

# DRAFT FOR COMMENT



## Part XIC Procedural Rules 2008

*Trade Practices Act 1974*

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The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes these Rules under section 152ELA of the *Trade Practices Act 1974*.

Dated 2008

Chairman

Australian Competition and Consumer Commission

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## **Part 1 Preliminary**

### **1 Name of Rules**

These Rules are to be known as the *Part XIC Procedural Rules 2008*.

### **2 Commencement**

These Rules commence on the day after they are registered on the Federal Register of Legislative Instruments.

### **3 Object of Rules**

The object of these Rules is to promote timeliness and certainty in decision-making in the exercise of the Commission's functions and powers under Part XIC of the Act by:

- (a) encouraging parties to provide the Commission with all relevant information at the earliest opportunity;
- (b) facilitating an appropriate process of consultation in which interested and affected persons may make informed submissions to the Commission; and
- (c) promoting the long-term interests of end-users.

### **4 Definitions**

- (1) The dictionary in Schedule 1 of the Rules defines terms used in these Rules.
- (2) Unless the contrary intention appears, in these Rules, terms defined in the Act or in Part XIC of the Act have the same meaning in these Rules.
- (3) In interpreting these Rules, if a term is defined in more than one place:
  - (a) definitions in these Rules take precedence over definitions in Part XIC of the Act and definitions in the Act; and
  - (b) definitions in Part XIC of the Act take precedence over definitions elsewhere in the Act.

### **5 Relief from Rules**

The Commission may dispense with compliance with any of the requirements of these Rules before or after the occasion for compliance arises.

### **6 Exercise of powers by Commission**

Unless otherwise provided, the Commission may exercise its powers under these Rules by:

- (a) the Commission (including, where relevant, the Commission as constituted under section 19 or section 152CV of the Act); or
- (b) a member of the Commission to whom the relevant power of the Commission has been delegated under subsection 25(1) of the Act.

## Part 2 Documents

### 7 Provision of documents to Commission

#### *Electronic documents*

- (1) Electronic documents may be provided to the Commission by any of the following means:
  - (a) delivering a compact disc or DVD containing the documents to an office of the Commission;
  - (b) emailing the documents to the email address specified by the Commission for that purpose.
- (2) A compact disc or DVD provided to the Commission under paragraph (1)(a) must contain a text-searchable index which clearly describes the subject matter of each individual document.

#### *Non-electronic documents*

- (3) Non-electronic documents may be provided to the Commission by delivering the documents to an office of the Commission.
- (4) Non-electronic documents provided to the Commission must contain an index which clearly describes the subject matter of each individual document.
- (5) A document provided to the Commission after 5.00pm on a business day is taken to be received on the next business day for the purposes of calculating a period of time under Part XIC.

### 8 Form of documents

- (1) To the extent it is practicable to do so, a document provider must provide an electronic document to the Commission.
- (2) Any electronic document provided to the Commission must:
  - (a) be text-searchable and in a readable format;
  - (b) be capable of being printed; and
  - (c) allow text and images to be copied from the document.
- (3) To the extent it is practicable to do so, a document provider must provide that electronic document in a preferred electronic format.
- (4) To the extent it is practicable to do so, a document provider must also provide a copy or version of that document in an accessible electronic format.

*Note* The copy or version of the document provided in an accessible electronic format need not be an exact copy of the document. For example, a version of a signed expert report in Microsoft Word format that does not contain the expert's signature, but contains the text of the report.

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- (5) This rule does not prevent a document provider from also providing a copy or version of that electronic document in another format.

- (6) In this rule:

***preferred electronic format*** means:

- (a) for word-processed documents (including submissions, expert reports, and witness statements):
  - (i) plain text;
  - (ii) Microsoft Word format;
  - (iii) Rich Text Format;
  - (iv) text-searchable Portable Document Format (PDF);
- (b) for spreadsheets, Microsoft Excel format;
- (c) for presentations, Microsoft PowerPoint format.

***accessible electronic format*** means, for word-processed documents:

- (a) plain text;
- (b) Microsoft Word format; or
- (c) Rich Text Format.

