, to update the pre-filled portion of the date at the bottom of the form.

*Item 28*

Item 28 repeals Parts 2 and 3 of Schedule 1 to the CCA Regulations, which are redundant following changes by the CPR Act. Those Parts contain forms for use in applications for non-merger authorisation and notifications, which are now to be forms approved by the ACCC rather than prescribed in the CCA Regulations.

*Item 29*

Item 29 amends Form I of Part 1 of Schedule 1 to the CCA Regulations, to update the pre-filled portion of the date in question 1 of the form.

*Item 30*

Item 30 adds a note to question 5 in Form I of Part 4 of Schedule 1 to the CCA Regulations. As discussed under items 7 and 8, there are certain limitations on the information, documents and evidence which can be put before the Tribunal as part of a review of a merger authorisation determination of the ACCC. This note is inserted to ensure that applicants are aware that the review will not be a full rehearing, and is to be based on the material before the ACCC when it made its determination, unless the Tribunal otherwise allows.

*Item 31*

Item 31 amends Form I of Part 1 of Schedule 1 to the CCA Regulations, to update the pre-filled portion of the date at the bottom of the form.

 *Item 32*

Item 32 re-writes Form J, which is used in applications to the Tribunal for review of certain decisions of the ACCC, to provide for Tribunal review of new types of notices which can be given by the ACCC (which were added by the CPR Act).

Form J will now be used to make applications under either section 101A or 101B of the CCA, to review the giving of a notice under:

* subsection 93(3) (a notice revoking a notification for exclusive dealing);
* subsection 93(3A) (a notice revoking a notification for resale price maintenance);
* subsection 93(3B) (a notice revoking a resale price maintenance notification for a failure to comply with conditions imposed on that notification);
* subsection 93AAA(1) (a notice imposing conditions on a resale price maintenance notification);
* subsection 93AC(1) (an objection notice for a notification of collective bargaining given under subsection 93AB(1A));
* subsection 93AC(2) (an objection notice for a notification of collective bargaining given under subsection 93AB(1));
* subsection 93AC(2A) (a notice revoking a collective bargaining notification which includes collective boycott for a failure to comply with conditions imposed on that notification);
* subsection 93ACA(1) (a notice imposing conditions on a collective bargaining notification which partially or wholly includes collective boycott conduct);
* subsection 93AD(5) (a notice determining an alternative period of up to 10 years in which a collective bargaining notice expires);
* subsection 93AG(7) (a notice extending a stop notice, which requires collective boycott conduct to temporarily cease, by up to a further 90 days); or
* section 95AB (a notice withdrawing the benefit of a class exemption in a particular case).

*Item 33*

Item 33 amends Form JA and JB of Part 4 of Schedule 1 to the CCA Regulations, to update the pre-filled portion of the date at the bottom of the forms.

*Item 34*

Item 34 introduces a new Form JBA to be used for applications to the Tribunal under subsection 44O(1A) of the CCA for review of a decision of the Commonwealth Minister made under section 44NBC of the CCA. Both subsection 44O(1A) and section 44NBCare added to the CCA by the CPR Act.

*Item 35*

Item 35 amends Form JC, K and L of Part 4 of Schedule 1 to the CCA Regulations, to update the pre-filled portion of the date at the bottom of the form.

*Item 36*

Item 36 repeals Part 5 of Schedule 1 to the CCA Regulations, which is redundant following changes by the CPR Act. Part 5 contains forms for use in applications for merger authorisation and clearance, and Tribunal review in relation to the same. The CPR Act repealed the merger clearance process (which renders the respective forms redundant), and also provides for the forms related to merger authorisations to be forms approved by the ACCC, rather than prescribed.

*Item 37*

Item 37 updates the table of fees payable in relation to applications and notices, at Schedule 1B to the CCA Regulations.

The table is updated to:

* remove reference to the Tribunal*,* as the Tribunal will no longer receive applications for merger authorisation;
* update references to the relevant provisions under which authorisation may be sought or notification given, following changes by the CPR Act;
* remove the concessional fee for additional applications for authorisation, on the basis that subsection 88(5) now allows for a single application to seek authorisation for several types of conduct;
* add a fee for notification of resale price maintenance conduct, and set that fee at $1,000 ($0 for an additional notice); and
* apply the same fee and concessional fee to all notifications for exclusive dealing, consistently with the fact that third line forcing is now assessed under the same test as other types of exclusive dealing.