Australian
Competition &
Consumer
Commission

Arbitrations

A guide to resolution of access disputes under Part IIIA of the *Trade Practices Act 1974*

April 2006

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Important notice

This guide is designed to give you basic information; it does not cover the whole of the Trade Practices Act and is not a substitute for professional advice. Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the dispute need to be taken into account when determining how the Act applies to that dispute.

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Contents

Abbreviations

ACCC	Australian Competition and Consumer Commission
Act	*Trade Practices Act 1974*
CMT	Case management team
Federal Court	Federal Court of Australia
NCC	National Competition Council
Part IIIA	Part IIIA Access to Services in the *Trade Practices Act 1974*
Regulations	Trade Practices Regulations 1974
Tribunal	Australian Competition Tribunal

Glossary of terms

Access seeker	A third party who makes a request for access to a service declared under Part IIIA of the Act
Arbitration	Refers to the process of arbitration of an access dispute by the commission under Part IIIA of the Act
Arbitration hearing (or hearing)	The process of conducting the arbitration. A hearing may be conducted in person and/or by way of telephone or closed circuit television. A hearing may be held to receive submissions by oral evidence or for discussing procedural matters or any other purpose
Commission	Refers to those members of the ACCC who are constituted to conduct the arbitration
Conference	A meeting between the parties and one or more commissioners
Declared service	A service (see definition of service) for which a declaration is in operation—see s. 44B of the Act
Final determination	A determination of the commission made pursuant to s. 44V of the Act that is not a draft determination
Hilmer Report	*National Competition Policy—Report by the Independent Committee of Inquiry*, August 1993, chaired by Mr Fred Hilmer AO
Key infrastructure	Facilities that satisfy the criteria for application of Part IIIA of the Act
Minister	The 'designated minister' as defined by s. 44D of the Act to be the Commonwealth minister, unless it is in relation to declaration of a service where the provider is a state or territory body and the state or territory is a party to the competition principles agreement, then the designated minister is the responsible minister of the state/territory
Party	A person who is formally recognised as a party to an arbitration under Part IIIA of the Act—see ss. 44B and 44U of the Act
Provider	The entity that is the owner or operator of the facility that is used (or is to be used) to provide the service (see definition of service)—see s. 44B of the Act

Service	As defined in s. 44B, the term service refers to 'a service provided by means of a facility' and includes the (a) use of an infrastructure facility such as a road or railway line; (b) handling or transporting things such as goods or people; and (c) a communications service or similar service, but excludes matters specified in the Act
Third party	In relation to a service (see definition of service), a person who wants access to the service or wants a change to some aspect of their existing access to the service—see s. 44B

Preface

About these guidelines

Part IIIA of the *Trade Practices Act 1974* (the Act) is a key component of the regulatory framework supporting the development of a competitive environment in markets associated with the operation of key infrastructure facilities. It establishes a regime under which access seekers can obtain access to services provided by owners or operators of key infrastructure facilities. Access may be facilitated under Part IIIA through an access undertaking, certification of a state or territory access regime, or through declaration of the relevant service. The designated minister[1], after consideration of a recommendation by the National Competition Council (NCC), is responsible for determining whether a service should be declared. In the event that an access seeker and provider cannot agree on the terms and conditions of access to a declared service, either party may request the Australian Competition and Consumer Commission (ACCC) to arbitrate the dispute by making a determination.[2]

There are special features that distinguish access arbitrations from typical commercial arbitrations. Access arbitrations concerning declared services are often characterised by a lack of mutual commercial incentives to reach settlement, particularly where the service is provided by means of infrastructure with natural monopoly characteristics and the access provider would compete with the access seeker in upstream or downstream markets. Moreover, in arbitrating access disputes, the ACCC must reach its determination through the application of specific statutory criteria. These factors typically make access arbitrations more complex than standard commercial arbitrations.

The purpose of this guide is to:

- **explain how the ACCC will exercise its dispute resolution powers under Part IIIA of the Act**
- **highlight particular sections of Part IIIA that impose specific obligations on both the parties to a dispute and the ACCC in arbitrating the dispute.**

1 The designated minister will generally be the Commonwealth treasurer, except in cases where the infrastructure is owned by a state or a territory government, in which case the designated minister will be the responsible minister of that state or territory.

2 The ACCC may also be called on to arbitrate disputes under an access undertaking when that undertaking specifies the ACCC would be responsible for resolving disputes pursuant to that undertaking.

Specifically:

- chapter 1 provides an introduction and overview of Part IIIA
- chapter 2 explains the structure and process which the ACCC will generally follow when arbitrating an access dispute
- chapter 3 discusses how the ACCC conducts arbitration hearings, its powers to seek information, including the use of experts, and more general procedural matters such as improper conduct
- chapter 4 looks at how the ACCC may address issues relating to privacy, confidentiality and disclosure of information and matters of procedural fairness
- chapter 5 outlines the circumstances in which arbitrations can be terminated by either the ACCC or by the parties that notified the dispute
- chapter 6 contains a brief overview of post-determination matters (e.g. review, enforcement and variation of a determination).

Where possible, the relevant sections of Part IIIA are identified in bold throughout the text, such as **[s. 44ZF]** to assist anyone wishing to refer to the legislative provisions for further reference.

At the time of writing this guide (April 2006), the ACCC has not arbitrated an access dispute under Part IIIA. However, the ACCC has arbitrated a number of access disputes in the telecommunications industry under Part XIC of the Act. As a result, the ACCC has developed some expertise in this type of dispute resolution which has informed this guide.

The *Trade Practices Amendment (National Access Regime) Bill 2006* was introduced into parliament on 2 June 2005 and passed the House of Representatives with amendment on 9 February 2006. It contains numerous amendments to Part IIIA, which if passed, will affect some aspects of the arbitration process, such as the proposed publication and backdating of final determinations by the ACCC. The ACCC is monitoring the progress of the draft legislation and will update this guide as necessary to reflect any legislative change.

