

EXPLANATORY STATEMENT

Australian Postal Corporation Act 1989

Australian Postal Corporation Regulations 2021

Issued by the Authority of the Minister for Communications,
Urban Infrastructure, Cities and the Arts

Legislative authority

Section 102 of the *Australian Postal Corporation Act 1989* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Paragraph 102(h) of the Act provides that the Regulations may prescribe fines, not exceeding \$1,000 for offences against the regulations.

Section 32B provides that Regulations may provide for inquiries into certain disputes about bulk mail services.

Section 90T of the Act deals with articles reasonably believed to consist of, or contain, certain drugs or other chemical compounds. Subsections 90T(7), 90T(8) and 90T(9) provide that Regulations may be made to determine procedures for removing such items from, and returning them to, their normal course of carriage; procedures for recording articles removed and opened; and, the places where such records are to be kept.

Section 90U deals with articles consisting of, or containing, quarantine material. Subsections 90U(8), 90U(9) and 90U(10) provide that Regulations may be made to determine procedures for removing such items from, and returning them to, their normal course of carriage; procedures for recording articles removed and opened; and, the places where such records are to be kept.

Section 91 allows Australia Post to request information about articles removed from the normal course of carriage. Paragraphs 91(1)(a) to (e) provide that it can request:

- the name and address of the sender and intended recipient of the article;
- a description of the contents of the article;
- whether the article was dealt with by the compliance agency and, if so, the reason for dealing with it; and
- any unique identifier on the article.

Paragraph 91(1)(f) allows Australia Post to request any other information in relation to the article that is prescribed in regulations for the purposes of subsection 91(1).

Purpose

The *Australian Postal Corporation Regulations 2021* (the Regulations) replace the *Australian Postal Regulations 1996* (the 1996 Regulations) that sunset on 1 April 2021. The Regulations have similar effect as the 1996 Regulations, and the overall nature, scope, impacts and regulated entities remain unchanged. Updates have been made to modernise the drafting; and remove redundant provisions, including those which, on closer examination, are unlikely to be validly supported by the enabling power(s) in the Act.

Part 1 of the Regulations specifies preliminary information (such as the name, key definitions and legislative authority) and in combination with Schedule 1 to the Regulations, repeals the 1996 Regulations.

Part 2 of the Regulations establishes procedures and record keeping requirements for articles removed from the normal course of carriage, when they are reasonably believed to contain certain drugs, other chemical compounds or quarantine material. Part 2 applies to items removed by a Customs Officer, or in the case of quarantine material an examiner authorised by Australia Post (an “authorised examiner”). An authorised examiner can be an employee of Australia Post, or another person who examines the article (for example, a person who operates an x-ray machine or metal detector).

Part 3 of the Regulations establishes procedures for the Australian Competition and Consumer Commission (ACCC) to inquire into disputes about the amount of rate reduction applied by Australia Post for a bulk interconnection service. Section 32A of the Act provides for bulk mail interconnection services, whereby bulk quantities of mail are delivered by Australia Post within Australia at discounted rates. Australia Post sets the discounted rate, which applies if the letters have been sorted in accordance with the terms and conditions for accessing the service and have been lodged at a specified post office. They are provided in recognition that the customer has performed certain functions which may ordinarily be performed by Australia Post.

Part 4 of the Regulations set out the transitional arrangements (and accompanying definitions) arising from the repeal of the 1996 Regulations and the commencement of the (replacement) Regulations.

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

Commencement

The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Consultation

A public consultation process was undertaken in developing the Regulations. The Department of Infrastructure, Transport, Regional Development and Communications (the Department) advised of the intention to remake the Instrument and asked for submissions on the Department’s *Have Your Say* webpage. No public submissions were received.

The Department consulted directly with Department of Home Affairs; Department of Agriculture, Water and the Environment; State Government entities referenced in the 1996 Regulations; ACCC; and Australia Post. All provided submissions to the Department and regard has been given to their views.

The Treasury and Attorney-General’s Department were consulted as part of the drafting process.

A number of possible reforms were identified through the consultation in regards Part 2 of the Regulations. These reforms would require changes to Part 7B of the Act and will be explored further with affected parties.

Regulatory Impact

The Regulations are made with similar effect as the 1996 Regulations. The nature, scope, impacts and regulated entities under the 1996 Regulations remain unchanged in the Regulations. As the Regulations remain necessary, have been remade without significant amendments and are operating effectively and efficiently within the framework established by the Act, a Regulation Impact Statement is not required.

A certification letter to this effect has been provided by the Department to the Office of Best Practice Regulation.

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 in **Attachment B**.

Other details

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

Details of the accompanying Regulations are set out in **Attachment C**.

Statement of Compatibility with Human Rights

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

Australian Postal Corporation Regulations 2021

The *Australian Postal Corporation Regulations 2021* (the Regulations) are compatible with the human rights and freedoms recognised or declared in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

The Regulations replace the existing *Australian Postal Corporation Regulations 1996*, which were due to sunset on 1 April 2021. The Regulations have similar effect as the 1996 Regulations, and the overall nature, scope, impacts and regulated entities remain unchanged. Updates have been made to modernise the drafting, and to remove redundant provisions to ensure the Regulations are fully supported by the enabling Act, being the *Australian Postal Corporation Act 1989* (the Act).

