

# EXPOSURE DRAFT



EXPOSURE DRAFT (15/10/2018)

## Telecommunications (Arbitration) Regulations 2018

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I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2018

Peter Cosgrove  
Governor-General

By His Excellency's Command

Mitch Fifield [**DRAFT ONLY—NOT FOR SIGNATURE**]  
Minister for Communications and the Arts

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Preliminary **Part 1**

Section 1

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## Part 1—Preliminary

### 1 Name

This instrument is the *Telecommunications (Arbitration) Regulations 2018*.

### 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

### 3 Authority

This instrument is made under the following:

- (a) the *Telecommunications Act 1997*;
- (b) the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

### 4 Schedule 2

Each instrument that is specified in Schedule 2 to this instrument is amended or repealed as set out in the applicable items in that Schedule, and any other item in that Schedule has effect according to its terms.

### 5 Definitions

In this instrument:

**arbitration** means arbitration of a dispute by the ACCC under:

- (a) section 335, 351, 372M or 462 of the *Telecommunications Act*; or

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## Part 1 Preliminary

### Section 5

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- (b) clause 18, 27, 29, 36 or 46 of Schedule 1 to the Telecommunications Act;  
or
- (c) clause 5 or 8 of Schedule 2 to the Telecommunications Act; or
- (d) section 149 or 151 of the Consumer Protection Act.

**Consumer Protection Act** means the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

**determination** means a determination of a dispute.

**dispute** means a dispute notified under subsection 6(1).

**member**, in relation to the ACCC, includes an associate member of the ACCC.

**party** means a person who, under section 8, is a party to an arbitration.

**service** means:

- (a) access to a service that is required to be provided under:
  - (i) clause 4 or 7 of Schedule 2 to the Telecommunications Act; or
  - (ii) section 149 of the Consumer Protection Act; or
- (b) access to a carriage service, facility or network that is required to be provided under:
  - (i) section 372L of the Telecommunications Act; or
  - (ii) clause 17, 33, 34, 35 or 46 of Schedule 1 to the Telecommunications Act; or
  - (iii) section 151 of the Consumer Protection Act; or
- (c) a service that is required to be provided under section 335 or 351 of the Telecommunications Act; or
- (d) compliance with the numbering plan that is required under section 462 of the Telecommunications Act; or
- (e) access to information that is required to be provided under clause 21, 22, 23, 24 or 25 of Schedule 1 to the Telecommunications Act; or
- (f) consultation that is required under clause 29 of Schedule 1 to the Telecommunications Act.

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

**service seeker** means a person:

- (a) seeking to make or vary an agreement about provision of a service to the person; or
- (b) whose service provider has changed, or proposes to change, the terms and conditions on which a service is provided by the service provider to the person.

**Telecommunications Act** means the *Telecommunications Act 1997*.

## Part 2—Notification of disputes

### 6 Notification of disputes

- (1) A service seeker or service provider may notify the ACCC in writing that a dispute exists if the service seeker and the service provider are unable to agree about the terms and conditions on which a service is, or is to be, provided.
- (2) The following are examples of things on which a service seeker and service provider might disagree:
  - (a) the price, or the method of establishing the price, at which a service is provided;
  - (b) whether a previous determination should be varied.
- (3) Notification of a dispute about a service must include the following information:
  - (a) the name of the person notifying the dispute (the *notifier*) and, if the notifier is not an individual, the name and address of an individual who represents the notifier;
  - (b) the notifier's address for the delivery of documents in relation to the notification;
  - (c) whether the notifier is the service seeker or service provider and:
    - (i) if the notifier is the service seeker—the name and address of the service provider; or
    - (ii) if the notifier is the service provider—the name and address of the service seeker;
  - (d) the provision of the Telecommunications Act or the Consumer Protection Act that requires the service;
  - (e) 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; and
    - (ii) each aspect of the service on which the service seeker and service provider are able to agree; and
    - (iii) each aspect of the service on which the service seeker and service provider are unable to agree;
  - (f) a description of any effort that has been made to resolve the dispute.
- (4) When it receives notification of a dispute about a service, the ACCC must give written notice of the dispute as follows:
  - (a) if the service seeker notified the dispute—to the service provider;
  - (b) if the service provider notified the dispute—to the service seeker;
  - (c) if the ACCC considers that the determination of the dispute may require another person to do something—to the other person;
  - (d) to any other person whom the ACCC considers may wish to become a party.