**9 Contact details**

- (1) In relation to each Part XIC process, a document provider must, at the beginning of that Part XIC process, provide the Commission with:
  - (a) the name of a person whom the Commission may contact in relation to documents (the ***nominated person***); and
  - (b) the nominated person's contact details.
- (2) If a document provider wishes for the Commission to contact a different person in relation to some documents (the ***additional nominated person***), the document provider must:
  - (a) provide the Commission with:
    - (i) the name of the additional nominated person; and
    - (ii) the additional nominated person's contact details; and
  - (b) identify to the Commission the documents in relation to which the additional nominated person should be contacted.
- (3) The nominated person or additional nominated person's contact details must be provided to the Commission in the form set out in Schedule 2 of the Rules.
- (4) A document provider must inform the Commission of any change to information provided under subrules (1) and (2) as soon as practicable.
- (5) The Commission may provide some or all of the contact details of the document provider, nominated person or additional nominated person (as the case may be) to a person for the purposes of making a request under subrule 25(1).

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(6) In this rule:

**contact details**, in relation to a nominated person or additional nominated person, includes:

- (a) contact telephone number;
- (b) fax number (if applicable);
- (c) email address;
- (d) an address in Australia for delivery of documents; and
- (e) such other contact information as the Commission may require from time to time.

## **10 Expert reports**

(1) This rule applies to an expert report that is provided to the Commission in connection with a Part XIC process.

*Note* The terms **expert report** and **expert** are defined in the Dictionary.

(2) This rule applies regardless of whether the expert is retained by the Commission or any other person.

(3) A person who retains an expert must give a copy of this rule 10 to the expert.

(4) An expert report must:

- (a) give details of:
  - (i) the expert's qualifications; and
  - (ii) the literature or other material used in making the expert report;
- (b) clearly and fully state all assumptions of fact;
- (c) give reasons for each opinion expressed in the expert report;
- (d) if more than one opinion is provided in the expert report, contain a summary of each opinion;
- (e) make clear when a particular question or issue falls outside the relevant field of expertise; and
- (f) contain a declaration by the expert that the expert has made all the inquiries which are believed to be desirable and appropriate and that no matters of significance which are considered to be relevant have been withheld.

*Note* Under Part 7.4 of the *Criminal Code* the giving of false or misleading information to the Commission is a serious offence.

(5) An expert report must include or attach:

- (a) a statement of the questions or issues that the expert was asked to address;
- (b) the factual premises upon which the expert report proceeds; and
- (c) a list of the documents and any other materials that the expert has been instructed to consider.

(6) A party who retains an expert must, on request by the Commission, provide to the Commission any documents or materials listed in paragraph (5)(c).

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- (7) If an expert changes a material opinion in an expert report provided to the Commission, the change must be communicated by the person who provided the report to the Commission as soon as practicable.
- (8) If an expert's opinion in an expert report is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one.
- (9) If the expert believes that an expert report may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- (10) If an expert report refers to calculations, analyses, measurements, or other extrinsic matter, details of these must be provided to the Commission at the same time as the expert report.

**11 Declaration of accuracy and completeness**

- (1) A document provided to the Commission in a Part XIC process must contain or be accompanied by a declaration that the information contained in the document is accurate and complete and that no matters of significance which are considered to be relevant have been withheld.

*Note* Under Part 7.4 of the *Criminal Code* the giving of false or misleading information to the Commission is a serious offence.

- (2) A declaration made under subrule (1) must be signed and submitted by a person authorised for that purpose.

**12 Non-compliance with Part**

- (1) A document that does not comply with this Part will not be treated by the Commission as a validly lodged document and will be returned to the document provider, nominated person or additional nominated person where applicable.
- (2) The Commission will not have regard to a document that does not comply with the requirements of this Part.



## Part 3                      Variations and modifications of a minor nature

### Division 1                Variations of a minor nature

#### 13                Specification by Commission

- (1) The Commission may specify in writing that, in the Commission's opinion, a variation of a declaration under subsection 152AL(3) of the Act is taken to be a variation of a minor nature for the purposes of subsection 152AO(3) of the Act.
- (2) In determining whether a variation of a declaration is a variation of a minor nature under subrule (1), regard must be had to the following matters:
  - (a) whether the variation corrects typographical, grammatical, arithmetic, or other similar errors in the declaration; and
  - (b) whether the variation involves a material change in the effect of the declaration.
- (3) Subrule (2) does not, by implication, limit the matters to which regard may be had.
- (4) A variation of a declaration has effect once the Commission has specified that the variation is a variation of a minor nature.
- (5) As soon as practicable, the Commission must publish notice of the specification on the Commission's Internet site.

