

## REPLACEMENT EXPLANTORY STATEMENT

**This Explanatory Statement replaces the Explanatory Statement registered on 23 September 2019 for the *Broadcasting Services (Transmitter Access) Regulations 2019* [F2019L01248].**

*Broadcasting Services Act 1992*

*Broadcasting Services (Transmitter Access) Regulations 2019*

### Authority

The Governor-General has made the *Broadcasting Services (Transmitter Access) Regulations 2019* (the Regulations) under section 217 of the *Broadcasting Services Act 1992* (the Act), and pursuant to subclauses 45A(9) and 47(3) of Part 5 of Schedule 4 to the Act. These provisions provide that the Governor-General may make regulations prescribing matters required or permitted to be prescribed by the relevant Acts, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 217(2) of the Act provides that the Regulations may prescribe penalties, not exceeding 50 penalty units for offences by individuals against the Regulations, and not exceeding 250 penalty units for offences by companies against the Regulations.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character (including regulations), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument. The Regulations repeal the *Broadcasting Services (Transmitter Access) Regulations 2001* (sunsetting Regulations).

### Purpose and Operation

The Regulations relate to exemptions to, and the arbitration of disputes by the Australian Competition and Consumer Commission (the ACCC) in relation to, access to broadcasting transmission towers and designated associated facilities under various provisions within the Act. These provisions are:

- (a) **Clause 45A, Part 5 of Schedule 4:** this clause applies to designated associated facilities that are situated on, at, in or under a broadcasting transmission tower or the site on which a broadcasting transmission tower is situated. Subclauses (2) and (4) require the owner or operator of a designated associated facility, upon request, to grant access to a commercial television broadcasting licensee or a national broadcaster, or to grant access to a datacaster, respectively.

Subclause (9) provides for the Regulations to incorporate exemptions to subclauses (2) and (4). Part 2 of the Regulations set out exemptions to the access requirements incumbent upon owners and operators of designated associated facilities.

- (b) **Clause 47, Part 5 of Schedule 4:** this clause provides that owners and operators of broadcasting transmission towers and designated associated facilities must comply with the applicable clause of this Part 5 of Schedule 4 on such terms and conditions that are agreed between the owner or operator and the access seeker in relation to access to

broadcasting transmission towers (clause 45), designated associated facilities (clause 45A) and sites (clause 46). Failing agreement by the parties, the terms and conditions are to be determined by an arbitrator appointed by the parties.

If the parties cannot agree on the appointment of an arbitrator, the ACCC will be the arbitrator. Subclause (3) provides that the Regulations may make provision for and in relation to the conduct of an arbitration for the purposes of this clause. Part 3 of the Regulations sets out how an arbitration is to be conducted for the purposes of subclause 47(3).

Following a review of the sunseting Regulations, and after consultation with the ACCC and key industry stakeholders, the Government has determined that the aim of the Regulations to provide industry with a ‘safety net’ or arbitrator of last resort when faced with disputes about the terms and conditions for access to specified facilities and services. Industry stakeholders also note that the Regulations provide a significant degree of clarity and certainty for industry when the ACCC is conducting arbitrations. The exemptions to access to designated associated facilities provisions also gave certainty to the industry stakeholders that access would be in a fair and just manner and not overly impact the ongoing commercial operations of their business. This included ensuring that the key telecommunications objective of maintaining the integrity of telecommunications network and the key broadcasting objective of continuity of service.

While the Regulations are in place for ten years and are considered fit-for purpose, it is recognised that evolving transmission facilities and services could result in a review of the definitions of transmission and facility terms before that time.

The Regulations remake the sunseting Regulations with updates to the drafting style and five changes of note to ensure the arbitration process is streamlined and consistent and aligned with other ACCC access arbitration regimes:

- Provide for the parties in an arbitration to provide information on the dispute and any other information or evidence requested by the ACCC, and for the ACCC to make a decision on this basis (i.e. ‘on the papers’), rather than having to determine each case after a potentially lengthy and expensive hearing;
- Provide for the ACCC to conduct joint arbitrations, which could lead to faster decisions where a number of access providers and access seekers are involved in a dispute about a single issue;
- Realign the offences and penalty scheme to make some offences strict liability offences (including contravention of a direction, failure to comply with a notice to give information or produce documents relevant to an arbitration, and offences by witnesses failing to appear, answer questions or produce documents) and reduce all relevant penalties to 10 units. This aligns the offences regime with both departmental regulations and other ACCC arbitration processes, with a more streamlined procedure with reduced, consistent penalties.
- Remove ‘reasonable excuse’ defences provided to defences relating to a witness. Reasonable excuses defences in sections 152DE and 152DF of the *Competition and Consumer Act 2010* (CCA) have been repealed, and are now redundant. Nothing in any of the offence provisions under these Regulations 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 Act 1995* would also be available to persons, where applicable.

- Align and streamline the determination process including removing interim determination provisions to reflect consistency with modern ACCC arbitration processes.

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

The notes on the provisions of the Regulations are set out in Attachment A.