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## Part 2 Notification of disputes

### Section 7

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#### 7 Withdrawal of notifications

- (1) Notification of a dispute may only be withdrawn:
  - (a) by the person who notified the dispute; and
  - (b) before the ACCC makes a determination.
- (2) Withdrawal of a notification of a dispute must:
  - (a) be given in writing to the ACCC; and
  - (b) include the following information:
    - (i) the name of the person withdrawing the notification;
    - (ii) whether the person withdrawing the notification is the service seeker or service provider;
    - (iii) a short description of the dispute.
- (3) A person who withdraws a notification of a dispute must give a copy of the withdrawal to:
  - (a) if the person is the service seeker—the service provider; or
  - (b) if the person is the service provider—the service seeker.
- (4) Withdrawal of a notification of a dispute takes effect when the withdrawal is received by the ACCC.
- (5) 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**

### **8 Parties to arbitration**

The parties to an arbitration are:

- (a) the service seeker; and
- (b) the service provider; and
- (c) if the ACCC considers that the determination of the dispute may require another person to do something—the other person; and
- (d) any other person who applies in writing to be made a party and is accepted by the ACCC as having a sufficient interest.

### **9 Determination by ACCC**

- (1) Unless notification of the dispute is withdrawn under section 7, or the ACCC terminates the arbitration under section 11, the ACCC must make a written determination.
- (2) Before making a determination, the ACCC must give a draft of the determination to each party.
- (3) When the ACCC makes a determination it must:
  - (a) give a copy of the determination to each party; and
  - (b) include the reasons for the determination.

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

- (1) The ACCC must take the following matters into account in making a determination:
  - (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;
  - (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.
- (2) For the purposes of paragraph (1)(f), whether a determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services is to be determined in the same way as the question is

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## Part 3 Arbitration of disputes

### Section 11

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determined for the purposes of Part XIC of the *Competition and Consumer Act 2010*.

Note: See section 152AB of the *Competition and Consumer Act 2010*.

- (3) The ACCC may take into account any other matters that it considers relevant.

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

- (1) The ACCC may terminate an arbitration (without making a determination) if it considers that:
  - (a) the notification of the dispute was vexatious; or
  - (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
  - (c) a party has not engaged in negotiations in relation to the dispute in good faith; or
  - (d) 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.
- (2) In addition, if the dispute is about varying an existing determination, the ACCC may terminate the arbitration if it considers that there is no sufficient reason why the existing determination should not continue to have effect.

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

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

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

- (1) For the purposes of an arbitration, the ACCC may be constituted by a member, or 3 members, of the ACCC nominated in writing by the Chairperson of the ACCC.
- (2) 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.
- (3) If subsection (2) does not apply, the Chairperson must nominate a member of the ACCC to preside at the arbitration.

#### **13 Determination of questions**

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.

#### **14 Conduct of arbitration**

- (1) The ACCC may conduct an arbitration:
  - (a) on the papers; or
  - (b) by holding an arbitration hearing; or
  - (c) in part on the papers and in part by holding an arbitration hearing.

Note: See section 22 for when the ACCC may conduct a joint arbitration.
- (2) In conducting an arbitration, the ACCC:
  - (a) is not bound by technicalities, legal forms or rules of evidence; and
  - (b) 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; and
  - (c) may inform itself of any matter relevant to the dispute in any way it considers appropriate.
- (3) The ACCC may determine the periods 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.

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## Part 4 Procedure in arbitrations

### Division 2 Powers of ACCC in conducting arbitration

#### Section 15

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

#### 15 Power to refer matters and give directions

The ACCC may do any of the following things for the purposes of an arbitration:

- (a) refer any matter to an expert and accept the expert's report as evidence;
- (b) direct a party to conduct research or investigations to obtain relevant information;
- (c) direct a person who is, or was, a party to give relevant information to one or more other parties;
- (d) 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;
- (e) give any other such direction, and do any such thing, as is necessary or expedient to make a determination.

Note: A person may commit an offence if the person does an act, or omits to do an act, that contravenes a direction under any of paragraphs (b) to (e) (see section 25).

#### 16 Power to require person to give information or produce documents

- (1) The ACCC may give a notice to a person under subsection (2) if the ACCC has reason to believe that the person has information, or a document, relevant to an arbitration.
- (2) The ACCC may, by written notice given to the person, require the person:
  - (a) to give any such information to the ACCC; or
  - (b) to produce any such document to the ACCC;for the purposes of the arbitration.
- (3) The notice must:
  - (a) specify the period (which must be at least 14 days after the notice is given to the person) within which the person is required to comply with the notice; and
  - (b) specify the manner in which the person is required to comply with the notice; and
  - (c) state the effect of section 26 (offence for failure to comply with a notice).