### Division 2                Modifications of a minor nature

#### 14                Modification notices

- (1) A ***modification notice*** is a notice given to the Commission by a person who has given the Commission:
  - (a) an application for an exemption order;
  - (b) an access undertaking; or
  - (c) an access undertaking variation;modifying the application, undertaking, or variation.
- (2) A person may only give a modification notice:
  - (a) within the time allowed under rule 15; and
  - (b) before the Commission has made a decision to accept or reject the application, undertaking, or variation.
- (3) The Commission may determine that a modification in a modification notice is a modification of a minor nature for the purposes of subsections 152AT(2A), 152ATA(2A), 152BU(1A), 152BY(2A), 152CBC(1A), and 152CBG(2A) of the Act.

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- (4) In determining whether a modification is a modification of a minor nature under subrule (3), regard must be had to the following matters:
  - (a) whether the modification corrects typographical, grammatical, arithmetic, or other similar errors in the application, undertaking, or variation; and
  - (b) whether the modification involves a material change in the effect of the application, undertaking, or variation.
- (5) Subrule (4) does not, by implication, limit the matters to which regard may be had.
- (6) A modification in a modification notice has effect once the Commission has determined that the modification is a modification of a minor nature.
- (7) As soon as practicable, the Commission will publish notice of its determination on the Commission's Internet site.

**15 Time allowed for giving a modification notice**

- (1) A modification notice must be given to the Commission within 28 days from the date the application, undertaking, or variation is given to the Commission.
- (2) If a modification notice is given to the Commission after the time allowed in subrule (1) has passed, the Commission may (but is not obliged to) extend the time for giving a modification notice.

## **Part 4                      Confidential information**

### **Division 1                General**

#### **16            No limitation on other powers**

Subject to rule 25, the provisions of this Part do not limit the Commission's powers, including the Commission's powers under section 152CRA of the Act.

#### **17            No concession of confidentiality**

By treating information as confidential in accordance with this Part, the Commission is not to be taken as conceding that the confidentiality of the information is otherwise able to be protected by law.

#### **18            Application to Commission**

- (1) The following persons may access confidential information in a Part XIC process without needing to comply with the provisions of this Part:
  - (a) a member of the Commission;
  - (b) an associate member of the Commission;
  - (c) a person referred to in subsection 27(1) of the Act;
  - (d) a person engaged by the Commission under section 27A of the Act.
- (2) Without limiting paragraph (1)(d), a legal practitioner acting on behalf of the Commission may also access confidential information without needing to comply with the provisions of this Part.

### **Division 2                Confidential information**

#### **19            Documents that must not contain any confidential information**

- (1) The following documents must not contain any confidential information:
  - (a) an application for an exemption order;
  - (b) an access undertaking;
  - (c) an access undertaking variation;
  - (d) a modification notice.
- (2) A document that does not comply with subrule (1) will not be treated by the Commission as a validly lodged document and will be returned to the document provider, nominated person or additional nominated person where applicable.
- (3) The Commission will not have regard to a document listed in subrule (1) that does not comply with the requirements of this rule.

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**20 Requests for confidentiality**

- (1) This rule applies to a document provider who provides the Commission with a document in a Part XIC process which the document provider claims contains confidential information (*confidential document*).
- (2) At the time of providing a confidential document a document provider must provide the Commission with written reasons why the information contained in the document is confidential.
- (3) After considering the reasons a document provider has given under subrule (2) in relation to the confidential document, the Commission must:
  - (a) inform the document provider that, in the Commission's opinion, some or all of the information in the document is confidential; and
  - (b) notify the document provider in writing of the Commission's decision under paragraph (a).
- (4) This rule does not limit the circumstances in which the Commission may:
  - (a) treat information as confidential;
  - (b) treat information as not confidential;
  - (c) publicly refer to the fact that confidential information has been provided to the Commission by a document provider without disclosing the substance of that confidential information.

**21 Confidential information to be marked**

- (1) A document provider who provides the Commission with a confidential document must:
  - (a) if the confidential document is a non-electronic document delivered to the Commission—provide it in a plain envelope endorsed with the words “Confidential Restriction on Publication Claimed”;
  - (b) if the confidential document is a non-electronic document sent to the Commission by fax—commence the cover sheet of the fax transmission with the words “Confidential Restriction on Publication Claimed”;
  - (c) if the confidential document is an electronic document delivered to the Commission on compact disc or DVD—include the words “Confidential Restriction on Publication Claimed” in the relevant electronic filename contained on the disc or DVD; or
  - (d) if the confidential document is an electronic document emailed to the Commission—commence the body of the email with the words “Confidential Restriction on Publication Claimed”.
- (2) Any confidential information in the confidential document must be clearly and specifically marked by:
  - (a) drawing a line around the confidential information; or
  - (b) placing the text “c-i-c” in bold face and square brackets immediately before and immediately after each instance of confidential information;or

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- (c) providing the confidential information in an annexure to the confidential document; or
- (d) such other method as the Commission may approve, in writing, from time to time.

