2019‑2020‑2021

The Parliament of the

Commonwealth of Australia

HOUSE OF REPRESENTATIVES

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| **EXPOSURE DRAFT** |

Competition and Consumer Amendment (National Access Regime) Bill 2021

No. , 2021

(Treasury)

A Bill for an Act to amend the *Competition and Consumer Act 2010*, and for related purposes

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A Bill for an Act to amend the *Competition and Consumer Act 2010*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the *Competition and Consumer Amendment (National Access Regime) Act 2021*.

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 | The day after this Act receives the Royal Assent. |  |

Note: This table relates only to the provisions of this Act as originally enacted.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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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—National access regime reforms

Part 1—Removing merits review of declaration decisions

Competition and Consumer Act 2010

1 Subsection 44I(1)

Omit “Subject to this section, a”, substitute “A”.

2 Subsection 44I(2)

Repeal the subsection.

3 Sections 44K, 44KA, 44KB and 44L

Repeal the sections.

4 Subsection 44V(1)

Omit “section 44Y, 44YA, 44ZZCB or 44ZZCBA”, substitute “section 44Y or 44ZZCB”.

5 Subsection 44W(4A)

Repeal the subsection.

6 Subsection 44XA(2) (table item 4)

Repeal the item.

7 Section 44YA

Repeal the section.

8 Division 6B of Part IIIA (heading)

Omit “**registered contracts, access undertakings and Tribunal review**”, substitute “**registered contracts and access undertakings**”.

9 Section 44ZZCBA

Repeal the section.

10 Subsection 44ZZOAAA(2)

Omit “44K, 44L,”.

11 Paragraph 44ZZOAAA(3)(a)

Omit “44H(9), 44J(7),”.

12 Subparagraph 44ZZOAAA(6)(a)(ii)

Omit “44K, 44L,”.

13 Subsection 44ZZOAAA(9) (paragraph (a) of the definition of *decision maker*)

Omit “44K, 44L,”.

14 Subparagraph 44ZZOAA(a)(iii)

Omit “44K(6), 44L(5),”.

15 Subparagraph 44ZZOAA(a)(iv)

Omit “44K(6A), 44L(5A),”.

16 Subparagraph 44ZZOAA(b)(ii)

Omit “44K(6A), 44L(5A),”.

17 Subsection 44ZZOA(3) (table item 3, column 1)

Omit “44K(6A), 44L(5A),”.

18 Paragraph 44ZZOA(5)(c)

Omit “44K, 44L,”.

19 Paragraph 44ZZOA(9)(b)

Omit “44K, 44L,”.

20 Application of amendments

The amendments of the *Competition and Consumer Act 2010* made by this Part apply in relation to the following:

(a) a decision by the designated Minister:

(i) made on or after the commencement of this Part under section 44H of that Act (including a decision that is taken to be made under subsection 44H(9) of that Act); and

(ii) that relates to a declaration recommendation applied for under section 44F of that Act on or after the commencement of this Part;

(b) a decision by the designated Minister:

(i) made on or after the commencement of this Part under section 44J of that Act (including a decision that is taken to be made under subsection 44J(7) of that Act); and

(ii) that relates to a revocation recommendation given by the Council on or after the commencement of this Part.

Part 2—Limiting repeat declaration and revocation processes

Competition and Consumer Act 2010

21 Section 44B

Insert:

***revocation exclusion period*** has the meaning given by subsection 44J(2A).

22 Before subsection 44F(1)

Insert:

Applying to Council to request recommendation

23 After paragraph 44F(1)(e)

Insert:

; or (f) in the case of a person other than the designated Minister—subsection (1AA) or (1AB) applies in relation to the service.

24 Subsection 44F(1) (note)

Omit “(e)”, substitute “(f)”.

25 After subsection 44F(1)

Insert:

Exception in paragraph (1)(f)—services the subject of previous decisions

(1AA) This subsection applies in relation to a service if:

(a) the designated Minister has previously made a decision under section 44H not to declare the service, or not to declare a substantially similar service that is provided by means of the same facility as the first‑mentioned service, having received a declaration recommendation as referred to in subsection 44H(1); and

(b) a period of less than 10 years has elapsed since receipt of that declaration recommendation.