The Regulations are made under section 102 of the Act, which provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Sections 32B, Section 90T, 90U and 91 prescribe matters that may, or are required to, be prescribed in regulations. Paragraph 102(h) of the Act provides that the Regulations may prescribe fines, not exceeding \$1,000 for offences against the regulations.

Part 2 of the Regulations establishes procedures and record keeping requirements for articles removed from the normal course of carriage, when they are reasonably believed to contain certain drugs, other chemical compounds or quarantine material. Part 2 applies to items removed from the normal course of carriage by a Customs Officer, or in the case of quarantine material an examiner authorised by Australia Post (an “authorised examiner”). An authorised examiner can be an employee of Australia Post, or another person who examines the article (for example, a person who operates an x-ray machine or metal detector).

Part 3 of the Regulations establishes procedures for the Australian Competition and Consumer Commission (ACCC) to inquire into disputes about the amount of rate reduction applied by Australia Post for a bulk interconnection service (these are services under which bulk quantities of mail are delivered by Australia Post within Australia at discounted rates).

Part 1 of the Regulations contain preliminary matters and Part 4 contains transitional matters.

Human rights implications

This Legislative Instrument engages the following rights:

- Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR); and
- Article 17 of the ICCPR, and also referred to in Article 16 of the *Convention on the Rights of the Child* (the CROC), and Article 22 of the *Convention on the Rights of Persons with Disabilities* (the CRPD).

Article 14(2) of the ICCPR

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the 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 offences or penalties that are classified as a criminal offence under national law, and also 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.

Strict liability offences engage and limit the right to be presumed innocent as they allow for the imposition of criminal liability without the need 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 aim and is reasonable, necessary and proportionate to that aim.

Subsection 31(4) of the Regulations is effectively a strict liability offence applying to Australia Post by operation of Part 2.5 of the *Criminal Code Act 1995* (Criminal Code), which deals with Corporate Criminal Responsibility. Subsection 31(4) creates a strict liability offence for any failure by Australia Post to comply with an information or document production notice issued under subsection 31(1) of the Regulations.

The offence in section 31 of the Regulations is aimed at upholding the integrity of the inquiry process and facilitating the conduct of effective inquiries into bulk mail disputes. By making the offence a strict liability offence, it provides a strong incentive for Australia Post to fully and meaningfully participate in the inquiry and provide all relevant information and documents that will assist the ACCC in carrying out its statutory responsibility for the conduct of the inquiry. The conduct that is the subject of the offence is not burdensome to comply with, and there are safeguards to protect any confidential commercial information that Australia Post holds (refer to section 33 of the Regulations). The penalty (10 penalty units) is not unduly onerous.

For the above reasons, strict liability in respect of subsection 31(4) of the Regulations is a reasonable and proportionate response. It would remain incumbent on the prosecution to prove the physical elements of these offences beyond a reasonable doubt. Australia Post will have access to the defences available under Part 2.5 of the Criminal Code where applicable – for example, the defence of intervening conduct or event (section 10.1 of the Criminal Code) or the defence of honest and reasonable mistake of fact (section 9.2 of the Criminal Code). These are considered to be a sufficient safeguard against mistake and error, and provide the opportunity to avoid penalty for reasonable excuses.

Article 17 of the ICCPR

Article 17 of the ICCPR recognises the right that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. It also prohibits unlawful attacks on a person’s reputation, providing that persons have the right to the protection of the law against such interferences or attacks. The right to privacy includes respect for informational privacy, including in respect of storing, using and sharing personal information, and the right to control the dissemination of this information.

Article 17 does not set out reasons for which the guarantees in it may be limited. However, limitations contained in other articles indicate certain legitimate objectives in appropriate circumstances, for example, those which are necessary in a democratic society in the interests of national security, public order, or the protection of the rights or freedoms of others. In any event, limitations on privacy must be authorised by law and must not be arbitrary.

To the extent that personal information is recorded pursuant to sections 7 and 13 of the Regulations, it will engage the right to privacy under Article 17 of the ICCPR. Specifically, the Regulations requires the establishment and maintenance of a record of articles that may contain drugs in contravention of Commonwealth import or export laws (section 7), and articles that may consist of, or contain, quarantine materials (section 13). The information to be set out in the record includes personal information, such as an addressee's name or address and a sender's name.

Section 18 would permit former or current employees of Australia Post to disclose information or documents where required by or under the *Corruption, Crime and Misconduct Act 2003* (WA).

To be permissible as a matter of international human rights law, interferences with privacy must be according to law and not arbitrary. In order not to be arbitrary, the interference must be reasonable and necessary in the particular circumstances, as well as proportionate to achieving a legitimate objective.

Any such interference with a person's right to privacy arising by operation of sections 7 and 13 of the Regulations would not constitute an arbitrary interference with a person's privacy within the meaning of Article 17, for several reasons:

- Personal information is only included in the record in a narrow range of circumstances – namely, where articles have been removed from the normal course of the postal carriage and opened for examination because they contain quarantine material or are reasonably suspected to contain drugs.
- The establishment and maintenance of records containing personal information is for a legitimate objective – namely, supporting a robust approach to importation and exportation of prohibited in the interests of national security and biosecurity.
- There are appropriate safeguards in sections 10 and 16 of the Regulations to ensure that the information can be used for limited purposes – namely, administration or enforcement of a law relating to customs or a Commonwealth laws relating to the importation and exportation of goods and quarantine material; providing information to Australia Post under section 91 of the Act; and the collection of statistical data.