### Consultation

On behalf of the Minister for Communications, Cyber Safety and the Arts, the Department of Communications and the Arts (the Department) undertook a targeted consultation process on the Regulations. The Department provided the proposed Regulations and a review consultation paper to stakeholders directly impacted by the Regulations, including relevant regulatory bodies, transmission companies, peak broadcasting and telecommunications bodies (who shared these with their members) and the national broadcasters.

The Department received ten submissions and the outcome of this was that there was agreement to remake the sunseting Regulations. Minor amendments were proposed by some stakeholders to the proposed Regulations and these are reflected in the changes made. Other amendments proposed by commercial broadcasters were not recommended by the Department as they would reduce the flexibility of the ACCC and may delay resolution of arbitrations.

### Regulation Impact Statement

The Office of Best Practice Regulation considered that the remaking of this instrument without substantial changes is not likely to have more than a minor and/or machinery regulatory impact on business, community organisations and individuals. As such, a Regulation Impact Statement was not required (see OBPR reference ID: 25496).

### Statement of Compatibility with Human Rights

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

**Notes on the provisions of the Regulations**

**Part 1—Preliminary**

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

**Section 1 - Name**

This section provides for the Regulations to be cited as the *Broadcasting Services (Transmitter Access) Regulations 2019*.

**Section 2 - Commencement**

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

**Section 3 - Authority**

Section 3 provides that the Regulations are made under the authority of the *Broadcasting Services Act 1992* (the Act).

Section 217 of the Act provides the general regulation-making power.

**Section 4 - Schedule 2**

Section 4 is a machinery clause that enables Schedule 2 to the Regulations to amend or repeal an instrument that is specified in the Schedule. This enables the *Broadcasting Services (Transmitter Access) Regulations 2001* (specified in Schedule 2 to the Regulations) to be repealed.

**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.

*Access provider* is defined to mean the owner or operator of a broadcasting transmission tower or a designated associated facility.

*Access seeker* is defined to mean a person described as an access seeker in clause 45, 45A or 46 of Schedule 4 to the Act. For the purposes of those clauses of the Act an access seeker is a national broadcaster (the Australian Broadcasting Corporation or the Special Broadcasting Service), a commercial television broadcaster or a datacaster.

*Act* means the *Broadcasting Services Act 1992*.

*Determination* means a written determination made by the ACCC under subsection 9(1) of these Regulations. This is a written determination of the terms and conditions of access.

**Dispute** means a dispute notified under subsection 8(1). This is a dispute that an access seeker or access provider notifies to the ACCC in writing, arising where the access seeker and access provider are unable to agree about the terms and conditions on which access is, or is to be given to a broadcasting transmission tower, the site of a broadcasting transmission tower, or a designated associated facility.

**Telecommunications network** has the meaning given by section 7 of the *Telecommunications Act 1997*, which provides that a telecommunications network is a system, or series of systems, that carries or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy.

## **Part 2—Access to designated associated facilities**

### **Section 6 - Exemptions from obligation to give access**

Subsection 6(1) provides that the obligations on owners or operators arising from subclause 45A(9) of Schedule 4 to the Act to provide access to designated associated facilities do not apply if subsection (2) or (4) applies.

Subsection 6(2) applies where the provision of access by the owner or operator of a designated associated facility would:

- prevent one of their existing customers from obtaining a, sufficient amount of a service to meet their reasonably anticipated requirements, with those requirements to be measured at the time the request for access is made (note that the reasonably anticipated requirements may be greater or less than actual usage at the time the request is made);
- prevent a person who, at the time the request is made, has a right to access either under a contract or a determination made by the ACCC (a 'pre-request right'), from being able to obtain a sufficient level of access to meet his or her actual requirements;
- depriving a person of a right which he or she possesses under a contract which was in force on 10 May 2000 (a 'protected contractual right').

“Sufficient amount of service” means that the access seeker is able to fully achieve the material performance of the relevant defined transmission tower, facilities and designated associated facilities during the term of the service. This reflects ongoing operation, continuity and integrity (paragraph 6(2)(a)).

“Sufficient level of access” means that physical access conditions and access rights are not materially degraded during the term of the service (paragraph 6(2)(b)).

The level of sufficiency would be documented by the parties and evidence would be required to meet the threshold.

Subsection 6(3) clarifies that the person covered by subsection 6(2) is either the owner or operator of the designated associated facility; or a customer of the owner or operator who is seeking access, or has a right to access, the designated associated facility at the point in time that the request for access is made.

Subsection 6(4) provides that an owner or operator who would otherwise be required to give access under subclauses 45A(2) and (4) of Schedule 4 to the Act is not required to do so if

there are reasonable grounds to believe the access seeker would fail to a material extent either to comply with the terms and conditions on which the access provider complies, or is reasonably likely to comply, with the obligation to give access; or the access seeker would fail, in connection with the obligation, to protect the integrity of a telecommunications network, the continuity of a broadcasting service, or the safety of people working on a telecommunications network or facility or using services supplied by means of a telecommunications network or facility.

