

# EXPLANATORY STATEMENT

## *Competition and Consumer Act 2010*

### ***Guidelines relating to deferral of arbitrations and backdating of determinations under Part IIIA of the Competition and Consumer Act 2010***

Under Part IIIA of the *Competition and Consumer Act 2010* (the Act), the Australian Competition and Consumer Commission (ACCC) must, among other tasks, arbitrate access disputes for declared services and assess access undertakings and access codes.

#### **Authority**

The *Trade Practices Amendment (National Access Regime) Act 2006* amended Part IIIA of the *Trade Practices Act 2006* (TPA) by, among other things, providing the ACCC with mechanisms to:

- defer arbitration of an access dispute where it is also considering an access undertaking on related issues (section 44ZZCB)
- backdate a final determination and apply payment of interest (section 44ZO).

These amendments took effect on 1 October 2006.

The amendments also required the ACCC to, by legislative instrument, determine guidelines within six months of commencement of the legislation and to have regard to these guidelines when making decisions under Part IIIA (subsections 44ZZCB (5)(6)(7), 44ZO(7)(8)(9)).

On 1 January 2011 the TPA was replaced by the Act. The obligations on the ACCC to determine and have regard to these guidelines carried over in the transition and remain in force.

#### **Purpose and operation of the Instrument**

On 21 December 2006 the ACCC released the first set of guidelines. These first set of guidelines are scheduled to sunset on 1 October 2017.

The ACCC's obligation to maintain, by legislative instrument, and have regard to these guidelines remains in the Act. Accordingly, the ACCC has remade the guidelines to extend their operation beyond 30 October 2017.

The purpose of the guidelines is to explain how the ACCC may apply the provisions on deferral of arbitrations and backdating of final determinations and application of the payment of interest.

A description of each provision in the Instrument is set out in the notes at **Attachment A**.

#### **Consultation**

On 26 May 2017, the ACCC publicly released a draft version of the remade guidelines and published a notice on its website inviting public comments. No submissions were received in response.

## **Regulatory impact assessment**

The Office of Best Practice Regulation has advised that a Regulation Impact Statement was not required (reference OBPR ID: 22537).

## **Statement of compatibility with human rights**

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the Legislation Act applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. The statement of compatibility set out below has been prepared to meet that requirement.

### *Overview of the Instrument*

The purpose of these guidelines is to assist interested parties by setting out how the ACCC might apply the deferral and backdating provisions in the context of an arbitration under Part IIIA.

The Instrument fulfils the ACCC's legislative obligation to maintain and have regard to guidelines about how it might apply the deferral and backdating provisions.

### *Human rights implications*

The Instrument has been assessed for compatibility with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

The Instrument does not engage any of those rights or freedoms.

### *Conclusion*

The Instrument is compatible with human rights as it does not raise any human rights issues.

## Attachment A

### ***Notes to the Guidelines relating to deferral of arbitrations and backdating of determinations under Part IIIA of the Competition and Consumer Act 2010***

#### **Section 1 Introduction**

This section explains the legislative background and relevant provisions of the Act.

#### **Section 2 Deferring arbitration of access disputes or consideration of access undertakings**

This section explains the ACCC's likely approach in deciding whether or not to suspend either an undertaking or arbitration process, if an undertaking is lodged after an arbitration has commenced.

It is possible that the ACCC may be required to assess an access undertaking at the same time that it is arbitrating an access dispute in relation to the same matter(s). To allow for this possibility, the ACCC, when arbitrating an access dispute now has the discretion under section 44ZZCB of the Act to decide whether or not to suspend either an undertaking or arbitration process, if an undertaking is lodged after an arbitration has commenced. The guidelines outline relevant considerations by the ACCC when deciding to defer one or more arbitrations while considering an undertaking that relates to the same matter. These include:

- effect of the undertaking—the ACCC must consider the fact that an undertaking, if accepted, will apply generally to all access seekers
- the access undertaking process may enable the ACCC to deal with issues that are common to multiple arbitrations.

The guidelines also outline the circumstances where it may be appropriate for the ACCC to continue with arbitrations, namely where:

- matters covered by the proposed undertaking have already been substantively considered in arbitrations
- the arbitrations deal with issues separate or additional to those covered in the undertaking and/or
- consideration of the undertaking is likely to involve a long time frame
- outstanding access issues are likely to be dealt with more effectively by arbitration.

The guidelines deal with other matters that the ACCC may be required to consider when conducting parallel processes, such as the use of confidential information and its approach to coordination of decision-making.

#### **Section 3 Backdating of final determinations**

This section explains the ACCC's approach to backdating a final determination and the application of payment of interest. Given that the backdating provision is intended to remove

an incentive for either party to delay the negotiate/arbitrate process, the ACCC will, in general, be inclined to backdate determinations and award interest.

The guidelines provide information as to how the ACCC may calculate the rate of interest. The rate of interest should reflect the opportunity cost of the overpayment (or the underpayment, as the case may be)—that is, the opportunities that the person making the payment has foregone by being deprived of that overpaid (or underpaid amount). Where the parties have reached agreement on an interest rate, the ACCC may have regard to this rate as evidence of the parties' estimate of the opportunity cost. Where such agreement is not reached, the ACCC may base its calculation on the rate that would have been paid to raise the amounts by means of debt financing. In this circumstance, the ACCC's generally preferred approach will be to adopt the variable indicator rate for large businesses that is published by the RBA. The ACCC may also decide to invite or direct parties to make written submissions.