Conclusion

The Regulations are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. While the measures may engage the prohibition on interference with privacy and unlawful attacks on reputation, the Regulations are reasonable, necessary and proportionate in serving a legitimate objective and the limitations on the right to the presumption of innocence are reasonable, necessary and proportionate.

Details of the *Australian Postal Corporation Regulations 2021*

Part 1—Preliminary

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

Section 1 – Name

This section provides that the title of the Regulations is the *Australian Postal Corporation Regulations 2021*.

Section 2 – Commencement

This section provides for the Regulations to commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Australian Postal Corporation Act 1989*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

There is 1 Schedule to the Regulations.

Section 5 – Definitions

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

The note to section 5 refers to a number of expressions that are used in the Regulations, which are defined in the Act. The note includes a list of relevant expressions that are defined in the Act.

Part 2—Dealing with articles and their contents

Division 1—Articles that may contain drugs etc.

Division 1 of Part 2 of the Regulations requires the Comptroller-General of Customs to establish and maintain records of articles removed from the course of post when that are reasonably believed to consist of, or contain, certain drugs or other chemical compounds.

Section 6 - Purpose of Division

Section 6 provides that this Division of the Regulations is made for the purposes of subsection 90T(8) of the Act.

Section 7 - Record of articles—particulars of articles and their examination

Subsection 90T(8) of the Act empowers the Regulations to set out rules about establishing and maintaining a record of the relevant articles. The Act itself sets out the contents of the record, including particulars of the articles and their examination.

Section 7 of the Regulations provides that in establishing and maintaining a record in respect of an article mentioned in subsection 90T(8) of the Act, the Comptroller-General must ensure the record includes those things listed in section 7; the name of the addressee and sender, the class of the article, the country of origin, particulars of the customs officer that removed the item or dealt with the item once it was removed, the particulars of an officer in any other agency to which the article was referred, the tools and technology used to examine the article or its content, and if there was any pilferage or damage to the article or its content.

A note accompanies section 7 which provides that the record must also set out whether the article and its contents were, following the examination, dealt with according to law or returned to the normal course of carriage: see paragraph 90T(8)(c) of the Act.

Section 8 - Record of articles—places where kept

Section 8 provides that the places at which the record is required to be established and maintained are the places approved as places for the examination of international mail for the purposes of paragraph (f) of the definition of Customs place in subsection 183UA(1) of the *Customs Act 1901*. At the time the Regulations is made, these are described in the *Comptroller General of Customs (International Mail Centres) Approval 2019* and the *Approval of place for the examination of international mail No. 1 of 2016*.

Section 9 – Record of articles—how kept

Section 9 provides that the records may be kept electronically (for example, on a computer system) or manually (for example, on a physical medium).

Section 10 – Record of articles—use of information

Section 10 allows three purposes for which information contained in the record can be used:

- the administration or enforcement of a law relating to customs or a law of the Commonwealth relating to the importation into, or exportation from, Australia of goods or anything else;
- providing information to Australia Post under section 91 of the Act; or
- the collection of statistical data.

Section 10 is intended to be an inclusive list of uses.

Division 2—Articles that may consist of, or contain, quarantine material

Division 2 of Part 2 of the Regulations prescribes the Heads of the Departments/agencies responsible for quarantine in Western Australia, Tasmania and Northern Territory, and requires them to establish and maintain a record of articles found to contain quarantine material.

Section 11 – Purpose of Division

Section 11 explains the purpose of Division 2 of the Regulations; namely, it is setting out matters for the purposes of subsection 90U(9) of the Act.

Section 12 - Persons who are to establish and maintain record

Section 12 lists three persons who must establish and maintain a record in respect of an article mentioned in subsection 90U(9) of the Act:

- the head of the Western Australian Department, if the article is in the course of post to Western Australia;
- the head of the Tasmanian Department, if the article is in the course of post to Tasmania; and
- the head of the Northern Territory Department, if the article is in the course of post to the Northern Territory.

Section 13 - Record of articles—particulars of articles and their examination

Section 13 provides that when participating quarantine inspection agencies (as represented by their respective agency heads) make a finding that an article contains quarantine material, the Agency Head must ensure that the records include those things listed in section 13; the name of the addressee and sender, the product type, any unique identifier, a description of the quarantine material, particulars of the authorised examiner that removed the item from the ordinary course of carriage and the quarantine officer that was present when it was opened, the particulars of an officer in any other agency to which the article was referred, the tools and technology used to examine the article or its content, and if there was any pilferage or damage to the article or its content.

These requirements ensure that comprehensive records are kept on each article found to contain quarantine material, and ensure that the records kept across participating quarantine inspection agencies are consistent.

Executive arrangements are planned to be concluded between the Commonwealth and each respective State in recognition that Commonwealth laws cannot impose administrative powers on State Officials without the relevant State's concordance.

Section 14 - Record of articles—places where kept

Section 14 specifies the physical place where records relating to articles found to contain or consist of quarantine material are to be established and maintained.

Section 15 - Record of articles—how kept

Section 15 prescribes that information collected under subsection 90U(9) and paragraph 90U(10)(b) of the Act may be kept electronically (for example, on a computer system) or manually (for example, on a physical medium).

