

## EXPLANATORY STATEMENT

*Telecommunications Act 1997*

*Telecommunications (Consumer Protection and Service Standards) Act 1999*

*Telecommunications (Arbitration) Regulations 2018*

### Authority

The Governor-General has made the *Telecommunications (Arbitration) Regulations 2018* (the Regulations) under subsection 594(1) of the *Telecommunications Act 1997* (Telecommunications Act), and subsection 160(1) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Consumer Protection Act). These subsections provide that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the relevant Acts, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 594(2) of the Telecommunications Act and subsection 160(2) of the Consumer Protection Act provide that the regulations may prescribe penalties, not exceeding 10 penalty units, for offences by individuals against the regulations.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character (including regulations), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument. The Regulations repeal the *Telecommunications (Arbitration) Regulations 1997* (sunsetting Regulations).

### Purpose and Operation

The Regulations relate to the arbitration of disputes by the Australian Competition and Consumer Commission (the ACCC) under various provisions within the Telecommunications Act and the Consumer Protection Act. These provisions are:

- (a) Sections 335, 351, 372M and 462 of the Telecommunications Act
- (b) Clauses 18, 27, 29, 36 and 46 of Schedule 1 to the Telecommunications Act
- (c) Clauses 5 and 8 of Schedule 2 to the Telecommunications Act and
- (d) Sections 149 and 151 of the Consumer Protection Act

The Telecommunications Act and the Consumer Protection Act compel certain entities to provide particular services (being those services identified in the definition of ‘service’ in section 5 of the Regulations) to another party. These obligations are fulfilled on terms and conditions agreed between the parties. If the parties cannot agree on these terms and conditions, both of the Acts provide that the parties may choose an arbitrator to determine the terms and conditions. In the event that the parties cannot agree on an arbitrator, the ACCC is designated as the arbitrator of last resort. The Regulations create a framework of rules and procedures for the ACCC to follow when conducting these arbitrations.

Following a review of the sunseting Regulations, and after consultation with the ACCC and industry, the Government has determined that the Regulations continue to be required to provide a backstop for industry when faced with disputes about terms and conditions for access to the specified services. The Regulations were also noted as providing much regarded clarity and certainty for industry when ACCC is conducting these arbitrations, and without them, there would be no clear procedure for the ACCC to follow when conducting these arbitrations.

The Regulations remake the sunseting Regulations with updates to the drafting style and three significant changes:

- Allowing the ACCC to make decisions ‘on the papers’, rather than having to determine each case after a potentially lengthy and expensive hearing
- Allowing the ACCC to conduct joint arbitrations, which could lead to faster decisions where a number of telecommunications providers are involved in a dispute about a single issue; and
- Removing ‘reasonable excuse’ defences in the sunseting Regulations in relation to prosecution for failure to attend an arbitration hearing as a witness when summoned, or failure of a witness to an arbitration hearing to be sworn or make an affirmation, or answer a question or produce a document (section 27 of the Regulations). These defences reflected provisions in the *Competition and Consumer Act 2010* (CCA) that have now been repealed, and are therefore now redundant. The general defences in Part 2.3 of the *Criminal Code Act 1995* (the Criminal Code) would still be available, where applicable

The Regulations are a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

The notes on the provisions of the Regulations are set out in [Attachment A](#).

### Consultation

On behalf of the Minister for Communications and the Arts, the Department of Communications and the Arts (the Department) undertook a public consultation process on the Regulations. The Department provided a draft of the Regulations to key stakeholders via email and published the draft on the Department’s website for comment. The stakeholders who were contacted directly include relevant Government Departments, consumer groups, peak bodies and industry. The Department received two submissions from Telstra and Vodafone Hutchinson Australia (VHA). Neither objected to remaking the sunseting Regulations.

### Regulation Impact Statement

The Office of Best Practice Regulation considered that the remaking of this instrument without substantial changes is not likely to have more than a minor and/or machinery regulatory impact on business, community organisations and individuals. As such, a Regulation Impact Statement was not required (see OBPR reference ID: 24241).

### Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

**Notes on the provisions of the Regulations**

**Part 1—Preliminary**

Part 1 contains general provisions relating to the commencement and operation of the Regulations.

**Section 1 - Name**

This section provides for the Regulations to be cited as the *Telecommunications (Arbitration) Regulations 2018*.

**Section 2 - Commencement**

Section 2 provides for the commencement of the Regulations. It provides that the whole of the instrument commences on the day after this instrument is registered on the Federal Register of Legislation.

