

## **DRAFT FOR COMMENT**

### **EXPLANATORY STATEMENT**

**Issued by the Australian Competition and Consumer Commission**

#### ***Part XIC Procedural Rules 2008***

##### **Legislative provisions**

Section 152ELA of the *Trade Practices Act 1974* (the Act) provides that the Australian Competition and Consumer Commission (the Commission) may, by written instrument, make rules in relation to the practice and procedure to be followed by the Commission in performing its functions or exercising its powers under Part XIC of the Act (paragraph 152ELA(1)(a)). The rules may make 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 Part XIC of the Act (paragraph 152ELA(1)(b)). The rules may prescribe matters required or permitted by other provisions of Part XIC of the Act (paragraph 152ELA(1)(c)).

Rules made under subsection 152ELA(1) of the Act are to be known as Procedural Rules (subsection 152ELA(2)).

The Procedural Rules may make provision for or in relation to the confidentiality of certain information or documents given to the Commission; the matters the Commission must have regard to in deciding whether to make an interim determination under Division 8 of Part XIC of the Act; the form and content of applications, undertakings, variations or other documents given to the Commission under Part XIC of the Act; and dispensing with the need for an oral hearing in relation to the arbitration of an access dispute under Division 8 of Part XIC of the Act (subsection 152ELA(3)). However these are not the only matters for which the Commission may make rules (subsection 152ELA(4)).

The Procedural Rules may make provision for or in relation to a matter empowering the Commission to make decisions of an administrative character (subsection 152ELA(5)).

The Procedural Rules may require a power conferred on the Commission by the rules in relation to an arbitration under Division 8 of Part XIC of the Act to be exercised by the Commission as constituted under section 152CV for the purposes of that arbitration (subsection 152ELA(6)).

The instrument setting out the Procedural Rules is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (subsection 152ELA(8)).

##### **Purpose**

The purpose of the Procedural Rules (the 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.

## **Background**

In 1997 an access regime for telecommunications was established in order to promote the long-term interests of users of telephone services by promoting competition through connectivity of any user to any other user no matter whose infrastructure is utilised for that purpose.

This access regime was implemented by the *Trade Practices Amendment (Telecommunications) Act 1997* which amended the *Trade Practices Act 1974* and inserted Part XIC into the Act. Under Part XIC of the Act, the Commission is responsible for implementing and enforcing the access regime for telecommunications and has been given several powers in order to fulfil this regulatory role. Principally, the Commission has been given the power to:

- declare carriage services and related services, which makes carriers and carriage service providers of those services subject to the standard access obligations relating to those services;
- make orders exempting carriers or carriage service providers of declared services, or services that may become declared services, from standard access obligations;
- accept or reject access undertakings or variations of access undertakings from carriers or carriage service providers of declared services, and
- arbitrate disputes between access seekers and access providers about the terms and conditions of access to declared services.

Recognising that the operation of the access regime may be detrimentally affected by problems of delay and participants “gaming” the Commission’s processes thereby frustrating the objective of timely decision making<sup>1</sup>, the Parliament empowered the Commission to make Procedural Rules through the enactment of the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* which amended the *Trade Practices Act 1974*.

It is clear from the explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* that the purpose of amendments made to the *Trade Practices Act 1974* 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.<sup>2</sup>

The explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* 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.<sup>3</sup> The Rules are intended to confirm the scope of the Commission’s existing discretions in relation to the exercise of its

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

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*, p.68

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powers and the performance of its functions under Part XIC.<sup>4</sup> The Rules will 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.

### **Regulation Impact Statement**

The Commission consulted with the Office of Best Practice Regulation (OBPR) at both the pre-public consultation and post-public consultation stages (OBPR Ref No. 9638).

### **Consultation**

Subsection 152ELC(1) of the Act requires the Commission to produce a written plan for the development of the Rules. Prior to producing the plan, the Commission issued a position paper outlining the Commission's approach it proposed to adopt in issuing the development plan. The Commission had regard to submissions provided in response to the position paper in finalising the development plan for the making of the Rules, which it made available on its Internet site in accordance with paragraph 152ELC(1)(b) of the Act.

Section 152ELB of the Act requires the Commission to publish a draft of the Rules on its Internet site, invite people to make submissions on the draft, and consider any submissions received within the specified time limit (which must be at least 30 days after the day the draft is published) before it makes the Rules.

