



# **Competition and Consumer Legislation Amendment Act 2011**

**No. 184, 2011**

**An Act to amend the law relating to competition  
and consumers, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# Competition and Consumer Legislation Amendment Act 2011

No. 184, 2011

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## **An Act to amend the law relating to competition and consumers, and for related purposes**

*[Assented to 6 December 2011]*

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Competition and Consumer  
Legislation Amendment Act 2011*.

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## 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.

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	6 December 2011
2. Schedule 1	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 2 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	6 February 2012
3. Schedule 2	The later of: (a) the day this Act receives the Royal Assent; and (b) 1 January 2012.	1 January 2012
4. Schedule 3	Immediately after the commencement of Schedule 5 to the <i>Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010</i> .	1 January 2011

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Note: This table relates only to the provisions of this Act as originally enacted.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 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Mergers and acquisitions**

### ***Competition and Consumer Act 2010***

#### **1 Subsections 50(1) and (2)**

Omit “a market”, substitute “any market”.

#### **2 Subsection 50(6) (definition of *market*)**

Omit “substantial”.

#### **3 At the end of Part XIII**

Add:

### **Division 2—Application of amendments made by the Competition and Consumer Legislation Amendment Act 2011**

#### **179 Amendments of section 50**

The amendments of section 50 made by Schedule 1 to the *Competition and Consumer Legislation Amendment Act 2011* apply to acquisitions occurring after the commencement of that Schedule.

#### **4 Subsection 50(1) of Schedule 1**

Omit “a market”, substitute “any market”.

#### **5 Subsection 50(6) of Schedule 1 (definition of *market*)**

Omit “substantial”.



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## **Schedule 2—Unconscionable conduct**

### *Australian Securities and Investments Commission Act 2001*

#### **1 Sections 12CB and 12CC**

Repeal the sections, substitute:

#### **12CB Unconscionable conduct in connection with financial services**

- (1) A person must not, in trade or commerce, in connection with:
  - (a) the supply or possible supply of financial services to a person (other than a listed public company); or
  - (b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.
- (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
  - (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
  - (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.
- (3) For the purpose of determining whether a person has contravened subsection (1):
  - (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
  - (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (4) It is the intention of the Parliament that:
  - (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
  - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is

identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

- (i) the terms of the contract; and
- (ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

(5) In this section:

*listed public company* has the same meaning as it has in the *Income Tax Assessment Act 1997*.

### **12CC Matters the court may have regard to for the purposes of section 12CB**

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened section 12CB in connection with the supply or possible supply of financial services to a person (the *service recipient*), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the service recipient; and
- (b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and
- (e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or

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- equivalent financial services from a person other than the supplier; and
- (f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and
  - (g) if the supplier is a corporation—the requirements of any applicable industry code (see subsection (3)); and
  - (h) the requirements of any other industry code (see subsection (3)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and
  - (i) the extent to which the supplier unreasonably failed to disclose to the service recipient:
    - (i) any intended conduct of the supplier that might affect the interests of the service recipient; and
    - (ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and
  - (j) if there is a contract between the supplier and the service recipient for the supply of the financial services:
    - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and
    - (ii) the terms and conditions of the contract; and
    - (iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and
    - (iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and
  - (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and
  - (l) the extent to which the supplier and the service recipient acted in good faith.
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- (2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **acquirer**) has contravened section 12CB in connection with the acquisition or possible acquisition of financial services from a person (the **supplier**), the court may have regard to:
- (a) the relative strengths of the bargaining positions of the acquirer and the supplier; and
  - (b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
  - (c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the financial services; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the financial services; and
  - (e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent financial services to a person other than the acquirer; and
  - (f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and
  - (g) the requirements of any applicable industry code (see subsection (3)); and
  - (h) the requirements of any other industry code (see subsection (3)), if the supplier acted on the reasonable belief that the acquirer would comply with that code; and
  - (i) the extent to which the acquirer unreasonably failed to disclose to the supplier:
    - (i) any intended conduct of the acquirer that might affect the interests of the supplier; and
    - (ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

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- (j) if there is a contract between the acquirer and the supplier for the acquisition of the financial services:
    - (i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and
    - (ii) the terms and conditions of the contract; and
    - (iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and
    - (iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and
  - (k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the financial services; and
  - (l) the extent to which the acquirer and the supplier acted in good faith.
- (3) In this section:

*applicable industry code*, in relation to a corporation, has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

*industry code* has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

## ***Competition and Consumer Act 2010***

### **2 Paragraph 131(2)(a)**

Omit “section 22”, substitute “section 21”.