Subsection 6(5) provides examples of grounds for believing that an access seeker would fail to comply with the terms and conditions on which the access provider complies with the obligation to give access. Unlike the *Telecommunications Act 1997*, the Act does not include these examples so they are spelt out in the Regulations.

## **Part 3—Arbitration**

### **Division 1 —General**

#### **Section 7 - Purpose and application of this Part**

Section 7 provides that the purpose of Part 3 is to set out how an arbitration is to be conducted for the purposes of subclause 47(3) of Schedule 4 to the Act.

Under clause 47 owners and operators of broadcasting transmission towers and designated associated facilities are required to comply with the applicable subclause on such terms and conditions as are agreed between the owner or operator and the access seeker.

Where the owner or operator and the access seeker are unable to agree on the terms and conditions, the terms and conditions are to be determined by an arbitrator appointed by the parties. Where the parties are unable to agree on the appointment of an arbitrator, the ACCC will be the arbitrator.

Subclause 47(3) of Schedule 4 provides that the Regulations may make provision for and in relation to the conduct of an arbitration under clause 47.

#### **Section 8 - Notification of disputes**

Section 8 provides a process for how the parties to a dispute relating to the provision of a service that is within the scope of the Regulations can notify the ACCC of their dispute.

Subsection 8(1) provides that either one of the parties, being either an access seeker or access provider, may notify the ACCC of the dispute in writing.

An example note following subsection 8(1) provides examples of what the parties may disagree on. These include the price, or method of establishing the price, at which a service is provided, or whether a previous determination of the terms and conditions should be varied.

Subsection 8(2) sets out the information the ACCC will require to understand the parties to the dispute, the nature of the dispute and the actions that have been taken to date to resolve the dispute. It also sets out information the ACCC will require to proceed with the arbitration. It provides that a notification of a dispute about a service must include:

- the name of the person notifying the ACCC about the dispute, and if the notifier is not an individual, then the name and address of an individual who represents the notifier;

- the notifier’s address for delivery of documents in relation to the notification of the dispute;
- whether the notifier is the access seeker or access provider, and the name and address of the other party;
- the relevant provision of the Act that the dispute relates to
- a description of the dispute, including:
  - (i) whether the dispute is about varying existing terms and conditions of access and, if it is, a description of the arrangements; and
  - (ii) each aspect of the service on which the access seeker and access provider are able to agree; and
  - (iii) each aspect of the service on which the access seeker and access provider are unable to agree.
- a description of any effort that has been made to resolve the dispute, including efforts to appoint an arbitrator in accordance with paragraph 47(1)(b), 47(1A)(b) or 47(2)(b) of Schedule 4 to the Act;
- if the parties have failed to agree on the appointment of an arbitrator, confirmation of the failure to agree;
- any other information that the notifier considers relevant (such as the name and address of a person that the notifier considers may have an interest in the dispute).

Subsection 8(3) clarifies that a contravention of the form requirements set out in subsection 8(2) for a notification of a dispute does not affect the validity of the notification.

Subsection 8(4) clarifies how the ACCC must proceed when it is notified of a dispute. It provides that, when the ACCC receives notification of a dispute, the ACCC must give written notice of the dispute to:

- the other party in the dispute (either the access seeker or access provider);
- if the ACCC considers that the determination of the dispute may affect another person (whether or not the determination would require the other person to do something)—the other person;
- any other person whom the ACCC considers may wish to become a party.

Subsection 8(5) clarifies that each of the following are a party to the arbitration of the dispute:

- the access seeker;
- the access provider;
- a person the ACCC considers that the determination of the dispute may affect;
- any other person who applies in writing to be made a party to the arbitration and is accepted by the ACCC as having a sufficient interest.

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

Subsection 9(1) provides that the ACCC must make a written determination of the terms and conditions of access.

Subsection 9(2) provides that a determination may deal with any matter relating to access, including matters that were not the basis for notification of the dispute.

Subsection 9(3) sets out examples of matters that the ACCC may include in a determination. These include:

- requiring the access provider to give the access seeker access;
- requiring the access seeker to accept and pay for access;
- specifying the terms and conditions with which the access provider needs to comply to satisfy his or her obligations under clauses 45, 45A and 46 of Schedule 4 to the Act;
- specifying any other terms and conditions under which the access seeker is to be given access;
- requiring a party to extend or enhance the capability of a broadcasting transmission tower, designated associated facility or site; and
- specifying the extent to which the determination overrides an earlier determination made under this section.

Subsection 9(4) prohibits the ACCC from making a determination requiring access where access is already required under Part 5 of Schedule 4 to the Act or any other law of the Commonwealth. This provision is intended to reinforce the fact that the ACCC's determination power is an arbitral power (a non-judicial power that is concerned with ascertaining what ought to be, in the opinion of the arbitrator, the rights and liabilities of each party), not a judicial one (that is concerned with ascertaining existing rights and liabilities). The ACCC must also give the parties to the dispute reasons for its determination (subsection 9(7)).

