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HOUSE OF REPRESENTATIVES

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FINANCIAL SECTOR REFORM (COMPETITION IN CLEARING AND  
SETTLEMENT) BILL 2023

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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## Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<b>Abbreviation</b>	<b>Definition</b>
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	ASX Limited
CCA	<i>Competition and Consumer Act 2010</i>
CFR	Council of Financial Regulators
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
CS facility	A clearing and settlement facility as defined in section 768A of the <i>Corporations Act 2001</i>
CS service	A CS service defined in section 828 of the <i>Corporations Act 2001</i> as would be amended by this Bill.
RBA	Reserve Bank of Australia



# **Chapter 1: Competition in the provision of CS services**

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## Outline of chapter

1.1 This Schedule amends the Corporations Act, the Competition and Consumer Act and ASIC Act to facilitate competitive outcomes in the provision of CS services for Australia’s financial markets. The amendments provide ASIC with powers to:

- implement and enforce requirements for a monopoly provider of CS services to operate in a way that achieves competitive outcomes; and
- ensure safe and effective competition in clearing and/or settlement should a competitor emerge.

The amendments also provide the ACCC with the power to conduct binding arbitration to resolve disputes regarding access to CS services that are part of the same corporate group as the CS facility the CS service operates in relation to and are covered by a declaration made by the Minister.

## Context of amendments

- 1.2 CS facilities are facilities that provide mechanisms for parties to transactions related to financial products to meet their obligations to each other that arise from entering into those transactions. They include central counterparties, securities settlement facilities and central securities depositories. These facilities are crucial to supporting confident and informed participation by investors in Australia's financial markets and are critical to the functioning and stability of financial markets.
- 1.3 The Corporations Act permits more than one CS facility to handle the clearing and settlement of transactions executed on the one financial market. However, the current market structure is a monopoly where ASX (through its subsidiaries ASX Clear Pty Ltd and ASX Settlement Pty Ltd) is the sole provider of cash equity CS facility services and CS services. The current regulatory settings for CS facilities in the Australian cash equity market, while reflecting an openness to competition, lack mechanisms to facilitate competitive outcomes. This view was affirmed by the CFR in its 2015 Review of Competition in Clearing Australian Cash Equities: Conclusions, and subsequently in its 2017 report, Safe and Effective Competition in Cash Equity Settlement in Australia: Response to Consultation.
- 1.4 In June 2015 the CFR recommended legislative amendments to give the relevant regulators rulemaking and arbitration powers to facilitate safe and effective competition in clearing and/or settlement, and to deal with the continued monopoly provision of cash equity CS services until competition emerges.
- 1.5 New rule-making powers in the Corporations Act will allow ASIC, with ministerial consent, to make rules to manage matters related to competition, such as pricing, access, governance arrangements and interoperability. Amendments to the CCA will provide the ACCC with an arbitration power that will enable binding arbitration of disputes about the terms of access to CS services where those services are covered by a declaration made by the Minister. This is intended to make arbitration available where there is a monopoly or significant market power in the provision of the service that has been declared. It will also allow for arbitration in a competitive environment, should it emerge, where one CS facility is reliant upon access to another CS facility. Together, these powers will facilitate competitive outcomes in the provision of CS services both prior to and following the introduction of competition.
- 1.6 Subsequent to the 2015 Conclusions Paper and the 2017 report, the CFR published three policy statements, outlining its expectations for ASX's conduct as the monopoly provider of CS services (Regulatory Expectations), and the two sets of minimum conditions for safe and effective competition between CS



facilities, should a competitor emerge (Minimum Conditions (Clearing) and Minimum Conditions (Settlement) (together the Minimum Conditions).

## Summary of new law

- 1.7 These amendments provide ASIC and the ACCC with new powers that would allow the regulators to enforce the CFR's policy statements governing the monopoly provision of CS services and competition in clearing and settlement.
- ASIC may make rules to facilitate outcomes that are consistent with those expected in a competitive market for CS services, and ensure that competition, should it emerge, is safe and effective.
    - ASIC may make rules that deal with the activities, conduct or governance of CS facility licensees, their associated entities and other persons specified by regulations, in relation to the provision of CS services. This includes rules with respect to the governance arrangements of the licensee or related entities providing the service, such as the composition of its board of directors.
    - ASIC may only make such rules dealing with the activities, conduct or governance of the above-mentioned entities in relation CS services (or governance more broadly) if the CS services the entity provides are covered by a determination made by the Minister. It is expected that the rule making power will initially cover cash equities with the flexibility to expand to other financial products if the need arises in the future.
    - A compliance and enforcement regime is established in regards to rules made by ASIC, including a directions power for ASIC, civil penalties and alternatives to civil penalties, such as enforceable undertakings.
  - ACCC may make binding arbitration decisions to resolve disputes regarding access to CS services. Negotiation and arbitration apply where the provider of the CS services is the licensee of a CS facility, or a related entity of a CS facility licensee, and the CS service can only operate because it has access to the CS facility the licensee is authorised to operate.
    - The arbitration power is to provide for resolution of disputes where parties are unable to agree on the terms of access to those CS services through commercial negotiation.

## Detailed explanation of new law

### ASIC rule making power

- 1.8 The amendments provide ASIC with a power to make rules that deal with the activities, conduct or governance of CS facility licensees, and certain other entities, in relation to CS services. The rules may also deal with incidental matters.
- 1.9 The definitions provision in section 9 of the Corporations Act is updated to include defined terms introduced by these amendments.

*[Schedule 1, item 2, section 9 of the Corporations Act]*

### CS services

- 1.10 A ‘CS service’ is a service that can only be provided if it has access to a CS facility, or to data used in the operation of a CS facility.
- [Schedule 1, item 8, section 828 of the Corporations Act]*
- 1.11 The definition of a CS service is intended to capture a range of services provided to users, including the provision of data held or produced by the relevant CS facility.
- 1.12 ‘CS services’ cover all aspects of operating a CS facility under Part 7.3 of the Corporations Act and extend to a wider range of activities that leverage CS facility infrastructure and data. CS services include CS facility services (including the clearing and/or settlement of transactions in relation to financial products), access arrangements, and the provision of data to generate holding statements. Market operators’ and other CS facility operators’ access to the CS facility and its services are examples of CS services. Should a committed competitor emerge, the CS services definition will also capture the appropriate interoperability arrangements between different CS facilities, as set out in the Minimum Conditions.
- 1.13 Generally, these services can only be provided if the user has an agreement with the relevant CS facility licensee for access to that facility. CS facilities are significant financial market infrastructure. In Australia, these facilities are currently privately owned and operated as a vertically integrated monopoly. This raises the potential for conflicts of interest, including an incentive for CS facility licensees to allow only affiliated entities access to the facility, or to provide affiliates more favourable access terms than non-affiliated entities.

- 1.14 The definition of CS services includes services where access to a CS facility (including access to data used in the operation of a CS facility) is yet to be provided.
- 1.15 A CS facility is as defined in section 768A of the Corporations Act (see also the Glossary). In brief, a CS facility is a facility which provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other arising from entering into those transactions. The relevant obligations are prescribed in regulation 7.1.09 of the Corporations Regulations. The explanatory memorandum to the *Financial Services Reform Bill 2001* that introduced the regulatory regime for CS facility licensees, stated that the ‘mechanisms’ which are referred to include technical infrastructure, regulations and procedures.

## Classes of CS services in relation to which ASIC may make rules

- 1.16 The CS services rules made by ASIC cannot impose requirements, outlining the activities, conduct and governance arrangements of CS facility licensees in relation to CS services, unless those services are of a type covered by a determination made by the Minister.  
***[Schedule 1, item 8, subsection 828B(1) of the Corporations Act]***
- 1.17 The Minister may, by legislative instrument, make a determination specifying one or more classes of CS services.  
***[Schedule 1, item 8, subsection 828B(2) of the Corporations Act]***
- 1.18 There is a non-exhaustive list of the matters by reference to which the Minister’s determination may specify a class of CS services. These include specification by reference to the particular CS facilities to which the relevant CS services have access, by reference to the data used in the operation of certain CS facilities to allow for the operation of the class of CS services, or by reference to financial products to which the CS services relate.  
***[Schedule 1, item 8, subsections 828B(3) and (4) of the Corporations Act]***
- 1.19 For example, the Minister may determine that CS services provided in relation to specified classes of financial products are a class of CS services covered by the determination. ASIC could then make rules outlining requirements with respect to the activities and conduct of CS facility licensees or associated entities in relation to the provision of CS services for that financial product, or in relation to the governance of the entity providing the CS services.
- 1.20 While the Regulatory Expectations and Minimum Conditions relate to CS services in connection with cash equities, the legislative framework is flexible enough to extend to other CS services and classes of financial products, should circumstances require and based on CFR advice. However, the Government’s

intent is that a determination would, in the first instance, only relate to CS services in connection with cash equities traded in Australia.

- 1.21 Determinations are legislative instruments and are therefore subject to review by Parliament and, potentially, disallowance. This ensures the Parliament can exercise an appropriate level of scrutiny and oversight over the determinations. It is expected that initial determinations will allow the CS services rules to impose requirements with respect to CS services dealing with cash equities with the flexibility to expand to other financial products if the need arises in the future. Determinations made by a Minister are not subject to merits review.

***[Schedule 1, item 9, paragraph 1317C(gec) of the Corporations Act]***

- 1.22 In making determinations, the Minister must consider certain matters in relation to the effect of a determination. These matters are the likely effect of the determination on the Australian economy, and on the efficiency, integrity, and stability of the Australian financial system; the likely regulatory impact of making the determination; and the safety, fairness and effectiveness of competition in the provision of CS services. The Minister may also have regard to any other matters that they consider relevant.

