



DEVELOPMENT PLAN FOR PROCEDURAL RULES

POSITION PAPER

February 2006

1. INTRODUCTION

Under section 152ELA of the *Trade Practices Act 1974* (the Act), which came into force in September 2005, the Australian Competition and Consumer Commission (the Commission) was provided with a broad power to make written rules to deal comprehensively with the procedures to apply to the Commission and third parties in connection with matters arising under Part XIC of the Act and incidental matters.

This section also permits the Commission to prescribe particular matters of a procedural nature in relation to a number of specific provisions contained in Part XIC of the Act.

Under section 152ELC of the Act, the Commission is required to publish a written plan that outlines the Commission's proposals for making these procedural rules and an indicative timetable for making them ('the development plan').

The Commission is required to publish this plan within six months of the amendments taking effect, i.e., by 24 March 2006. That said, a failure to meet this timeframe would not invalidate subsequent decisions in relation to the procedural rules.

This Position Paper identifies the approach that the Commission would propose to adopt in issuing the development plan, including the matters that the plan would identify as to be addressed in the procedural rules and the indicative timetable by which those procedural rules would be issued.

The Commission seeks submissions from interested parties on the appropriateness of the proposed development plan. Comments should be provided by 22 February 2006 and can be addressed to:

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To foster an informed and robust consultative process, the Commission proposes to treat all submissions as non-confidential, unless the submissions indicate otherwise. Unless the author of a submission requests that the submission be kept confidential, written submissions given to the Commission will be made available to interested parties upon request. If submissions contain confidential information, then the author of the submission should provide the Commission with a copy that is marked confidential and a masked copy of the submission. This masked copy may be made available to interested parties upon request.

In addition to a hard copy, people making submissions are encouraged to provide an electronic copy of the submission to sean.riordan@accc.gov.au.

2. THE NEW LEGISLATIVE PROVISIONS

Overview of legislation

Schedule 7 to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* amended the Act so as to provide the Commission with greater discretion concerning matters that arise under Part XIC of the Act.

New section 152ELA of the Act allows the Commission a broad power to make written rules to deal comprehensively with the procedures to apply to the Commission and third parties in connection with matters arising under Part XIC of the Act, including in connection with incidental matters. It also permits the Commission to prescribe particular matters and thereby override the existing operation of Part XIC of the Act in a number of respects.

New section 152ELC requires the ACCC to publish a development plan, within six months of the amendments taking effect, which sets out its intended approach to making procedural rules and an indicative timetable for the making of the rules. This development plan is intended to encourage industry awareness and public consultation in relation to the procedural rules, and would not be binding on the Commission when it makes the rules.

Sections 152ELA to 152ELC are set out in Attachment A to this paper.

Scope of rule-making power

Some examples of the matters in relation to which the Commission could use its broad power under section 152ELA of the Act to make procedural rules are

- confidentiality of information or documents given to the Commission by an applicant for an exemption order, a person who gives the Commission an access undertaking or a party to an arbitration dispute;
- matters to which the Commission will have regard in deciding whether to make an interim determination in an access dispute;
- the form and content of applications, undertakings, variations and other documents given to the Commission under Part XIC; and
- when an oral hearing would be needed in relation to the arbitration of an access dispute.

The procedural rules may provide for a matter by giving the Commission the power to make administrative decisions in relation to that matter, in addition to the power to specify principles or rules of general application, in order to provide additional flexibility for the Commission in deciding how to provide for its practices and procedures¹.

The particular provisions of Part XIC of the Act that the procedural rules can override are summarised as follows:

¹ See Commonwealth of Australia, *Telecommunications Legislation Amendment (Competition And Consumer Issues) Bill 2005—Explanatory Memorandum*, at page 67.

Provisions dealing with level of consultation on exemption applications or access undertakings that are under consideration

Previously, if an applicant modified their proposal during the consultation phase, the consultation process recommenced—now the procedural rules power will permit the Commission flexibility to continue the current consultation process where it deems the modification to be minor. For instance, the procedural rules could specify that a modification should be treated as minor where the terms are substantively the same to those previously proposed, or where the modification is to adopt a position that the Commission indicated it would consider reasonable in the course of the consultation process.