**Section 3 - Authority**

Section 3 provides that the Regulations are made under the authority of the *Telecommunications Act 1997* (the Telecommunications Act), and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act).

Subsection 594(1) of the Telecommunications Act, and subsection 160(1) of the Consumer Protection Act provide the general regulation-making power.

**Section 4 - Schedule 2**

Section 4 is a machinery clause that enables Schedule 2 to the Regulations to amend or repeal an instrument that is specified in the Schedule. This enables the *Telecommunications (Arbitration) Regulations 1997* (specified in Schedule 2 to the Regulations) to be repealed.

**Section 5 - Definitions**

Section 5 provides definitions for key terms used in the Regulations.

**Arbitration** is defined to mean the arbitration of a dispute by the ACCC under certain provisions of the Telecommunications Act or the Consumer Protection Act.

**Determination** means the determination, by the ACCC, of a dispute.

**Dispute** means a dispute notified under subsection 6(1) of the Regulations. Subsection 6(1) provides that a service seeker or service provider (as defined in section 5 of the Regulations) may notify the ACCC that a dispute exists if they are unable to agree on the terms and conditions on which a service is, or is to be, provided.

**Member** includes an associate member of the ACCC. Associate members of the ACCC participate as full members in meetings of the Commission (section 8A and 19 of the *Competition and Consumer Act 2010* (CCA)), so this definition is provided for the avoidance of doubt and means that an associate member may also determine an arbitration under these Regulations.

**Party** means a party to an arbitration under the Regulations.

**Service** means a service that is, or is to be, provided under the provisions of the Telecommunications Act or the Consumer Protection Act that may require arbitration. The relevant services are:

- Access to operator or directory assistance services for the end-users of another carriage service provider (clauses 4 and 7 of Schedule 2 to the Telecommunications Act)
- Access to the emergency call service provided by a recognised person for the purposes of sections 149 and 151 of the Consumer Protection Act
- Access to a fixed-line facility owned or operated by a person other than a carrier, in order that a carrier may install fibre-ready infrastructure (section 372L of the Telecommunications Act)
- Access to supplementary facilities owned or operated by carriers (clause 17 of Schedule 1 to the Telecommunications Act)
- Access to telecommunications transmission towers or underground facilities, and to the sites of telecommunications transmission towers, for carriers (clauses 33, 34 and 35 of Schedule 1 to the Telecommunications Act)
- Access to designated interconnection services from carriage service providers for the purpose of ensuring any-to-any connectivity (clause 46 of Schedule 1 to the Telecommunications Act)
- Services required to be provided for defence purposes or for the management of natural disasters (section 335 of the Telecommunications Act)
- Pre-selection services (section 351 of the Telecommunications Act)
- Compliance with the requirements of the numbering plan to provide number portability to another carriage service provider (section 462 of the Telecommunications Act)
- Access to network information required when a carrier supplies carriage services to another carrier (clauses 21, 22, 23, 24 or 25 of Schedule 1 to the Telecommunications Act)
- Consultation required when a carrier (the first carrier) supplies carriage services to another carrier and the first carrier is modifying or reconfiguring its network (clause 29 of Schedule 1 the Telecommunications Act)

**Service provider** means a person required to provide a service under the Telecommunications Act or the Consumer Protection Act.

**Service seeker** is defined to capture circumstances where a person is seeking to make or vary an agreement about the provision of services. It also captures the circumstance where the service provider has changed, or proposes to change, the terms and conditions on which the service provider provides a service to a person.

## **Part 2—Notification of disputes**

Part 2 contains the process by which a service seeker or service provider may notify the ACCC of a dispute relating to the terms and conditions on which a service is, or is to be, provided. It also allows for, and provides a process of, withdrawal of notifications of disputes.

### **Section 6 - Notification of disputes**

Section 6 provides a process for how the parties to a dispute relating to the provision of a service that is within the scope of the Regulations can notify the ACCC of their dispute.

Subsection 6(1) provides that either one of the parties, being either a service seeker or service provider, may notify the ACCC of the dispute in writing.

Subsection 6(2) provide examples of what the parties may disagree on. These include the price, or method of establishing the price, at which a service is provided, or whether a previous determination of the terms and conditions should be varied.