***[Schedule 1, item 8, subsection 828B(5) of the Corporations Act]***

- 1.23 Before making a determination, the Minister must also consult ASIC, ACCC and the RBA. A failure to consult those regulators does not invalidate a determination. Those same regulators may in turn (on their own initiative or in response to a request) provide advice on whether a specific determination should be made.

***[Schedule 1, item 8, subsections 828B(6), (7) and (8) of the Corporations Act]***

- 1.24 The Minister may amend or revoke a determination following the same procedures, and having regard to the same considerations, as apply when the Minister makes an initial determination.

***[Schedule 1, item 8, subsection 828B(9) of the Corporations Act]***

## Power to make CS services rules

- 1.25 Once the Minister has determined the class of CS services in relation to which rules can be made, ASIC may by legislative instrument make CS services rules. The CS services rules may deal with the activities, conduct or governance of CS facility licensees, their associated entities and other persons prescribed by regulations. The power to make CS services rules applies to the activities, conduct and governance of those entities in relation to CS services. The scope of the rule making power to cover activities, conduct and governance is not intended to limit by implication, other rule making provisions in the Corporations Act that use similar terms.

***[Schedule 1, item 8, subsections 828A(1) and (2) of the Corporations Act]***

- 1.26 In relation to matters of governance, the rules can deal with matters that have either a direct or indirect relationship to the provision of CS services. Allowing the rules to deal with these matters directly or indirectly related to the provision of CS services provides the scope for ASIC to make rules that could enforce the governance aspects of Regulatory Expectations. Rules can therefore be made on a range of matters, including requiring user input into the governance arrangements of the CS facility despite those matters potentially having an indirect relationship to the provision of the CS services (see paragraph **Error! Reference source not found.** for further detail on matters the rules can cover).

***[Schedule 1, item 8, subsection 828A(3) of the Corporations Act]***

- 1.27 A 'CS facility licensee' is defined in section 761A of the Corporations Act as a person who holds an Australian CS facility licence. An associated entity is defined in section 50AAA of the Corporations Act.
- 1.28 The ability to prescribe other persons by regulation is needed to allow the framework to develop to meet innovations and new players in the market. It may be necessary to apply the CS services rules to additional entities. If it becomes clear that this is necessary, the rules may need to be applied swiftly to ensure safe and effective competitive outcomes. The rules are therefore equally capable of applying to persons or entities that are not CS facility licensees.
- 1.29 The objective of the rule making regime is to regulate the conduct of a monopoly provider of CS services and, in the event that a committed competitor does emerge, ensure safe and effective competition. In this context, 'safe' means in a way that does not adversely affect financial stability or market functioning. This objective is already embodied by existing objects in the Corporations Act and the ASIC Act. For example:
- Section 760A of the Corporations Act, states that one of the main objects of Chapter 7 is to promote the reduction of systemic risk and the provision of fair and effective services by CS facilities; and
  - Section 1(2) of the ASIC Act provides that in performing its functions and exercising its powers, ASIC must strive to maintain, facilitate, and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy.
- 1.30 Specifically, it is intended that the rules may deal with matters including, but not limited to:
- the dealings of a CS facility licensee with users of the facility, including participants, end users, potential or actual competing CS facilities (such as central counterparties and/or securities settlement

- facilities, and/or central securities depositories), technology service providers and other relevant stakeholders;
- the CS facility licensee's governance arrangements (including its board composition and participation of users in the CS facility's governance arrangements)
- the CS facility licensee's arrangements for handling conflicts of interest (including how the CS facility handles confidential information of its competitors);
- the CS facility licensee's accountability (including public reporting);
- the CS facility licensee's provision of services to users (including competitors) including investment in core infrastructure, service levels, transparent, non-discriminatory and fair and reasonable pricing of the CS facility's services, and the provision of access to the CS facility's services (including data) on transparent, non-discriminatory and fair and reasonable terms;
- coordination, cooperation and links between CS facilities, including in respect of interoperability, settlement, default management, risk management, recovery and resolution;
- coordination and cooperation between CS facilities, registries and issuers in respect of the transfer and administration of holdings of financial products; and
- the cessation of the provision of services by a CS facility (including a structured wind-down supported by financial commitments).

1.31 More broadly, ASIC can make rules that:

- specify the persons required to comply with requirements imposed by the CS services rules;
- prescribe matters which must be dealt with in the operating rules and procedures of a licensed CS facility, in relation to CS services. This includes the power to prescribe the content of the operating rules and procedures, should the need arise;
- prescribe matters in respect of which the facility must have written procedures, in relation to CS services; and
- specify matters to which the Minister must have regard in deciding whether to disallow a change to operating rules, in relation to CS services.

***[Schedule 1, items 3, 4, 5 and 8, subsections 822A(1), 822B(2)(c), 822E(4) and 828A(2) of the Corporations Act]***

- 1.32 The above non-exhaustive lists of rules ASIC can make will ensure the regulators have the ability to put in place adequate regulatory arrangements to give effect to certain elements of the Regulatory Expectations and Minimum Conditions, as required (see paragraph **Error! Reference source not found.**).
- 1.33 The rules cannot provide for matters in relation to a CS facility to which an exemption made by the Minister under section 820C of the Corporations Act applies.  
*[Schedule 1, item 8, subsection 828A(4) of the Corporations Act]*
- 1.34 CS services rules are legislative instruments and are therefore subject to parliamentary disallowance. They are not subject to sunseting to provide certainty to the market. The decision to make CS services rules is not subject to merits review.  
*[Schedule 1, item 9, paragraph 1317C(gcd) of the Corporations Act]*

## Ministerial consent required to make the rules

- 1.35 Written Ministerial consent is required before ASIC may make CS services rules. Such Ministerial consent is not a legislative instrument within the meaning of section 8(1) of the *Legislation Act 2003* and is therefore not subject to disallowance. This provision is included to assist readers, as the consent is only an interim step in the rule making process and will not by itself have the effect of changing a person's rights or obligations. The provision is declaratory of the law and is not a substantive exemption from the ordinary operation of that Act.  
*[Schedule 1, item 8, section 828K of the Corporations Act]*
- 1.36 A decision to provide Ministerial consent is not reviewable by the Administrative Appeals Tribunal but is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.  
*[Schedule 1, item 9, paragraph 1317C(gce) of the Corporations Act]*
- 1.37 In certain emergency circumstances ASIC can make CS services rules without Ministerial consent and without having consulted the ACCC and any other person or body that may be required by regulations to be consulted. To make emergency rules, ASIC must be of the opinion that it is necessary, or in the public interest, to do so in order to protect the Australian economy, the efficiency, integrity or stability of the Australian financial system, or to protect safety, fairness or effective competition in the provision of CS services.  
*[Schedule 1, item 8, subsection 828L(1) of the Corporations Act]*
- 1.38 If ASIC makes an emergency rule, it must provide a written explanation of the decision to the Minister on the day after the rule is made and follow any

written directions of the Minister to amend or revoke the rules. A direction from the Minister is not a legislative instrument. This provision is included to assist readers; as such a direction is not a legislative instrument within the meaning of section 8(1) of the *Legislation Act 2003*. The provision is not a substantive exemption from the ordinary operation of that Act. While the direction is not disallowable by Parliament, it can only have the effect of changing a person's rights by way of the rules, which are disallowable.

**[Schedule 1, item 8, subsections 828L(2) and (3) of the Corporations Act]**

- 1.39 A decision to give such a direction is not reviewable by the Administrative Appeals Tribunal but is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

**[Schedule 1, item 9, paragraph 1317C(gcd) of the Corporations Act]**

- 1.40 ASIC must consult with the RBA to make emergency rules. However, a failure to consult does not invalidate the rule.

**[Schedule 1, item 8, subsections 828L(4) and (5) of the Corporations Act]**

- 1.41 ASIC may amend or revoke a CS services rule. In doing so, ASIC is subject to the same requirements that apply to the making of CS services rules. The requirements to consult, have regard to certain matters, and obtain Ministerial consent do not apply when ASIC amends emergency rules at the direction of the Minister. These requirements do not apply as ASIC must act in accordance with the Minister's directions.

**[Schedule 1, item 8, section 828M of the Corporations Act]**

- 1.42 ASIC and the RBA may give advice to the Minister in relation to any matter which the Minister has discretion under Part 7.3A of the Act, as well as any other matter concerning the CS service rules.

**[Schedule 1, item 8, sections 828N and 828Q of the Corporations Act]**

- 1.43 Further, the ACCC may also provide advice to the Minister in relation to any matter concerning the CS service rules.

**[Schedule 1, item 8, section 828P of the Corporations Act]**

## The process of making the rules

- 1.44 The method by which CS services rules are made is similar to the manner in which derivative transaction rules, derivative trade repository rules and market integrity rules are currently made.

- 1.45 In deciding whether to make a rule, ASIC must have regard to the same matters the Minister must have regard to in deciding whether to make the determination. This includes the likely effect of the proposed rule on the economy and the financial system, the likely regulatory impact of the proposed



rule, and the likely effect of the proposed rule on the safety, fairness and effectiveness of competition in the provision of CS services. ASIC may have regard to other matters ASIC considers are relevant, such as any relevant international standards and commitments, and matters raised in consultation, if consultation occurred.