Provisions dealing with the level of consultation (if any) on modifications to declarations, exemptions and access undertakings that are in operation

Previously, if the Commission considered a modification to be minor then it may make the changes without consultation—the legislative amendments will now mean consultation is not required if the proposed modification is taken under procedural rules as being minor in nature. The Commission will have the flexibility to not consult, or limit consultation, in accordance with procedural rules.

Provisions dealing with the failure to supply information specifically requested

Previously, if information was not supplied, an application for an exemption or a proposed access undertaking fell into abeyance—now the procedural rules power will permit the Commission to reject an application or an access undertaking on the basis that information is not supplied within a specified timeframe.

Miscellaneous provisions providing powers to Commission in handling Part XIC matters or specifying procedures for Commission to follow

Section 152CDA will permit the Commission to write procedural rules that permit it to defer the consideration of access undertakings proposed to it, and amendments to section 152CLA will permit the procedural rules to alter the Commission's general approach to when it will defer an access dispute. Further amendments will permit the procedural rules to alter existing provisions that specify Commission procedures in arbitrating access disputes, including the provisions dealing with information confidentiality and the joining of related access disputes.

Attachment B to this paper contains a table that identifies each of the sections the operation of which may be varied by a procedural rule.

3. PROPOSED APPROACH TO PROCEDURAL RULES

As required by the new section 152ELB, the Commission will undertake a public consultation process prior to making any procedural rules. This would require the Commission placing a draft version of the rules on its website, inviting people to make submissions in relation to the rules, and considering any submissions it receives.

The Commission proposes to make an initial round of procedural rules, and to thereafter maintain the currency of the procedural rules by amending them from time to time².

The Commission proposes to determine whether to address an issue in the initial round of procedural rules, or to prioritise issues that are to be addressed within that round, based upon the extent to which addressing a particular issue would promote the efficient operation of Part XIC of the Act. This would include a consideration of whether or not:

- the Commission would already have sufficient procedural flexibility to properly determine a matter arising under Part XIC of the Act in an efficient manner; or
- sufficient information on the general practice and procedure that the Commission would adopt in a particular Part XIC proceeding is already available to interested parties.

Once developed, the procedural rules will be easily accessible from the Commission's website.

The Commission proposes that the procedural rules will change the Commission's procedures as soon as they are introduced, including those for matters already before the Commission for consideration. Of course, undertakings and exemption applications already before the Commission would not need to be resubmitted if the process regarding lodgement was changed.

4. DISCUSSION OF PARTICULAR TYPES OF MATTERS ARISING UNDER PART XIC OF THE ACT

Minor variations to declarations, exemptions and access undertakings that are in operation

Prior to the recent legislative amendments, the Commission had the power to make or accept variations to declarations, exemptions and access undertakings that were in operation. This required a full public consultation process unless the Commission had the opinion that the changes were 'minor' in nature.

The legislative amendments mean that, from 24 March 2006, unless and until procedural rules are made that provide otherwise, an abridged process will not be able to be followed in making amendments to these instruments. This is because modifications will need to be considered minor under the procedural rules, rather than the ordinary meaning of the word, before anything less than a full public consultation process would be required.

That said, the ACCC does not anticipate that there will be a need for it in the immediate future for it to modify such an instrument in circumstances where an abridged consultation process would be appropriate.

The Commission considers that these matters should be addressed to preserve the operation of the Act and to provide appropriate flexibility to the Commission in its role, and that this should occur in the initial round of rule-making.

² The power to vary or revoke instruments such as the procedural rules is provided under subsection 33(3) of the *Acts Interpretation Act 1901*.

Access undertakings and exemption applications

The Commission's ability to make procedural rules in relation to the procedures for assessing access undertakings and exemption applications has the potential to promote timely decision-making by limiting the potential for parties to intentionally or inadvertently delay the process.