Subsection 6(3) sets out the information the ACCC will require to understand the parties to the dispute, the nature of the dispute and the actions that have been taken to date to resolve the dispute. It also sets out information the ACCC will require to proceed with the arbitration. It provides that a notification of a dispute about a service must include:

- The name of the person notifying the ACCC about the dispute, and if the notifier is not an individual, then the name and address of an individual who represents the notifier
- The notifier's address for delivery of documents in relation to the notification of the dispute
- Whether the notifier is the service seeker or service provider, and the name and address of the other party
- The relevant provision of the Telecommunications Act or the Consumer Protection Act that the dispute relates to
- A description of the dispute, including:
  - (i) Whether the dispute is about varying existing access arrangements and, if it is, a description of the arrangements
  - (ii) Each aspect of the service on which the service seeker and service provider are able to agree
  - (iii) Each aspect of the service on which the service seeker and service provider are unable to agree
- A description of any effort that has been made to resolve the dispute

Subsection 6(4) clarifies how the ACCC must proceed when it is notified of a dispute. It provides that, when the ACCC receives notification of a dispute, the ACCC must give written notice of the dispute to:

- The other party in the dispute (either the service seeker or service provider)
- If the ACCC considers that the determination of the dispute may require another person to do something—the other person
- Any other person whom the ACCC considers may wish to become a party

### **Section 7 - Withdrawal of notifications**

Section 7 provides a process for how a party can withdraw a notification of a dispute.

Subsection 7(1) provides that a notification of a dispute may only be withdrawn by the person who notified the dispute, and before the ACCC makes a determination. The requirement that the dispute may only be withdrawn before the ACCC makes a determination is intended to prevent vexatious disputation in which a person who has little hope of success in an arbitration notifies a dispute in order to cause delays, or raise costs, for the other party.

Subsection 7(2) sets out the information the ACCC will require to terminate the arbitration. It provides that the withdrawal of a notification of a dispute must be given in writing to the ACCC, and include the following information:

- The name of the person withdrawing the notification
- Whether the person withdrawing the notification is the service seeker or service provider
- A short description of the dispute

Subsection 7(3) provides that a person who withdraws a notification of a dispute must give a copy of the withdrawal to the other party in the dispute.

Subsection 7(4) provides that a withdrawal of a notification of a dispute takes effect when the withdrawal is received by the ACCC.

Subsection 7(5) provides that the ACCC must give a copy of a withdrawal of a notification of a dispute to each person (except the person who gave the withdrawal to the ACCC) to whom the ACCC gave notice of the dispute under subsection 6(4).

## **Part 3—Arbitration of disputes**

Part 3 outlines the process of arbitration of disputes when being conducted by the ACCC. Part 3 of the Regulations is based on Division 3, Subdivision C of Part IIIA of the CCA.

### **Section 8 - Parties to arbitration**

Section 8 provides that the parties to an arbitration are the service seeker, the service provider, anyone that the ACCC considers will have to do something as a result of the determination of the dispute, and any other person who applies in writing to be made a party and is accepted by the ACCC as having a sufficient interest.

## **Section 9 - Determination by ACCC**

Subsection 9(1) provides that unless notification of the dispute is withdrawn under section 7 of the Regulations, or the ACCC terminates the arbitration under section 11, the ACCC must make a written determination of the dispute.

Subsection 9(2) provides that before the ACCC makes the determination, it must give a draft of the determination to each party.

Subsection 9(3) provides that when the ACCC makes a determination it must give a copy of the determination to each party and include the reasons for the determination.

## **Section 10 - Matters that ACCC must take into account**

Subsection 10(1) provides for the matters that the ACCC must take into account when making a determination of the dispute. These matters, which are intended to be of equal importance, are:

- a) The legitimate business interests of the parties, and the parties' investment in facilities used to supply the service that is the subject of the dispute
- b) The interests of all persons who have rights to use the service
- c) The direct costs of providing access to the service
- d) The operational and technical requirements necessary for the safe and reliable operation of a telecommunications network, or facilities used to supply carriage services
- e) The economically efficient operation of a carriage service, a telecommunications network or a facility and
- f) Whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services

Subsection 10(2) provides that, for the purposes of subsection 10(1)(f), the long-term interests of end-users is to be determined in the same way as the question is determined for the purposes of Part XIC of the CCA. The note to subsection 10(2) directs the reader to section 152AB of the CCA. Section 152AB provides that the ACCC must, when determining whether a particular thing promotes the long-term interests of end-users for the purposes of Part XIC, have regard to the extent to which that thing is likely to result in the achievement of the following objectives:

- Promoting competition in markets for carriage services or services provided by means of carriage services
- Achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
- Encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied or are likely to become capable of being supplied

Subsection 10(3) provides that, in making a determination, the ACCC may take into account any other matters that it considers relevant. This provides flexibility to deal with specific or unforeseen circumstances and covers the breadth of the matters that the ACCC may be required to arbitrate.