***[Schedule 1, item 8, section 828H of the Corporations Act]***

- 1.46 ASIC is required to consult with the public prior to making a CS services rule. Making the proposed rule, or a description of the content of the proposed rule, available on ASIC's website and inviting the public to comment within a reasonable timeframe should be sufficient to comply with this requirement.

***[Schedule 1, item 8, paragraph 828J(1)(a) and subsection 828J(2) of the Corporations Act]***

- 1.47 ASIC must also consult with the RBA, the ACCC and any other person or body specified in the regulations. The RBA or ACCC may provide advice to ASIC if they consider it appropriate to do so. ASIC would be expected to rely upon the advice of the RBA in making any assessment on the likely impacts of rules on the stability of the Australian financial system, given the RBA's primary role in regard to such matters. As the Financial Stability Standards determined by the RBA under section 827D of the Corporations Act are to prevail over the CS services rules, to the extent of any inconsistency, advice from the RBA should include advice about any potential conflict.

***[Schedule 1, item 8, paragraph 828J(1)(b) of the Corporations Act]***

- 1.48 A failure to consult at all or for a particular time does not invalidate a rule. While ASIC is required to consult on every proposed rule, this provision is designed to promote certainty among regulated entities by ensuring that an alleged technical failure to comply with the consultation requirements does not affect the validity of the rule. It also provides ASIC with the flexibility to use targeted consultation with affected stakeholders where this is appropriate without creating uncertainty as to the validity of a rule. Furthermore, there are additional safeguards to ensure that ASIC undertakes proper consultation, including that the CS services rules are disallowable by the Parliament. ASIC is also regularly called to appear before Parliamentary Committees for parliamentary oversight purposes.

***[Schedule 1, item 8, subsection 828J(3) of the Corporations Act]***

## Exemptions

- 1.49 The regulations, or ASIC by written instrument, may exempt a person or class of persons from all or part of the CS services rules, the provisions of new Part 7.3A, regulations made for the purposes of that Part, or associated definitions

in the Act or regulations.

***[Schedule 1, item 8, subsections 828R(1) and (2) of the Corporations Act]***

1.50 The exemption power has been included to ensure that there is sufficient power to address any unforeseen consequences of the implementation of the requirements under this Part. Given the systemic importance and evolving nature of CS services it is necessary that the rule making power provide flexibility as to the matters CS services rules deal with, and the persons on whom requirements may be imposed. This includes the event of material changes to the operating environment or market structure for CS services, such as the emergence of a competitor in the provision of CS services.

1.51 The exemption power is also provided to deal with circumstances where the determinations, regulations or rules may operate inadvertently or in a perverse manner, contrary to the underlying intention of the regime. While the framework seeks to provide a high degree of flexibility, there may be cases where it cannot be adapted (without legislative reform) to an unanticipated scenario, or at least not adapted within a sufficiently short time frame to avoid the unintended result.

1.52 Conditions may be imposed on an exemption. A person to whom an exemption applies must comply with any conditions on that exemption. ASIC may apply to the Court for an order that a person comply with the condition in a specific way.

***[Schedule 1, item 8, subsection 828R(3) of the Corporations Act]***

1.53 An exemption, whether made by ASIC or through regulations, that applies to a class of persons is a legislative instrument, and therefore is disallowable by Parliament. Exemptions that have a general effect on a class (that is, exemptions that do not just relate to a specific person) are therefore subject to Parliamentary scrutiny and potential disallowance. This is an important check upon ASIC's power of exemption.

***[Schedule 1, item 8, subsection 828R(4) of the Corporations Act]***

1.54 An exemption that applies to a person, not a class of persons, is a notifiable instrument. This ensures that there is transparency regarding the granting of exemptions and that ASIC's exercise of the power is open to public scrutiny.

***[Schedule 1, item 8, subsection 828R(5) of the Corporations Act]***

1.55 A decision by ASIC to make an instrument either exempting a person or a class of persons from all of certain provisions of Part 7.3A is not subject to merits review.

***[Schedule 1, item 9, paragraph 1317C(gcd) of the Corporations Act]***

- 1.56 The regulations prevail over an ASIC exemption in case of an inconsistency.  
*[Schedule 1, item 8, subsection 828R(6) of the Corporations Act]*

## Power of ASIC to give directions

- 1.57 Where ASIC considers that a person is not complying, or is not likely to comply, with its obligations under the CS services rules, ASIC may give the person a specified direction to do specified things which it believes will promote compliance. This direction must be accompanied by a statement from ASIC in writing setting out the reasons for giving the person the direction. A decision by ASIC to make a direction is not subject to merits review.

*[Schedule 1, items 8 and 9, subsections 828G(1) and (2) and paragraph 1317C(gcd) of the Corporations Act]*

- 1.58 The direction has effect until either ASIC revokes the direction; or the end of a period specified in the direction as the period during which the direction is effective. During this time, the person must comply with the direction. Failure to comply with a direction is an offence.

*[Schedule 1, item 8, subsections 828G(3) and (4) of the Corporations Act]*

- 1.59 Where a person fails to comply with a direction, ASIC may apply to the Court for, and the Court may make, an order that the person comply with the direction.

*[Schedule 1, item 8, subsection 828G(5) of the Corporations Act]*

- 1.60 ASIC may vary or revoke a direction by giving written notice to the person.

*[Schedule 1, item 8, subsections 828G(6) and (7) of the Corporations Act]*

## Compliance with the rules

- 1.61 Any person, whether it is a CS facility licensee, associated entity of a CS facility licensee or a person prescribed by the regulations, that is subject to the CS services rules must comply with them. A civil penalty applies to breaches of the CS services rules.

*[Schedule 1, item 8, subsection 828C(1) of the Corporations Act]*

- 1.62 The Court or the appropriate panel will consider the appropriate penalty for each contravention of the rule, taking into account the breach and severity of the misconduct. ASIC may make submissions to the Court or the appropriate panel on the amount of penalty that is appropriate in the matter. Ultimately, however, the Court or appropriate panel will decide the penalty amount.

- 1.63 In the event of any inconsistency between the CS services rules and the Financial Stability Standards made under section 827D of the Corporations

Act, the Financial Stability Standards prevail to the extent of the inconsistency.  
***[Schedule 1, item 8, note 2 to subsection 828C(1) of the Corporations Act]***

1.64 A person or entity who must comply with the CS services rules is obliged to notify ASIC in writing, as soon as practicable, if they become aware that they may no longer meet their obligations under the rules or have breached the rules. ASIC may give advice to the Minister about such a notification. Failure to notify ASIC is an offence and may attract civil penalties.

***[Schedule 1, item 8, section 828D of the Corporations Act]***

1.65 The regulations may allow for alternatives to civil proceedings for a person who is alleged to have breached the CS services rules. The section imposes limits on the alternatives which may be allowed by the regulations, which are limited to:

- paying a penalty to the Commonwealth that is not more than 3 000 penalty units for individuals and 15 000 penalty units for a body corporate;
- undertaking or instituting remedial measures (including education programs);
- accepting sanctions other than the payment of a penalty to the Commonwealth; or,
- entering into a legally enforceable undertaking, which may include one or more of the following:
  - an undertaking to take specified action within a specified period;
  - an undertaking to refrain from taking specified action;
  - an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

1.66 This provision largely mirrors the existing section 798K of the Corporations Act which applies to enforcement of market integrity rules, section 901F of the Corporations Act which applies to enforcement of derivative transaction rules and section 903E of the Corporations Act which applies to enforcement of derivative trade repository rules.

***[Schedule 1, item 8, section 828E of the Corporations Act]***

1.67 A person's failure to comply with CS services rules does not affect the validity of a transaction in relation to financial products, or any rights or obligations arising under, or relating to, the transaction.

***[Schedule 1, item 8, section 828F of the Corporations Act]***

## Access negotiation and arbitration to certain clearing and settlement services

### Power to arbitrate disputes

- 1.68 The framework in the new Part XICB has some parallels with the National Access Regime in Part IIIA of the CCA, where some of those provisions will apply in respect of the new framework.
- 1.69 The arbitration regime inserted by this Schedule is similarly designed to be used where there is an imbalance of bargaining power between a CS service provider and an access seeker.
- 1.70 CS facilities are often part of vertically integrated monopolies, where listing, trade execution, clearing, settlement and other processes are undertaken by related companies within a corporate group. In these circumstances there is an incentive for the facility to provide access to its services to affiliated entities on more favourable terms than for unaffiliated entities, giving rise to discriminatory terms of access.
- 1.71 A vertically integrated monopoly would usually be competing in upstream and downstream markets. The incentive for the vertically integrated monopolist is to discriminate in favour of its related entities upstream or downstream to the detriment of competitors in those markets, which could manifest itself in denial of access or monopoly pricing. Where the owner of a facility is not vertically integrated, the principal competition concern is not access to the facility but rather the price (and other terms) charged for access.
- 1.72 This imbalance of bargaining power may arise even after there is competition in the market for CS services if one or more CS service provider continues to hold significant market power. Therefore, it is important that when access seekers are unable to negotiate an agreement on commercial terms and conditions, they can rely on arbitration to resolve an access dispute on reasonable terms.
- 1.73 The purpose of the arbitration power is to provide for the timely resolution of material disputes where parties are genuinely unable to agree on the terms of access to CS services through commercial negotiation.
- 1.74 Schedule 2 establishes a new arbitration regime for persons seeking access to CS facilities in new Part XICB of the CCA.