*Examples* The cost of this equipment is \$5,000,000.

The cost of this equipment is \$[c-i-c]5,000,000[c-i-c].

- (3) Any information contained in a confidential document that is not marked in accordance with subrule (2) may be treated by the Commission as being information that is not confidential.

## Division 3 Public documents

### 22 Public version of a document to be provided at same time as confidential document

- (1) A **public version** of a confidential document is a version of the document that does not contain any confidential information and may be published on the Commission's Internet site.
- (2) A document provider who provides the Commission with a confidential document must provide the Commission with a public version of that document at the same time.
- (3) A public version of a confidential document must be produced by one of the following methods:
  - (a) replacing any confidential information with the text "c-i-c" in bold face and square brackets;
  - (b) masking the confidential information; or
  - (c) such other method as the Commission may approve, in writing, from time to time.

*Example* The cost of this equipment is \$[c-i-c].

- (4) The Commission may refuse to accept a public version of a confidential document, if in the Commission's opinion, the redactions required by subrule (3) are so substantial as to render the document incomprehensible.
- (5) If a public version of a confidential document is not provided to the Commission in accordance with subrule (2), the Commission may, in regard to:
  - (a) an access undertaking or access undertaking variation, defer consideration of the undertaking or variation;
  - (b) any other Part XIC process, treat the confidential document that has been provided to the Commission as an invalidly lodged document.
- (6) A confidential document that is treated by the Commission as an invalidly lodged document under paragraph (5)(b) will be returned to the document provider, nominated person or additional nominated person where applicable.

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**23 Publication of public documents**

- (1) The Commission may make a public document publicly available on its Internet site.

*Note* **Public document** is defined in the Dictionary.

**Division 4 Access to documents**

**24 Access to public documents**

- (1) A person may access public documents via the Commission's Internet site.
- (2) If a public document is not available via the Commission's Internet site, a person may request the Commission provide a copy of that public document.
- (3) The Commission may provide the person with a copy of a public document if requested to do so under subrule (2).
- (4) A person who makes a request for a copy of a public document in relation to an access dispute must be a party to that access dispute.

**25 Access to confidential documents**

- (1) A person (a **requestor**) may request a copy of a confidential document subject to subrule (2) by making a request in writing to the document provider, nominated person or additional nominated person where applicable.
- (2) A requestor who makes a request for a copy of a confidential document in relation to an access dispute must be a party to that access dispute.

*Negotiation of confidentiality restrictions*

- (3) Subject to subrule (4), the requestor and the document provider must negotiate in good faith to agree the terms on which the document provider will provide the requestor with a copy of the confidential document.
- (4) The requestor and the document provider need not comply with subrule (3) if they have already reached agreement about the terms on which the document provider will provide the requestor with a copy of the confidential document.

*Example* The requestor and the document provider may reach agreement by way of a signed confidentiality undertaking about the terms on which the document provider will provide the requestor with access to all confidential documents provided to the Commission by the document provider in a particular Part XIC process.

*Note* An example of a form of confidentiality undertaking is set out in Schedule 2 of the Rules.

*Commission can act if parties cannot agree*

- (5) If the document provider and the requestor have not reached agreement within three business days from when the document provider received the request under subrule (1), the document provider or the requestor may, by written notice to the Commission, request the Commission determine the terms on which the document provider will provide the requestor with a copy of the confidential document.
- (6) If requested under subrule (5), the Commission may, by written notice to the document provider and requestor, determine the terms on which the document provider will provide the requestor with a copy of the confidential document.

*Example* The terms may require the requestor to sign a confidentiality undertaking as set out in Schedule 2 of the Rules.

*Provision of copy*

- (7) The document provider must provide a copy of the confidential document to the requestor within one business day from the later of:
  - (a) the date on which the document provider received the request under subrule (1); and
  - (b) either:
    - (i) the date on which the document provider and the requestor agreed the terms on which the document provider will provide the requestor with a copy of the confidential document; or
    - (ii) where the Commission provides the document provider with a notice under subrule (6) in relation to the confidential document, the date on which the Commission gave the notice under subrule (6).
- (8) To the extent practicable, and subject to any terms agreed under subrule (4) or determined under subrule (6), the document provider must comply with any request by the requestor:
  - (a) to provide the confidential document (or a version of the document) in electronic or non-electronic form;
  - (b) to provide the confidential document (or a version of the document) in a particular format; or
  - (c) regarding how the copy is to be delivered to the requestor.
- (9) The document provider may charge the requestor:
  - (a) its reasonable costs in providing the copy; or
  - (b) an amount agreed between the document provider and the requestor.