Section 16 - Record of articles—use of information

Subsection 16(1) prescribes that the information collected under subsection 90U(9) and paragraph 90U(10)(b) of the Act may be:

- used for the administration or enforcement of a law of the Commonwealth, State or Territory relating to quarantine;
- provided to Australia Post under section 91 of the Act; or
- collected as statistical data.

Subsection 16(1) is intended to be an inclusive list of uses.

Subsection 16(2) provides that a quarantine inspection agency may provide to Australia Post information under subsection 90U(9) and paragraph 90U(10)(b) of the Act, to allow Australia Post to track articles either removed from, or in, the normal course of carriage.

Division 3—Miscellaneous

Section 17 – Prescribed State/Territory

Section 17 specifies that Western Australia, Tasmania and the Northern Territory are prescribed States/Territories for the purposes of the definition of ‘prescribed State/Territory’ in section 90E of the Act. The term ‘prescribed State/Territory’ is used in the definitions of ‘compliance agency’, ‘quarantine inspection officer’ and ‘quarantine material’ in sections 90E and 90U, and paragraph 102(dc) of the Act.

Section 18 - Prohibition on use or disclosure by current and former employees

Section 18 provides that for the purposes of paragraphs 90J(6)(d) and 90LC(5)(d) of the Act, the *Corruption, Crime and Misconduct Act 2003* (WA), as in force at the commencement of the section, is prescribed.

Part 7B of the Act limits the use or disclosure by current or former employees of Australia Post of information or documents which:

- is, or relates to, an article, or some or all of the contents or substance of an article, that has been carried by post or is in the course of post;
- relates to services supplied, or intended to be supplied, to another person by Australia Post; or
- relates to the affairs or personal particulars (including name or address) of another person.

The purpose of this section is to permit current and former Australia Post employees to disclose certain information as required by the Western Australian Corruption and Crime Commission (the WA Commission).

The primary disclosure/use offences are set out in sections 90H and 90LB of the Act. The disclosure or use of information is authorised in limited circumstances. Paragraph 90J(6)(d) permits the disclosure of information or a document by a current Australia Post employee as required by a prescribed law of a State or Territory that establishes a Commission or other body to conduct investigations or inquiries. Similar provisions apply to former employees of Australia Post under paragraph 90LC(5)(d).

The Act permits current and former employees of Australia Post to disclose information to various commissions:

- under the *New South Wales Crime Commission Act 1985* (NSW) (paragraphs 90J(6)(a) and 90LC(5)(a) of the Act);
- *Independent Commission Against Corruption Act 1988* (NSW) (paragraphs 90J(6)(b) and 90LC(5)(b) of the Act); and
- Queensland Crime and Misconduct Commission, is also permitted under paragraphs 90J(6)(c) and 90LC(5)(c).

The WA Commission was established by the *Corruption and Crime Commission Act 2003* (WA) on 1 January 2004. The WA Commission can receive and assess matters referred to it

from the Royal Commission and can continue the investigation of such matters. In addition, the Anti-Corruption Commission may refer an allegation to the WA Commission; and the WA Commission has the power to direct the Anti-Corruption Commission to refer a matter to it. Parts 6 and 7 of the *Corruption and Crime Commission Act 2003* (WA) give the WA Commission powers to:

- require a public authority or a public officer to produce a statement of information;
- obtain documents or other things from any person; and
- summon witnesses to attend before the CCC for an examination and/or to produce any record or thing described in the summons.

The effect of Section 18 is to enable the WA Commission to obtain information from Australia Post concerning such matters as inwards correspondence records and post office box subscriber details. This material may be required to enable the Commission to fulfil its functions and to continue the functions currently discharged by the Western Australian Anti-Corruption Commission and the Royal Commission.

Part 3—Inquiries into relevant disputes about bulk interconnection services

Section 32A of the Act provides for bulk mail interconnection services. These are services under which bulk quantities of mail are delivered within Australia at discounted rates. The discounted rates apply if the letters have been sorted in accordance with the terms and conditions for accessing the service and have been lodged at a specified post office. They are provided in recognition that the customer has performed certain functions which may ordinarily be performed by Australia Post.

Section 32B of the Act provides for regulations to allow the ACCC to inquire into disputes between Australia Post and a person using the bulk mail service.

Part 3 of the Regulations establishes procedures for the ACCC to inquire into disputes about the amount of rate reduction applied by Australia Post for a bulk interconnection service.

Division 1—Preliminary

Section 19 - Simplified outline of this Part

Section 19 sets out a simplified outline of Part 3.

Section 20 - Purpose of this Part

Section 20 provides that Part 3 is made for the purposes of section 32B of the Act.

Section 21 - Parties to inquiry

Section 21 specifies who is eligible to be a party to an inquiry into a relevant dispute, namely:

- Australia Post;
- a person who notifies the dispute to the ACCC (that is, the complainant); and
- another person who is obtaining or wishes to obtain a rate reduction in respect of the supply of a bulk interconnection service and after applying in writing to the ACCC, is accepted by the ACCC as having a sufficient interest in the inquiry.

If the ACCC were to not agree to the other person who wishes to be treated as a party to the relevant dispute, it would be open to that person to lodge their own notice of complaint under section 22 of the Regulations in respect of its own particular dispute.

Division 2—Initiation of inquiries

Section 22 - Notice of dispute

Subsection 22(1) sets out the requirement for a person who is obtaining or who wishes to obtain a rate reduction in respect of the supply of a bulk interconnection service, to give the ACCC written notice of a dispute with Australia Post about the terms and conditions on which the rate reduction is or would be provided to the person.