In May 2008, the Commission published a draft of the Rules on its Internet site [www.accc.gov.au](http://www.accc.gov.au) for public comment. It sought submissions from members of the public by 23 June 2008 (a period of 30 days). The Commission considered these submissions in making the Rules.

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<sup>4</sup> *ibid*, p.69

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### **Notes on the Procedural Rules**

#### **PART 1 – PRELIMINARY**

##### **Rule 1 – Name of Rules**

Rule 1 provides that the Rules are to be known as the *Part XIC Procedural Rules 2008*.

##### **Rule 2 – Commencement**

Rule 2 provides that the Rules commence on the day after they are registered on the Federal Register of Legislative Instruments.

##### **Rule 3 – Object of Rules**

Rule 3 provides that the object of the Rules is to promote timeliness and certainty in decision-making by the Commission under Part XIC of the Act.

The Commission encourages all parties to provide it with information at the earliest opportunity, because this allows the Commission as much time as possible to consider the information.

Additionally, it allows other interested or affected persons who wish to comment on the information an opportunity to do so, and for the Commission to consider their comments. This exchange of information and comment allows for more informed decision-making.

The early provision of information and subsequent exchange of information promotes good decision-making which is in the long-term interests of end-users. This is an object of Part XIC of the Act (see subsection 152AB(1)).

##### **Rule 4 – Definitions**

Rule 4 provides that the Dictionary in Schedule 1 of the Rules defines terms used in the Rules.

For convenience, rule 4 also provides that where terms are not defined in the Rules, but are defined in the Act, or in Part XIC of the Act those terms have the same meaning in the Rules.

##### **Rule 5 – Relief from Rules**

Rule 5 provides that the Commission may dispense with compliance with any of the requirements of the Rules before or after the occasion for compliance arises.

This rule is analogous to Order 1, rule 8 of the *Federal Court Rules* and is intended to apply in circumstances where a person is unable to meet a procedural requirement of the Rules due to unforeseen matters.

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The rule is expressed broadly to give the Commission maximum flexibility in dealing with such circumstances.

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

Rule 6 makes clear that, in accordance with the Act, the Commission may exercise its powers in certain circumstances by a member of the Commission to whom the relevant power has been delegated.

## **PART 2 – DOCUMENTS**

### **Rule 7 – Documents given to the Commission**

Rule 7 provides that documents may be given to the Commission in either electronic or non-electronic format.

Electronic documents may be provided to the Commission by either delivering a CD or DVD containing the documents to a Commission office. Documents may also be provided by emailing them to an address specified by the Commission (*i.e.*, not the Commission's general email address).

Non-electronic documents may be provided to the Commission by delivering them to a Commission office.

This rule is intended to make it clear that when giving documents to the Commission an index which clearly describes the subject matter of each individual document must also be included. Specifically, documents provided electronically should clearly indicate (where practicable) the name of individual computer files. This will assist the Commission and parties to accurately identify the documents being referred to or relied upon.

### **Rule 8 – Form of documents**

Rule 8 provides that, to the extent it is practicable to do so, a person must provide a document to the Commission in electronic format. It is expected that most documents will be provided to the Commission electronically (in either an original or "scanned" format). However, the Commission acknowledges that there may be circumstances where documents will be provided to the Commission in a non-electronic format.

The intention of the Commission in requiring lodgement of an electronic document in both a preferred electronic format and an accessible electronic format is for information to be broadly accessible to as many people as possible. Requiring documents to be text-searchable reduces administrative overheads for the Commission with no inconvenience to the document provider in many cases.

The Commission has also included requirements that an electronic document must have the capability of being printed and must allow for text and images to be copied from the document. These requirements are necessary as the Commission has in the past received documents electronically that restrict the Commission's ability to access and assess the information contained in the document.

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This rule accords with the practice of the Australian Competition Tribunal (which may review certain decisions of the Commission under Part XIC of the Act).

The Commission has required that documents be provided in an accessible electronic format as well as a preferred electronic format to the extent that it is practicable to do so to provide greater transparency in decision-making by ensuring that barriers are removed that prevent people who are vision impaired from obtaining equal access to information.