Subsection 9(5) limits the ACCC's power of determination in relation to designated associated facilities. The ACCC must not make an interim or final determination in this context that would:

- be inconsistent with an exemption mentioned in section 6 of the Regulations; or
- result in the access seeker becoming the owner or part owner of any part of a facility without the consent of the owner of the facility; or
- require a party (other than the access seeker) to bear some or all of the costs of extending or enhancing the capability of a facility, or maintaining extensions to or enhancements of the capability of a facility.

Subsection 9(6) provides that before the ACCC makes the determination, it must give a draft of the determination to each party.

Subsection 9(7) provides that when the ACCC makes a determination it must give a copy of the determination to each party and include the reasons for the determination.

Subsection 9(8) clarifies that the ACCC is not required to make a written determination of the terms and conditions of access if notification of the dispute is withdrawn under section 11 or if the ACCC terminates the termination of the dispute under section 12.

## **Section 10 - Matters to be taken into account**

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

- the legitimate business interests of the parties, and the parties' investment in facilities used in giving access to a tower, designated associated facility or site which is the subject of the arbitration;



- the interests of all persons who have been given access to the tower, designated associated facility or site which is the subject of the arbitration;
- the direct costs of giving access to the tower, designated associated facility or site which is the subject of the arbitration;
- the operational and technical requirements for the safe and reliable operation of the tower, designated associated facility or site which is the subject of the arbitration or another facility located at the same place;
- the economically efficient operation of a tower, designated associated facility or site which is the subject of the arbitration;
- the value to a party of any extension of property, or enhancement of capability, to be paid for by another person; and
- whether the final determination will promote the objects set out in paragraphs 3(1)(a), (aa), (b) and (ba) of the Act. These are:
  - to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;
  - to promote the availability to audiences and users throughout Australia of a diverse range of datacasting services;
  - to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and
  - to provide a regulatory environment that will facilitate the development of a datacasting industry in Australia that is efficient, competitive and responsive to audience and user needs.

Subsection 10(2) provides that, in making a determination, the ACCC may take into account any other matters that it considers relevant, such as the public interest, impact on competition within the industry and potential power imbalances between parties. This provides flexibility to deal with specific or unforeseen circumstances and covers the breadth of the matters that the ACCC may be required to arbitrate.

### **Section 11 - Withdrawal of notifications**

Section 11 provides a process for how a party can withdraw a notification of a dispute made under subsection 8(1).

Subsection 11(1) provides that a notification of a dispute may only be withdrawn by the person who notified the dispute, and at any time before the ACCC makes a determination. The requirement that the dispute may only be withdrawn before the ACCC makes a determination is intended to prevent vexatious disputation in which a person who has little hope of success in an arbitration notifies a dispute in order to cause delays, or raise costs, for the other party. It also encourages parties to continue to cooperate in negotiations with each other to resolve the dispute.

Subsection 11(2) sets out the information the ACCC will require to terminate the arbitration. It provides that the withdrawal of a notification of a dispute must be given in writing to the ACCC, and include the following information:

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

Subsection 11(3) provides that a person who withdraws a notification of a dispute must give a copy of the withdrawal to the other party in the dispute.

Subsection 11(4) provides that a withdrawal of a notification of a dispute takes effect when the withdrawal is received by the ACCC.

Subsection 11(5) provides that the ACCC must give a copy of a withdrawal of a notification of a dispute to each person who is party to the arbitration and to whom the ACCC gave notice of the dispute under subsection 8(4).

## **Section 12 - When ACCC may terminate arbitration**

Section 12 is based on section 44Y of the *Competition and Consumer Act 2010* (Cth) (CCA).

Subsection 12(1) provides that the ACCC may terminate an arbitration if it considers that:

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

Subsection 12(2) enables the ACCC to terminate an arbitration if it relates to a dispute about an existing determination and the ACCC thinks there is no sufficient reason why the existing determination should not continue to have effect.

## **Division 2 — Conduct of arbitration**

### **Section 13 - Conduct of arbitration**

Subsection 13(1) provides that the ACCC may conduct an arbitration on the papers, by holding an arbitration hearing, or in part on the papers and in part by holding an arbitration hearing.

The note to subsection 13(1) guides readers to section 24 of the Regulations for when the ACCC may conduct a joint arbitration.

The *Broadcasting Services (Transmitter Access) Regulations 2001* did not specify that the ACCC could conduct an arbitration on the papers. Empowering the ACCC to consider matters on the papers helps to reduce costs for industry, and fosters a streamlined arbitration process.

Subsection 13(2) sets out the ACCC's rules for the conduct of the arbitrations. This is modelled on section 44ZF of the CCA.

Subsection 13(2) states that:

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

Subsection 13(3) is also modelled on section 44ZF of the CCA. The subsection provides that the ACCC may determine the periods of time that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties, and may require that their cases be presented within those periods.

#### **Section 14 - Constitution of ACCC for arbitration**

Section 14 details the constitution of the ACCC for the purposes of an arbitration conducted under the Regulations. Section 14 reflects subclause 47(4) of Schedule 4 to the Act, which stipulates that the Regulations may provide, for the purposes of a particular arbitration conducted by the ACCC under clause 47, the ACCC may be constituted by a single member, or a specified number of members, of the ACCC. Further, subclause 47(4) provides that for each such arbitration, that member or members are to be nominated in writing by the Chair of the ACCC.