Subsection 22(2) specifies what must be included in the notice, including:

- the amount of any rate reduction Australia Post is providing or has offered, and the amount the person proposes should apply;
- if the period of the rate reduction is in dispute, the particulars of the period provided or offered by Australia Post, and the proposed period;
- any other terms and conditions on which Australia Post is providing or has offered regarding the rate reduction, and the proposed terms; and
- particulars of the person providing the notice.

Subsection 22(3) provides that the notice may be accompanied by documents relevant to the dispute; and if relevant, a request made in accordance with section 33 of the Regulations in relation to information contained in a document mentioned in that paragraph.

A notice can relate to more than one dispute between the person and Australia Post.

Section 23 - ACCC response to notice of dispute

Section 23 sets out the steps the ACCC must undertake (as soon as practicable) after receiving notice of a dispute under subsection 22(1), which includes giving written notice of the dispute to Australia Post and any other person who, in the opinion of the ACCC, may wish to become a party to the inquiry. Under section 23(a), the notice given must include, the date on which the ACCC will commence and complete an inquiry into the dispute, and the circumstances in which an inquiry is not to be undertaken and discontinued.

Section 24 - Response of Australia Post to notice by ACCC

Section 24 requires Australia Post to advise the ACCC, within 7 days of being notified of a dispute, whether Australia Post is supplying or has made an offer to supply a bulk interconnection service to the complainant on terms and conditions that are more advantageous to the complainant than the standard terms and conditions of the service. This must include the method for calculating the rate reduction and period in which it applies. If applicable, Australia Post must also provide to the ACCC details of the supply or the offer or in cases where no supply or offer to supply was made, the reasons why no such supply is provided or offer was made.

Subsection 24(2) provides that if Australia Post is required to provide the method by which any rate reduction in respect of the supply of the service is calculated, the method must show the component that is Australia Post's estimate of the average transport costs per letter avoided in relation to letters lodged with Australia Post for delivery in accordance with its terms and conditions of the relevant bulk interconnection service.

A note accompanies section 24 to remind the reader that Australia Post can claim confidentiality, under section 33, in relation to the material provided to the ACCC.

Section 25 - Withdrawal of notice of dispute

Section 25 provides that a complainant can withdraw notification of a dispute by providing a written notice to the ACCC and giving a copy to Australia Post.

Section 26 - Circumstances in which inquiry not to be undertaken

Section 26 sets out the circumstances in which the ACCC will not commence an inquiry:

- withdrawal of notification by the complainant under section 25 of the Regulations;
- belief of the ACCC that the dispute is trivial, misconceived or lacking in substance, or that it arose from negotiations between the complainant and Australia Post which were not conducted in good faith; or
- failure of the complainant to provide sufficient information to the ACCC within 7 days of being asked to do so.

Subregulation 26(2) provides that if the ACCC decides not to proceed with an inquiry, it must advise the Minister and all parties to the dispute its reasons.

The enabling legislation does not provide authority for merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act) for this type of administrative decision. Furthermore, a decision made by the ACCC under this section to not commence an inquiry is not considered appropriate for independent merits review because it is an 'automatic or mandatory' type of decision, namely a decision where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances. In that case, there is nothing on which a merits review can operate. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 3.8 to 3.12 of the guide, *What decisions should be subject to merit review?*). Judicial review of the ACCC's decision may be available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.

It would remain open to the aggrieved person who made the complaint to initiate a new notice of dispute under section 22.

Section 27 - Commencement and duration of inquiry

Subsection 27(1) provides that the ACCC must commence an inquiry within 21 calendar days of notification of the dispute by the complainant, and give written notice to the Minister of the commencement of the inquiry. This delay commencement timeframe allows a "cooling-off" period before the commencement of the inquiry, during which the complainant and Australia Post may resolve the dispute.

An inquiry must be completed within 60 days of it beginning (subsection 27(2)), unless the ACCC extends the period of the inquiry pursuant to subsection 27(3) or (5), which respectively allow:

- an extension of up to a maximum of 30 days if both parties give their written consent to the extension and the Minister is advised by the ACCC and provided with reasons for the extension; or
- an extension equal to the number of days it takes a party to the dispute to provide additional information to the ACCC if required to do so. This may be in addition to the initial 30 day period or in addition to the extended period of 30 days.

Division 3—Conduct of inquiries

Section 28 - Powers of ACCC

Section 28 provides that, in respect of the inquiry, the ACCC may:

- extend the time in which information must be given to, or a document produced for, the ACCC;
- permit a person to amend or withdraw information given to the ACCC for the purposes of the inquiry;
- adjourn an inquiry to any time or place;
- decide to limit the duration of the time in which persons may, give evidence or make a submission;
- decide who may be present at an inquiry; and
- decide whether a conference may be conducted wholly or partly in person or by telephone, closed circuit television or another means of communication.

So that inquiries are efficient and fair, subsection 28(2) requires the ACCC to exercise its powers in a manner that enables the ACCC to complete an inquiry within the time prescribed by section 27; and that is fair and efficient.

Subsection 28(3) provides that that in conducting an inquiry, the ACCC is not bound by technicalities, legal forms or the rules of evidence.