*[Schedule 2, item 11, section 153ZEA of the CCA]*

## Declared CS Service

- 1.75 New Part XICB of the CCA applies to an entity (the access seeker) seeking access to a **declared CS service**. A CS Service is only a declared CS service if:
- The provider of the CS Service is a CS facility licensee or is related to a CS facility licensee; and
  - That CS facility licensee holds an Australian CS facility licence that authorises it to operate a CS facility; and
  - The CS service can only be provided because it has access to that CS facility, or to data used in the operation of that facility; and
  - The CS Service is covered by a Ministerial declaration made under section 153ZEF (see paragraph 1.90).

The arbitration regime is only open to access seekers seeking access to CS services that hold the above characteristics. Each characteristic is expanded upon below.

### *The provider of the CS service*

- 1.76 To be a declared CS Service, the provider of the CS service must be a CS facility licensee or be related to a CS facility licensee. Part XICB does not adopt the definition of provider from Part IIIA of the CCA. The meaning of provider takes on its normal, natural meaning.
- 1.77 The provider of the CS service, or a related entity of the provider, must also hold a CS facility licence that allows it to operate a CS facility. In effect, this means that to be a declared CS service, the provider of the CS service either needs to also be an operator of a CS facility, or a related party of the provider needs to be the operator a CS facility.

***[Schedule 2, item 11, paragraphs (a) and (b) in the definition of ‘declared CS service’ in section 153ZEB of the CCA]***

### *The CS service can only be provided because it has access to a linked CS facility*

- 1.78 For a declared CS service, the CS service must only be able to be provided because it has access to the same CS facility that the provider operates, or that the provider’s related party operates (the linked CS facility).
- 1.79 A CS service does not have this characteristic if it does not need access to that CS facility in order to provide services. A CS service does have this characteristic if it has access to multiple CS facilities, including the linked CS facility, but is reliant on having access to the linked facility in order to provide its services. In the former case, arbitration regarding the CS service is only

open with respect to an access dispute concerning services in relation to the linked CS facility.

1.80 In effect, for a CS service to be a declared CS service, the provider of the CS service, or a related entity of the provider, must operate the CS facility that allows the CS service to operate.

1.81 Part XICB adopts a specific meaning of the word **linked** in relation to a CS facility and a CS service that incorporates the description above. A declared CS Service and CS facility are linked where the relevant CS facility licensee, or a related person of that licensee, is also the provider of the CS service.

***[Schedule 2, item 11, paragraph (c) in the definition of ‘declared CS service’ and the definition of ‘linked’ in section 153ZEB of the CCA]***

*The CS service must be covered by a Ministerial declaration*

1.82 Additionally, the CS service must be covered by a Ministerial declaration in order to be a declared CS Service.

1.83 Declarations can be given in respect of one or more specific CS services or can be made with respect to a class of CS services. The Minister must consider certain matters and undertake consultation prior to making a declaration (the Minister’s power to make a declaration is expanded upon in paragraphs 1.90 to 1.98)

***[Schedule 2, item 11, paragraph (d) in the definition of ‘declared CS service’ in section 153ZB of the CCA]***

1.84 The effect of this definition of declared CS service is that the ACCC will have power to make binding arbitration determinations usually where an entity is seeking access to a CS service where common ownership arrangements exist between the provider of that CS service and the CS facility the CS service operates in relation to.

*The access seeker or the provider of the CS service must be a corporation*

1.85 The arbitration regime only applies if either the access seeker is a corporation or the provider of the declared CS service is a corporation, including instances of a partnership or joint venture consisting wholly of corporations. Alternatively, if neither the access seeker nor the provider of the CS service is a corporation, then access must constitute constitutional trade and commerce. It is expected that the majority of CS service providers would be CS facility licensees, who are required to be a body corporate under section 824A of the Corporations Act.

***[Schedule 2, item 11, section 153ZED of the CCA]***

1.86 The extended application to providers of a CS service that are joint ventures or partnerships consisting of corporations clarifies that anything in Part XICB will apply to the responsible person for the management and control of the

provider.

*[Schedule 2, item 11, section 153ZEC of the CCA]*

- 1.87 An access seeker for a declared CS service, is defined as a person who wants access to the CS service or wants a change to some aspect of the person's existing access to the CS service. Access seekers are any third parties that are direct users of CS services. This may include intermediaries, agents and other stakeholders that are accessing a CS service on behalf of another person. An example of other stakeholders may be share registries who access CS services to maintain records for shareholders and shareholdings on behalf of their clients.

*[Schedule 2, item 11, section 153ZEB of the CCA]*

### **Crown and application**

- 1.88 Part XICB of the CCA binds the Crown in each of its capacities. That is, the provisions bind the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory. However, it will not make the Crown liable to be prosecuted for an offence.

*[Schedule 2, item 11, section 153ZEE of the CCA]*

- 1.89 Part XICB only applies to domestic CS licensees. Overseas CS licensees are not captured in the access regime.

### **Declaring a clearing and settlement service**

- 1.90 The Minister has the power to add or exempt classes or certain CS services by declaration. CS services that are specified within a declaration that is in force are considered covered by the declaration and may be subject to negotiation or arbitration.

*[Schedule 2, item 11, subsections 153ZEF(1), (2) and (3) of the CCA]*

- 1.91 The declaration is a legislative instrument and therefore subject to review and disallowance by Parliament.

*[Schedule 2, item 11, subsection 153ZEF(1) of CAA]*

- 1.92 The Minister's declaration may be varied or revoked, for example if the facts change or subsequent information becomes available.

- 1.93 The amendment or revocation of a declaration does not affect the following notifications that were made prior to the amendment or revocation:

- the notification of an arbitration access dispute; or
- the operation or enforcement of any determination made of an access dispute.

*[Schedule 2, item 11, section 153ZEG of the CCA]*



- 1.94 A CS service covered by that declaration, where the notification of the relevant dispute was made before the revocation, can continue to be the subject of arbitration. The Commission must only terminate the arbitration under section 60 of the CCA if the provider ceases to be a CS facility licensee or related to one that authorises the operation of the relevant CS facility.
- 1.95 Where a negotiation has been notified and a relevant declaration is revoked, the provider of the CS service that was the subject of the declaration can notify the access seeker that the negotiation is at an end because the CS service is no longer a declared CS service. The negotiation does not continue in the same manner as an arbitration is able to continue despite a relevant declaration being revoked. This is because the CS service would cease to be a declared CS service and therefore the next step in resolving the dispute, starting arbitration, is unavailable (see also paragraph 1.104).

***[Schedule 2, item 11, subsection 153ZEI(2) of the CCA]***

***Matters to consider***

- 1.96 In declaring whether CS services are to be subject to negotiation or arbitration the Minister must consider the following in consultation with the Commission prior to making a declaration:
- the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of making the declaration
  - the likely regulatory impact of the declaration
  - the extent to which a provider of a CS service that will be affected by the declaration has a monopoly or significant market power over the provision of the service; and
  - any other factors the Minister considers relevant.

***[Schedule 2, item 11, subsection 153ZEF(4) of the CCA]***

- 1.97 The Minister must not make the declaration unless the Minister has consulted the ACCC about the proposed declaration. However, where the Minister makes a declaration without consulting the Commission, the declaration remains valid.

***[Schedule 2, item 11, subsections 153ZEF(5) and (6) of the CCA]***

- 1.98 ASIC and the RBA may provide advice to the Commission without being requested or the Commission may request advice from ASIC and the RBA for the purposes of advising the Minister on whether a declaration should be made. The Commission must advise the Minister when requested, but can provide

advice relating to a declaration at its discretion.

*[Schedule 2, item 11, subsections 153ZEF(7), (8) and (9) of the CCA]*

## **Negotiation of access**

- 1.99 Commercial negotiation and agreement is the preferred method of accessing CS services. It is intended that arbitration by the ACCC would only be available where parties are genuinely unable to agree on terms of access to CS services through commercial negotiations.

### *Notification of negotiations beginning*

- 1.100 An access seeker may notify a CS service provider of intention to negotiate access if the CS service is a declared CS service.

*[Schedule 2, item 11, subsection 153ZEH(1) of the CCA]*

- 1.101 The access seeker must provide a contact person, contact details and the terms intended to be negotiated in the notification to the provider. The terms may include whether access can be granted, the price of access and other terms and conditions of access. Regulations may prescribe additional matters the access seeker must outline in the notification.

*[Schedule 2, item 11, subsections 153ZEH(2) and (3) of the CCA]*

- 1.102 Once the access seeker has provided notification to the provider it must also provide a copy of the notification to the Commission as soon as practicable.

*[Schedule 2, item 11, subsection 153ZEH(4) of the CCA Act]*

### *Notification of negotiations ending*

- 1.103 An access seeker may end a negotiation at any time by providing notice to the provider. This applies regardless of whether an access seeker refers or previously referred a related access dispute to arbitration. The access seeker must also notify the Commission as soon as practicable that negotiations have ended. The negotiation is taken to have ended when notification has been provided in line with the provisions by either the provider or the access seeker.

*[Schedule 2, item 11, subsections 153ZEI(1) and (3) and paragraph 153ZEI(4)(a) of the CCA]*

- 1.104 A provider may also give notice to the access seeker that the negotiation is at an end if the CS service ceases to be a declared CS service. This might be because:

- the provider is no longer a CS facility licensee or a person related to a CS facility licensee
- the licensee no longer holds a relevant Australian CS facility licence

- it is no longer the case that the CS service can only be provided because it has access to, or to data used in the operation of, the CS facility or facilities; or
- the CS service is no longer covered by a Ministerial declaration.