### **Rule 9 – Contact details**

Rule 9 requires a person providing a document to the Commission in connection with a process under Part XIC of the Act to also provide the Commission with information about a person who can be contacted about the documents (for example, to respond to requests relating to confidential information in the documents: see subrule 9(5)).

Subrule 9(2) allows a document provider to nominate different contact persons for different documents, but there must be at least one contact person for each document provided to the Commission.

Subrule 9(3) requires this notification to be given to the Commission in the form prescribed in Schedule 2 of the Rules.

Subrule 9(4) requires any changes to the information for a contact person (for example, if the person to contact changes, or if their contact details change) to be notified to the Commission as soon as practicable.

### **Rule 10 – Expert reports**

Rule 10 sets out the requirements for expert reports provided to the Commission. These requirements reflect the requirements set out in the relevant Federal Court Practice Direction: *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*.

Subrule 10(3) requires a person who retains an expert (including experts retained by the Commission) to give a copy of rule 10 to the expert. The Commission has included such a rule in the interests of transparency in decision-making and also to provide any expert retained with clear guidance on matters which must be included in the expert's report.

This rule takes into account comments made by the Australian Competition Tribunal in matters under Part XIC of the Act, for example *Application by Vodafone Network Pty Ltd* (2007) ATPR ¶42-150 at 46,928 [94]; [2007] ACompT 1.

### **Rule 11 – Declaration of accuracy and completeness**

Rule 11 requires persons providing a document to the Commission in a Part XIC process to declare that they believe the information contained in the document to be accurate and complete and that no matters of significance have been withheld.

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This rule is based on similar requirements for expert reports (see paragraph 10(4)(f) and subrules 10(8) and 10(9)).

The intention of this rule is to prevent persons providing information in a Part XIC process from disclaiming the accuracy or completeness of the information they have given. The objects of the Rules are best promoted when accurate and complete information is placed before the Commission.

A false declaration may amount to a criminal offence under the *Criminal Code*.

### **Rule 12 – Non-compliance with Part**

Rule 12 provides that a document that does not comply with this Part (because, for example, it does not have the declaration required by rule 11) will not be treated as being validly lodged and will be returned to the person who provided it. The Commission will not have regard to a document that does not comply with this Part.

## **PART 3 – VARIATIONS AND MODIFICATIONS OF A MINOR NATURE**

### **DIVISION 1 – VARIATIONS OF A MINOR NATURE**

#### **Rule 13 – Specification by Commission**

This rule provides that the Commission can specify when a variation to a declared service is a variation of a minor nature for the purpose of subsection 152AO(3) of the Act. The principal consequence if a variation is a variation of a minor nature is that the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about the variation.

In determining whether a variation is a variation of a minor nature, the Commission will have regard to whether the variation corrects typographical, grammatical, arithmetic, or other similar errors in the declaration, and whether the variation involves a material change to the effect of the declaration. If a variation has no material change in the effect of a declaration then the Commission is likely to consider the variation to be a variation of a minor nature. The Commission may also have regard to other matters in forming an opinion as to whether a proposed variation is a variation of a minor nature.

Subrules 13(4) and 13(5) provide that once the Commission has specified that a variation is a variation of a minor nature, the variation has effect and the Commission will publish a notice of that specification on its Internet site.

### **DIVISION 2 – MODIFICATIONS OF A MINOR NATURE**

#### **Rule 14 – Modification notices**

Subsections 152AT(2A), 152ATA(2A), 152BU(1A), 152BY(2A), 152CBC(1A), and 152CBG(2A) of the Act allow an applicant for an exemption order or a carrier or carriage service provider who has provided the Commission with an access undertaking or an access undertaking variation (as the case may be) to give a written

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notice to the Commission within the time allowed under the Rules modifying the application, undertaking, or variation so long as the modification is taken to be a modification of a minor nature.

The intention of this rule is to overcome deficiencies in the current process whereby an applicant for an exemption order or a carrier or carriage service provider who has provided the Commission with an undertaking or variation cannot make a modification to that application, undertaking or variation once it has been given to the Commission.

Currently the applicant, carrier or carriage service provider would need to withdraw the application, undertaking or variation and submit a new application, undertaking or variation (as the case may be). The consequence of this is that consideration of the application, undertaking or variation has to commence again, including the decision-making period and any public consultation that may be required. This results in very substantial and unnecessary delays in the Commission's decision-making.