## **Section 11 - When ACCC may terminate arbitration**

Section 11 is based on section 44Y of the CCA.

Subsection 11(1) provides that the ACCC may terminate an arbitration if it considers that:

- The notification of the dispute was vexatious or
- The subject matter of the dispute is trivial, misconceived or lacking in substance or
- A party has not engaged in negotiations in relation to the dispute in good faith or
- The service that is the subject of the dispute should continue to be provided under an existing arrangement between the service seeker and service provider.

Subsection 11(2) enables the ACCC to terminate an arbitration if it relates to a dispute about an existing determination and the ACCC thinks there is no sufficient reason why the existing determination should not continue to have effect.

## **Part 4—Procedure in arbitrations**

Part 4 outlines the procedures which apply for the arbitration of disputes by the ACCC.

### **Division 1—Conduct of arbitration**

#### **Section 12 - Constitution of ACCC for arbitration**

Section 12 details the constitution of the ACCC for the purposes of an arbitration conducted under the Regulations.

Subsection 12(1) provides that for the purposes of an arbitration, the ACCC may be constituted by a single member, or 3 members, of the ACCC that are nominated in writing by the Chairperson of the ACCC. A member includes an associate member (see section 5 of these Regulations).

Subsection 12(2) requires that if the Chairperson of the ACCC is a member of the ACCC for the purposes of an arbitration, the Chairperson must preside at the arbitration.

Where the Chairperson of the ACCC, for the purposes of an arbitration, is not a member of the ACCC subsection 12(3) requires the Chairperson to nominate a member of the ACCC to preside at the arbitration.

#### **Section 13 - Determination of questions**

Section 13 provides that, if the ACCC is constituted by 3 members of the ACCC for the purposes of an arbitration, a matter must be decided according to the opinion of the majority of the members.

#### **Section 14 - Conduct of arbitration**

Subsection 14(1) provides that the ACCC may conduct an arbitration on the papers, by holding an arbitration hearing, or in part on the papers and in part by holding an arbitration hearing.

The note to subsection 14(1) guides readers to section 22 of the Regulations for when the ACCC may conduct a joint arbitration.

The *Telecommunications (Arbitration) Regulations 1997* did not specify that the ACCC could conduct an arbitration on the papers. Empowering the ACCC to consider matters on the papers helps to reduce costs for industry, and fosters a streamlined arbitration process.

Subsection 14(2) sets out the ACCC's rules for the conduct of the arbitrations. This is modelled on section 44ZF of the CCA.

Subsection 14(2) states that:

- The ACCC is not bound by technicalities, legal forms or rules of evidence
- The ACCC must act as speedily as a proper consideration of the dispute allows, having regard to the need to inquire into and investigate carefully and quickly the dispute and all matters affecting the merits, and a fair settlement, of the dispute
- The ACCC may inform itself of any matter relevant to the dispute in any way it considers appropriate

Subsection 14(3) is also modelled on section 44ZF of the CCA. The subsection provides that the ACCC may determine the periods of time that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties, and may require that their cases be presented within those periods.

## **Division 2—Powers of ACCC in conducting arbitration**

Division 2 of the Regulations sets out the powers given to the ACCC in conducting an arbitration.

### **Section 15 - Power to refer matters and give directions**

Section 15 gives power to the ACCC to do any of the following actions for the purposes of an arbitration:

- Refer any matter to an expert and accept the expert's report as evidence
- Direct a party to conduct research or investigations to obtain relevant information
- Direct a person who is, or was, a party to give relevant information to one or more other parties
- Direct a person not to divulge, or communicate to anyone else, stated information that was given to the person for the purposes of an arbitration unless the person is permitted by the ACCC and
- Give any other such direction, and do any such thing, as is necessary or expedient to make a determination

The note to section 15 guides the reader to section 25, which provides that a person commits an offence if that person fails to follow a direction by the ACCC under paragraphs 15(b) to 15(e) (inclusive).

### **Section 16 - Power to require person to give information or produce documents**

Subsection 16(1) provides that the ACCC may give a notice to a person under subsection 16(2) if the ACCC has reason to believe that the person has information, or a document, relevant to an arbitration. For example, the ACCC may consider that a third party (such as an equipment provider, network installer or finance provider) has information relevant to the matters in dispute.

Subsection 16(2) provides that the ACCC has the power to require a person to give information or to produce any document to the ACCC for the purposes of the arbitration by way of written notice to the person.