(1AB) This subsection applies in relation to a service if:

(a) a declaration has previously been in operation for the service, or for a substantially similar service that is provided by means of the same facility as the first‑mentioned service; and

(b) the designated Minister made a decision under section 44J to revoke the declaration, having received a revocation recommendation as referred to in subsection 44J(3); and

(c) a period of less than 10 years has elapsed since receipt of that revocation recommendation.

(1AC) However, subsection (1AA) or (1AB) does not apply if the Council is satisfied that there has been a material change of circumstances since the receipt of the relevant recommendation.

Notice for applications that cannot be made

26 Subsection 44F(1A)

Omit “(e)”, substitute “(f)”.

27 Before subsection 44F(2)

Insert:

Dealing with applications

28 Before subsection 44F(5)

Insert:

Withdrawal and variation of applications

29 Before subsection 44J(1)

Insert:

Council may recommend revocation

30 After subsection 44J(1)

Insert:

(1A) The Council may consider whether to recommend revocation of a declaration:

(a) on its own initiative; or

(b) if requested in writing to do so by the designated Minister or any other person.

31 Subsection 44J(2)

Repeal the subsection, substitute:

(2) The Council cannot recommend revocation of a declaration unless:

(a) the Council is satisfied that, at the time of the recommendation:

(i) one or more of paragraphs 44F(1)(a) to (e) would prevent the making of an application for a recommendation that the service concerned be declared; or

(ii) subsection 44H(4) would prevent the service concerned from being declared; and

(b) one of the following applies:

(i) the declaration is not subject to a revocation exclusion period;

(ii) the declaration is subject to a revocation exclusion period, but the Council is satisfied that there has been a material change of circumstances since the start of the period;

(iii) the designated Minister requested the Council to consider revocation of the recommendation.

Revocation exclusion period

(2A) A declaration is subject to a ***revocation exclusion period*** if a period of less than 10 years has elapsed since whichever is the most recent of the following events to have occurred in relation to the declaration:

(a) the designated Minister’s receipt of the declaration recommendation as referred to in subsection 44H(1) that enabled the declaration to be made;

(b) if the designated Minister has previously made a decision under subsection (3) of this section not to revoke the declaration, having received a revocation recommendation in relation to the declaration as referred to in that subsection—the designated Minister’s receipt of that revocation recommendation;

(c) if the Council has published under subsection (2B) of this section a notice of a decision not to recommend revocation of the declaration—the publication of the notice.

Notice if Council considers revocation without making recommendation

(2B) If the Council considers whether to recommend revoking a declaration under subsection (1) but decides not to make such a recommendation, the Council must as soon as practicable after that decision:

(a) publish, by electronic or other means, a notice of the decision; and

(b) give a copy of the notice to the provider of the declared service and the designated Minister.

(2C) However, if the Council’s decision not to make the recommendation to revoke the declaration is because:

(a) the declaration is subject to a revocation exclusion period; and

(b) the Council is not satisfied that there has been a material change of circumstances since the start of the period;

the Council is not required to publish or give notice of the decision under subsection (2B).

Designated Minister must decide whether to revoke

32 Before subsection 44J(6)

Insert:

Limits on revocation

33 Before subsection 44J(7)

Insert:

Deemed decision of designated Minister

34 Application of amendments

(1) Section 44F of the *Competition and Consumer Act 2010*, as amended by this Part, applies in relation to persons applying to the Council on or after the commencement of this Part asking the Council to recommend that a service be declared (regardless of whether the relevant previous decisions of the designated Minister were made before, on or after that commencement).

(2) Section 44J of the *Competition and Consumer Act 2010*, as amended by this Part, applies in relation to a declaration made before, on or after the commencement of this Part, regardless of whether the events referred to in paragraphs 44J(2A)(a) and (b) of that Act (as inserted by this Part) occurred before, on or after that commencement.

(3) However subsection 44J(2B) of the *Competition and Consumer Act 2010*, as inserted by this Part, applies only in relation to a decision of the Council not to recommend revocation of a declaration that occurs on or after the commencement of this Part.

Part 3—Arbitration and access determination reforms

Competition and Consumer Act 2010

35 At the end of subsection 44I(3)

Add:

Note 1: The expiry or revocation of a declaration of a service can have other consequences as follows:

(a) it requires a pending arbitration of an access dispute relating to the service to be terminated (section 44YAA);

(b) in the case of revocation of the declaration, it causes a final or interim determination in relation to the service to be revoked (section 44ZUAA and subsection 44ZUA(3));

(c) in the case of expiry of the declaration, it can cause an interim determination in relation to the service to expire (paragraph 44ZOA(2)(d));

(d) it requires a review by the Tribunal of a final determination in relation to the service to be terminated (section 44ZPA).