Rule 14 provides for a written notice, called a "modification notice", to be provided to the Commission. For the modification set out in a modification notice to have effect:

- the modification notice must be given within the time prescribed by rule 15 (provided that the Commission has not made a decision on the application, undertaking or variation being modified, before then); and
- the Commission must determine whether the modification is a modification of a minor nature.

As with variations of a minor nature under rule 13, in determining whether a modification is a modification of a minor nature, the Commission will have regard to whether the modification corrects typographical, grammatical, arithmetic, or other similar errors in the document being modified, and whether the modification involves a material change in the effect of the document being modified. If a modification has no material change in the effect of the document being modified then the Commission is likely to consider the modification to be a modification of a minor nature. The Commission may also have regard to other matters in forming an opinion as to whether a proposed modification is a modification of a minor nature.

Subrule 14(6) provides that a modification has effect once the Commission has determined it is a modification of a minor nature. Rule 14(7) provides that the Commission will publish such a determination on its Internet site.

### **Rule 15 – Time allowed for giving a modification notice**

Subrule 15 provides that a modification notice must be given to the Commission within 28 days of giving the document that it modifies. The Commission may, but is not obliged to, extend that time.



## **PART 4 – CONFIDENTIAL INFORMATION**

### **DIVISION 1 – GENERAL**

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

Rule 16 clarifies that, subject to rule 25, the provisions in Part 4 of the Rules do not limit the Commission's powers under section 152CRA of the Act. Section 152CRA, which deals with the publication of determinations of access disputes and the reasons for making the determinations, has a separate regime relating to confidential information.

#### **Rule 17 – No concession of confidentiality**

Rule 17 provides that the Commission, in keeping information confidential under Part 4 of the Rules, is not to be taken to have conceded that the information treated as being confidential in a Part XIC process is truly confidential information entitled to legal protection.

#### **Rule 18 – Application to Commission**

Rule 18 provides that the members, associate members, and staff of the Commission, as well as consultants to the Commission (including the Commission's lawyers) need not comply with the provisions in Part 4 to obtain access to confidential information.

This reflects the current practice of the Commission in Part XIC processes.

### **DIVISION 2 – CONFIDENTIAL INFORMATION**

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

In the interests of transparency in decision-making, rule 19 provides that certain documents must not contain any confidential information, namely:

- applications for exemption orders (both ordinary and anticipatory);
- ordinary access undertakings and special access undertakings;
- variations of ordinary access undertakings and special access undertakings; and
- modification notices (which modify the above documents).

In general, the Commission must publish copies of these documents for public consultation before making a decision in relation to them. For this reason, the Commission has made a rule requiring these documents not contain any confidential information.

A document that does not comply with rule 19 will not be treated as being validly lodged and will be returned to the person who provided it. The Commission will not have regard to a document that does not comply with the requirements of this rule.

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### **Rule 20 – Requests for confidentiality**

The Commission considers supporting documents or submissions given to it in a Part XIC process to be given to it on a voluntary basis and should be made publicly available for consultation purposes.

However, the Commission recognises that in giving information to the Commission in order for it to assess an application for an exemption order, access undertaking, access undertaking variation, or determine an access dispute, there may be detailed information concerning the relevant carrier or carriage service provider's business that is commercially sensitive. The Commission also recognises that in certain circumstances submissions made by members of the public may also contain commercially sensitive information.

Rule 20 provides that, when a person provides the Commission with a document containing information that is claimed to be confidential, it must also provide the Commission with written reasons why the information is confidential. A request for confidentiality will be determined on the basis of the reasons the person has provided to the Commission.

After considering those reasons, the Commission must respond, in writing, to the person providing the document informing them that, in the Commission's opinion, some or all of the information in the document is not confidential.

This rule accords with the process required by the Australian Competition Tribunal Practice Direction No. 3.

Subrule 20(4) provides that the provisions of rule 20 do not limit the circumstances in which the Commission may treat information as confidential, not confidential, or refer to the fact that confidential information has been provided without disclosing the substance of the confidential information.

This subrule is intended to provide the Commission with the ability to respond to changing activities in the industry. For example, confidential information in a document may be made public by the person who gave the document to the Commission some time after they had given the Commission that particular document. As that information is now in a public forum it would lose its confidential nature and would no longer be treated by the Commission as information that was confidential. The subrule is not intended to override any decision the Commission has made in respect of claims for confidentiality.