More generally, the ACCC will regularly review the effectiveness of its arbitration processes and update or publish an addendum to the guide as necessary.

1 Introduction

The national access regime contained in Part IIIA was inserted into the Trade Practices Act in 1995, thereby implementing certain recommendations contained in the report on National Competition Policy (the Hilmer Report). The amendment followed an extensive process of negotiations between Commonwealth, state and territory governments involving public consultations.

1.1 Part IIIA—an overview

Part IIIA establishes a regime of regulatory rights and responsibilities relating to the provision of services that are considered critical to competition in related markets. The regime focuses on third party access to the services provided by a limited class of facilities that have the following distinguishing features:

- natural monopoly characteristics wherein, due to economies of scale or scope, a single facility can satisfy all the demand for its services in a market at lower cost than two or more facilities
- occupation of a strategic position in an industry, so that access to the facility's services is a prerequisite for businesses to be able to compete effectively in markets upstream or downstream of the facility (often referred to as a 'bottleneck' facility)
- being of national significance, having regard to its size and/or importance to interstate or international trade.

Access can only be required under Part IIIA if it would promote competition in at least one other market, and not be contrary to the public interest.

What does Part IIIA cover?

The types of services that may be covered by Part IIIA are typically provided by facilities such as gas transmission and distribution pipelines, electricity transmission and distribution networks, railway tracks, airport facilities, water pipelines, communications networks and certain sea ports. The extent to which specific examples of such facilities meet the requirements of Part IIIA will depend on case by case assessment of individual market circumstances.

There is, however, some limit on the types of matters that the ACCC can arbitrate using Part IIIA. A party cannot notify an access dispute under Part IIIA if the dispute relates to a telecommunications service, but instead must utilise the telecommunications specific provisions under Part XIC of the Act **[s. 152CK]**.

How does Part IIIA work?

There are three components of the national access regime under Part IIIA:

- declaration of a service (under s. 44H)
- access undertakings (under s. 44ZZA)
- declaration that a state or territory access regime is effective (under s. 44N).

Declaration

After considering a recommendation made by the NCC, the minister may choose to declare a service. Declaration of a service establishes a right of a third party to negotiate the terms and conditions of access with the service provider. The terms and conditions of access to a declared service are negotiated between the parties in the first instance. Should the parties be unable to agree on the terms of access, either party may notify the ACCC of an access dispute. The ACCC is then empowered to determine the dispute by making a determination. In making a determination, the ACCC must have regard to matters specified in the Act (see s. 44X). Ministerial declarations (or decisions not to declare) and ACCC determinations can be appealed to the Australian Competition Tribunal (Tribunal). An access determination is able to be enforced in the Federal Court.

Access undertakings

Access providers may give an access undertaking to the ACCC but only where a service is not already declared. An undertaking may specify the terms and conditions on which access will be made available to third parties. An undertaking may provide for the ACCC to resolve disputes that arise under that undertaking. If the ACCC accepts an access undertaking, the service cannot then be declared. An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent. An access undertaking is able to be enforced in the Federal Court.

Certification of an effective state or territory regime

The responsible minister for a state or territory may apply for the NCC to recommend to the Commonwealth minister that existing arrangements under state or territory legislation constitute an effective access regime. A service that is subject to an effective state or territory access regime cannot be declared.

Part IIIA establishes an arbitration framework that can be used to resolve disputes concerning the supply of services that have been 'declared'. The arbitration framework reflects a negotiate/arbitrate model. Where the parties both have an interest in establishing and maintaining a commercial relationship with each other, they will often be able to negotiate access arrangements without recourse to arbitration. However this will not always be the case, particularly where the provider has no commercial incentive to provide reasonable access to the access seeker. In situations where the parties are unable to agree on access arrangements or use consensual dispute resolution processes to assist them, the ACCC can, if requested, step in and arbitrate the dispute.

1.2 Declared services

As a general rule, there is no legal obligation on a firm to supply a service to another firm. Normally an access seeker will negotiate directly with the provider of a service to obtain access. However if these private negotiations are unsuccessful, the access seeker may apply to the NCC to have it recommend to the designated minister that the service be 'declared'.[3] The Commonwealth minister (or if relevant a responsible state or territory minister) may also apply to the NCC for such a recommendation. Services provided by the crown in the right of the Commonwealth, states and territories are subject to the provisions of Part IIIA.

Method of declaration

For services to be declared an application must be made to the NCC **[s. 44F(1)]**. The Trade Practices Regulations specify the information that must be included in the application **[r. 6A]**.

In order to make such a recommendation the NCC must be satisfied that **[s. 44G(2)]**:

- access would promote competition in another market whether in Australia or not (usually in an upstream or downstream market)
- it would be uneconomical for anyone to develop another facility to provide the service
- the facility to which access is required must be of national significance with regard to its size or importance to interstate or overseas trade or the national economy
- access to the facility can be provided without undue risk to human health or safety
- no other effective access regime is in place in relation to the facility[4]
- access must not be contrary to the public interest.

The NCC cannot recommend a service be declared if it is subject to an access undertaking. Similarly, the minister cannot declare a service that is the subject of an access undertaking.

The NCC must make a recommendation to the minister to either declare or not declare the service **[s. 44F(2)(b)]**.[5] The designated minister cannot proceed to make a declaration without a recommendation of the NCC.

On receiving a recommendation, the minister must either declare or decide not to declare the service **[s. 44H(1)]**. In deciding whether to declare a service or not, the minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service **[s. 44H(2)]**.

3 See ss. 44G and 44H of the Act.

4 In determining whether an effective access regime is in place the NCC must take into account the principles in the Competition Principles Agreement and any relevant previous ministerial decision that the access regime is effective **[ss. 44G(3), (4)]**. See also s. 44DA.