Subsection 16(3) sets out the details that must be included in a written notice given by the ACCC. A written notice must specify the following:

- The time period for compliance (which must be at least 14 days after the notice is given to the person)
- How the person is required to comply with the notice
- The effect of section 26 (offence for failure to comply with these notices)

The note accompanying section 16 guides the reader to section 26, which provides that a person commits an offence if the person fails to comply with a notice.

### **Section 17 - Power to summon person to give evidence and produce documents**

Subsection 17(1) provides that the member of the ACCC who is presiding at an arbitration may summon a person to:

- Attend before the ACCC to give evidence and

- Produce such documents (if any) as are referred to in the summons

Subsection 17(2) provides that a summons must be in the form set out in Schedule 1 to the Regulations.

Subsection 17(3) provides the manner in which a summons must be served. A summons must be served on a person by:

- Delivering a copy of the summons to the person personally and
- Showing the original of the summons to the person when the copy is delivered to the person.

The note to section 17 guides the reader to section 27, which provides that a person commits an offence if the person fails to comply with a summons.

### **Division 3—Arbitration hearings**

#### **Section 18 - Conduct of arbitration hearings**

Subsection 18(1) provides that the ACCC may do any of the following things for the purposes of an arbitration hearing:

- Require evidence or argument to be presented in writing
- Decide the matters on which it will hear oral evidence or argument
- Hear and determine the dispute in the absence of a person who has been summoned to attend before the ACCC
- Sit at any place
- Adjourn to any time and place

Subsection 18(2) provides that the ACCC can choose to conduct an arbitration hearing by telephone, closed-circuit television, or any other means of communication.

#### **Section 19 - Arbitration hearings to be in private**

Subsection 19(1) provides that subject to subsection 19(2), an arbitration hearing must be conducted in private.

Subsection 19(2) provides that if the parties agree, an arbitration hearing, or part of an arbitration hearing, may be conducted in public.

The presiding member of the ACCC at an arbitration hearing conducted in private may give written directions about the persons who may be present at the hearing (subsection 19(3)).

Subsection 19(4) provides that when giving directions under subsection 19(3), the member presiding must consider the wishes of the parties and the need for commercial confidentiality.

#### **Section 20 - Right to representation**

Section 20 provides that a party may appear in person at an arbitration hearing, or be represented by someone else at the hearing.

## **Section 21 - Evidence on oath or affirmation**

Section 21 provides that the ACCC may take evidence on oath or affirmation at an arbitration hearing and, for that purpose, a member of the ACCC may administer the oath or affirmation.

## **Division 4—Joint arbitration of disputes**

Division 4 of Part 4 of the Regulations provides the ACCC with the discretion to conduct joint arbitration hearings following notification to the parties of the dispute. These arrangements are modelled on section 44ZNA of the CCA.

These arrangements empower the ACCC to conduct multilateral arbitrations where appropriate, following consultations with relevant parties. The ACCC may only conduct a joint arbitration if one or more matters are common to different disputes that the ACCC is arbitrating at the same time. The ACCC's ability to consider disputes with common matters will help to streamline administrative requirements and reduce costs for industry.

For example, where there are multiple negotiations regarding the terms and conditions for access to the same service and disputes arise, holding a joint arbitration allows for an accelerated outcome and also provides consistent outcomes for industry. This in turn can reduce delays and costs for industry.

### **Section 22 - When joint arbitration may be conducted**

Subsection 22 of the Regulations permits the ACCC to conduct joint arbitration of disputes in limited situations. The ACCC must be arbitrating two or more disputes at a particular time and those disputes must have one or more matters in common.

Subsection 22(1) provides the Chairperson of the ACCC with the discretion to decide, by written notice to the parties to the different disputes (see subsection 22(3)), that the ACCC must conduct a joint arbitration hearing in respect of the nominated disputes specified in the notice.

Subsection 22(2) provides that this discretion may only be exercised where the Chairperson considers that this would likely result in the nominated disputes being resolved in a more efficient and timely manner.

Subsection 22(3) provides that, before deciding that the ACCC must conduct a joint arbitration the Chairperson must consult the parties, specifying that a joint arbitration is proposed and inviting the parties to make written submissions on the proposal within 14 days after notice of the proposal is given.

Subsection 22(4) requires the Chairperson to have regard to any submission so made in deciding whether the ACCC must conduct a joint arbitration, and to have regard to any other matter the Chairperson considers relevant.