*Commission may provide copy*

- (10) If a document provider does not comply with subrule (7), the requestor may request the Commission provide the whole or a part of a copy of the confidential document to the requestor.
- (11) A request under subrule (10) must include:

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- (a) a copy of the request made to the document provider under subrule (1);
  - (b) a copy of any response to the request made to the document provider under subrule (1); and
  - (c) if the document provider and the requestor agreed the terms on which the document provider would provide the requestor with a copy of the confidential document, a copy of that agreement.
- (12) The Commission may provide a requestor with the whole or a part of a copy of a confidential document if requested to do so under subrule (10).
- (13) The Commission may charge the requestor an amount agreed between the Commission and the requestor for providing a copy of the confidential document.

*Note* Subsection 171A(2) of the Act allows the Commission to charge for discretionary services.

**Division 5                      Application to access disputes**

**26                      Application to access disputes**

- (1) This Part displaces the operation of subsections 152DK(1), (2), (3), and (4) of the Act.
- (2) Without limiting the Commission's powers under section 152DC of the Act, the Commission may give a direction under section 152DC of the Act in relation to:
  - (a) confidential documents; or
  - (b) public documents.



## Part 5                      Deferrals

### 27                      Deferral of consideration of an access undertaking etc.

- (1) The Commission may defer consideration of:
  - (a) an access undertaking; or
  - (b) an access undertaking variation;  
by giving a written notice to the person who gave the Commission the undertaking or variation.
- (2) Without limiting subrule (1) and for the avoidance of doubt, the Commission may defer consideration of:
  - (a) an access undertaking; or
  - (b) an access undertaking variation;  
for a period determined by the Commission if the Commission considers that:
  - (c) the person who gave the Commission the access undertaking or access undertaking variation; or
  - (d) any other person;  
has not complied with Part 4 of these Rules and the Commission determines that it is appropriate to do so.
- (3) To avoid doubt:
  - (a) any period during which the Commission has deferred consideration of an access undertaking or an access undertaking variation under subrule (1) is disregarded in calculating the period referred to in subsections 152BU(6), 152BY(8), 152CBC(6), or 152CBG(8) of the Act (including any extension of those periods); and
  - (b) the Commission may exercise the power conferred by subrule (1) even if the Commission has previously exercised that power in relation to that access undertaking or access undertaking variation.

*Note*                      Subsection 33(1) of the *Acts Interpretation Act 1901* provides that where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Rule 28

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**Part 6 Use of information****28 Purported limitations**

- (1) A person who, in connection with a Part XIC process:
  - (a) gives information to the Commission;
  - (b) produces documents to the Commission; or
  - (c) gives evidence to the Commission;
 may not impose, or purport to impose, any limitation on the Commission's use of the information, documents, or evidence other than a permitted limitation.
- (2) Any condition imposed, or purportedly imposed, in contravention of subrule (1) is of no effect.
- (3) In this rule:

*permitted limitation* means:

- (a) an accepted claim of confidentiality under Part 4 of these Rules; or
- (b) a limitation agreed to in writing by the Commission before the information, documents, or evidence are given or produced.

*Example* A condition purporting to restrict the Commission from using the document in any Part XIC process other than the process in connection with which the document was provided to the Commission is not a permitted limitation.

**29 Using information in Part XIC processes**

- (1) In exercising its powers and functions in connection with a Part XIC process, the Commission may have regard to:
  - (a) any information given, documents produced, and evidence given to the Commission in connection with that particular Part XIC process;
  - (b) any information given, documents produced, and evidence given to the Commission in connection with another Part XIC process;
  - (c) any information given, documents produced, and evidence given to the Commission in connection with Part XIB of the Act; and
  - (d) any information given, documents produced, and evidence given to the Commission in connection with any other power or function of the Commission.
- (2) In exercising its powers and functions in connection with a Part XIC process under subrule (1) the Commission may permit the following persons to have access to the information, documents or evidence referred to in subrule (1):
  - (a) a member of the Commission;
  - (b) an associate member of the Commission;
  - (c) a person referred to in subsection 27(1) of the Act;
  - (d) a person engaged by the Commission under section 27A of the Act.