5 Section 44H(9) of the Act specifies that if the designated minister does not publish within 60 days after receiving the declaration recommendation, it is taken at the end of that 60-day period, that the minister has decided not to declare the service and it is taken that she/he has published that decision.

The minister cannot declare the service unless he or she is satisfied of the same matters as those applied by the NCC (listed above) before making a final decision **[s. 44H(4)]**. If the minister declares the service, the declaration must specify the duration of the declaration **[s. 44H(8)]**.

The minister is not limited in regard to the grounds on which they make a decision.

Application for review of the minister's decision may be made (by the provider or the person who applied for declaration) to the Australian Competition Tribunal **[s. 44K]**. Subject to any application for review, the declaration takes effect at a time specified in the declaration, but which cannot be less than 21 days after it is published **[s. 44I(1)]**.

Revocation of declaration

The minister may revoke a declaration, but may not do so without the NCC first making a recommendation to the minister that the declaration be revoked **[s. 44J(6)]**. To make such a recommendation the NCC must be satisfied that at least one of the criteria in s. 44H(4) no longer applies to the service **[s. 44J(2)]**.

The minister must publish the decision to revoke or not to revoke a declaration **[s. 44J(4)]** and if the minister decides not to revoke, reasons must be given to the provider for this decision **[s. 44J(5)]**.

1.3 Disputes about access to declared services

If an access seeker and the provider of a declared service are unable to agree on one or more aspects of access to the service, they may:

- seek arbitration of the dispute by the ACCC under Part IIIA and/or
- choose to resolve the dispute through other means, for example private arbitration, mediation, conciliation or expert determination.

If parties reach an agreement in regard to access to a declared service the contract of agreement may be registered with the ACCC under s. 44ZW. The ACCC may decide not to register a contract, but if it so chooses, it must publish its decision. Once registered, the contract then becomes enforceable as if it was an ACCC arbitration determination.

Parties may continue to negotiate the terms of access while the ACCC arbitrates a dispute. Parties are permitted to withdraw notification of an access dispute at any time prior to the ACCC making its final determination.

1.4 What is arbitration?

Arbitration is a process whereby the parties submit their dispute to an arbitrator, who then makes a determination that is binding upon the parties.

Arbitration by the ACCC

Under Part IIIA, the arbitration process commences once the ACCC is notified in writing that an access dispute exists.[6] However, the ACCC would typically expect that parties would attempt to resolve the dispute prior to notification. In some cases the ACCC may be able to assist the parties reach agreement before a dispute is notified. This may occur by ACCC staff being able to, in certain circumstances, provide some preliminary guidance on the ACCC's likely approach to a particular issue in an arbitration. These matters are discussed in more detail in chapter 2 of this guide.

Where the ACCC is notified of an access dispute, it must make a written determination on access unless it terminates the arbitration under s. 44Y or the notification is withdrawn. The use of the term arbitration refers to the broader dispute resolution process set out in Division 3 of Part IIIA of the Act. The process itself may include hearings and/or written submissions and other inquiries.

A reference to 'arbitration hearing' in the guide refers to a meeting between ACCC commissioners (those members of the ACCC nominated to arbitrate an access dispute who, under Part IIIA, constitute the commission for the purposes of conducting the arbitration) and the parties to the arbitration. A hearing may be conducted by way of telephone, closed circuit television (e.g. video conference facilities) or any other means of communication. A hearing may be held to receive submissions by oral evidence or for discussing procedural matters or any other purpose.

There are three main phases to an arbitration—the preliminary, substantive and determination phases. Although these phases can overlap, it is useful to think of an arbitration in these terms because the tasks undertaken in each phase are qualitatively different.

6 The written notification must include the information required by r. 6C of the Trade Practices Regulations. See section 2.1 of this guide for more information.

During the **preliminary** phase of arbitration, the ACCC seeks to ascertain the parties to the dispute, resolve any jurisdictional issues and ensure that the relevant parties have identified the substantive issues in dispute.

The **substantive** phase involves the ACCC shaping the processes relevant to the arbitration and receiving all the relevant information. The ACCC will generally make directions for the parties to follow and seek submissions from the parties before deliberating on the issues in dispute. The ACCC may also seek expert advice on particular matters.

In arbitrating an access dispute, the ACCC does not merely choose between the positions put by each party. The ACCC may take into account any matter that it thinks is relevant. Further, a determination may deal with any matter relating to access by the third party to the service including matters which were not the basis of the notification. The ACCC, however, must take certain matters into account in making a determination. This is discussed more fully in section 2.16. In considering its position on the relevant matters, the ACCC may undertake its own analysis and seek information in addition to that provided by the parties.

The steps, obligations and procedures that are involved in the substantive phase of arbitration are detailed in chapter 2 of this guide.

The **determination** phase of an arbitration involves the ACCC issuing a draft determination for comment by the parties and finally making a determination. The ACCC may terminate the arbitration in certain circumstances without making a determination. These matters are discussed in chapter 5.

1.5 Parties may refer dispute to private arbitration

The parties may also seek to refer the dispute to private arbitration rather than refer the matter to the ACCC. The dispute may still be referred to the ACCC if private arbitration is not successful or if either party does not agree to this approach. Private arbitration or some other dispute resolution mechanism can be conducted contemporaneously with the ACCC determining the dispute. A dispute notification may be withdrawn at any time prior to the making of a final determination.

If private arbitration is successful, the parties may enter into a contract for access in accordance with the resolution. The parties may then submit the contract to the ACCC for registration.

Contract registration

A contract for access between parties cannot be registered unless it meets certain pre-conditions. Registration is only applicable if:

- the contract provides for access to a declared service
- the contract was made after the service was declared
- the parties to the contract are the service provider and a third party
- the provider is a corporation or the third party is a corporation
- access is, or would be, in the course of, or for the purpose of, constitutional trade or commerce **[s. 44ZV]**.