Subsection 14(1) provides that for the purposes of an arbitration, the ACCC may be constituted by one or more members, of the ACCC that are nominated in writing by the Chairperson of the ACCC. Members of the ACCC refer to those Commissioners appointed to the ACCC.

Subsection 14(2) requires that if the Chairperson of the ACCC has nominated two or more members under subsection 14(1) to arbitrate, the Chairperson is required to nominate one of those members to preside at the arbitration.

Subsection 14(3) clarifies that a member of the ACCC is not disqualified from involvement in the arbitration of the dispute about a particular matter merely because the member has performed functions, or exercised powers in this matter. This balances the timeliness and effectiveness of resolving a dispute by a member who has knowledge or experience in a particular matter against the possibility of a conflict of interest precluding the member. This matter would be considered by the Chairperson in the nomination of the member under subsection 14(1) of the Regulations.

#### **Section 15 - Reconstitution of ACCC for arbitration**

Section 15 provides that if a member constituting, or who is one of the members constituting, the ACCC for the purposes of a particular arbitration and that person stops being a member of the ACCC or is otherwise unavailable for the arbitration, the Chairperson of the ACCC must direct:

- in the case of a single member constituting the ACCC: that one other member shall constitute the ACCC for the purposes of finishing the arbitration (subsection 15(2)(a);
- in the case of more than one member constituting the ACCC: that either the remaining member or members of the ACCC shall constitute the ACCC for the purposes of finishing the arbitration, or that one or more other members of the ACCC are to join the remaining member(s) to finish the arbitration (subsection 15(2)(b).

Subsection 15(3) provides that where a direction is given under this section, the ACCC must continue and finish the arbitration in accordance with the direction.

Subsection 15(4) provides that the ACCC as constituted by a direction made under this section may have regard to any record of proceedings of the arbitration by the ACCC as previously constituted.

Section 15 streamlines previous regulations 20 and 21 from the sunseting Regulations.

### **Section 16 - Determination of matters**

Section 16 provides that a question before the ACCC is to be resolved according to the opinion of a majority of members of the ACCC or, in the event of an even division of opinion, according to the opinion of the member presiding on the matter.

### **Division 3 — Powers of ACCC in conducting arbitration**

Division 3 of the Regulations sets out the powers given to the ACCC in conducting an arbitration.

### **Section 17 - Power to refer matters and give directions**

Section 17 gives power to the ACCC to do any of the following actions for the purposes of an arbitration:

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

The note to section 17 guides the reader to section 27, which provides that a person commits an offence if that person fails to follow a direction by the ACCC under paragraphs 17(b) to 17(e) (inclusive).

## **Section 18 - Power to require person to give information or produce documents**

Subsection 18(1) provides that the ACCC may give a notice to a person under subsection 18(2) if the ACCC has reason to believe that the person has information, or a document, relevant to an arbitration. For example, the ACCC may consider that a third party (such as an existing customer, an equipment provider, network installer or finance provider) has information relevant to the matters in dispute.

Subsection 18(2) provides that the ACCC has the power to require a person to give information or to produce any document to the ACCC for the purposes of the arbitration by way of written notice to the person.

Subsection 18(3) sets out the details that must be included in a written notice given by the ACCC. A written notice must specify the following:

- the time period for compliance (which must be at least 14 days after the notice is given to the person); and
- how the person is required to comply with the notice; and
- the effect of section 28 (offence for failure to comply with these notices)

The note accompanying section 18 guides the reader to section 28, which provides that a person commits an offence if the person fails to comply with a notice.

Persons that are subject to the related offence under section 28, in reliance on the common law privilege against self-incrimination, will be able to refuse to give information or produce the requested document if doing so would tend to incriminate that person or expose them to penalty.

## **Section 19 - Power to summon person to give evidence and produce documents**

Subsection 19(1) provides that the member of the ACCC who is presiding at an arbitration may summon a person to:

- attend before the ACCC to give evidence; and
- produce such documents (if any) as are referred to in the summons.

Subsection 19(2) provides that a summons must be in the form set out in Schedule 1 to the Regulations.

Subsection 19(3) provides the manner in which a summons must be served. A summons must be served on a person by:

- delivering a copy of the summons to the person personally; and
- showing the original of the summons to the person when the copy is delivered to the person.

The note to section 19 guides the reader to section 29, which provides that a person commits an offence if the person fails to comply with a summons.

Persons that are subject to the related offence under section 29, in reliance on the common law privilege against self-incrimination, will be able to refuse to give information and

produce documents if doing so would tend to incriminate that person or expose them to penalty.

## **Division 4 — Arbitration hearings**

### **Section 20 - Conduct of arbitration hearings**

Subsection 20(1) provides that the ACCC may do any of the following things for the purposes of an arbitration hearing:

- require evidence or argument to be presented in writing;
- decide the matters on which it will hear oral evidence or argument;
- hear and determine the dispute in the absence of a person who has been summoned to attend before the ACCC;
- sit at any place;
- adjourn to any time and place

Subsection 20(2) provides that the ACCC can choose to conduct an arbitration hearing by telephone, closed-circuit television, or any other means of communication.