### **Rule 21 – Confidential information to be marked**

The onus is on a person providing a document to the Commission in a Part XIC process to clearly identify information that is claimed to be confidential. If information is not clearly identified and marked as being confidential, that information may be treated by the Commission as not being confidential. It is the intention of the Commission to isolate any confidential information in a document. Such a practice assists the Commission to reduce administrative overheads.

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Where a document provider provides the Commission with a confidential document, the document provider must use the endorsement “Confidential Restriction on Publication Claimed” regardless of whether the document provider is providing the Commission with a non-electronic document or an electronic document.

This practice is in accordance with the process required under regulation 24 of the *Trade Practices Regulations 1974* (Cth) and the process required by the Australian Competition Tribunal Practice Direction No. 3.

Confidential information in confidential documents must be clearly marked by:

- drawing a line around the particular information that is confidential; or
- putting the text “[c-i-c]” at the start and at the end of the confidential information; or
- putting the confidential information in a confidential annexure (which is the practice adopted by the Australian Competition Tribunal); or
- another method approved by the Commission from time to time.

### **DIVISION 3 – PUBLIC DOCUMENTS**

#### **Rule 22 – Public version of a document to be provided at the same time as a confidential document**

In order to facilitate the public consultation that the Commission is required to undertake under Part XIC, rule 22 requires a person who provides the Commission with a confidential document to also provide a public version of the document suitable for the Commission to publish on its Internet site, where the Commission is required to publicly consult, at the same time as it provides the confidential document.

In regard to access disputes, the Commission requires a person who provides the Commission with a confidential document to also provide a public version of the document suitable for the Commission to provide to parties to the arbitration should the need arise. The Commission will not publish a public version of a document provided to it in an access dispute because the arbitration of access disputes is a private process.

The public version of the confidential document must be produced by:

- replacing the confidential information with the text “[c-i-c]”; or
- masking the confidential information; or
- another method approved by the Commission from time to time.

If a public version of a confidential document is not provided in accordance with subrule 22(2):

- if the document is provided in connection with the Commission’s consideration of an access undertaking or an access undertaking variation, the Commission may defer consideration of the undertaking or variation; or
- if the document is provided in connection with any other Part XIC process, the Commission may treat the confidential document as an invalidly lodged

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document and return the document to the document provider, nominated person, or additional nominated person as appropriate.

### **Rule 23 – Publication of public documents**

Rule 23 provides that the Commission may publish a public document on its Internet site.

The Commission will not publish a public version of a document provided to it in an access dispute because the arbitration of access disputes is a private process. In regard to the publication of determinations of access disputes and the reasons for making the determinations, section 152CRA of the Act provides for a separate regime relating to confidential information.

## **DIVISION 4 – ACCESS TO DOCUMENTS**

### **Rule 24 – Access to public documents**

Rule 24 provides that a person may access a public document (which includes a public version of a confidential document) by downloading a copy of it from the Commission's Internet site.

Where 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. However, it is not mandatory for the Commission to do so.

This rule is to cater for circumstances where a public document provided to the Commission is not available via the Commission's website. For example, a public document may be provided to the Commission for the purposes of an access dispute. The Commission will not publish that public document because the arbitration of access disputes is a private process.

### **Rule 25 – Access to confidential documents**

Rule 25 provides a generic confidentiality regime for access to confidential documents. In general, the regime requires, at first instance, a person requesting a document containing the confidential document of another person to agree the terms of access. The regime requires any negotiation about the terms of access to confidential documents to be undertaken in good faith. If agreement cannot be reached within a short period of time (three business days), the Commission may impose terms of access if requested to do so.

In the usual course, the Commission expects that the terms of access it determines will be in accordance with the confidentiality undertaking that is Form 2 in Schedule 2 of the Rules.

It is then primarily for the document provider to promptly provide copies of the relevant confidential documents to the requestor. If the document provider does not do so within one business day, the Commission may provide a copy of the document to the requestor, if requested to do so.

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A requestor who makes a request to the Commission for a copy of a confidential document must show that they have already attempted to obtain a copy of the document from the document provider.