Note 2: The expiry date of a final determination in relation to a declared service cannot be later than the expiry date specified in the declaration of the service: see subsection 44V(1A).

36 Subsection 44I(4)

Repeal the subsection.

37 Subsection 44V(1)

After “44Y”, insert “, 44YAA”.

38 After subsection 44V(1)

Insert:

(1A) A final determination on access to the service must specify the expiry date of the determination. The expiry date must not be later than the expiry date specified in the declaration of the service.

Note: A declaration of a service must specify an expiry date: see subsection 44H(8).

39 After subsection 44W(2)

Insert:

(2A) If, after the notification under section 44S of an access dispute in relation to a declared service, the declaration of the service expires or is revoked, the Commission must not make a determination in relation to the service.

40 At the end of Subdivision C of Division 3 of Part IIIA

Add:

44YAA Commission must terminate arbitration on expiry or revocation of declaration

If the Commission is arbitrating a dispute in relation to a declared service and the declaration of the service expires or is revoked, the Commission must terminate the arbitration.

41 Subdivision E of Division 3 of Part IIIA (heading)

After “**Effect**”, insert “**and duration**”.

42 After subsection 44ZO(2)

Insert:

Duration of final determination

(2A) A final determination that takes effect continues in effect until its expiry date, unless it is revoked earlier.

Note: A final determination must specify an expiry date: see subsection 44V(1A). For revocation of a final determination, see section 44ZUAA.

(2B) To avoid doubt, the expiry or revocation of the final determination does not affect the availability of remedies under Division 7 in respect of the period when the determination was in operation.

43 At the end of subsection 44ZOA(2)

Add:

; (d) the declaration of the service to which the access dispute relates expires.

Note: For revocation of an interim determination, see section 44ZUA.

44 After subsection 44ZP(6)

Insert:

(6A) The determination, as affirmed or varied by the Tribunal, must specify the expiry date of the determination. The expiry date must not be later than the expiry date specified in the declaration of the service that is the subject of the determination.

45 After section 44ZP

Insert:

44ZPA Tribunal must terminate review on expiry or revocation of declaration

If the Tribunal is reviewing a final determination of an access dispute in relation to a declared service under section 44ZP, and the declaration of the service expires or is revoked, the Tribunal must terminate the review.

46 At the end of section 44ZR

Add:

(5) In making any orders on appeal, the Federal Court must take into account whether, in relation to the declared service that is the subject of the decision of the Tribunal, the declaration of the service has expired or been revoked.

(6) Subsection (5) does not limit the matters the Federal Court may take into account.

47 At the end of section 44ZU

Add:

(3) Despite subsection (1), the Commission cannot vary the expiry date of a final determination to be later than the expiry date specified in the declaration of the service that is the subject of the determination.

48 After section 44ZU

Insert:

44ZUAA Revocation of final determinations

(1) If:

(a) a final determination is in operation in relation to a declared service; and

(b) the declaration of the service is revoked under section 44J;

the final determination is taken to be revoked on the day after the end of the period of 6 months beginning on the day the declaration is revoked.

(2) However, if the expiry date specified in the final determination is a day during the 6‑month period referred to in subsection (1), then the final determination is instead taken to be revoked on the expiry date.

Note: A final determination must specify an expiry date: see subsection 44V(1A).

49 At the end of section 44ZUA

Add:

(3) If:

(a) an interim determination is in operation in relation to a declared service; and

(b) the declaration of the service is revoked under section 44J;

the interim determination is taken to be revoked on the day the declaration is revoked.

50 At the end of section 44ZZL

Add:

; (d) the expiry date of the determination.

Note: A final determination must specify an expiry date: see subsection 44V(1A).

51 Application of amendments

(1) The amendments of the *Competition and Consumer Act 2010* made by this Part apply in relation to:

(a) the arbitration of an access dispute that is notified on or after the commencement of this Part; and

(b) a determination that is made on or after the commencement of this Part in relation to such an arbitration.

(2) For the purposes of subitem (1), it is irrelevant, in relation to the declared service to which the arbitration or determination relates, whether the declaration of the service is made before, on or after the commencement of this Part.