



Draft Part XIC Procedural Rules 2008

**An ACCC Discussion Paper consulting on the draft *Part XIC
Procedural Rules 2008***

May 2008

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1. Introduction

1.1. Background

Under section 152ELA of the *Trade Practices Act 1974* (Act) the Australian Competition and Consumer Commission (Commission) has 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 other 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.

Attached to this document is a draft of the *Part XIC Procedural Rules 2008* (Rules) (Appendix 1) and an accompanying draft Explanatory Statement (ES) (Appendix 2).

2. Timetable and consultation process

2.1. Consultation process

Before making any procedural rules the Commission is required by statute to publish a draft of the rules on its Internet site and invite people to make submissions. The Commission is also required to consider any submissions received within the timeframe it specifies at the time the draft procedural rules are published (subsection 152ELB(1)).

2.2. Timetable for the consultation

The Act requires that the timeframe specified by the Commission must be at least 30 days after the day of publication of the draft procedural rules (subsection 152ELB(2)). The Commission considers that 30 days provides interested persons with a reasonable opportunity to consider the draft Rules and accompanying ES and provide written submissions for the purposes of this consultation.

The Commission therefore invites submissions on the draft Rules and the accompanying draft ES by no later than 5pm, **Monday 23 June 2008**. Any submissions received after this date may not be considered by the Commission.

Accordingly, the Commission proposes the following timeframe for public consultation on the Rules:

ACTIVITY	TIMING
Publication of draft Rules and discussion paper	23 May 2008
Submissions on draft Rules due	23 June 2008
Consideration of submissions and preparation of final Rules	23 June 2008 – 23 July 2008
Making of final Rules	31 July 2008

2.3. Making submissions

The Commission encourages industry participants, interested stakeholders and members of the public to consider the matters set out in this Discussion Paper and to make submissions to the Commission on the content of the draft Rules and draft ES.

All submissions will be considered as public submissions and will be published on the Commission's website.

The ACCC will only accept written submissions in response to this Discussion Paper.

Submissions should be provided in an electronic format (MS Word or PDF format) that is text-searchable and allows a 'copy and paste' function.

Please forward submissions **by email** to the Contact Officer:

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Any queries in relation to this Discussion Paper should be directed to Alison Russell.

3. Draft Procedural Rules – an overview

3.1. Legislative provisions

The Commission's procedural rule-making power was introduced through the enactment of the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* which amended the *Trade Practices Act 1974* (Act). The explanatory memorandum (EM) to the relevant Bill provides that the purpose of the amendments made to the Act is to address concerns that the current provisions of Part XIC do not provide the Commission with sufficient discretion to determine its own procedures, to avoid delays caused by procedural obligations and to respond to changing activities in the industry.¹ The EM also provides that the Commission's rule-making power is intended to be broad in scope so that the Commission can deal comprehensively with the procedures to apply to it and third parties in connection with matters arising under Part XIC of the Act.²

The Rules are intended to confirm the scope of the Commission's existing discretions in relation to the exercise of its powers and the performance of its functions under Part XIC. They are also intended to provide greater certainty about the procedures and practices that will apply to the Commission's exercise of its powers under Part XIC of the Act.³

3.2. Purpose of the Rules

The overarching object of the Rules is to promote timeliness and certainty in decision-making by the Commission under Part XIC of the Act.

It is intended that the Rules will achieve this objective by:

- introducing uniform processes for both access providers and access seekers
- providing transparency and certainty in the Commission's procedures and decision making
- enabling timeliness in the performance of the Commission's functions under Part XIC of the Act.

3.3. Content of the Rules

Please refer to Appendix 1 of this document for the complete version of the draft Rules. The draft ES, which is contained in Appendix 2 to this discussion paper, provides an explanation of the individual rules.

Below is a brief discussion about a selection of the Rules. However, interested parties should address their submissions to the content of the draft Rules (Appendix 1) and the accompanying draft ES (Appendix 2).

The draft Rules relate, among other things, to the following matters:

¹ Explanatory Memorandum to *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005*, p.50

² *ibid*, p.68

³ *ibid*, p.69

- confidentiality of information or documents given to the Commission by an applicant for an exemption order, a person who gave the Commission an access undertaking or a variation of an access undertaking or a party to an arbitration of an access dispute
- the form and content of applications, undertakings, variations or other documents given to the Commission under Part XIC
- dispensing with the need for an oral hearing in relation to the arbitration of an access dispute under Division 8 of Part XIC unless the Commission otherwise determines.

The draft rules also prescribe rules of a procedural nature in relation to a number of specific provisions contained in Part XIC of the Act. These are discussed below.

Minor variations and modifications

By virtue of rule 13, the Commission can specify when a variation to a declared service is a variation of a minor nature for the purposes of subsection 152AO(3) of the Act. Currently, the ACCC is only permitted to revoke a declaration where it is satisfied that the service is of a minor importance.

Similarly rule 14 provides that access providers may make minor modifications to exemption applications (152AT(2A), 152ATA(2A)), access undertakings (152BU(1A), 152CBC(1A)) and variations of access undertakings (152BY(2A), 152CBG(2A)).

Both rules specify that in determining whether a variation or modification is of a minor nature, the Commission will have regard to whether the variation or modification corrects typographical or other similar errors and whether the variation or modification would result in a material change to the effect of the declaration, application, undertaking or variation.

The principal consequence of a variation of a declaration being a variation of a minor nature (rule 13) is that the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997*.

The intention of rule 14 is to overcome deficiencies in the current process which prohibits changes to an exemption application, access undertaking or a variation to an access undertaking once it has been given to the Commission. This rule will stop an applicant, carrier or carriage service provider from having to resubmit an application, undertaking or variation and will also stop unnecessary delays in the Commission's decision-making processes.

Deferral

By virtue of rule 27, the Commission may defer consideration of an access undertaking or a variation of an access undertaking by giving written notice to the access provider.

Section 152CDA of the Act expressly provides that the Procedural Rules may authorise the deferral of consideration of an access undertaking or variation despite any other provision in Division 5 of Part XIC.

The purpose of this rule is to prevent access providers from “gaming” the access undertaking process by knowingly lodging incomplete or otherwise unacceptable access undertakings.⁴

Information requests

Rules 33 to 35 deal with further information requests by the Commission in relation to exemption order applications, access undertakings and variations of access undertakings. In particular these rules allow the Commission to specify a time limit for compliance with an information request and provide that if the information request is not fully complied with within the time limit for compliance then the Commission may reject the document. The Commission may also extend the time limit for compliance with an information request but only where it has not previously rejected the document.

The power to make such a rule is derived from sections 152AU(2A), 152BT(2A), 152BZ(2A), 152CBB(2A) and 152CBH(2A) of the Act.

3.4. Transitional provisions

The Rules include transitional arrangements and it is intended that the Rules will apply to all Part XIC processes that begin after the Rules commence. In addition, particular provisions have been earmarked to apply to Part XIC processes that are on foot when the Rules commence. The provisions which will apply to Part XIC processes that are on foot at the time of commencement deal with:

- modifications of a minor nature
- deferrals
- use of information, and
- requests for further information.

These provisions, which apply only prospectively, allow the most relevant provisions of the Rules to apply to all Part XIC processes once the Rules commence.

⁴ ibid, p.66