This rule is intended to facilitate confidentiality arrangements between parties so that confidential information is made available to parties in a timely manner. The rule is also intended to prevent carriers or carriage service providers from hindering the statutory consultation process which the Commission must undertake by frustrating access to confidential information that is necessary to comment on the document that is the subject of the Part XIC process.

The inability to resolve issues concerning confidentiality adversely impacts on statutory timeframes with which the Commission must comply in relation to an application for an exemption order, an access undertaking or an access undertaking variation as well as delays in the arbitration of access disputes.

This rule gives effect to the intention of the explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* and provides a mechanism for the Commission to overcome delay caused by disputes over access to and supply of confidential information.<sup>5</sup>

This rule is intended to promote the object of the Rules, namely timeliness and certainty in decision-making.

Subrule 25(2) makes clear that only parties to an access dispute may request copies of confidential documents in relation to that access dispute.

### **DIVISION 5 – APPLICATION TO ACCESS DISPUTES**

#### **Rule 26 – Application to access disputes**

Rule 26 provides that Part 4 of the Rules displaces the operation of subsections 152DK(1), (2), (3), and (4) of the Act. However the Part does not affect the Commission's power under section 152DC of the Act to give directions.

The explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* makes it clear that the Procedural Rules may displace subsections 152DK(1) to (4) and allow for the Commission to specify completely different procedures for dealing with confidential information.<sup>6</sup>

### **PART 5 – DEFERRALS**

#### **Rule 27 – Deferral of consideration of an access undertaking etc.**

Rule 27 provides that the Commission may defer consideration of an access undertaking or an access undertaking variation by giving written notice to the person who gave the Commission the undertaking or variation (as the case may be).

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<sup>5</sup> *ibid*, p.67

<sup>6</sup> *ibid*

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The explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* makes it clear that the Procedural Rules can authorise the deferral of consideration of an access undertaking or variation despite any provisions that might suggest otherwise in Division 5 of Part XIC.<sup>7</sup>

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.<sup>8</sup>

Subrule 27(2) provides that the Commission may (if it determines it appropriate) defer consideration of an access undertaking or access undertaking variation if Part 4 of the Rules is not being complied with.

### **PART 6 – USE OF INFORMATION**

#### **Rule 28 – Purported limitations**

As a general rule the Commission takes the view that if it has legitimately obtained information for one purpose and that material discloses information relevant to another of its statutory functions, the Commission is under no general duty to disregard the information in the context of that other function.

Given that it could lead to inappropriate results if the Commission were to ignore relevant information in its possession, the Commission will generally consider itself free to use that information for its other functions in other contexts.

Rule 28 reflects the Commission’s view that the Commission will generally not accept any limitations imposed on the use of information, documents or evidence given to the Commission.

The Commission considers that the objects of the Rules will be furthered if it can consider information that it already has in its possession. Rule 28 therefore provides that purported limitations imposed on the Commission’s ability to subsequently use information provided to it are, with limited exceptions, of no effect.

The only exceptions to this are claims for confidentiality that have been accepted in accordance with Part 4 of the Rules, and limitations that are agreed to by the Commission before the information, documents or evidence are given or produced.

This is consistent with the general position taken by the Commission in relation to information given to it.<sup>9</sup>

#### **Rule 29 – Using information in Part XIC processes**

Consistently with the rationale for rule 28, rule 29 sets out the information to which the Commission may have regard during a Part XIC process. In general, in a

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<sup>7</sup> *ibid*, p.65

<sup>8</sup> *ibid*, p.66

<sup>9</sup> ACCC, *Collection and use of information* (October 2000), p.15

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Part XIC process, the Commission may have regard to information, documents and evidence given to the Commission:

- in connection with the Part XIC process;
- in connection with another Part XIC process;
- in connection with Part XIB of the Act; and
- in connection with its other powers or functions.

The Commission considers that the objects of the Rules will be furthered if it can consider information that it already has in its possession.

Subrule 29(2) is intended to make it clear the persons whom the Commission may permit access to the information, documents and evidence.

Subrule 29(4) reinforces the Commission's view that it will not accept any limitation imposed on the use of information, documents or evidence given to the Commission unless the Commission has agreed to such a limitation.