1.105 An Australian CS facility licence will no longer be current where the licensee has failed to comply with its obligations under Part 7.3 of the Corporations Act, and consequently the licence is suspended or cancelled.

1.106 Where a provider has notified the access seeker that negotiations have ended on this basis, they must also notify the Commission as soon as practicable.  
***[Schedule 2, item 11, subsection 153ZEI(2) and paragraph 153ZEI(4)(b) of the CCA]***

### ***Conducting negotiations***

1.107 Negotiations are generally between the access seeker and the provider. However, if both the access seeker and provider agree, other persons may be included in the negotiations.  
***[Schedule 2, item 11, subsection 153ZEJ(1) of the CCA]***

1.108 Each party has an obligation to negotiate in good faith on the terms and conditions of access to the CS service, prior to seeking arbitration on an access dispute.  
***[Schedule 2, item 11, subsection 153ZEJ(2) of the CCA]***

1.109 Some examples of conduct that may breach the good faith obligation include avoiding or refusing to engage in discussions with the other party, making clearly unreasonable offers or failing to consider or accept reasonable offers made by the other party.

1.110 All reasonable requests from the parties regarding timeframes for negotiations must be accommodated by the other parties.  
***[Schedule 2, item 11, subsection 153ZEJ(3) of the CCA]***

1.111 The negotiation must address the issues that are specified on the notification provided by the access seeker to the provider, that may include whether access can be granted, the price of access and other terms and conditions of access. Other issues may be negotiated provided that all parties agree in writing.  
***[Schedule 2, item 11, subsection 153ZEJ(4) of the CCA]***

1.112 Where the parties reach agreement over each issue that is the subject of the negotiations, they must provide written notification of the outcome to the Commission, as soon as practicable.  
***[Schedule 2, item 11, subsection 153ZEJ(5) of the CCA]***

*Exchange of information between parties*

- 1.113 Parties to a negotiation must exchange information related to the access request in a manner and at a time consistent with the duty of each party to negotiate in good faith. This ensures both parties can negotiate with full information.  
**[Schedule 2, item 11, subsection 153ZEK(4) of the CCA]**
- 1.114 A party may request information relating to the access request from the other party to the negotiation, where the information is held by the responding party and the request is reasonable. Relevant information must be provided within 21 days or within a longer period if agreed by the parties to the negotiation.  
**[Schedule 2, item 11, subsections 153ZEK(1) and (3) of the CCA]**
- 1.115 The information must be provided in a readily readable form, including, where requested, in an electronic file format with all underlying data files and inputs.  
**[Schedule 2, item 11, subsection 153ZEK(3) of the CCA]**
- 1.116 Information requests must comply with the requirement to negotiate in good faith and not be overly burdensome. To ensure that it meets this requirement the request for information must be in writing and state the reasons why it is reasonable to make the request. The request must comply with any other requirements specified in the regulations.  
**[Schedule 2, item 11, subsection 153ZEK(2) of the CCA]**
- 1.117 Specific pieces of information are not required to be exchanged if sharing the information is personal information within the meaning of the *Privacy Act 1988*.  
**[Schedule 2, item 11, subsection 153ZEL(1) of the CCA]**
- 1.118 Any information that is exchanged must only be used for the purposes of Part XICB.  
**[Schedule 2, item 11, subsection 153ZEL(2) of the CCA]**
- 1.119 If negotiations do not proceed to arbitration, the information may not be used once negotiations cease. However, if negotiations end but proceed to arbitration, then parties to the arbitration may use the information exchanged during negotiations.
- 1.120 The penalty for breaching section 153ZEL(2) is maximum civil penalty of \$500,000 for individuals and 600 penalty units for bodies corporate. These penalties were determined to be appropriate based on comparable penalties in the News Media Bargaining Code under section 52ZV(3) of the CCA.  
**[Schedule 2, items 7 and 8, section 76 of the CCA]**

### **Commission's power if information not provided**

- 1.121 Once a dispute has progressed to arbitration, a party is required to seek permission from the Commission in writing if it wishes to rely on information that was requested but not provided to other parties during negotiations.  
***[Schedule 2, item 11, subsection 153ZEW(1) of the CCA]***
- 1.122 If a request for information is not complied with and an access dispute has started (see paragraph 1.124), the Commission may:
- direct that a party is not entitled to rely on specified information or materials;
  - draw adverse inferences from the failure to comply with the request for information; or,
  - proceed to a determination solely on the basis of the information provided to the other party during negotiations (not have regard to the information that the party failed to provide).  
***[Schedule 2, item 11, subsection 153ZEW(4) of the CCA]***
- 1.123 When granting permission to consider the information, the Commission must consider:
- the desirability to comply with the information request; and
  - whether the responding party was given a reasonable opportunity to provide the information to the other parties before the dispute was notified.  
***[Schedule 2, item 11, subsection 153ZEW(2) of the CCA]***

### **Notification of access disputes**

- 1.124 Either an access seeker or the service provider may provide written notification to the Commission of an access dispute if they are unable to agree on terms and conditions for access to a declared CS service.  
***[Schedule 2, item 11, subsection 153ZEM(1) of the CCA]***
- 1.125 Prior to accepting an access dispute, the Commission must be satisfied that either the provider is a corporation (or a partnership or joint venture consisting wholly of corporations); the access seeker is a corporation, or that access is or would be in the course of or for the purposes of constitutional trade or commerce.
- 1.126 The person notifying the dispute must provide information that suggests that the parties have been unable to reach agreement about one or more matters related to access to the CS service. To ensure clarity regarding the matters which are agreed and in dispute, the party who notifies the Commission of the access dispute has an obligation to provide to the Commission a list of matters which have been agreed and the matters which are in dispute. The notification

must also include any additional matters specified in the regulations.

***[Schedule 2, item 11, subsection 153ZEM(2) of the CCA]***

- 1.127 Once the Commission has received notification, it must give notice to the party that did not submit the notification. The Commission may notify other persons of the access dispute where the Commission thinks the person might want to become a party, however, there is no requirement for those other parties that are notified to join the arbitration.

***[Schedule 2, item 11, subsection 153ZEM(3) of the CCA Act]***

### ***Sharing information with ASIC and the RBA***

- 1.128 Once the Commission is notified of an access dispute, it may notify ASIC or the RBA of the matter, request advice, and give information relating to the dispute. ASIC and the RBA may give advice that relates to the arbitration of an access dispute to the Commission, including information of a confidential commercial nature. ASIC and the RBA are not limited to only providing advice when the Commission requests, but may do so at any time in relation to the arbitration of an access dispute.

***[Schedule 2, item 11, section 153ZEX of the CCA]***

## **Arbitration of access disputes**

### **Parties to the arbitration**

- 1.129 The parties to the arbitration are the access seeker, the CS service provider and any other party joined to the arbitration by the Commission. Parties seeking to join the arbitration must make a written application to the Commission to be made a party. The application must demonstrate that the other party has a sufficient interest in the determination to be made in the arbitration. If the applicant satisfies the Commission that it has demonstrated a sufficient interest, then the applicant will also become a party to the arbitration. The Commission cannot unilaterally join parties to an arbitration.

***[Schedule 2, item 11, section 153ZEO of the CCA]***

### **Determinations**

- 1.130 The Commission must make a written final determination on the outcome of access by the access seeker to the CS service, and may also make a written interim determination. A determination may deal with any matter related to access to CS service to which the access dispute relates, including matters that were not the basis for notification of the dispute. The Commission must provide the final determination to the parties within 180 days from being notified of the access dispute.

***[Schedule 2, item 11, subsections 153ZEP(1) and (2) of the CCA]***

- 1.131 For transparency, the arbitration commission must provide reasons for its determination. Both the determination and reasons for the determination must

be provided to the parties. The determination is not intended to be a legislative instrument, as it will only apply to parties to the arbitration. This does not differ from the existing standard in section 44V of the CCA, but instead clarifies the status of the determination.

***[Schedule 2, item 11, subsections 153ZEP(4) and (5) of the CCA]***

- 1.132 The Commission must consult with ASIC and the RBA prior to making an interim or final determination. This recognises the central role those regulators have in the oversight of CS facilities. The consultation requirement enables ASIC to provide advice on the obligations of CS facility licensees under Parts 7.3 and 7.3A of the Corporations Act, and the RBA to offer advice on the financial stability implications of matters related to the access dispute. Any advice that is provided to the Commission by either ASIC or the RBA must be considered in making a determination .

***[Schedule 2, item 11, paragraph 153ZEP(3)(b) of the CCA]***

- 1.133 The Commission may provide a draft determination to the parties to arbitration prior to making either an interim or final determination. The option to issue a draft determination is also applicable for where the Commission varies or revokes a determination. Whether to issue a draft determination is at the discretion of the Commission.

***[Schedule 2, item 11, paragraph 153ZEP(3)(a) of the CCA]***

- 1.134 A draft decision is issued after the Commission has given full consideration to the matters in dispute. However, the draft determination is designed to give the parties an opportunity to comment on the draft determination and for the Commission to further consider its analysis and position before making its final determination.