### **Section 21 - Arbitration hearings to be in private**

Subsection 21(1) provides that subject to subsection 21(2), an arbitration hearing must be conducted in private.

Subsection 21(2) provides that if the parties agree, an arbitration hearing, or part of an arbitration hearing, may be conducted in public.

The presiding member of the ACCC at an arbitration hearing conducted in private may give written directions about the persons who may be present at the hearing (subsection 21(3)).

Subsection 21(4) provides that when giving directions under subsection 21(3), the member presiding must consider the wishes of the parties and the need for commercial confidentiality.

### **Section 22 - Right to representation**

Section 22 provides that a party may appear in person at an arbitration hearing, or be represented by someone else at the hearing.

### **Section 23 - Evidence on oath or affirmation**

Section 23 provides that the ACCC may take evidence on oath or affirmation at an arbitration hearing and, for that purpose, a member of the ACCC may administer the oath or affirmation.

## **Division 5 — Joint arbitration of disputes**

Division 5 of Part 3 of the Regulations provides the ACCC with the discretion to conduct joint arbitration hearings following notification to the parties of the dispute. These arrangements are modelled on section 44ZNA of the CCA.

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

For example, where there are multiple negotiations regarding the terms and conditions for access to the same transmission site, tower, facility or designated associated facilities and disputes arise, holding a joint arbitration allows for an accelerated outcome and also provides consistent outcomes for industry. This in turn can reduce delays and costs for industry, particularly if several sites or facilities owned or operated by the same provider are involved in the dispute.

## **Section 24 - When joint arbitration may be conducted**

Subsection 24 of the Regulations permits the ACCC to conduct joint arbitration of disputes in limited situations. The ACCC must be arbitrating two or more disputes at a particular time and those disputes must have one or more matters in common.

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

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

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

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

## **Section 25 - Procedure in joint arbitration**

Subsection 25(1) provides that the conduct of arbitration as set out in sections 13 to 23, and the offences and miscellaneous matters set out in sections 27 to 33, apply to a joint arbitration in a corresponding way to the way in which they apply to a particular arbitration. This means that the procedures for the ACCC to follow in conducting the arbitration, its powers and the offences that apply to the arbitration of a single dispute also apply to joint arbitrations.

Subsection 25(2) provides that the Chairperson of the ACCC may, for the purposes of the conduct of a joint arbitration, give written directions to the member of the ACCC presiding at the arbitration.

Subsection 25(3) provides that, for the purposes of a joint arbitration of two or more disputes, the ACCC may have regard to any record of the proceedings of the arbitration of any of those disputes. This provides it with flexibility so that it does not need to seek, for example, the resubmission of evidence or information. If the ACCC has already been provided with

information about the disputes when it was considering them separately, it should be able to consider that.

## **Section 26 - Determination of disputes**

Subsection 26(1) provides that, when the ACCC is conducting a joint arbitration of two or more disputes, it may make a single determination that covers all of the disputes. For example, if there are several disputes that are all about the terms of access to a specific type of site, tower, facilities, and/or designated associated facility and the costs of meeting these terms of access are the same irrespective of the parties and the individual sites, the ACCC may issue a single determination that sets out the access terms and costs of access for all parties. This helps provide consistent outcomes across industry.

Subsection 26(2) provides that if the ACCC does not make a single determination that covers all of the disputes, the ACCC may refer to any record of the proceedings of the joint arbitration or adopt any findings of fact made by the ACCC to assist in making a determination of the dispute.

The note to section 26 guides the reader to sections 9 and 10, which set out the requirements and considerations that the ACCC must take into account when making a determination.

## **Division 6 — Offences**

Division 6 of Part 3 of the Regulations outlines the offences applicable to arbitration procedures. The offence provisions are included to help to ensure the smooth running of the arbitrations, and prevent companies trying to game the system through drawing out the process and thereby increasing costs for the parties.

Some of the offences set out in Division 6 are strict liability offences, which differs from the offence regime in the *Broadcasting (Transmitter Access) Regulations 2001* which had higher and differential penalty rates. Commonwealth Regulations have mostly all transitioned to the use of strict liability as it provides a consistent, fair approach that is tied into the Criminal Code.

The strict liability offences included in the Regulations are in respect of the contravention of a direction issues under paragraphs 17(b) to (e) of the Regulations (see section 27), failure to comply with a notice under section 18 to give information or produce documents (see section 28), failure to attend an arbitration as a witness (see section 29), failure of a witness to be sworn or make an affirmation, or answer a question or produce a document (see section 29), and also in respect of the physical element of the offence relating to intimidation (see section 30).

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



By way of example, the services and facilities that may be subject to ACCC arbitration may be those that are critical to providing competitive, effective and high quality reception to consumers across Australia. This includes for example, access to facilities that provide commercial and national television services and datacasting services. Without access to the facilities that provide these services, a broadcaster or transmission company may face delays and increased costs in either providing services to consumers or resolving reception or equipment failure problems. At the same time, a provider may seek to raise its rivals' costs by delaying access to the facilities, or by delaying or otherwise perverting the conduct of the arbitration. Strict liability offences are therefore required to discourage this conduct and promote the continuity of broadcasting services to the market.