The ACCC may register a contract for access to declared services if all the parties to the contract apply for registration **[s. 44ZW(1)]**. In deciding whether to register a contract the ACCC must take into account **[s. 44ZW(2)]**:

(a) the public interest including interest in competition in markets (whether or not in Australia)

(b) the interests of all who have rights to use the service to which the contract relates.

If the ACCC decides to register the contract it must enter the names of the parties to the contract, the service to which the contract relates and the date on which the contract was made on the public register **[s. 44ZW(1)]**.

If the ACCC decides not to register a contract it must publish the decision and give the parties reasons for its decision **[s. 44ZW(3), (4)]**. The parties may apply to the Tribunal within 21 days for a review of the ACCC's decision **[s. 44ZX]**.

The advantage of having a contract registered is that it may be enforced as if it were a determination of the ACCC **[s. 44ZY(a)]**. However, the contract cannot be enforced by any other means **[s. 44ZY(b)]**, such as through the enforcement of private contractual rights arising under the agreement.

1.6 ACCC suggests alternative dispute resolution mechanisms

Should parties notify the dispute to the commission, it has no powers under Part IIIA to order or give directions requiring a party to attend mediation or conciliation. However, at any time after the ACCC is notified that a dispute exists, the commission may suggest to parties that they consider alternative dispute resolution mechanisms if it considers that this will facilitate the resolution of the dispute.

Other contractual arrangements

In some cases, contractual arrangements between the parties may provide for a dispute resolution process. The contract may provide that the dispute resolution process is supplementary to any other avenues available to the parties. Alternatively, it may provide that the parties cannot use alternative avenues of dispute resolution until they have completed the process set out in the agreement.

The commission cannot require a party to attend conciliation or mediation hearings in accordance with the process set out in a contract. Moreover, once a dispute is notified and the commission has jurisdiction to arbitrate the matter, the commission must make a determination unless the matter is terminated or withdrawn.

Mediation

As indicated above, Part IIIA does not confer any powers on the commission to order that the parties participate in a formal mediation process. Accordingly, the commission has no powers in regard to mediation of the dispute and would not mediate the dispute, although it may recommend mediation.

Mediation is a consensual approach, whereby the mediator seeks to facilitate agreement between the parties. Mediation usually has the following characteristics:

- commitment by the parties to participate in the mediation in good faith
- agreement that the contents of the mediation remain confidential
- the ability for private 'conferencing' to occur between the mediator and any party
- agreement to embody the outcome of the mediation in an enforceable contract between the parties.

Parties are encouraged to attempt to reach a negotiated outcome at any time, even while the commission is conducting an arbitration. If, for instance, the parties to the arbitration agree to attend mediation and advise the commission that they wish to suspend the arbitration, the commission may agree to a suspension until:

- a specific time limit elapses
- the parties (or a party) advise the commission that they wish to reactivate the arbitration process.

The commission is unlikely to delay the resumption of the arbitration because a specified time limit has not elapsed where it is clear that mediation is no longer favoured by a party.

Referral of a matter to an expert

The parties may agree to refer particular issues to an expert for an opinion. This is a consensual process whereby the parties would ask an expert to express a view on particular issues.

Referral of a matter to an expert could enable the more timely resolution of particular issues outside the scope of the ACCC's traditional area of expertise (e.g. technical issues). Additionally, the use of a less formal mode of gathering information, without the need to strictly observe the requirements of procedural fairness, may enable the expert to complete the task more quickly than would otherwise be the case.

Typically the referral of matters to an expert would be contained in a resolution contract between the parties. This contract would set out:

- the issues requiring expert determination
- whether the determination was binding or non-binding
- whether the determination would include reasons
- agreement that there will be no appeal from the determination.

The expert's opinion would not bind the commission, but the commission would take into account the findings.

Sequencing

Every opportunity will be given to the parties to conclude commercial negotiations, or engage in alternative dispute resolution processes for particular issues. If the resolution of particular issues is necessary before other issues can be resolved, then it may be necessary for the commission to defer consideration of those issues pending an outcome and continue the arbitration in respect of other outstanding matters.

The fact that the commission is arbitrating particular issues should not prevent or deter the parties from seeking to resolve the dispute themselves. In some cases, the commission would expect that commercial negotiation, mediation and other processes will continue in parallel with an arbitration rather than being treated as mutually exclusive.

The remainder of the guide deals with the process and the matters that the ACCC will generally consider when arbitrating an access dispute.

2 Structure and process of an arbitration

This chapter provides a guide to the structure and process of an arbitration which the ACCC may follow in resolving access disputes under Part IIIA of the Act.

The broad structure of arbitration encompasses three stages:

- notification (i.e. preliminary phase of arbitration)
- procedure and submissions (i.e. substantive phase)
- arbitration and decision (i.e. determination phase).[7]

A flow chart showing the structure and process of dispute resolution is presented in figure 1.

Each arbitration process is likely to be different. Accordingly, the ACCC does not adhere to and is not obliged to adhere to any particular structure or process for conducting an arbitration. This, to some extent, can be determined between the parties and the commission having regard to the matters in dispute and the perceived best means of resolving them. For this reason, the flow chart provides only a general guide as to how an arbitration is likely to be conducted.