#### ***Matters the Commission must have regard to***

- 1.135 To provide certainty to industry on how access outcomes are determined the Commission must consider various matters. The Commission must consider the following matters when making a final determination, but has discretion on what to consider in making an interim determination:
- access to CS services is on fair and reasonable terms and conditions (including pricing) that are transparent and non-discriminatory
  - the long-term interests of the Australian market are supported by delivering outcomes that are consistent with those expected in a competitive market for CS services
  - address imbalances in bargaining power between providers of CS services and access seekers in Australia

- provide incentives for providers of CS services to negotiate commercial and non-discriminatory terms of access with access seekers of the CS services in Australia
- provide for a timely resolution of access related disputes between providers of CS services and access seekers, where they arise
- discourage providers of CS services from exerting market power to the detriment of competition in upstream and downstream markets.
- the operational and technical requirements necessary for the safe and reliable operation of any CS facility used to provide CS service
- any advice provided by ASIC or the RBA in response to consultations or in relation to the arbitration
- any obligations under Australian law that applies to the provider or CS facility licensee in relation to the CS service.

***[Schedule 2, item 11, subsection 153ZER(1) of the CCA]***

- 1.136 Generally, the matters the Commission must consider in making a determination address the inefficiencies that arise from exercising market power. The Commission must consider the specific circumstances of the provider and the CS facility licensee, including the legal and regulatory obligations that apply to the provider and licensee when making a determination. Obligations under Australian law covers relevant obligations of the CS service provider and CS facility licensee under legislation (such as the Corporations Act), subordinate legislation, licence conditions, standards and rules made by the relevant regulators governing access to the service.
- 1.137 The Commission may consider the following additional matters if it is relevant or necessary to the parties involved in arbitration:
- the pricing of access prices should generate expected revenue for a CS service that reflects the costs of providing access to the CS service
  - access price structures should not allow a vertically integrated provider to set terms and conditions that discriminate in favour of its related entities, except to the extent that the cost of providing access to other access seekers is higher
  - whether access pricing provides incentives to reduce costs or otherwise improve productivity
  - the legitimate business interests of the provider, and the provider's investment in the CS facility
  - the legitimate business interests of the CS facility licensee and the CS facility licensee's investment in the CS facility



- the interests of all persons who have rights to use the linked CS service
- guidance or policies that relate to CS services made by the RBA, ASIC or ACCC (in addition to the CS services rules made by ASIC)
- the public interest, including the public interest in having competition in markets (whether or not in Australia); or
- any other matters it considers relevant.

***[Schedule 2, item 11, subsections 153ZER(2) and (3) of the CCA]***

1.138 The legitimate business interests include the provider's ability to make a return on investment commensurate with the commercial risks involved, of the provider or CS facility licensee. However, the legitimate business interests of the provider does not include considering monopoly rents.

***Restrictions on access determinations***

- 1.139 The Commission is restricted from making a final determination that would have the following effects:
- prevents an existing user (a person using the service when the dispute was notified) who is not related to the provider from obtaining sufficient access to the CS service
  - prevents a person who is not related to the CS service provider from obtaining, by the exercise of a pre-notification right (that is, a right under a contract, or under a determination, that was in force at the time when the dispute was notified), sufficient access to the CS service
  - results in the access seeker becoming the owner (or one of the owners) of any part of the CS facility used for the purposes of providing the CS service, or of extensions to the facility used for the purposes of providing the service without the consent of the CS service provider
  - requires the CS service provider to bear some or all of the costs of extending or maintaining extensions of the facility used for the purposes of providing the service (including expanding the capacity of the facility to provide the service).

***[Schedule 2, item 11, subsection 153ZEQ(1) of the CCA]***

1.140 Any final determination made by the arbitration commission that deprives someone that is not related to the provider of a right to access the CS service, that existed prior to the notification, must require the access seeker to pay fair compensation for the deprivation as determined by the Commission. The access seeker is also required to reimburse both the provider and the Commonwealth for any compensation that is agreed by either the provider or the Commonwealth. The court may also order the access seeker to reimburse

the provider or Commonwealth for compensation.

***[Schedule 2, item 11, subsection 153ZEQ(4) of the CCA]***

- 1.141 In the case where the provider is not a CS facility licensee (the provider may be a related entity of the relevant CS facility licensee) the Commission must consider these restrictions and the implications as if the relevant CS facility licensee was the provider of the CS service.

***[Schedule 2, item 11, subsection 153ZEQ(5) of the CCA]***

- 1.142 With respect to the Commission considering the effects of preventing access to users that should have access, the Commission is not restricted from making a final determination that prevents an existing user (who is unrelated to the CS service provider) from accessing the service when the Commission is making a decision that relates to an earlier determination of an access dispute between the access seeker and the CS service provider. This is to ensure a previous determination made under the arbitration framework can be replaced by a new determination.

***[Schedule 2, item 11, subsection 153ZEQ(2) of the CCA]***

- 1.143 These restrictions are necessary for the Commission to consider so that appropriate access is granted and no unrelated third-party is disadvantaged from doing so.

- 1.144 A final determination that contravenes any of the restricted matters listed above is invalid only for the part that is contravened. That is, part of the determination is invalid to the extent that it contravenes any one of the restricted matters.

***[Schedule 2, item 11, subsection 153ZEQ(3) of the CCA]***

#### *Interim determinations*

- 1.145 The Commission may make interim determinations on the matter in dispute and/or any other matter relating to access to the CS service to which the dispute relates.

- 1.146 The Commission has discretion whether to consider any of the matters outlined in subsections 153ZER(1) or (2) when making an interim determination.

***[Schedule 2, item 11, subsections 153ZER(4) and (5) of the CCA]***

- 1.147 This is to facilitate appropriate access to the CS service while the arbitration is taking place and prevents a provider from using the arbitration process as a strategy to delay providing access. For example, if a CS service provider unreasonably refuses access to a CS service, then the Commission could make an interim order that requires the CS service provider to provide access to that service.

- 1.148 The interim determination only applies to parties to the arbitration.

1.149 An interim order takes effect on the day specified in the determination and has a limited duration. The interim determination will continue to have effect until it is revoked or one of the following occurs earlier:

- the notification of the access dispute is withdrawn
- the arbitration is terminated; or
- a final determination takes effect.

***[Schedule 2, item 11, section 153ZEZ of the CCA]***

*Final determinations*

1.150 The Commission has the power to make a final determination on any matter related to access to the CS service to which the access dispute relates, including matters that were not the basis for notification of the dispute.

***[Schedule 2, item 11, section 153ZEY of the CCA]***

1.151 For example, final determinations may include terms relating, but are not limited to:

- require the CS service provider to provide access to the service by the access seeker
- require the access seeker to accept, and pay for, access to the CS service
- specify the terms and conditions of the access seeker's access to the CS service; and
- vary or revoke an earlier determination relating to access to a CS service by the access seeker.

***[Schedule 2, item 11, subsection 153ZEP(2) of the CCA]***

1.152 The final determination is binding on the parties to the arbitration.

1.153 Generally, final determinations are to operate prospectively, with effect 21 days after the determination is made. However, a final determination may apply from an earlier date provided that it is specified on the determination. The determination cannot be backdated to a date prior to the notification of negotiations, but it may not be on a date that an access seeker did not have access to the CS service. Where a final determination applies simultaneously to an interim determination, the provisions of the final determination take precedent over the interim determination.

1.154 In the instance of a backdated final determination that requires a party to pay money to another party, interest may apply at the rate specified on the determination. Interest may only apply for part of the cost or part of the period

or both and is effective for the duration specified on the determination.

***[Schedule 2, item 11, section 153ZEY of the CCA]***

1.155 A final determination must be made within 180 days (six months) from the day the Commission is notified of the access dispute.

***[Schedule 2, item 11, subsection 153ZES(1) of the CCA]***

1.156 It is crucial that the Commission have the flexibility to extend the time period if it is appropriate in the circumstances. For example, a decision may be reliant on market information or a decision that may be released or made outside the set time limit for the arbitration. It is likely that the nature and circumstances of each arbitration will vary therefore it is optimal for the commission to have maximum flexibility to extend the time period, up to a pre-determined limit.

1.157 The Commission may extend the time one or more times, if it considers it is appropriate to do so, to a maximum period for decision of 270 days. For transparency, the Commission must notify the parties of the extension prior to it taking effect and provide reasons for an extension, the Commission is not required to rely on the agreement of parties to extend the time period. This is because parties may attempt to gain an advantage of the process by refusing an extension of time, resulting in crucial information not being able to be considered by the Commission.

***[Schedule 2, item 11, subsections 153ZES(2), (3) and (4) of the CCA]***

1.158 Including a time limit to release a final determination will ensure that the arbitration is conducted expediently and allows parties to be aware of the maximum timeframe by which an arbitration must conclude. This allows parties to plan the presentation of their cases accordingly and holds the arbitration commission to account.

1.159 Where the Commission fails to make a final determination within the extended period it is deemed that the Commission has made a final determination that does not impose or alter any obligations on either party. It is also considered that the Commission has published a written report about the final determination under section 153ZET of the CCA.

***[Schedule 2, item 11, subsection 153ZES(5) of the CCA]***

#### ***Parties may withdraw notification***

1.160 There are certain circumstances under which a party to the dispute may withdraw a notification. In some cases, the parties may resolve the dispute before it is determined by the Commission. In other cases, the parties may decide that they would prefer a negotiated outcome to a determination by the Commission, for example where the Commission has indicated the likely direction the determination will take.

1.161 In general, a notification may be withdrawn prior to the Commission making a final determination. The party that may withdraw the notification depends on the party that submitted the notification. The provider may only withdraw the notification that it submitted to the Commission and can do this at any time prior to the final determination. The access seeker may also withdraw the provider's notification but may only do so in the period between the Commission issuing a draft final determination and making a final determination. However, if the provider has notified a dispute over variation to a final determination, the access seeker is not permitted to withdraw the provider's notification.