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- (3) Without limiting paragraph (1)(d), a legal practitioner acting on behalf of the Commission may also access the information referred to in subrule (1).
- (4) The Commission may have regard to the information referred to in paragraphs (1)(b), (1)(c), or (1)(d) regardless of whether:
  - (a) the person who gave the information, produced the documents, or gave the evidence consents;
  - (b) the person who gave the information, produced the documents, or gave the evidence imposed, or purported to impose, any limitations on the subsequent use of the information, documents, or evidence at the time the information, documents, or evidence were first given or produced to the Commission and to which the Commission did not agree at that time.
- (5) Subrule (1) does not, by implication, limit the matters to which regard may be had.
- (6) For the avoidance of doubt, this rule does not affect the operation of sections 151BUA, 151BUB, 151BUC or 152DBA of the Act.

## **Part 7                      Access disputes**

### **Division 1                Hearings**

#### **30                      Procedure of the Commission**

- (1) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods.
- (2) The Commission must consider any document received in the relevant period determined under subrule (1) and it may (but is not obliged to) consider any document received after that date.
- (3) This rule modifies the operation of subsection 152DB(2) of the Act.

#### **31                      Oral hearings**

- (1) The arbitration of access disputes will be determined on the basis of written submissions and evidence unless the Commission otherwise determines.
- (2) The Commission may require evidence or argument to be presented in an oral hearing and may decide the matters on which it will require evidence or argument to be presented in an oral hearing.
- (3) The Commission may determine that an oral hearing is to be conducted, in whole or in part:
  - (a) in person;
  - (b) by telephone;
  - (c) by videoconferencing; or
  - (d) by any other means of communication.
- (4) This rule modifies the operation of subsections 152DB(3) and 152DB(4) of the Act.

### **Division 2                Joining arbitrations**

#### **32                      When arbitrations can be joined**

##### *Joined arbitrations*

- (1) If:
  - (a) the Commission is arbitrating two or more access disputes at a particular time; and
  - (b) one or more matters are common to those disputes;the Commission may, by notice in writing, join the arbitrations of the disputes specified in the notice (*joined disputes*).

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**Rule 32**

- (2) The Commission may only do so if it considers this would likely result in the joined disputes being resolved in a more efficient and timely manner.
- (3) In deciding whether to join two or more arbitrations of access disputes, the Commission may have regard to:
  - (a) the similarity of the matters in issue in each of the disputes;
  - (b) whether the disputes are in relation to the same declared service;
  - (c) whether the access seekers in each dispute are the same, or related bodies corporate; and
  - (d) whether the carriers or carriage service providers in each dispute are the same, or related bodies corporate.
- (4) Subrule (3) does not, by implication, limit the matters to which regard may be had.
- (5) The Commission may join the arbitrations of two or more access disputes even if no party to any of the access disputes requests the joinder of the arbitrations.

*Constitution of Commission*

- (6) Subject to these Rules, sections 152CV to 152CY of the Act apply in relation to the arbitration of the joined disputes in a corresponding way to the way in which they apply to a particular arbitration.
  - Note* For the purposes of section 152DBA of the Act, the arbitration of the joined disputes constitutes a single arbitration.
- (7) This rule does not limit the operation of section 152DMA of the Act.

Rule 34

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## Part 8 Other Part XIC processes

### Division 1 Requests for further information

#### 33 Application

This Division applies if the Commission requests a person to give the Commission further information about:

- (a) an exemption order under subsection 152AU(2);
- (b) an ordinary access undertaking under subsection 152BT(2);
- (c) a variation of an ordinary access undertaking under subsection 152BZ(2);
- (d) a special access undertaking under subsection 152CBB(2); or
- (e) a variation of a special access undertaking under subsection 152CBH(2).

#### 34 Time for compliance

- (1) The Commission may specify in a request for further information the time limit for complying with that request.
- (2) If the Commission does not specify in a request for further information the time limit for complying with the request, the time limit for complying with the request is:
  - (a) 28 days from the date of the request; or
  - (b) if the request is not dated, 28 days from the date on which the Commission gave the request to the person to whom it is directed.

#### 35 Rejection of principal document

- (1) If the time limit for complying with a request for further information passes without the information request being fully complied with, the Commission may reject the principal document relating to that request by giving written notice to the person who provided the principal document to the Commission.

*Note* **Principal document** is defined in the Dictionary.