7 An overview of the three phases of arbitration is presented in chapter 1 of this guide.

Figure 1 Structure and process of dispute resolution system (a guide only)

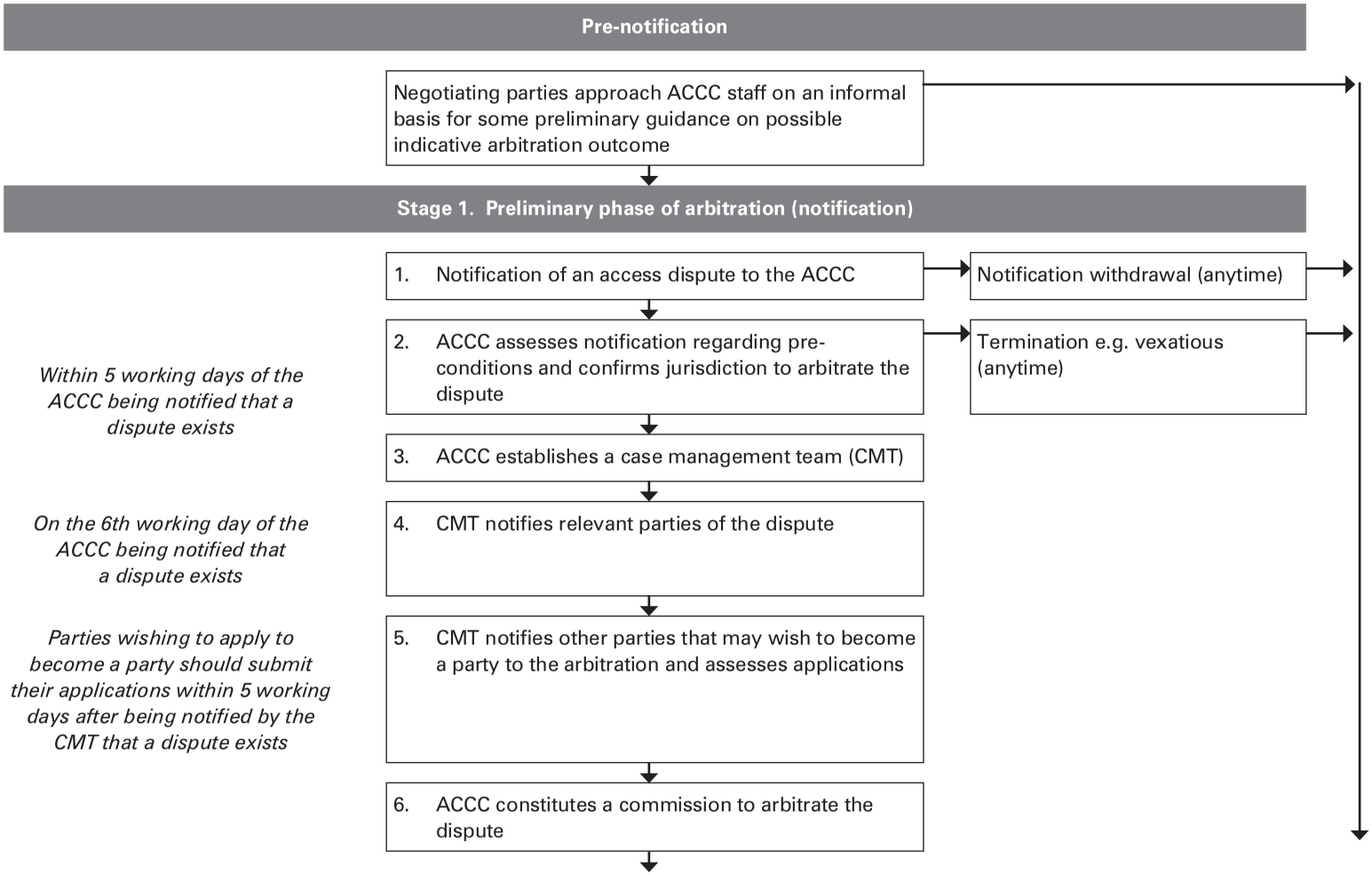


Figure 1 Structure and process of dispute resolution system (a guide only) (cont'd)