***[Schedule 2, item 11, subsections 153ZEN(1) and (2) of the CCA]***

1.162 The provider may not withdraw the access seeker's notification at all, but the access seeker is permitted to withdraw its notification at any time before the Commission makes its final determination. If the notification is withdrawn, it is taken for the purposes of the Part never to have been given.

***[Schedule 2, item 11, subsections 153ZEN(1) and (3) of the CCA]***

#### *Variation or revocation of determinations*

1.163 The Commission has the discretion to vary or revoke an interim or final determination.

1.164 Any party to an arbitration may apply to the Commission for a variation of a determination. However, the decision to vary or revoke a final determination or interim order is not contingent on an application from any party, nor prevented by an objection from any party.

***[Schedule 2, item 11, subsection 153ZFA(1) of the CCA]***

1.165 Before making a variation, the Commission must consider the same matters and restrictions as when making a final determination or interim determination as set out in sections 153ZEQ and 153ZER of the CCA. The Commission may provide a draft of the variation to the parties prior to issuing the finalised version.

***[Schedule 2, item 11, subsections 153ZFA(2) and (3) of the CCA]***

1.166 The Commission must provide reasons for the variation or revocation of a determination to affected parties.

***[Schedule 2, item 11, subsection 153ZFA(4) of the CCA]***

1.167 The variation or revocation is not a legislative instrument as it only relates to the parties to arbitration.

***[Schedule 2, item 11, subsection 153ZFA(5) of the CCA]***

### **Termination by the Commission**

- 1.168 The Commission must terminate an arbitration if the provider ceases to be a licensee or related to one, and that CS facility licensee authorises the operation of the facility (effectively paragraphs (a), (b) and (c) of the definition of declared CS service cease to be true).
- 1.169 The Commission may reject or terminate an arbitration if it thinks that:
- the notification is vexatious
  - the matter is trivial, misconceived or lacking in substance
  - the party that notified the dispute has not engaged in negotiations in good faith
  - the commercial negotiation prior to notifying the Commission is insufficiently relevant to the matters the final determination will deal with; or
  - access to the service should continue to be governed by an existing contract between the CS service provider and the access seeker.

#### ***[Schedule 2, item 11, subsection 153ZEU(1) of the CCA]***

- 1.170 It is not a ground for the Commission to reject or terminate an arbitration if a party, other than the notifying party, refuses to negotiate in good faith prior to the arbitration process, provided that the notifying party has engaged, or has attempted to engage, in negotiations in good faith.
- 1.171 If a dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

#### ***[Schedule 2, item 11, subsection 153ZEU(2) of the CCA]***

### **Arbitration reports**

- 1.172 The Commission must prepare and publish a written report about any final arbitration determination made. This is important to provide transparency on how the Commission came to its determination. This will enhance procedural transparency and regulatory accountability and will facilitate informed consideration of whether there are grounds to seek a review of a decision by way of a judicial review application to the courts. The report is not a legislative instrument.

#### ***[Schedule 2, item 11, subsections 153ZET(1) and (8) of the CCA]***

- 1.173 The report must address:
- the matters both agreed and in dispute
  - the principles applied by the Commission

- the methodologies applied by the Commission
- all matters considered by the Commission and reasons for doing so; and
- any information provided by the parties to the arbitration that was relevant to the principles and methodologies applied (subject to confidentiality restrictions).

***[Schedule 2, item 11, subsection 153ZET(3) of the CCA]***

- 1.174 The arbitration report may include the whole or part of a final determination and the reasons. The requirements that must be included in the report does not preclude the Commission from reporting on other matters relevant to an arbitration, subject to the exclusion of confidential commercial information.

***[Schedule 2, item 11, subsections 153ZET(2) and (4) of the CCA]***

- 1.175 Prior to publishing the arbitration report, the Commission must provide parties notice of the contents of the arbitration report, allowing parties 14 days to make written submissions identifying any information that the parties consider should not be published because of its confidential commercial nature. The Commission must have regard to the submissions in deciding whether any information should be excluded and any other matters that is considered relevant.

***[Schedule 2, item 11, subsections 153ZET(6) and (7) of the CCA]***

- 1.176 The Commission must not include in an arbitration report any information the Commission decided not to give to a party to the arbitration under section 44ZL of the CCA. That section provides for a party to an arbitration to request the Commission to treat material as confidential. The Commission must consider a party's request to keep specified information confidential and advise the other party, inviting their comments and if there are objections to the request and any reasons for their objections. The Commission is to consider the request, any objections and any further submission that relate to the request before deciding whether the confidential information should or should not be given to the other party.

***[Schedule 2, item 11, subsection 153ZET(5) of the CCA]***

## **Review of determinations**

- 1.177 A determination made by the Commission will not be subject to merits review by the Australian Competition Tribunal. The arbitration regime is intended as a backstop where parties are unable to agree on terms of access to a CS service through commercial negotiations. As such, merits review would entail further costs and could be a barrier to entry for parties seeking arbitration.

- 1.178 Parties to the arbitration may seek review of the Commission’s decision in the Federal Court of Australia. An application for judicial review must be made within 28 days of the Commission’s decision and be made in accordance with the Rules of the Court (made under the *Federal Court of Australia Act 1976*). An application for judicial review is limited to questions of law. Judicial review of the decision is available under the ADJR Act and s 39B of the Judiciary Act.
- 1.179 An application to the Federal Court does not automatically mean that the decision of the Commission is affected or that action to implement the decision must cease. In the event of an appeal, the decision of the Federal Court has effect until the Court or a judge of the Court makes an order otherwise. A court may do this if it considers it appropriate to stay or affect the implementation of the decision to secure the effectiveness of the hearing and determination of the appeal.
- 1.180 The Federal Court may make orders:
- affirming the decision of the Commission
  - setting aside the decision of the Commission
  - referring the matter back to the Commission to be decided again in accordance with;
    - the directions of the Federal Court; or
    - any other order that the court considers appropriate.

## Procedure in arbitrations

- 1.181 Subdivision D of Division 3 of Part IIIA that outlines the procedure of arbitration that is applicable to CS services.  
*[Schedule 2, item 11, section 153ZEV of the CCA]*
- 1.182 Given that the Commission has oversight of the National Access Regime outlined in Part IIIA it is appropriate that the procedure be extended to access to CS services as it is based on third party access. This ensures that the Commission applies a consistent application for arbitrating disputes for third party access.
- 1.183 The Commission works closely and will continue to work closely with ASIC and the RBA as regulators of licensed CS facilities. Arbitrations are to be conducted by members of the Commission to ensure consistency with the overall regulatory framework. The chairperson of the Commission is required to nominate in writing two or more members of the Commission to constitute the Commission for the purposes of a particular arbitration. The Commission will inform all parties in writing once the Commission has been constituted.



1.184 If a member of the arbitration stops being a commissioner or for whatever reason becomes unavailable for the purposes of the arbitration, the chairperson must either:

- direct that the remaining member(s) will constitute the Commission for the arbitration; or,
- appoint another member of the Commission to the arbitration.

***[Schedule 2, item 11, Division 6 referring to sections 44Z, 44ZA, 44ZB of the CCA]***

1.185 A newly constituted commission:

- must continue and finish the arbitration; and
- may have regard to the records of previous Commission proceedings of the arbitration.

1.186 Any questions before the Commission must be decided according to the majority, where there is an evenly split decision the presiding member may decide an appropriate response.

***[refer section 44ZC of the CCA].***

1.187 Arbitration hearings are to be in private unless the parties agree to a public hearing.

***[refer section 44ZD of the CCA].***

1.188 A party in arbitration may choose to be represented by another person

***[refer section 44ZE of the CCA]***

1.189 The Commission has complete discretion in determining:

- what is relevant for the dispute as it deems appropriate
- reasonable time periods for adequate presentation of the case
- what evidence or argument to request; and
- the method of communication the arbitration hearing will be conducted.

***[refer section 44ZF of the CCA]***

1.190 In general, the Commission may give directions and do all things that are necessary in investigating the dispute and consider all matters affecting the merits and fair settlement of the dispute to arrive at a determination. This includes the ability to take evidence on oath and summon a person to provide evidence. Where a person has been summoned and does not appear, the Commission may determine the arbitration without that person.

***[refer section 44ZF, 44ZG and 44ZH of the CCA]***

- 1.191 Various penalties throughout Subdivision D of Division 3 of Part IIIA of the CCA are applicable to parties in Part XICB arbitration. A person is required to do the following, where contravention is imprisonment of up to six months:
- comply with an order from the Commission to keep specified information confidential;  
*[refer subsection 44ZG(5) of the CCA]*
  - refrain from doing anything that the court would consider contempt throughout arbitration;  
*[refer subsection 44ZG(3) of the CCA]*
  - attend as a witness where the Commission is served a summons and answer questions where there is not a reasonable excuse to do so;  
*[refer sections 44ZI and 44ZJ of the CCA]*
- 1.192 Additionally, a penalty of 12 months imprisonment is applicable for a person that contravenes the requirement not to intimidate, threaten or disadvantage another person because that person has documents or is a witness for the Commission.  
*[refer section 44ZK of the CCA]*

### *Regulations*

- 1.193 The regulations may impose conditions for the purpose of arbitrating a dispute and may specify the payment of costs associated with arbitration and any apportionment of the charges between parties.  
*[refer section 44ZG(3) and 44ZN of the CCA]*
- 1.194 Regulations may also be made for other matters that set out rules about the conduct of mediation. These rules may be incorporated via a reference in the Regulations to extrinsic materials and must apply as in force at the time the regulations are made or at another fixed point in time. This is to ensure consistency across mediations and provide certainty for bargaining parties. A mediation must be conducted in accordance with any rules set out in the Regulations.  
*[Schedule 2, item 11, subsection 153ZEV(3) of the CCA]*
- 1.195 Regulations made for the purpose of an arbitration of an access dispute for CS services will not have the effect of modifying the operation of a provision of the Act but will merely modify the operation of regulations made under Subdivision D of Division 3 of Part IIIA of the CCA.