### **Section 23 - Procedure in joint arbitration**

Subsection 23(1) provides that the conduct of arbitration as set out in sections 12 to 21, and the offences and miscellaneous matters set out in sections 25 to 31, apply to a joint arbitration in a corresponding way to the way in which they apply to a particular arbitration. This means that the procedures for the ACCC to follow in conducting the arbitration, its powers and the offences that apply to the arbitration of a single dispute also apply to joint arbitrations.

Subsection 23(2) provides that the Chairperson of the ACCC may, for the purposes of the conduct of a joint arbitration, give written directions to the member of the ACCC presiding at the arbitration.

Subsection 23(3) provides that, for the purposes of a joint arbitration of two or more disputes, the ACCC may have regard to any record of the proceedings of the arbitration of any of those disputes. This provides it with flexibility so that it does not need to seek, for example, the resubmission of evidence or information. If the ACCC has already been provided with information about the disputes when it was considering them separately, it should be able to consider that.

### **Section 24 - Determination of disputes**

Subsection 24(1) provides that, when the ACCC is conducting a joint arbitration of two or more disputes, it may make a single determination that covers all of the disputes. For example, if there are several disputes that are all about the price of access to a specific type of service, and the costs of providing the service are the same irrespective of the persons to whom the service provider is providing the service, the ACCC may issue a single determination that sets out the price of the service for all parties. This helps provide consistent outcomes across industry.

Subsection 24(2) provides that if the ACCC does not make a single determination that covers all of the disputes, the ACCC may refer to any record of the proceedings of the joint arbitration or adopt any findings of fact made by the ACCC to assist in making a determination of the dispute.

The note to section 24 guides the reader to sections 9 and 10, which set out the requirements and considerations that the ACCC must take into account when making a determination.

## **Division 5—Offences**

Division 5 of Part 4 of the Regulations outlines the offences applicable to arbitration procedures. The offence provisions are included to help to ensure the smooth running of the arbitrations, and prevent companies trying to game the system through drawing out the process and thereby increasing costs for the parties.

Some of the offences set out in Division 5 are strict liability offences, meaning that establishing the physical act that is the subject of these offences is enough to prove fault. For these offences it is not necessary to prove fault elements, meaning that the state of mind of the person committing or omitting the offensive act is not necessary in proving the offence. The strict liability offences included in the Regulations are in respect of failure to provide information or produce documents relevant to an arbitration (see section 26), failure to attend an arbitration as a witness (see section 27), failure of a witness to be sworn or make an affirmation, or answer a question or produce a document (see section 27), and also in respect of a person engaging in conduct towards another person participating in an arbitration such as threats, intimidation, coercion, or causing damage, disadvantage or loss to that person (see section 28). These provisions were strict liability offences in the previous *Telecommunications (Arbitration) Regulations 1997*.

The Attorney-General's Department '*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*' (AGD Guide) notes that strict liability may be necessary to ensure the integrity of a regulatory regime. Consistent with the AGD Guide, applying strict liability in relation to these offences in the Regulations is necessary to uphold the integrity of the dispute resolution process and ensure the ACCC is able to conduct effective arbitrations. This is important to ensure access is provided to the specified services under the Telecommunications Act and Consumer Protection Act.

By way of example, the services that may be subject to ACCC arbitration may be services that are critical to promoting market entry and competition in Australia. They include, for example, access to facilities, number portability and access to emergency call services. Without access to these services a carrier or carriage service provider may face delays in providing services to end-users and increased costs. At the same time, a service provider may seek to raise its rivals' costs by delaying access to the services, or by delaying or otherwise perverting the conduct of the arbitration. Strict liability offences are therefore required to discourage this conduct and promote more effective competition in the market.



The offence provisions in Division 5 of Part 4 of the Regulations no longer include a standalone reasonable excuse defence that was provided for offences relating to a witness under the *Telecommunications (Arbitration) Regulations 1997*. The inclusion of the reasonable excuse defences reflected sections 152DE and 152DF in the CCA which have now been repealed, and is therefore now redundant. As a result, the reasonable excuse defence has not been included in these Regulations.

Despite this, a person would still have access to all of the defences in Part 2.3 of the *Criminal Code Act 1995* (Criminal Code). Part 2.3 of the Criminal Code sets out defences that are generally available, such as a defence of honest and reasonable mistake and intervening conduct or event.

The offences in Division 5 of Part 4 of the Regulations each attract 10 penalty units. This is in accordance with subsection 594(2) of the Telecommunications Act and subsection 160(2) of the Consumer Protection Act. The provisions are also consistent with the principles in the AGD Guide.