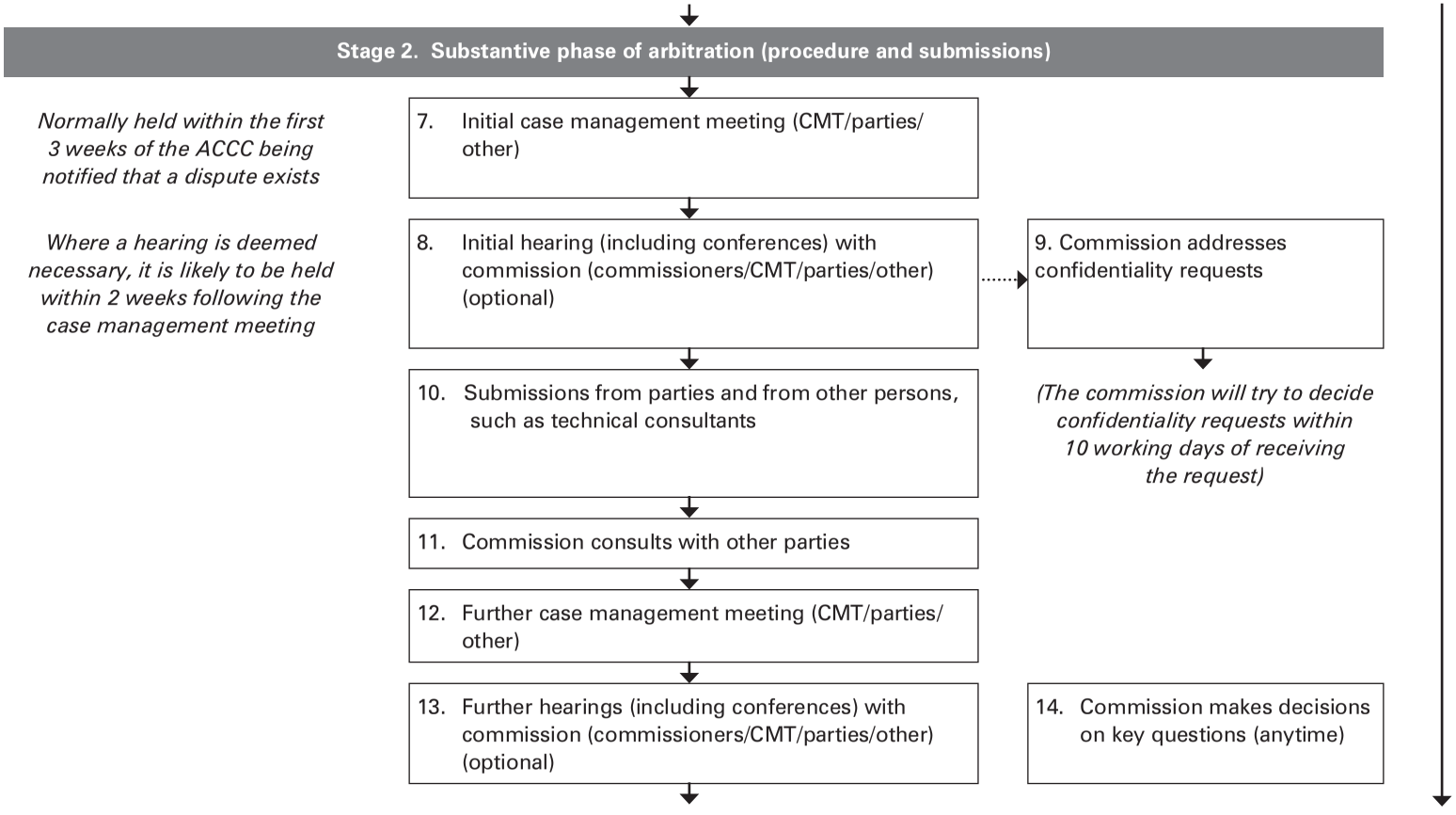
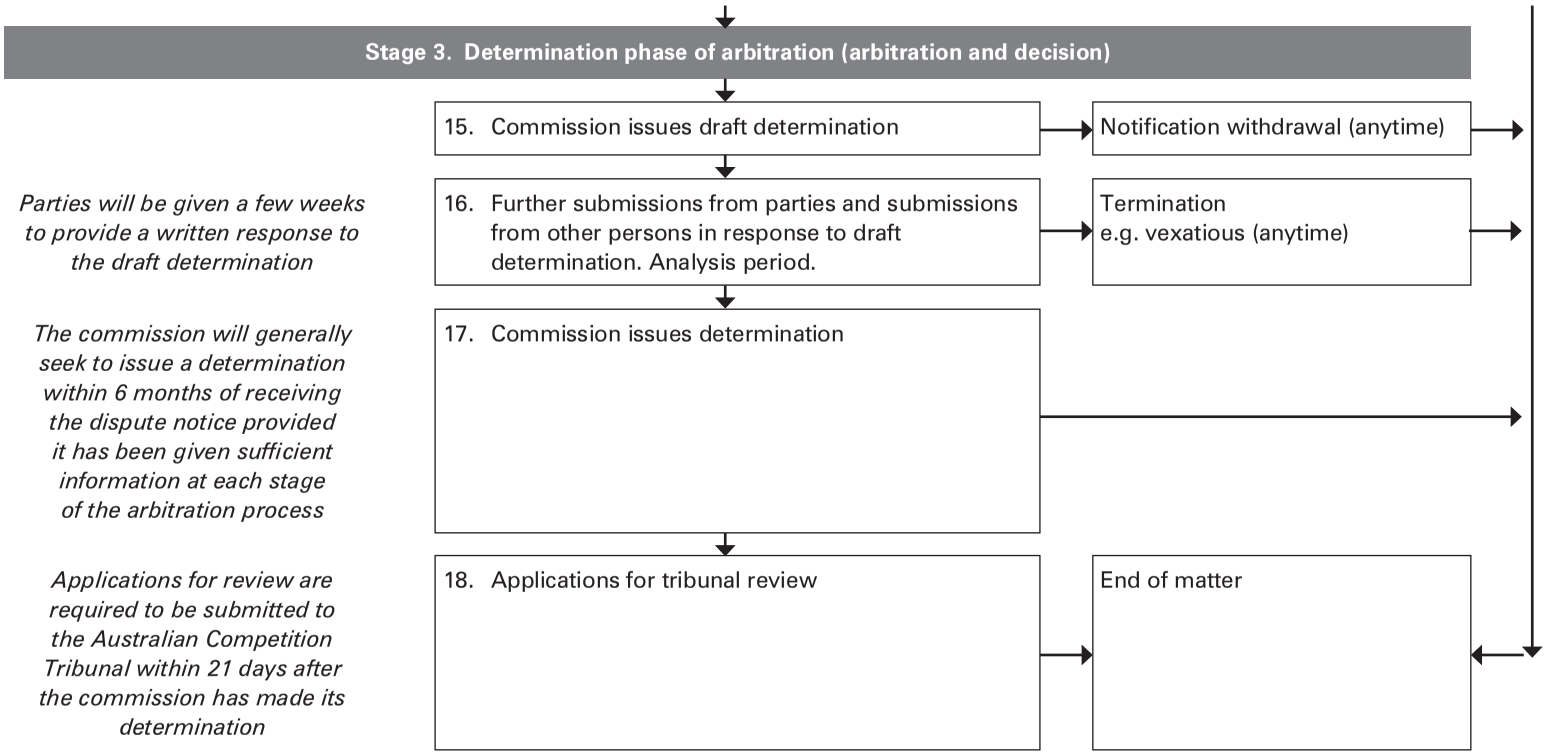


Figure 1 Structure and process of dispute resolution system (a guide only) (cont'd)



Pre-notification

2.1 Preliminary guidance

The ACCC may be of assistance to the negotiating parties before a dispute is notified by improving the level and quality of information available to them.