Section 29 - Joint inquiries

Subsection 29(1) provides that the ACCC can, with the parties' consent, join inquiries involving the same parties and covering disputes about sufficiently similar issues. If the ACCC does conduct a joint inquiry, it must make separate recommendations in relation to each dispute (subsection 29(3)).

Subsection 29(2) provides that in the case of a proposed joint inquiry, complainants that are bodies corporate that, under section 50 of the *Corporations Act 2001*, are related to each other are taken to be the same person.

Section 30 - Use of information obtained under Part VIIA of *Competition and Consumer Act 2010*

This section permits the ACCC to use any information that was obtained by it under Part VIIA of the *Competition and Consumer Act 2010* (CCA) if it thinks that information may be relevant to an inquiry. The note accompanying section 30 reminds the reader that further information about limitations on disclosure of the Part VIIA information are set out in section 95ZN of the CCA. Section 95ZN requires the ACCC to be satisfied, among other things, that that a claim of non-disclosure of confidential information is justified and not necessary in the public interest, and must take all reasonable steps that the information is not disclosed without the consent of the person, except to a Commissioner or a person presiding over or assisting the inquiry.

Section 31 - Power to obtain information and documents

This section relates to powers of the ACCC to require Australia Post or another party to produce documents or information, and provides that Australia Post commits an offence if they fail to do so.

Subsection 31(1) empowers the ACCC to require, by written notice to Australia Post, the provision of any information or documents that the ACCC considers Australia Post may be able to provide relevant to the inquiry. The ACCC can require in the notice that the information or document be provided at a place and within a specified period or on a date.

Subsection 31(2) requires Australia Post to provide the information or produce the document (or a copy of it) as specified in the notice and at the place and within the period, or on the date and at the time, specified in the notice.

A failure by Australia Post to comply with the notice permits the ACCC to draw an inference that is adverse to Australia Post (subsection 31(3)).

Any failure by Australia Post to comply with a section 31 notice, when it is capable of providing the information or producing the document in accordance with the notice; is an offence, attracting 10 penalty units. Paragraph 102(h) of the Act permits regulations to prescribe fines not exceeding \$1,000 for offences against the regulations. By operation of paragraph 4AB(1)(a) of the *Crimes Act 1914*, 10 penalty units is the equivalent number of penalty units for this monetary amount.

Nothing in this offence provision abrogates the common law privilege against self-incrimination (the privilege that entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person or expose them to penalty). The Regulations are drafted consistently with this position. In addition to the privilege continuing to apply, the general defences in Part 2.3 of the Criminal Code would also be available to Australia Post and its employees.

There are three notes accompanying section 31(4), referencing relevant provisions in the Criminal Code and *Crimes Act 1914*.

Subsection 31(5) mirrors subsection 31(1) but applies to a party to the dispute other than Australia Post. However, there is no consequence for a failure of a party who fails to comply with a section 31(5) notice. The person to whom the request is made can refuse to give information and not produce documents if doing so would tend to incriminate that person or expose them to penalty or if legal professional privilege applies to the requested information.

There are four notes accompanying subsection 31(5). The first draws attention to section 31, which allows a person supplying confidential commercial information under section 23 to make a request under section 33. The second explains that this section is in addition to more specific provisions in Part 3 under which a person may be requested or required to provide particular information or produce particular documents (for example, subsection 22(3) and section 24). The third note reminds readers that subsection 27(5) deals with the effect of delay in supplying information or a document on the time limit for an inquiry. The fourth reminds readers that giving false or misleading information, or producing a document that is false or misleading, in response to a notice under subsection 31(1) or (5) may be an offence under section 137.1 or 137.2 of the Criminal Code.

Section 32 - Documents produced to ACCC

Section 32 permits the ACCC to retain and make copies or take extracts from any documents provided to it and to keep any documents which are provided to it for as long as is necessary for the purposes of the inquiry.

Section 33 - Confidential commercial information

Section 33(1) provides that if either party to the dispute believes that a document provided to the ACCC contains confidential commercial information, the party may request the ACCC to withhold the material from the other party. After considering the request and the views of the other party, the ACCC can decide to withhold so much of the document as contains the confidential information (subsections 33(2) – (4)).

The note accompanying section 33(4) reminds that a decision by the ACCC may be a document discoverable under the *Freedom of Information Act 1982*. This means that the recipient party not granted access to the confidential information could seek access to the documents in question via Freedom of Information processes, which are subject to review.

Subsection 34 - Compromise of relevant disputes

Subsection 34(1) provides that if a complainant accepts an offer from Australia Post relating to the dispute at any time during the inquiry process, it must notify the ACCC in writing.

Subsection 34(2) makes clear that a reference in subsection 34(1) to an offer by Australia Post is taken to include a reference to a determination of standard terms and conditions of a bulk interconnection service.

Section 35 - Discontinuation of inquiry

Subsection 35(1) requires the ACCC to terminate an inquiry if:

- the complainant has withdrawn notification of the dispute under section 25 or the ACCC receives a notice from the complainant under subsection 34(1) and is satisfied that the rate reduction offer from Australia Post is fair and reasonable;
- it considers, after commencing the inquiry, that the dispute is trivial, misconceived or lacking in substance, or the dispute arises from negotiations between the complainant and Australia Post that were not conducted by the complainant in good faith; or
- if the complainant has failed to provide information requested by the ACCC to enable it to determine if the trivial or good faith grounds does not apply, within the time allowed.