### **PART 7 – ACCESS DISPUTES**

#### **DIVISION 1 – HEARINGS**

##### **Rule 30 – Procedure of the Commission**

Rule 30 provides that the Commission may determine the periods reasonably necessary for the fair and adequate presentation of a party's case in an access dispute and require that the party's case be presented in the periods so determined.

This rule modifies the operation of subsection 152DB(2) of the Act in that the Commission may, but is not obliged to, consider material provided outside those periods.

##### **Rule 31 – Oral hearings**

In the Commission's experience, arbitrations are often more efficiently conducted entirely in writing, without the need for an oral hearing. Rule 31 provides that the arbitration of an access dispute will be determined on the basis of written submissions and evidence unless the Commission otherwise determines.

Where the Commission has determined that an oral hearing should take place, subrule 31(2) allows the Commission, in appropriate cases, to limit the scope of the oral hearing. Subrule 31(3) then provides for how that oral hearing may be conducted.

This rule is expressly contemplated by paragraph 152ELA(3)(d) of the Act.

## **DIVISION 2 – JOINING ARBITRATIONS**

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

The Commission considers it is efficient and timely for arbitrations to be joined which allow for the concurrent running of the arbitrations where:

- the Commission is arbitrating two or more access disputes at a particular time; and
- those access disputes have common issues; or
- the parties to those access disputes are related bodies corporate.

Rule 32 provides that the Commission may join arbitrations in certain circumstances, with those joined arbitrations effectively becoming “joined disputes”. This is different to holding joint arbitration hearings in relation to separate arbitrations, which subrule (7) provides rule 32 does not affect.

It is the Commission’s view that where the Commission has joined arbitrations, those arbitrations would be considered as a single arbitration and subject to the processes which apply to single arbitrations.

Subrule 32(2) provides the Commission would only join arbitrations where it considers the arbitrations would be resolved in a more efficient and timely manner.

Subrule 32(3) sets out a non-exhaustive list of matters that the Commission may have regard to in determining whether to join arbitrations. Subrule 32(5) provides that the Commission may join arbitrations even though no party has requested it.

## **PART 8 – OTHER PART XIC PROCESSES**

### **DIVISION 1 – REQUEST FOR FURTHER INFORMATION**

#### **Rule 33 – Application**

Rule 33 sets out that this Division applies in relation to the requests by the Commission for further information identified in the rule.

#### **Rule 34 – Time for compliance**

Rule 34 provides that the Commission may specify the time for compliance with an information request in the information request itself. If the Commission does not do so, the information request must be complied with within 28 days.

#### **Rule 35 – Rejection of principal document**

Rule 35 provides that the Commission may reject the document to which the information request relates (the principal document) if the time for compliance passes without the information request being fully complied with.



## **DRAFT FOR COMMENT**

The purpose of this rule is to remove the incentive for access providers to delay regulatory outcomes by lodging applications for exemption orders, access undertakings or access undertaking variations that are not supported by all necessary evidence. It is the Commission's view that such a rule is therefore likely to lead to improvements in the speed of decision-making.<sup>10</sup>

### **Rule 36 – Extending time for compliance**

Rule 36 provides that the Commission may extend, or further extend, the time for compliance with an information request, though the Commission may not do so if the principal document has been rejected under rule 35.

## **DIVISION 2 – SUBMISSIONS AND SUPPORTING DOCUMENTS**

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

Rule 37 mirrors rule 30, and applies to Part XIC processes other than the arbitration of access disputes.

This rule is intended to prevent “rolling submissions”, where supporting information and submissions (and, indeed, submissions from interested persons) continue to be sent to the Commission up until when it makes its decision.

## **PART 9 – TRANSITIONAL**

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

Rule 38 provides that the Rules apply to all Part XIC processes that begin after the Rules commence (see rule 2).

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

Rule 39 provides that only the provisions identified in the rule apply to Part XIC processes that are on foot when the Rules commence, namely:

- Part 3, Division 2 (which deals with modifications of a minor nature);
- Part 5 (which deals with deferrals);
- Part 6 (which deals with the use of information);
- Part 8, Division 1 (which deals with requests for further information); and
- the other provisions of the Rules so far as they relate to the above provisions.

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.

Subrule 39(2) makes clear that this rule does not affect the Commission's power to give directions in arbitrations of access disputes under section 152DC of the Act.

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<sup>10</sup> See for example, Explanatory Memorandum to *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005*, p.56