In certain circumstances, some preliminary guidance from ACCC staff may be provided to assist parties to reach a negotiated settlement. Guidance may relate to encouraging the parties to narrow their scope of disagreement and/or referring parties to publicly available information on cases which the ACCC has previously dealt with same or similar issues. In general, staff would only be able to provide such guidance where there would be no obvious reason why the ACCC would decide the matter differently in the context of the current dispute.

Preliminary guidance would be provided by ACCC staff only, and would not represent the view of the commission as arbitrator. Such guidance is provided on the basis that it is accepted as a non-binding and informal opinion by ACCC staff.

Provision of preliminary guidance by ACCC staff would not preclude either party from notifying a dispute at any time and would not prevent the ACCC from arbitrating a dispute.

Preliminary phase of arbitration (notification)

2.2 Notification of an access dispute to the ACCC

Either a prospective user of a service or the service provider may notify the ACCC of an access dispute if they are unable to agree on terms and conditions for access.

Section 44S of Part IIIA of the Act and the Regulations (r. 6C) set out matters that must be addressed in an access dispute notification.

In summary, the ACCC requires that **[s. 44S]**:

- notification of an access dispute be provided in written form **[s. 44S(1)]**
- either the service provider or the third party are a corporation or access is or would be in the course of constitutional trade or commerce **[s. 44R]**
- the third party is 'unable to agree' with the provider on one or more aspects of access to the declared service **[s. 44S(1)]**
- the notification includes the following necessary information:
  - the name of the person notifying the dispute (the notifier)
  - the notifier's address for delivery of documents
  - whether the notifier is the service provider or third party and the name and particulars of the other party to the dispute
- a short description of the notifier's existing and anticipated business
- a description of the service and the facility used to provide the service
  - a description of the access dispute
  - whether the dispute is about the varying of existing access arrangements and, if so, a description of those arrangements
  - each aspect of the access to the service on which the parties to the dispute are able to agree
  - each aspect of the access to the service on which the parties to the dispute are not able to agree.
- a description of efforts, if any, to resolve the dispute
- particulars of existing users and those with rights to use the service, and a brief description of how access may affect these other users
- whether access would involve extending the facility
- an estimate or description of the direct costs of providing access to the service and who will bear those costs
- whether access will involve the third party becoming the owner of any part or extension of the facility
- description of one or more methods by which access to the service can be provided and details of any risk to human health or safety caused by that method
- if the notifier is the third party, a short description of the benefits from allowing access to the service or increased access to the service. **[r. 6C(1)]**.[8]

Regulation 6C(2) requires that the notifier pay the ACCC a notification fee of $2750.

These requirements are set out in template form at appendix A to assist the notifier in preparing a letter and an accompanying dispute notice to send to the ACCC advising it that an access dispute exists for the purposes of arbitrating the dispute.

8 The notifier will not necessarily have full knowledge of some these matters. Accordingly, in respect of some of these matters, the regulations only require that details be provided to the best of the notifier's knowledge.

2.3 ACCC assesses notification regarding pre-conditions and confirms jurisdiction to arbitrate the dispute

Notification, pre-conditions

Before the ACCC can accept notification of an access dispute certain threshold requirements must be satisfied. These are:

- the provider of the service is a corporation
- the access seeker (called the 'third party' in the Act) is a corporation
- access is or would be in the course of or for the purposes of constitutional trade or commerce **[s. 44R]**
- the third party is 'unable to agree' with the provider on one or more aspects of access to the declared service **[s. 44S(1)]**.

Once it receives the notification, the ACCC will assess whether these pre-conditions have been satisfied, and if so, it will accept the notification of an access dispute provided under s. 44S. The parties will be advised if any of these pre-conditions are not satisfied.

Unable to agree

A party may notify a dispute even where a contract for access already exists between the access seeker and the provider. Some contracts will have dispute resolution clauses. When parties have not used a dispute resolution process established by contract, the ACCC will likely ask the parties why not and whether that process would help resolve the dispute.

Nevertheless, 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 declared service. For example, this information may show that a party has sought to vary the contract and that the other party has refused the request or refused to negotiate; or that the agreement was only a partial or conditional agreement.

By way of guidance, the ACCC sets out the following rule of thumb for use in considering whether the access seeker and access provider are unable to agree:

- either the access seeker or the access provider must have made a request of the other party, or put a proposal to the other party
- that the other party must have refused the request or rejected the proposal. The refusal may be an explicit refusal or a constructive refusal (e.g. where the other party has not responded to the request or proposal within a reasonable time).

Where there is insufficient information in the notification for the ACCC to be satisfied that the access seeker and access provider have been unable to agree, the ACCC will write to the relevant party seeking additional information and will generally advise the other party that it has done so. In some instances, but not all, it may seek the views of both parties before reaching a conclusion on the 'unable to agree' issue.

Regulation 6C(1)(g) requires the party notifying a dispute to provide a description of the efforts made to resolve the dispute.

The ACCC may terminate an arbitration if it thinks the notification is vexatious, the matter is trivial, misconceived or lacking in substance or the party that notified the dispute has not engaged in negotiations in good faith **[s. 44Y]**. Chapter 5 of this guide provides further information on the circumstances in which an arbitration can be terminated.

ACCC jurisdiction and objections

Upon receiving the notification, the ACCC will examine it to see whether the pre-conditions appear to have been met. If so, the ACCC will generally assume jurisdiction. This would normally occur within the first five working days of the ACCC being notified of the dispute. That said, at the outset the ACCC will generally ask the parties whether there is any objection to the ACCC's jurisdiction, and it is at this time that any objections should be raised. This issue may be discussed during the initial case management meeting.

2.4 ACCC establishes case management team (CMT)

Once the ACCC has assumed jurisdiction, it will establish a case management team (CMT) for the dispute. Although the constitution of the team will be determined on a case by case basis, it is likely to include at least two ACCC staff, one of whom is from the relevant line area within the ACCC, and the other from the ACCC's Legal Group.