The offence provisions in Division 6 of Part 3 of the Regulations no longer include a standalone reasonable excuse defence that was provided for offences relating to a witness under the *Broadcasting Services (Transmitter Access) Regulations 2001*. The inclusion of the reasonable excuse defences reflected sections 152DE and 152DF in the CCA which have now been repealed, and is therefore now redundant. As a result, the reasonable excuse defence has not been included in these Regulations and in one sense, modernises the drafting: A person would still have access to all of the defences in Part 2.3 of the *Criminal Code Act 1995* (Criminal Code). Part 2.3 of the Criminal Code sets out defences that are generally available, such as a defence of honest and reasonable mistake and intervening conduct or event.

Nothing in the offence provisions under these Regulations abrogates the common law privilege against self-incrimination.

The offences in Division 6 of Part 3 of the Regulations each attract either 10 or 30 penalty units, depending on the severity of the offence. This is in accordance with subsection 217(2) of the Act. The provisions are also consistent with the principles in the AGD Guide.

### **Section 27 - Contravention of a direction**

Under paragraphs 17(b) to (e) of the Regulations, the ACCC has the power to refer matters and direct persons. Section 27 makes it a strict liability offence for a person to do an act or omit to do an act that contravenes the direction given by ACCC. This attracts 10 penalty units.

### **Section 28 - Failure to comply with notice to give information or produce documents**

It is a strict liability offence if a person is served with a summons to attend the ACCC and give evidence and has not been excused, or released from further attendance, and the person fails to attend as required by the summons. This offence attracts 10 penalty units.

### **Section 29 - Offences by witnesses**

Subsection 29(1) makes it an offence of strict liability if a person is served with a section 19 summons to attend before the ACCC to give evidence, and the person has not been excused, or released from further attendance, by a member of the ACCC; and the person fails to attend as required by the summons. This offence attracts 10 penalty units.

Subsection 29(2) makes it an offence of strict liability if a person served with a section 19 summons to attend before the ACCC to give evidence to the ACCC and fails to be sworn or to make an affirmation, or fails to answer a question. This offence attracts 10 penalty units.

Subsection 29(3) makes it an offence of strict liability if a person served with a section 19 summons to produce a document and the person fails to do so. This offence attracts 10 penalty units.

Nothing in this provision abrogates the common law privilege against self-incrimination. Persons that are subject to the related offence under section 29, in reliance on the common law privilege against self-incrimination, will be able to refuse to give information or produce documents if doing so would tend to incriminate that person or expose them to penalty. In addition, they may be able to rely on the defences in Part 2.3 of the Criminal Code, including the defence of honest and reasonable mistake of fact.

### **Section 30 - Intimidation etc.**

Subsection 30(1) provides that it is an offence for a person to engages in conduct that

- threatens, intimidates or coerces another person or causes damage, disadvantage or loss to another person; and
- does so because the other person has attended, or proposes to attend, before the ACCC to give evidence at an arbitration hearing, or has produced, or proposes to produce, a document to the ACCC (paragraph 30(1)(b))

An offence committed under subsection 30(1) attracts 30 penalty units.

Subsection 30(2) provides that strict liability applies to the physical element in paragraph 30(1)(b) of the offence. Strict liability is justified in this case because the particular conduct involved (for example, treats, intimidation, causing damage, disadvantage or loss) could prevent an arbitration from being conducted, or pervert the outcomes of the arbitration.

### **Section 31 - Disturbing an arbitration hearing etc.**

Section 31 provides that a person commits an offence if the person:

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

An offence committed under section 31 attracts 30 penalty units.

## **Division 7 — Miscellaneous**

### **Section 32 - Parties may request ACCC to treat material as confidential**

Subsection 32(1) provides that a party may:

- inform the ACCC that a certain part of a document contains confidential information in that party’s opinion; and
- request the ACCC not to give a copy of that part of the document to another party.

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

Subsection 32(2) provides that, if the ACCC receives a request under paragraph 32(1)(b), it must:

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

Subsection 32(3) provides that, if there is an objection to the ACCC complying with the request, the party having the objection may inform the ACCC of its objection and of the reasons for it.

Subsection 32(4) provides that the ACCC may decide not to give to the other party a copy of the document to the extent that it contains confidential commercial information. In making this decision, the ACCC must have consideration of the following:

- the request; and
- any objection; and
- any further submissions that any party has made in relation to the request.

### **Section 33 - Parties to pay costs of arbitration**

Section 31 provides that the ACCC may:

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

## **Part 4— Application, saving and transitional provisions**

Part 4 sets out a transitional provision (and accompanying definitions) that has the effect of ensuring that the arrangements under the *Broadcasting Services (Transmitter Access) Regulations 2001* will continue to apply in relation to disputes previously notified but not finally determined or concluded (either by way of withdrawal, termination or withdrawal) prior to the commencement of these Regulations.