Some causes for delay include:

- providers modifying an access undertaking or exemption application that is under consideration, which leads to the full consultation process starting again;
- providers not supplying all supporting information at the time of making their applications or proposing undertakings;
- applicants providing only confidential versions of submissions, which delays the beginning of the consultation period until public versions are provided and can be made available; and
- access providers submitting access undertakings when related arbitrations are before the Commission and the necessity to co-ordinate these processes when they are conducted simultaneously.

The procedural rules would appear to provide an appropriate mechanism by which these and other potential causes for delay can be avoided or discouraged.

The procedural rules will also provide industry with guidance on the general procedures, which has only been provided to a limited extent to date.

The Commission considers that there would be benefit in attempting to address the procedures in relation to access undertaking and exemption applications, including when it will defer consideration of an access undertaking and the other potential sources of delay identified above, in the initial round of making procedural rules.

Access disputes

The previous legislative arrangements set out a number of procedures in relation to the resolution of access disputes. The Commission also supplemented this information with detailed guidelines for industry about access dispute processes³.

However, particular problems have been experienced in arbitrating access disputes where there is a single access provider involved in a number of concurrent disputes.

The Commission currently faces some restrictions on its ability to join two or more access disputes that have one or more common matters. Joining disputes can be advantageous as it does not require the Commission to 'cover old ground'. In addition, whenever a party to a joined arbitration raises a matter that influences the Commission's thinking then the other parties can be easily informed and be provided with an opportunity to simultaneously comment on the issue.

The Commission has also experienced delays in the availability of information gathered from a party in one access dispute for use in other access disputes involving that party.

³ See ACCC, *Resolution of telecommunications access disputes—A guide*, March 2004 (revised).

While the new legislative arrangements continue to set out procedures in relation to resolving access disputes, the procedural rules permit the Commission to modify or replace a number of these procedures including those regarding joined hearings.

The Commission considers that it will use the initial round of procedural rules to address the current problems where there is a single access provider involved in a number of concurrent disputes, but does not propose to deal with access dispute practice and procedures more generally.

5. PROPOSED TIMETABLE FOR IMPLEMENTING PROCEDURAL RULES

The Commission is seeking comments on this position paper on the development plan for procedural rules by 22 February 2006. This should allow the Commission to finalise its plan in March 2006 and allow it to begin drafting the procedural rules.

The Commission expects to have a draft version of its procedural rules ready for public comment by May 2006. This timeframe will allow the Commission to give the potentially complex rules the appropriate level of consideration, and ensure that the rules are legally robust.

It is expected that there will be a six week consultation period on the draft rules (the statutory minimum is 30 days).

The Commission therefore expects to be in a position to finalise the procedural rules in August 2006.

However, the timing on particular rules may be able to be brought forward should there be an urgent need to do so.

SECTIONS 152ELA TO 152ELC OF THE TRADE PRACTICES ACT

152ELA Procedural Rules

- (1) The Commission may, by written instrument, make rules:
 - a) making provision for or in relation to the practice and procedure to be followed by the Commission in performing functions, or exercising powers, under this Part; or
 - b) making provision for or in relation to all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Commission under this Part; or
 - c) prescribing matters required or permitted by any other provision of this Part to be prescribed by the Procedural Rules.
- (2) Rules under subsection (1) are to be known as Procedural Rules.
- (3) The Procedural Rules may make provision for or in relation to any or all of the following:
 - a) the confidentiality of information or documents given to the Commission by:
 - i) an applicant for an order under subsection 152AT(1) or 152ATA(1); or
 - ii) a person who gave the Commission an access undertaking or a variation of an access undertaking; or
 - iii) a party to the arbitration of an access dispute under Division 8;
 - b) matters to which the Commission must have regard in deciding whether to make an interim determination under Division 8;
 - c) the form and content of applications, undertakings, variations or other documents given to the Commission under this Part;
 - d) dispensing with the need for an oral hearing in relation to the arbitration of an access dispute under Division 8.
- (4) Subsection (3) does not limit subsection (1).
- (5) The Procedural Rules may make provision for or in relation to a matter by empowering the Commission to make decisions of an administrative character.
- (6) The Procedural Rules may require a power conferred on the Commission by the Procedural Rules in relation to an arbitration under Division 8 to be exercised by the Commission as constituted under section 152CV for the purposes of that arbitration.
- (7) Subsections (5) and (6) do not limit subsection (1).