If the ACCC decides to terminate an inquiry it must notify the Minister and the parties to the dispute and provide reasons for its decision (subsection 35(2)).

Division 4—Conferences

Section 36 - Purpose of conferences

To expedite the progress of an inquiry or to better inform itself, the ACCC can hold conferences, under section 36. Conferences can only occur before the ACCC provides its final report to the Minister.

Section 37 - Conduct of conferences

Subsection 37(1) provides that if the ACCC decides to hold a conference, then it must determine the date, time and place and may require the attendance of the parties, a member of the staff of the ACCC or any other person and give notice to such persons (including of the date, time and place of the conference).

In keeping with the objective that the process is economic and efficient, section 37 requires that individuals must attend in person and corporations must be represented by a director, officer or employee of the corporation.

Section 38 - Conferences to be in private

Section 38 requires conferences to be held in private unless the parties agree that conference or part of a conference may be held in public.

Division 5—ACCC reports and recommendations

Section 39 – Report on inquiry

Section 39 requires the ACCC to provide a report of an inquiry to the Minister within the time prescribed for the inquiry, unless the ACCC has discontinued the inquiry.

The Report must recommend:

- in the case of a dispute about a rate reduction—the amount of the rate reduction that should be provided in respect of the supply of the bulk interconnection;
- in the case of a dispute about the period which the service will be supplied—the period for which the rate reduction should apply; and
- in the case of a dispute about the terms and conditions for the reduction reduction—the other terms and conditions on which the rate reduction should apply.

The ACCC's Report must give the reasons for the recommendation (subsection 39(2)(b)).

In making a recommendation, the ACCC is required to have regard to the matters set out in subsection 39(3), which are as follows:

- all of the circumstances of the dispute that are known to the ACCC;
- information provided to the ACCC in the inquiry;
- the obligations of Australia Post under sections 26 (Australia Post's commercial obligations), 27 (community service obligations) and 28 (general governmental obligations) of the Act;
- Australia Post's estimate of the average transport costs avoided by Australia Post in respect of letters, lodged for delivery under the service; and
- any other relevant matter.

Decision making by the ACCC is dealt with in section 18 of the CCA. The ACCC's Report will normally represent the majority opinion of the members of the ACCC. However, if a member of the ACCC does not agree to a recommendation made in a report, the Report must set out the recommendation that member would have made instead (subsection 39(4)).

The ACCC report is preliminary to the Minister's decision under section 31, and does not directly affect the interests of those to whom it relates. On this basis, the making of the report by the ACCC is not an action that is appropriate for merits review.

Division 6—Consideration of reports and recommendations by the Minister

Section 40 – Minister may give direction to Australia Post

Subsection 40(1) provides that the Minister can direct Australia Post in writing to comply with the ACCC recommendation. This applies despite section 49 of the Act, which gives the

Minister powers to direct the Australia Post Board in relation to the performance of its functions. The Minister must consult with the Board of Australia Post before giving a direction (subsection 40(2)) and under subsection 40(3) the direction cannot be inconsistent with subsection 32A(2) of the Act (terms and conditions—bulk interconnection services).

A direction under this section is not a legislative instrument and is not subject to disallowance: see paragraph (b) of item 3 of the table in section 6 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The enabling legislation does not provide sufficient authority for merits review under the AAT Act for this decision to give or not give a direction under section 40. Furthermore, a decision made by the Minister to give Australia Post a direction under this section is not considered appropriate for independent merits review because it is ultimately a decision of a “preliminary or procedural decision” in that it leads to, the making of a substantive decision by the Board of Australia Post.

The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of a preliminary or procedural character (see paragraphs 4.3 to 4.7 of the guide, *What decisions should be subject to merit review?*). Judicial review of the Minister’s decision may also be available under section 39B of the *Judiciary Act 1903* and subsection 75(v) of the Constitution.

Section 41 – Factors to be taken into account by Minister

In deciding whether to give a direction under section 40, section 41 requires the Minister to take into account the following matters:

- the reasons given by the ACCC for making the recommendation;
- Australia Post's obligations under the Act (generally, these are its commercial, social and governmental obligations set out in sections 26, 27 and 28);
- the response (if any) of the Board to the consultation mentioned in subsection 40(2); and
- and any other matter the Minister considers relevant.

Section 42 – Notice to Australia Post of direction

Subsection 42(1) requires the Minister to notify any direction to Australia Post within 28 days of receiving the relevant report from the ACCC and subsection 42(2) requires Australia Post to act in accordance with the direction.

Section 43 – Notice to parties and ACCC of decision of Minister

Subsection 43(1) requires the Minister to notify the complainant and the ACCC of their decision.

If the Minister decides to give a direction to Australia Post, they must notify the complainant and the ACCC at the time of giving the direction (subsection 43(2)(a)) and provide a copy of the direction and reasons for accepting the ACCC recommendation (subsection 43(3)(a)).

If the Minister does not accept the ACCC recommendation and does not give a direction to Australia Post, they must notify the complainant and the ACCC as soon as practicable after receiving the ACCC report (subsection 43(2)(b)) and provide reasons for not accepting the recommendation (subsection 43(3)(b)).

In developing the remade Regulations it was identified that the Act, that is the enabling legislation upon which the Regulations rely upon, does not lawfully extend to actions conferring review rights in relation to the Minister's actions after receipt of the ACCC's recommendations. Any decision by the Minister not to direct the ACCC would not be a decision under an enactment and therefore is incapable of merits review.