Note: A person may commit an offence if the person fails to comply with a notice (see section 26).

#### 17 Power to summon person to give evidence and produce documents

- (1) The member of the ACCC who is presiding at an arbitration may, for the purposes of the arbitration, summon a person to:
  - (a) attend before the ACCC to give evidence; and
  - (b) produce such documents (if any) as are referred to in the summons.

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Procedure in arbitrations **Part 4**  
Powers of ACCC in conducting arbitration **Division 2**

Section 17

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- (2) A summons must be in the form set out in Schedule 1.
- (3) A summons must be served on a person by:
  - (a) delivering a copy of the summons to the person personally; and
  - (b) showing the original of the summons to the person when the copy is delivered to the person.

Note: A person may commit an offence if the person fails to comply with a summons (see section 27).

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**Part 4** Procedure in arbitrations

**Division 3** Arbitration hearings

Section 18

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## **Division 3—Arbitration hearings**

### **18 Conduct of arbitration hearings**

- (1) The ACCC may do any of the following things for the purposes of an arbitration hearing:
  - (a) require evidence or argument to be presented in writing;
  - (b) decide the matters on which it will hear oral evidence or argument;
  - (c) hear and determine the dispute in the absence of a person who has been summoned to attend before the ACCC;
  - (d) sit at any place;
  - (e) adjourn to any time and place.
- (2) The ACCC may determine that an arbitration hearing is to be conducted by:
  - (a) telephone; or
  - (b) closed-circuit television; or
  - (c) any other means of communication.

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

- (1) Subject to subsection (2), an arbitration hearing is to be conducted in private.
- (2) If the parties agree, an arbitration hearing, or part of an arbitration hearing, may be conducted in public.
- (3) The member of the ACCC who is presiding at an arbitration hearing conducted in private may give written directions about the persons who may be present at the hearing.
- (4) In giving directions under subsection (3), the member presiding must have regard to the wishes of the parties and the need for commercial confidentiality.

### **20 Right to representation**

A party may appear in person at an arbitration hearing, or be represented by someone else.

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

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.

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## Division 4—Joint arbitration of disputes

### 22 When joint arbitration may be conducted

- (1) If:
  - (a) the ACCC is arbitrating 2 or more disputes at a particular time; and
  - (b) one or more matters are common to those disputes;the Chairperson of the ACCC may, by notice in writing, decide that the ACCC must conduct a joint arbitration of such of those disputes (the *nominated disputes*) as are specified in the notice.
- (2) The Chairperson may decide that the ACCC must conduct a joint arbitration of the nominated disputes only if the Chairperson considers this would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.
- (3) Before deciding that the ACCC must conduct a joint arbitration of the nominated disputes, the Chairperson must give each party to the arbitration of each nominated dispute a notice in writing:
  - (a) specifying what the Chairperson is proposing to do; and
  - (b) inviting the party to make a written submission on the proposal to the Chairperson within 14 days after the notice is given.
- (4) The Chairperson must have regard to any submission so made in deciding whether the ACCC must conduct a joint arbitration of the nominated disputes. The Chairperson may have regard to any other matter the Chairperson considers relevant.

### 23 Procedure in joint arbitration

- (1) Sections 12 to 21 and 25 to 31 apply to a joint arbitration in a corresponding way to the way in which they apply to a particular arbitration.
- (2) 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.
- (3) The ACCC as constituted for the purposes of a joint arbitration of 2 or more disputes may have regard to any record of the proceedings of the arbitration of any of those disputes.

### 24 Determination of disputes

- (1) The ACCC as constituted for the purposes of the joint arbitration of 2 or more disputes may make a single determination that covers all of the disputes.

# EXPOSURE DRAFT

**Part 4** Procedure in arbitrations

**Division 4** Joint arbitration of disputes

## Section 24

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- (2) If the ACCC does not make a single determination that covers all of the disputes, the ACCC as constituted for the purposes of the arbitration of each dispute may, for the purposes of making a determination of the dispute:
- (a) have regard to any record of the proceedings of the joint arbitration; and
  - (b) adopt any findings of fact made by the ACCC as constituted for the purposes of the joint arbitration.

Note: See also sections 9 and 10 in relation to the making of determinations.

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## **Division 5—Offences**

### **25 Contravention of a direction**

A person commits an offence if:

- (a) the person is given a direction under any of paragraphs 15(b) to (e); and
- (b) the person does an act or omits to do an act; and
- (c) the act or omission contravenes the direction.