### **Section 34 - Definitions**

Section 34 provides definitions for two key terms used in section 33 ‘commencement’ and ‘old law’.

**Commencement** means the day the *Broadcasting Services (Transmitter Access) Regulations 2019* commences.

*Old law* means the *Broadcasting Services (Transmitter Access) Regulations 2001*, as in force immediately before commencement.

### **Section 35 - Transitional—disputes notified before commencement**

Section 35 provides that despite the repeal of the *Broadcasting Services (Transmitter Access) Regulations 2001*, that 2001 Regulation will continue to apply in relation to a dispute if, immediately before commencement of the new Regulation:

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

### **Schedule 1—Form of summons**

Schedule 1 sets out the form of summons for the purposes of subsection 19(2).

### **Schedule 2—Repeals**

Schedule 2 repeals the *Broadcasting Services (Transmitter Access) Regulations 2001*. This instrument was due to sunset on 1 October 2019.

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

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

### **Broadcasting Services (Transmitter Access) Regulations 2019**

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

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

The *Broadcasting Services (Transmitter Access) Regulations 2019* (the Regulations) relate to exemptions to access requirements applicable to broadcasting transmission towers and designated associated facilities, and the arbitration of disputes by the Australian Competition and Consumer Commission (the ACCC) under Schedule 4 of the *Broadcasting Services Act 1992* (the Act).

The Act requires owners and operators of broadcasting transmission towers and designated associated facilities to provide commercial television broadcasters, national television broadcasters or datacasters with access to transmission sites, towers and designated associated facilities for the purpose of providing digital television and datacasting services.

Subclause 45A(9) of Part 5 of Schedule 4 to the Act enables regulations to be made to provide for exemptions from the access obligations in subclauses 45A(2) and (4).

Subclause 47(3) of Part 5 of Schedule 4 to the Act enables regulations to be made for and in relation to the conduct of an arbitration that relates to the terms and conditions of access to broadcasting transmission towers, their sites and designated associated facilities.

The Regulations:

- (a) enable the owner or operator of a designated associated facility to refuse access where a requirement to provide access would not be reasonable e.g. where being required to provide access would prevent the access provider or existing customers from obtaining sufficient capacity to meet their reasonably anticipated requirements; and where it would prevent the access provider from meeting their existing contractual obligations (Part 2 of the proposed regulations); and
- (b) provide for a streamlined process in accordance with which the Australian Consumer and Competition Commission (ACCC) is able to arbitrate disputes relating to terms and conditions of access to broadcasting transmission towers, their sites and designated associated facilities (Part 3 of the proposed regulations).

#### **Human rights implications**

This Legislative Instrument engages the following rights:

- Presumption of innocence

Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law. It imposes on the prosecution of the burden of proving a criminal charge and guarantees that no guilt can be presumed

until the charge has been proved beyond reasonable doubt. Under international law the term ‘criminal offence’ includes not only offences or penalties that are classified as a criminal offence under national law, but also other forms of penalties that may be designated as civil penalties under domestic law. The approach under international and comparative human rights law is to consider the substance and effect of the proceedings, rather than the ‘label’ itself.

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

Some offences (sections 27-30) contained in Division 6 of Part 3 of the Regulations are strict liability offences. Section 27 creates a strict liability offence for a person to contravene a direction issued under paragraphs 17(b) to (e) of the Regulations. Section 28 creates a strict liability offence for failure to comply with a notice to give information or produce documents. Section 29 creates strict liability offences by witnesses for failing to appear, failing to answer questions and failure to produce a document. Section 30 creates a strict liability offence for intimidation of witnesses.

The offences contained in sections 27 to 30 of the Regulations are aimed at upholding the integrity of the dispute resolution process and ensuring the ACCC is able to conduct effective arbitrations. This is important to ensure reasonable access is provided to the transmission sites, towers, facilities and designated associated facilities specified under the Act, necessary for the provision of commercial and national television and datacasting services to the Australian community.

By making these offences strict liability offences, it provides a strong deterrent for those parties who may seek to game (including delaying) arbitrations. Gaming might be done, for example, to gain an advantage over a competitor by drawing-out a protracted, unresolved access dispute necessary to conduct their business.

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

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

## **Conclusion**

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

- Right to freedom of expression

Article 19 of the (ICCPR provides that everyone shall have the right to hold opinions without interference. This is commonly referred to as the right to freedom of expression, and includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers in any form.

The Regulations include a provision that makes it an offence to engage in conduct that threatens, intimidates, coerces, or causes damage, disadvantage or loss to another person because that other person has or proposes to give evidence to the ACCC in an arbitration hearing. This offence is aimed at limiting inhibitors on an individual that chooses to provide evidence in oral or documentary form during an ACCC hearing under these Regulations.

The Regulations promote the right to freedom of expression because they make it an offence to interfere with an individual's choice to provide evidence, therefore securing their right to freedom of expression within this context.

### **Conclusion**

The Legislative Instrument is compatible with human rights because it promotes the right to freedom of expression.

**Minister for Communications, Cyber Safety and the Arts**