Part 4—Application, saving and transitional provisions

Division 1—Provisions for this instrument as originally made

This Division sets out several transitional provisions and accompanying definitions arising from the repeal of the *Australian Postal Corporation Regulations 1996* and the commencement of the replacement Regulations. These are required because there are textual differences between some aspects of Part 2 in the old and new regulations.

Although the differences between the old and new regulations are minimal, in practice the aim of the provisions is to avoid a situation where the repeal of the old regulations results in there being no law that applies to some records.

Section 44 - Definitions

Section 44 provides for two key terms used in the Division, 'commencement time' being the time when the section commence, that is the day after the instrument is registered on the Federal Register of Legislation, and 'old regulations' (being the *Australian Postal Corporation Regulations 1996*).

Section 45 - Things done under the old regulations

Section 45 provides for a general application provision relating to things done under the old regulations. This section ensures that decisions made under the old regulations continue to have effect.

Subsection 45(1) provides that, if a thing that was done for a particular purpose under the old regulations as in force immediately before those regulations were repealed, and the thing could be done for that purpose under the new Regulations, the thing has effect as if it had been done for that particular purpose under that instrument.

Subsection 45(2) of the Regulations clarifies that a reference to a thing being done includes a reference to a notice, approval or other instrument being given or made.

Section 45 only validates decisions made for a particular purpose under the old regulations, and does not retrospectively validate decisions made outside the limits of the old regulations or not made in accordance with a particular purpose contained in the old regulations.

Section 46 - Conduct, event or circumstance occurring before commencement time

Section 46 is an avoidance of doubt application provision relating to conduct, events and circumstances occurring before the commencement of the Regulations. It ensures that the powers, functions or duties under the Regulations can be performed or exercised in relation to past events.

Subsection 46(1) states that, to avoid doubt, a function or duty may be performed, or a power exercised, under this instrument in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before this section commences.

Subsection 46(2) provides that this section does not limit Division 1 of Part 4 of Regulations or section 7 of the *Acts Interpretation Act 1901* (as that Act applies in relation to this instrument because of paragraph 13(1)(a) of the *Legislation Act 2003*).

Section 47 - Records relating to articles that may contain drugs etc.

Section 47(1) provides for a general application provision relating to the records requirements under the Regulations for any article that is opened under section 90T of the Act after the commencement time. Section 7 is to apply in those circumstances.

In the case of any article that is opened under section 90T of the Act before the commencement time, the application rule under subsection 47(2) applies, which provides that regulations 3A, 3B and 3C of the old regulations continue to apply as if the repeal had not happened. This is necessary as the old regulations incorrectly referred to a Department which is not a legal entity.

The intention of section 47 is that any change to what the particulars of the record must contain only applies when setting out particulars in relation to articles opened after the commencement time.

Subsection 47(3) provides that in relation to any record established for the purposes of subsection 90T(8) of the Act, whether the record is established before or after the commencement time, sections 8, 9 and 10 of the new Regulations apply after the commencement time.

The intention of the application rules in subsection 47(3) is that:

- all records (whether created before or after the commencement time) must be held at the places specified in the new regulations;
- all records (whether created before or after the commencement time) must be kept in the way specified in the new regulations; and
- information in records created before or after the commencement time can be used for the purposes specified in the new regulations.

Section 48 - Records relating to articles that may contain quarantine material

Subsection 48(1) sets out an application rule which, in effect, provides that the person or body responsible for records will be that person specified in section 12 of the Regulations in relation to any article mentioned in subsection 90U(9) of the Act, whether opened under section 90U of the Act before or after the commencement time. The intention of the rule is that existing records and new records be kept by the persons specified in the new regulations.

Subsection 48(2) sets out an application rule which, in effect, provides that the record particulars set out in section 13 in relation to any article mentioned in subsection 90U(9) of the Act, apply regardless of whether opened under section 90U of the Act before or after the commencement time.

In the case of any article that is opened under section 90U of the Act before the commencement time, the application rule under subsection 48(3) applies, which provides that regulations 3G, 3H and 3I of the old regulations continue to apply in relation to as if the repeal had not happened. This is necessary as the old regulations incorrectly referred to a Department which is not a legal entity.

Subsection 48(4) provides that sections 14, 15 and 16 (relating to the place, manner and use of records) apply after the commencement time in relation to any record established for the purposes of subsection 90U(9) of the Act, whether the record is established before or after the commencement time.

Section 49 - Forfeiture and disposal of articles

In recognition that there may be a forfeiture of an article carried by post that is opened under Division 3 of Part 7B of the Act before the commencement time, subsection 49(a) provides that despite the repeal of the old regulations, regulation 5 of the old regulations would continue to apply, as if the repeal had not happened. This means that, if an article is opened before the commencement time, the old forfeiture regime continues to apply until the end of the process.

Section 50 - Prohibition on use or disclosure by current and former employees

This section sets out an application rule in relation to any disclosure of information or a document by a person after the commencement time, whether the person acquired or received the information or document before or after the commencement time. In such cases new section 18 applies in relation to the disclosure of such documents.

Schedule 1 – Repeals

Schedule 1 (in combination with section 4) repeals the whole of the *Australian Postal Corporation Regulations 1996*. The Regulations replace those sunseting regulations.