Penalty: 10 penalty units.

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

A person commits an offence of strict liability if:

- (a) the person is given a notice under section 16; and
- (b) the person fails to comply with the notice.

Penalty: 10 penalty units.

### **27 Offences by witnesses**

#### *Failure to appear*

(1) A person commits an offence of strict liability if:

- (a) the person is served with a summons under section 17 to attend before the ACCC to give evidence; and
- (b) the person has not been excused, or released from further attendance, by a member of the ACCC; and
- (c) the person fails to attend as required by the summons.

Penalty: 10 penalty units.

#### *Failure to answer questions etc.*

(2) A person commits an offence of strict liability if:

- (a) the person is served with a summons under section 17 to attend before the ACCC to give evidence; and
- (b) either:
  - (i) the person fails to be sworn or to make an affirmation; or
  - (ii) the person fails to answer a question that the person is required to answer by the ACCC.

Penalty: 10 penalty units.

#### *Failure to produce document*

(3) A person commits an offence of strict liability if:

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## Part 4 Procedure in arbitrations

### Division 5 Offences

#### Section 28

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- (a) the person is served with a summons under section 17 to produce a document; and
- (b) the person fails to produce the document as required by the summons.

Penalty: 10 penalty units.

#### **28 Intimidation etc.**

- (1) A person (the *first person*) commits an offence if:
  - (a) the first person engages in conduct that:
    - (i) threatens, intimidates or coerces another person; or
    - (ii) causes damage, disadvantage or loss to another person; and
  - (b) the first person does so because the other person:
    - (i) has attended, or proposes to attend, before the ACCC to give evidence at an arbitration hearing; or
    - (ii) has produced, or proposes to produce, a document to the ACCC.

Penalty: 10 penalty units.

- (2) Strict liability applies to the physical element in paragraph (1)(b) that the other person:
  - (a) has attended, or proposes to attend, before the ACCC to give evidence at an arbitration hearing; or
  - (b) has produced, or proposes to produce, a document to the ACCC.

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

A person commits an offence if the person:

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

Penalty: 10 penalty units.

# EXPOSURE DRAFT

## **Division 6—Miscellaneous**

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

- (1) A party may:
  - (a) inform the ACCC that, in the opinion of the party, a stated part of a document contains confidential commercial information; and
  - (b) request the ACCC not to give a copy of that part of the document to another party.
- (2) On receiving the request, the ACCC must:
  - (a) 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; and
  - (b) ask the other party whether it objects to the ACCC complying with the request.
- (3) 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.
- (4) The ACCC may decide not to give to the other party a copy of so much of the document as contains confidential commercial information that the ACCC considers should not be given after considering:
  - (a) the request; and
  - (b) any objection; and
  - (c) any further submissions that any party has made in relation to the request.

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

The ACCC may:

- (a) charge the persons who are, or were, parties to an arbitration for the ACCC's costs in conducting the arbitration; and
- (b) apportion the amount of the charge between those persons.

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

**Division 6** Miscellaneous

Section 32

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

### **32 Definitions**

In this Part:

*commencement* means the day this instrument commences.

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

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

Despite the repeal of the old law by Schedule 2 to this instrument, the old law continues to apply in relation to a dispute if, immediately before commencement:

- (a) notification of the dispute had been given to the ACCC; and
- (b) a withdrawal of the notification of the dispute had not been received by the ACCC; and
- (c) the arbitration of the dispute had not been terminated by the ACCC; and
- (d) a determination of the dispute had not been made.

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Form of summons **Schedule 1**  
Application, savings and transitional provisions **Part 5**  
Miscellaneous **Division 6**

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## Schedule 1—Form of summons

Note: See subsection 17(2).

Commonwealth of Australia

*Telecommunications Act 1997*

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

### Summons

[*Title of matter*]

To: [*name and address of witness*]

1. You are summoned to attend before the Australian Competition and Consumer Commission, [*insert address*], for an arbitration hearing in this matter on [*insert date*] at [*insert time*] and then from day to day until the hearing is completed or until you are released from further attendance.
2. You are required to attend before the Commission to give evidence at the hearing.
- \*3. You are required to bring with you and produce the following documents: [*set out the documents required*]

Date:

Presiding Member  
Australian Competition and Consumer Commission

*\*omit, if inapplicable*

# EXPOSURE DRAFT

Schedule 2 Repeals

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## Schedule 2—Repeals

### *Telecommunications (Arbitration) Regulations 1997*

#### **1 The whole of the instrument**

Repeal the instrument.