- (8) An instrument under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Note: For variation and revocation of instruments under subsection (1), see subsection 33 (3) of the *Acts Interpretation Act 1901*.

152ELB Public consultation

- (1) Before making any Procedural Rules, the Commission must:
- a) publish a draft of the Procedural Rules on the Commission's Internet site and invite people to make submissions to the Commission on the draft Procedural Rules; and
 - b) consider any submissions that are received within the time limit specified by the Commission when it published the draft Procedural Rules.
- (2) The time limit specified by the Commission must be at least 30 days after the day of the publication of the draft Procedural Rules.

152ELC Plan for the development of Procedural Rules

- (1) Within 6 months after the commencement of this section, the Commission must:
- a) prepare a written plan setting out:
 - i) an outline of the Commission's proposals for making Procedural Rules; and
 - ii) an indicative timetable for making those Procedural Rules; and
 - b) make a copy of the plan available on the Commission's Internet site.
- (2) A failure to comply with the plan does not affect the validity of an instrument under subsection 152ELA(1).
- (3) The plan is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT B

SECTIONS OF THE TRADE PRACTICES ACT THE OPERATION OF WHICH MAY BE VARIED BY THE PROCEDURAL RULES

Section	Matter	Available procedural rules power
152AT	Exemption from standard access obligations	Allows a minor modification to an application without the need to restart the full process.
152ATA	Anticipatory exemptions from standard access obligations	Allows a minor modification to an application without the need to restart the full process.
152AU	Ordinary or anticipatory exemptions from standard access obligations	Allows the Commission to set a time limit by which applicants must respond to requests for further information. The Commission may refuse to consider the application if this time limit is not met. If the procedural rules do not provide for a time limit, the Commission may refuse to consider the application until the further information is provided.
152BT	Access undertakings	Allows the Commission to set a time limit by which a provider submitting an undertaking must respond to requests for further information. The Commission may refuse to consider the undertaking if this time limit is not met. If the procedural rules do not provide for a time limit, the Commission may refuse to consider the undertaking until the further information is provided.
152BU	Access undertakings	Allows a minor modification to an undertaking without the need to restart the full process.
152BY	Access undertakings	Allows a minor modification to a variation to an undertaking (that is currently in operation), without the need to start the full process.
152BZ	Access undertakings	Allows the Commission to set a time limit by which a provider submitting a variation to an undertaking (that is currently in operation) must respond to requests for further information. The Commission may refuse to consider the variation if this time limit is not met. If the procedural rules do not provide for a time limit, the Commission may refuse to consider the variation until the further information is provided.
152CBB	Special access undertakings	Allows the Commission to set a time limit by which a provider submitting a special access undertaking must respond to requests for further information. The Commission may refuse to consider the special access undertaking if this time limit is not met. If the procedural rules do not provide for a time limit, the Commission may refuse to consider the special access undertaking until the further information is provided.

152CBC	Special access undertakings	Allows a minor modification to a special access undertaking without the need to restart the full process.
152CBG	Special access undertakings	Allows a minor modification to a variation to a special access undertaking (that is currently in operation) without the need to restart the full process.
152CBH	Special access undertakings	<p>Allows the Commission to set a time limit by which a provider submitting a variation to a special access undertaking must respond to requests for further information. The Commission may refuse to consider the variation if this time limit is not met.</p> <p>If the procedural rules do not provide for a time limit, the Commission may refuse to consider the variation until the further information is provided.</p>
152CDA	Access undertakings	Allows the Commission to defer consideration of an access undertaking or a variation to an access undertaking.
152CLA	Access disputes	Allows the Commission to specify the circumstances when the Commission may defer consideration of an access dispute.
152DB	Access disputes	Allows the Commission to specify procedures in relation to hearings in relation to access disputes.
152DK	Various	Allows the Commission to specify modifications to the current procedures for dealing with confidential information.
152DMA	Access disputes	Allows the Commission to specify modifications to the current procedures applying to joint hearings.