### **Joint arbitration hearings**

- 1.196 The Commission has the discretion to conduct joint arbitration hearings following notification to the parties to the dispute. These arrangements will allow the Commission to consider the CS service in its entirety and could streamline administrative requirements, reduce costs and may expedite

commercially negotiated outcomes.

*[Schedule 2, item 11, section 153ZEV of the CCA and section 44ZNA of the CCA]*

- 1.197 The Chairperson of the Commission may decide, by written notice, that the Commission must hold a joint arbitration hearing in respect of the specified disputes nominated in the notice. The Chairperson may exercise this discretion only where the Chairperson considers that such an arrangement would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.
- 1.198 The Commission is required to undertake consultation with the parties to the dispute prior to undertaking the joint arbitration hearing. The Commission must also have regard to submissions received in deciding whether to hold the joint hearing.
- 1.199 The procedural requirements applicable to the Chairperson and the Commission in arbitration hearings apply in the same way to joint arbitration hearings. The Commission must adhere to the rules specifying having regard to certain material in the arbitration of any nominated dispute.
- 1.200 The Commission may make a single determination that covers all of the disputes, that is not a legislative instrument.

### **Enforcement and remedies**

- 1.201 Preventing or hindering an access seeker's access to the CS service under a determination is prohibited under the arbitration regime. This applies to the provider or user of a CS service or a body corporate related to the provider or user of the CS service.
- [Schedule 2, item 11, section 153ZFB of the CCA]*
- 1.202 To ensure determinations are complied with by parties, a provision that enables a party to apply to the Federal Court has been incorporated. The involvement of the Federal Court is also extended to parties that contravene the prohibition on hindering access to CS services. This is modelled off the existing enforcement and remedies provision in Division 7 of Part IIIA of the CCA. Where a determination is in force and a party applies to the court that the determination has been, is or is likely to be contravened by the other party, the Court may make any order it considers appropriate including, but not limited to:
- grant a restraining or mandatory injunction; or
  - direct the party at fault to compensate the other party for loss or damage as a result of the contravention.
- [Schedule 2, item 11, section 153ZFC of the CCA and subsection 44ZZD(1) and 44ZZE(1) of the CCA]*

- 1.203 The order may apply to any other person the Court considers involved in the contravention. Whether a person was involved depends on whether that person aided, procured, induced, or conspired with others to give effect to the contravention. The person may have even been indirectly or directly knowingly concerned in or a party to the contravention.  
*[Schedule 2, item 11, section 153ZFC of the CCA and subsections 44ZZD(2) and (3) and section 44ZZE of the CCA]*

## **Injunctions**

- 1.204 The Federal Court may grant either a restraining or mandatory injunction. To grant an injunction that restrains a person from engaging in certain conduct the Federal Court may consider whether the person has, is likely to, or continue to engage in that conduct. The Federal Court may grant an injunction that compels a person to do a thing regardless of whether it appears that the person has, is likely to, or continues to refuse or fail to do a thing. Either injunction may be granted if it appears that there is imminent or substantial danger to a person if the person engages in the conduct or refuses or fails to do a thing. However, an injunction may only be granted by the Federal Court if all parties consent to the proceedings. An interim injunction may be granted whilst an outcome is determined. Whilst an interim injunction is in force the Commission cannot give any undertakings as to damages. The Federal Court may revoke or vary an injunction granted at any time.  
*[Schedule 2, item 11, section 153ZFC of the CCA and section 44ZZF, 44ZZG, 44ZZH, 44ZI and 44ZZK of the CCA]*
- 1.205 Section 44ZZJ of the CCA relating to enforcement of access undertakings does not apply to the arbitration regime relating to CS services.  
*[Schedule 2, item 11, section 153ZFC (2)(d) of the CCA]*
- 1.206 The Commission may apply to the Court where there has been a breach or a suspected breach consisting of using requested information outside the negotiations or arbitrations of CS services under section 153ZEL of the CCA.  
*[Schedule 2, items 9 and 10, paragraph 80(1)(a) of the CCA]*

## **Miscellaneous Part IIIA provisions to apply**

- 1.207 Selected provisions of Division 8 of Part IIIA are to apply to the clearing and settlement arbitration regime. Those provisions apply to determinations made for access to CS services in the same manner as determinations under Part IIIA.  
*[Schedule 2, item 11, subsection 153ZFE (1) of the CCA]*
- 1.208 The Commission is required to maintain a register of final determinations that includes the details of the parties subject to arbitration. The details specified on the determination including the names of the parties, the service and the date

the determination was made are all to be made publicly available on the register.

- 1.209 A regulation making power to prescribe details of any fees associated with maintaining the register and inspection of the register.  
*[Schedule 2, item 11, section 153ZFD of the CCA]*
- 1.210 Section 44ZZN protects a determination made for CS services from being invalid where there is unjust acquisition of property. The Commonwealth is liable to pay compensation if the determination results in an acquisition of property and the person has not been sufficiently compensated. Where the compensation relates to the deprivation of a pre-notification right, the determination may enable the Commonwealth to seek reimbursement from the third party to the determination under section 44W of the CCA.  
*[Schedule 2, item 11, paragraph 153ZFE (1)(a) of the CCA]*
- 1.211 The access provisions under Part XICB do not affect the operation of Part IV of the CCA, relating to competition conduct rules or Part VII of the CCA, relating to authorisation provisions. If an access arrangement in a code or undertaking contains anti-competitive terms, it will continue to be subject to the operation of Part IV and Part VII of the CCA. Similarly, the operations of industry bodies in formulating access codes will be subject to the competitive conduct rules unless authorised or otherwise excluded from the competitive conduct rules.  
*[Schedule 2, item 11, paragraph 153ZFE (1)(b) of the CCA]*
- 1.212 The application of section 44ZZO of the CCA to determinations made for access to CS services is necessary as it may be required to establish the state of mind of an individual in proceedings for offences under the arbitration regime for access to CS services. In these circumstances, it is sufficient to show that an employee or agent of the individual engaged in the relevant conduct and had the relevant state of mind. State of mind includes knowledge, intention, opinion, belief or purpose.  
*[Schedule 2, item 11, paragraph 153ZFE (1)(c) of the CCA]*

## Consequential amendments

### ASIC rule making power

- 1.213 The operating rules and written procedures of a CS facility must deal with, in addition to any matters prescribed by the regulations, any matters prescribed by the CS services rules. The CS services rules prevail over any inconsistency

with the operating rules of a CS facility. This is limited to where the CS services rules specifically require something that the operating rules must deal with. This is important as it maintains the legal certainty of the operating rules and their enforceability as between parties to the statutory contract under section 822B of the Corporations Act.

***[Schedule 1, items 2 and 3, subsection 822A(1) and paragraph 822B(2)(c) of the Corporations Act]***

- 1.214 The Minister is required to consider consistency of an operating rule change with the CS facility licensee's obligation to comply with the CS services rules.  
***[Schedule 1, item 4, subsection 822E(4) of the Corporations Act]***
- 1.215 The Financial Stability Standards take priority in the event of any inconsistency between the standards and the CS services rules, derivative transaction rules or derivative trade repository rules.  
***[Schedule 1, item 7, subsection 827D(2A) of the Corporations Act]***
- 1.216 In addition to the matters to be taken into account by the Minister in section 827A, the Minister must have regard to relevant advice received from the ACCC in deciding whether to grant, vary, suspend or cancel CS facility licence or disallow changes to the operating rules of a CS facility. This is to ensure that the ACCC can assess the impact of any operating rule changes or licensing decisions on competition and can provide advice to the Minister accordingly.  
***[Schedule 1, item 6, paragraph 827A(2)(h) of the Corporations Act]***
- 1.217 The ASIC Act is updated to allow ASIC to disclose protected and confidential information to the ACCC. This is intended to facilitate easier information sharing between the agencies in respect of CS facilities.  
***[Schedule 1, item 1, paragraph 127(2A)(da) of the ASIC Act]***
- 1.218 The penalty for failing to notify ASIC where a person becomes aware it can no longer meet its obligations under the CS services rules is 100 penalty units. Similarly, the penalty for failing to comply with an ASIC direction is consistent with existing penalties, being 100 for an individual and 1000 for a body corporate.  
***[Schedule 1, items 10 and 11, subsection 1317E(3) and Schedule 3 of the Corporations Act]***

## Arbitration

- 1.219 ASIC has been included as a defined term in the CCA to improve the readability of the Act. The effect of including ASIC as a defined term is that additional references are now redundant and can be removed.  
***[Schedule 2, items 1, 2, 3, 4 and 5, subsections 4(1), 26(1), 26(2), 86E(4) and 155AAA(12) of the CAA]***

- 1.220 Part IIIA of the Act is updated to clarify that the reference to determination is a final determination. This minor and technical amendment improves readability and consistency within Part IIIA by clarifying that a final determination does not include an interim determination.

*[Schedule 2, item 6, paragraph 44T(1)(b) of the CCA]*

## Commencement, application, and transitional provisions

- 1.221 The amendments commence the day after which the Bill receives Royal Assent.