## **Section 25 - Contravention of a direction**

Under paragraph 15(b) to (e), the ACCC has the power to refer matters and direct persons. Section 25 makes it an offence to do an act or omit to do an act that contravenes the direction given by ACCC. This attracts 10 penalty units.

## **Section 26 - Failure to comply with notice to give information or produce documents**

It is a strict liability offence if a person is served with a summons to attend the ACCC and give evidence and has not been excused, or released from further attendance, and person to attend a required by the summons.

This offence attracts 10 penalty units

## **Section 27 - Offences by witnesses**

Subsection 27(1) makes it an offence of strict liability if a person is served with a summons to attend before the ACCC to give evidence, and the person has not been excused, or released from further attendance, by a member of the ACCC; and the person fails to attend a required by the summons. This offence attracts 10 penalty units.

Subsection 27(2) makes it an offence of strict liability if a person served with a section 17 summons to attend before the ACCC to give evidence to the ACCC and fails to be sworn or to make an affirmation, or fails to answer a question. This offence attracts 10 penalty units.

Subsection 27(3) makes it an offence of strict liability if a person served with a section 17 summons to produce a document and the person fails to do so. This offence attracts 10 penalty units.

## **Section 28 - Intimidation etc.**

Subsection 28(1) provides that it is an offence for a person to engages in conduct that

- Threatens, intimidates or coerces another person or causes damage, disadvantage or loss to another person and
- This is because the other person has attended, or proposes to attend, before the ACCC to give evidence at an arbitration hearing, or has produced, or proposes to produce, a document to the ACCC (subsection 28(1)(b))

An offence is committed under subsection 28(1) attracts 10 penalty units.

Subsection 28(2) provides that strict liability applies to the physical element in paragraph 28(1)(b) of the offence. Strict liability is justified in this case because the particular conduct involved (for example, threats, intimidation, causing damage, disadvantage or loss) could prevent an arbitration from being conducted, or pervert the outcomes of the arbitration.

## **Section 29 - Disturbing an arbitration hearing etc.**

Section 29 provides that a person commits an offence if the person:

- insults, disturbs or uses insulting language towards an ACCC member exercising powers, or performing functions or duties for the purposes of an arbitration hearing or
- interrupts an arbitration hearing or
- creates a disturbance, or participates in creating or continuing a disturbance, in a place where an arbitration hearing is being conducted

An offence committed under subsection 29 attracts 10 penalty units.

## **Division 6—Miscellaneous**

### **Section 30 - Parties may request ACCC to treat material as confidential**

Subsection 30(1) provides that a party may:

- Inform the ACCC that a certain part of a document contains confidential information in that party's opinion
- Request the ACCC not to give a copy of that part of the document to another party

This provides assurance to a party that information that may damage its competitive position within the market, if disclosed to a competitor, will not be disclosed.

Subsection 30(2) provides that, if the ACCC receives a request under paragraph 30(1)(b), it must:

- Inform the other party that the request has been made and of the general nature of the matters to which the relevant part of the document relates
- Ask the other party whether it objects to the ACCC complying with the request

Subsection 30(3) provides that, if there is an objection to the ACCC complying with the request, the party having the objection may inform the ACCC of its objection and of the reasons for it.

Subsection 30(4) provides that the ACCC may decide not to give to the other party a copy of the document to the extent that it contains confidential commercial information. In making this decision, the ACCC must have consideration of the following:

- The request
- Any objection
- Any further submissions that any party has made in relation to the request

### **Section 31 - Parties to pay costs of arbitration**

Section 31 provides that the ACCC may:

- Charge the persons who are, or were, parties to an arbitration for the ACCC's costs in conducting the arbitration
- Apportion the amount of the charge between those persons

## **Part 5—Application, savings and transitional provisions**

Part 5 sets out a transitional provision (and accompanying definitions) that has the effect of ensuring that the arrangements under the *Telecommunications (Arbitration) Regulations 1997* will continue to apply in relation to disputes previously notified but not finally determined or concluded (either by way of withdrawal, termination or withdrawal) prior to the commencement of these Regulations.

### **Section 32 - Definitions**

Section 32 provides definitions for two key terms used in section 33 ‘commencement’ and ‘old law’.