### **3 Subsection 20(2) of Schedule 2**

Omit “or 22”.

### **4 Sections 21 and 22 of Schedule 2**

Repeal the sections, substitute:

## 21 Unconscionable conduct in connection with goods or services

- (1) A person must not, in trade or commerce, in connection with:
  - (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
  - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.
- (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
  - (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
  - (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.
- (3) For the purpose of determining whether a person has contravened subsection (1):
  - (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
  - (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (4) It is the intention of the Parliament that:
  - (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
  - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
  - (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
    - (i) the terms of the contract; and
    - (ii) the manner in which and the extent to which the contract is carried out;

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and is not limited to consideration of the circumstances relating to formation of the contract.

**22 Matters the court may have regard to for the purposes of section 21**

- (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the *customer*), the court may have regard to:
  - (a) the relative strengths of the bargaining positions of the supplier and the customer; and
  - (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
  - (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
  - (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
  - (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and
  - (g) the requirements of any applicable industry code; and
  - (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and
  - (i) the extent to which the supplier unreasonably failed to disclose to the customer:
    - (i) any intended conduct of the supplier that might affect the interests of the customer; and

- (ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
  - (j) if there is a contract between the supplier and the customer for the supply of the goods or services:
    - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
    - (ii) the terms and conditions of the contract; and
    - (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
    - (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
  - (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
  - (l) the extent to which the supplier and the customer acted in good faith.
- (2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *acquirer*) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the *supplier*), the court may have regard to:
- (a) the relative strengths of the bargaining positions of the acquirer and the supplier; and
  - (b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
  - (c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person



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- acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
- (e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
  - (f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and
  - (g) the requirements of any applicable industry code; and
  - (h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and
  - (i) the extent to which the acquirer unreasonably failed to disclose to the supplier:
    - (i) any intended conduct of the acquirer that might affect the interests of the supplier; and
    - (ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and
  - (j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:
    - (i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and
    - (ii) the terms and conditions of the contract; and
    - (iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and
    - (iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and
  - (k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and
  - (l) the extent to which the acquirer and the supplier acted in good faith.
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**22A Presumptions relating to whether representations are misleading**

Section 4 applies for the purposes of sections 21 and 22 in the same way as it applies for the purposes of Division 1 of Part 3-1.

## **Schedule 3—Technical amendments**

### ***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010***

**1 Item 36 of Schedule 5**

Omit “1A and 1AA”, substitute “1AAA, 1AA and 1A”.

**2 Item 50 of Schedule 5**

Omit “or of the Australian Consumer Law”.

**3 Item 54 of Schedule 5 (note)**

Omit “or Australian Consumer Law”.

**4 Item 65 of Schedule 5**

Omit “, or a provision of the Australian Consumer Law,”.

**5 Item 71 of Schedule 5**

Omit “, or of the Australian Consumer Law,”.

**6 Item 74 of Schedule 5**

Omit “or 6(1)”.

**7 Item 90 of Schedule 5**

Omit “Part IV, IVA, IVB, V or VC or of the Australian Consumer Law”, substitute “, IVA, IVB, V or VC, or of the Australian Consumer Law,”.

**8 Item 90 of Schedule 5**

Omit “Division 2”, substitute “or Division 2”.

**9 Item 96 of Schedule 5**

Omit “or a”, substitute “, or of a”.

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*[Minister's second reading speech made in—  
House of Representatives on 15 June 2011  
Senate on 18 August 2011]*

(109/11)

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16      *Competition and Consumer Legislation Amendment Act 2011*      No. 184, 2011