- (2) The Commission may reject a principal document under subrule (1) even if the requested information is provided to the Commission after the time limit for complying with a request for further information has passed.

#### 36 Extending time for compliance

- (1) The Commission may extend, or further extend, the time limit for complying with a request for further information either before or after the time limit for complying with the request has passed.

- (2) The Commission may not extend, or further extend, the time limit for complying with a request for further information if the principal document has been rejected under rule 35.

## **Division 2                      Submissions and supporting documents**

### **37                      Time for submissions and supporting documents**

- (1) The Commission may determine the periods that are reasonably necessary for the lodging of submissions and documents in support of:
  - (a) an application for an exemption order;
  - (b) an access undertaking; or
  - (c) an access undertaking variation;and may require that the documents be lodged within those periods.
- (2) The Commission must consider any document received in the relevant period determined under subrule (1) and it may (but is not obliged to) consider any document received after that date.

**Rule 38**

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## **Part 9                      Transitional**

### **38                      Application to new Part XIC processes**

These Rules apply to all Part XIC processes that begin after these Rules commence.

### **39                      Application to existing Part XIC processes**

- (1) The following provisions of these Rules apply in relation to applications for an exemption order, access undertakings, or access undertaking variations being considered by the Commission when these Rules commence:
  - (a) Part 3, Division 2;
  - (b) Part 5;
  - (c) Part 6;
  - (d) Part 8, Division 1;
  - (e) the other provisions of these Rules so far as they relate to the above provisions.
- (2) This rule does not limit the Commission's powers under section 152DC of the Act.



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## Schedule 1 Dictionary

(rule 4)

***access dispute*** means a dispute notified to the Commission under section 152CM of the Act.

***access undertaking*** means:

- (a) an ordinary access undertaking under Subdivision A of Division 5 of Part XIC of the Act; or
- (b) a special access undertaking under Subdivision B of Division 5 of Part XIC of the Act.

***access undertaking variation*** means:

- (a) a variation of an ordinary access undertaking under section 152BY of the Act; or
- (b) a variation of a special access undertaking under section 152CBG of the Act.

***Act*** means the *Trade Practices Act 1974*.

***anticipatory exemption order*** means an order under paragraph 152ATA(3)(a) of the Act.

***business day*** means a day that is not a Saturday, a Sunday, or a day that is a national public holiday in Australia.

***confidential document*** means a document provided to the Commission which the document provider claims contains confidential information.

***confidential information*** means information in a document that the document provider claims is confidential and the Commission has accepted as confidential.

***declaration inquiry*** means an inquiry under paragraph 152AL(3)(a) of the Act (including an inquiry under section 152AM of the Act) or paragraph 152ALA(7)(a) of the Act.

***document*** means any document provided to the Commission in an electronic or non-electronic form in connection with any Part XIC process.

***document provider*** means a person who provides a document to the Commission in connection with any Part XIC process.

***electronic document*** means a document that is a computer file.

***exemption order*** means:

- (a) an anticipatory exemption order; or
- (b) an ordinary exemption order.

***expert***, in relation to a question or issue, means a person who has specialised knowledge about matters relevant to the question or issue based on that person's training, study or experience.

***expert report*** means a document prepared for the purposes of a Part XIC process by an expert that sets out the expert's opinion on each question or issue referred to the expert.

***legal practitioner*** has the same meaning as in the *Judiciary Act 1903*.

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**modifications** includes additions, omissions and substitutions.

**modification notice** has the meaning given by subrule 14(1).

**non-electronic document** means a document that is not an electronic document and includes:

- (a) paper documents; and
- (b) documents sent by fax transmission.

**ordinary exemption order** means an order under paragraph 152AT(3)(a) of the Act.

**Part XIC process** means:

- (a) a declaration inquiry;
- (b) a pricing principles inquiry;
- (c) the consideration of an application for an exemption order;
- (d) the consideration of an access undertaking;
- (e) the consideration of an access undertaking variation; or
- (f) the resolution of an access dispute.

**pricing principles inquiry** means the consultation required under subsection 152AQA(4) of the Act.

**principal document**, in relation to a request for further information, means the:

- (a) application for an exemption order;
- (b) ordinary access undertaking;
- (c) access undertaking variation; or
- (d) special access undertaking,

to which the request relates.

**public document** means a document that does not contain any confidential information and includes a public version of a confidential document.