**Commencement** means the day the *Telecommunications (Arbitration) Regulations 2018* commences.

**Old Law** means the *Telecommunications (Arbitration) Regulations 1997*, as in force immediately before commencement.

### **Section 33 - Transitional—disputes notified before commencement**

Section 33 provides that despite the repeal of the old law by Schedule 2 to the Regulations, the *Telecommunications (Arbitration) Regulations 1997* continues to apply in relation to a dispute if, immediately before commencement of the new Regulation:

- Notification of the dispute had been given to the ACCC
- A withdrawal of the notification of the dispute had not been received by the ACCC
- The arbitration of the dispute had not been terminated by the ACCC
- A determination of the dispute had not been made

### **Schedule 1—Form of summons**

Schedule 1 sets out the form of summons for the purposes of subsection 17(2).

### **Schedule 2—Repeals**

Schedule 2 repeals the *Telecommunications (Arbitration) Regulations 1997*.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Telecommunications (Arbitration) Regulations 2018**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The *Telecommunications (Arbitration) Regulations 2018* (the Regulations) relate to the arbitration of disputes by the Australian Competition and Consumer Commission (the ACCC) under various provisions within the Telecommunications Act and the Consumer Protection Act. These provisions are:

- (a) sections 335, 351, 372M and 462 of the Telecommunications Act
- (b) clauses 18, 27, 29, 36 and 46 of Schedule 1 to the Telecommunications Act
- (c) clauses 5 and 8 of Schedule 2 to the Telecommunications Act and
- (d) sections 149 and 151 of the Consumer Protection Act

The *Telecommunications Act 1997* (Telecommunications Act) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Consumer Protection Act) compel certain entities to provide particular services (being those services identified in the definition of ‘service’ in section 5 of the Regulations) to another party. These obligations are fulfilled on terms and conditions agreed between the parties. If the parties cannot agree on these terms and conditions, both of the Acts provide that the parties may choose an arbitrator to determine the terms and conditions. In the event that the parties cannot agree on an arbitrator, the ACCC is designated as the arbitrator of last resort. The Regulations create a framework of rules and procedures for the ACCC to follow when conducting these arbitrations.

#### **Human rights implications**

This Legislative Instrument engages the following rights:

- Presumption of innocence

Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Under international law the term ‘criminal offence’ includes not only offences or penalties that are classified as a criminal offence under national law, but also other forms of penalties that may be designated as civil penalties under domestic law. The approach under international and comparative human rights law is to consider the substance and effect of the proceedings, rather than the ‘label’ itself.

Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need for the prosecution to prove fault. In the case of a strict liability offence, the prosecution is only required to prove the physical elements of the offence. A strict liability offence will not violate the presumption of innocence if it pursues a legitimate objective and is reasonable, necessary and proportionate to that objective.

Some offences (sections 26 – 28) contained in Division 5 of Part 4 of the Regulations are strict liability offences. Section 26 creates a strict liability offence for failure to comply with notice to give information or produce documents. Section 27 creates strict liability offences by witnesses, for failing to appear, failing to answer questions, and failure to produce a document. Section 28 creates a strict liability offence for intimidation of witnesses.

The offences contained in sections 26-28 of the Regulations are aimed at upholding the integrity of the dispute resolution process and ensuring the ACCC is able to conduct effective arbitrations. This is important to ensure access is provided to the specified services under the Telecommunications Act and Consumer Protection Act, necessary for the conduct of business in the telecommunications market and provision of services to the community.

By making these offences strict liability offences, it provides a strong deterrent for those parties who may seek to game (including delaying) arbitrations. Gaming might be done, for example, to gain an advantage over a competitor by drawing-out a protracted, unresolved dispute about access to services necessary to conducting their business. In the context of the competitive telecommunications market a strong deterrent is necessary.

The offences arise in a regulatory context where participants are expected to know their duties and obligations during ACCC arbitration proceedings. The conduct that is the subject of the offences, is not burdensome to comply with, for example, answering questions during an arbitration. The penalty (10 penalty points) is also not unduly onerous. For these reasons strict liability is reasonable and proportionate in the pursuit of a legitimate objective.

Of course, it remains incumbent on the prosecution to prove the physical elements of these offences beyond a reasonable doubt. An accused will have access to the defences available under Part 2.3 of the Criminal Code Act 1995 (*Criminal Code*), where applicable. For example, the defence of intervening conduct or event (s10.1 of the Criminal Code), or the defence of honest and reasonable mistake of fact (s9.2 of the Criminal Code) may be available. These are considered to be a sufficient safeguard against error, abuse, and provide the opportunity to avoid penalty for reasonable excuses.

## **Conclusion**

The Legislative Instrument is compatible with human rights because limitations on the right to the presumption of innocence are reasonable, necessary and proportionate.

## **Minister for Communications and the Arts**