**public version**, of a confidential document, has the meaning given by subrule 22(1).

**Rules** means the *Part XIC Procedural Rules 2008*.

## **Schedule 2      Forms**

(rules 9, 23)

### **Form 1      Contact details form**

**[TYPE OF PART XIC PROCESS]**

**CONTACT DETAILS FORM FOR [NAME OF DOCUMENT PROVIDER]**

**The nominated person to be contacted for this [Type of Part XIC Process]:**

<b>Nominated person</b>	<b>Name</b>
	<b>Phone</b>
	<b>Fax</b>
	<b>Email</b>
	<b>Delivery address</b>

**The additional nominated person to be contacted in relation to [type of documents]:**

<b>Additional nominated person</b>	<b>Name</b>
	<b>Phone</b>
	<b>Fax</b>
	<b>Email</b>
	<b>Delivery address</b>

**DATED:**      <day><month><year>

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**Form 2      Confidentiality undertaking form**

**COMMONWEALTH OF AUSTRALIA**

***Trade Practices Act 1974***

**[TYPE OF PART XIC PROCESS]**

**Name of Requestor:**

**Name of Document Provider:**

**CONFIDENTIALITY UNDERTAKING**

I, \_\_\_\_\_ of [employer's company name] ("[undertaking company]") undertake to [full name of document provider who owns or is providing the confidential information as the case requires] ("[provider]") that:

- 1      Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking ("**the [provider] Confidential Information**") that is in my possession, custody, power or control.
- 2      I acknowledge that:
  - (a)    this Undertaking is given by me to [provider] in consideration for [provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
  - (b)    all intellectual property in or to any part of the [provider] Confidential Information is and will remain the property of [provider]; and
  - (c)    by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the [provider] Confidential Information except as expressly provided in this Undertaking.
- 3      I will:
  - (a)    only use the [provider] Confidential Information for:
    - (i)    the purposes of the [**Type of Part XIC process**] before the Australian Competition and Consumer Commission ("**ACCC**") (or any related proceedings or appeals); or
    - (ii)   any other purpose approved by [provider] in writing;

("the Approved Purposes");

- (b) comply with any reasonable request or direction from [provider] regarding the [provider] Confidential Information.

*Include the following only if required*

- (c) except as expressly stated in this Undertaking, not manipulate any part of (including without limitation the code, data queries, table structures, report definitions, user interfaces or structure of) a cost model which appears in any part of the [provider] Confidential Information (“**[provider] Model**”) including, without limitation, any part of the network dimensioning and costing model called the [Model];
- (d) not copy or reproduce all or any part of the [provider] Model for any purpose, other than the Approved Purposes, without [provider]’s prior express written approval.

Without limiting the generality of paragraph (c), I acknowledge that I may review the code, data queries, table structures, report definitions, user interfaces and structure of the [provider] Model, and vary the assumptions or variables used in the [provider] Model in order to obtain various outputs from the [provider] Model, provided in each case that this is done solely for the Approved Purposes.

- 4 Subject to paragraph 5 below, I will not disclose any of the [provider] Confidential Information to any other person without the prior written consent of [provider].
- 5 I acknowledge that I may disclose the [provider] Confidential Information to which I have access to:
- (a) ACCC employees for the Approved Purposes; and
- (b) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
- (i) the person to whom disclosure is proposed to be made (“**the person**”) is notified in writing to [provider] and [provider] has approved the person as a person who may receive the [provider] Confidential Information, which approval shall not be unreasonably withheld;
- (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [provider]; and
- (iii) a signed undertaking of the person has already been served on [provider]; and
- (c) if required to do so by law;

## DRAFT FOR COMMENT

Schedule 2

Forms

- 
- (d) to any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(b) for the Approved Purpose.
- 6 I will establish and maintain security measures to safeguard the [provider] Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.
- 7 Except as required by law and subject to paragraph 10 below, within a reasonable time after whichever of the following first occurs:
- (a) finalisation of the **[Type of Part XIC process]**;
  - (b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or
  - (c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);
- I will destroy or deliver to [provider] the [provider] Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the [provider] Confidential Information in my possession, custody, power or control.
- 8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:
- (a) which is in the public domain; or
  - (b) which has been obtained by me otherwise than from [provider] in relation to the **[Type of Part XIC Process]**;
- provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality undertaking or a breach of any other obligation of confidence in favour of [provider] or by any other unlawful means, of which I am aware.
- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [provider] at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [provider] of the [provider] Confidential Information pursuant to paragraph 7 above.

Signed: \_\_\_\_\_ Dated: \_\_\_\_\_

Print name: \_\_\_\_\_

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**ATTACHMENT 1**

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.