The commission arbitrating the dispute may engage an expert to advise on any matter relevant to the dispute **[ss. 44ZF(1)(c)**, **44ZG(1)(e)]**. However, the role of the expert is to assist the commission with the evidence and not to resolve the dispute through expert determination. More information about the use of experts in an arbitration is provided in chapter 3 of this guide.

2.5 CMT notifies relevant parties of the dispute

The CMT will give written notice of the access dispute to the access provider (if the access seeker notified the access dispute) or the access seeker (if the access provider notified the access dispute). This would normally occur around the sixth working day following the ACCC receiving the dispute notification.

2.6 CMT notifies other parties that may wish to become a party to the arbitration and assesses applications

The CMT will also notify persons whom it thinks might want to become a party to arbitration after receiving notice of an access dispute **[s. 44S]**.

Any person who is not the access provider or access seeker who wishes to become a party should send a written application to the ACCC within five working days after being notified by the CMT.

The provider and access seeker automatically become parties to the arbitration. Whereas a party that applies in writing to the ACCC to become a party has no automatic right to become a party. If the applicant has demonstrated a 'sufficient interest', then the applicant will also become a party to the arbitration **[s. 44U]**.

However, once notified, there is no obligation on the person to apply to become a party and the person must make an application to become a party in the required way. All applicants must satisfy the test of sufficient interest, which is discussed more fully in the next section.

There may be persons who do not want to become a party to the arbitration or who would not pass the sufficient interest test required to become a party. However, it is not always necessary to be a party to the arbitration to express views about the issues. The commission is required to take into account a range of specific matters including the public interest and the interest of all persons who have rights to use the service **[s. 44X(1)]**. The commission may also take into account any other matters that it thinks are relevant **[s. 44X(2)]**.

The commission may consult more widely than the actual parties to the arbitration, including, in some cases, calling for public submissions as part of the conduct of the arbitration. The commission can take issues raised by those persons into consideration when determining a dispute.

A person may wish to be joined as a party because under Part IIIA certain rights are conferred on parties. For example, only a party to the arbitration can attend and present their case at an arbitration hearing. Further, only a party to an arbitration can seek review of a commission determination by the tribunal.

Parties to an arbitration—sufficient interest

In the context of dispute arbitration under the Act, the ACCC understands the expression 'sufficient interest' to mean 'sufficient interest in the determination(s) to be made in the arbitration'. Typically, the determination(s) will create rights and obligations between two persons in relation to supply of the declared service. The person seeking to become a party will need to demonstrate that it has a sufficient interest in those arrangements.

The expression 'sufficient interest' is not defined in the Act. The tribunal has been called upon to consider the meaning of the phrase in the context of reviewing two arbitration determinations made under Part XIC.[9] There, the tribunal drew a distinction between an interest that was 'direct and immediate' and an interest which was 'indirect'. In the tribunal's view (below), an indirect interest could not be characterised as a sufficient interest:

> The effect of the Tribunal's determination, even if it does establish a benchmark for the pricing of the declared services will be an indirect one in common with consequential effect that the price of access to the declared services is likely to have on a wide range of intermediate and end-users of carriage services. Macquarie, like all those other users has an interest, but we do not think the interest is a "sufficient interest" for the purpose of Part XIC. If it were, intervention by numerous users of other carriage services and services supplied by means of carriage services would be permissible under s. 152CO.

9 *Telstra Corporation Ltd* [2001] ACompT 1; (2001) ATPR 41-812

> This cannot be the intention of the Act, as to allow the intervention by numerous people would frustrate the arbitration process envisaged by Part XIC, including the object of protecting commercially sensitive information to be achieved by requiring hearings to be in private under s. 152CZ, and for the arbitration procedure to be expeditious: see s. 152DB.[10]

The distinction drawn by the tribunal between direct and indirect effects is one that the ACCC has previously used and will continue to use in determining who may be a party.

On the basis of the tribunal's decision, it can be said that the precedent effect of a determination in itself is generally not enough to prove sufficient interest. Something more is required. In the above instance, the extensive assistance provided by Optus in the cost modelling work, which was a central issue in dispute before the tribunal, was held to be one of the factors that provided a basis for accepting that Optus had a sufficient interest in the matter.[11]

In addition, the ACCC may accept that a person has a sufficient interest if it considers that the person's interests may be directly affected if, for instance:

- the person is contractually bound to take a price that would be determined in the arbitration
- the person has agreed to acquire a controlling interest in one of the parties to the arbitration.

Although the precedent effect or commonality of issues may not always provide a basis for making a person a party to an arbitration, in appropriate cases it may provide grounds for initiating a separate arbitration.

2.7 ACCC constitutes a commission to arbitrate the dispute

The chairperson of the ACCC is required to nominate in writing two or more members of the ACCC to constitute the commission for the purposes of a particular arbitration **[s. 44Z]**. The ACCC will inform all parties in writing once the commission has been constituted.

The presiding member throughout the arbitration is to be:

- the chairperson **[s. 44ZA(1)]** or
- a member nominated by the chairperson if the chairperson is not a member of the commission as constituted for the arbitration **[s. 44ZA(2)]**.

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 **[s. 44ZB(2)(a)]** or
- appoint another member of the commission to the arbitration **[s. 44ZB(2)(b)]**.

10 ibid., p. 40

11 ibid., p. 24 and 26. The tribunal also noted that what may not be a sufficient interest for one purpose may be so for another.

A newly constituted commission under **s. 44ZB(2)**:

- must continue and finish the arbitration
- may have regard to the records of previous commission proceedings of the arbitration **[s. 44ZB(3)]**.

Decisions of the commission

If the commission is constituted by two or more members, any question before the commission is to be decided according to the opinion of the majority of those members, or if the members are evenly divided on the question, according to the opinion of the member who is presiding **[s. 44ZC]**.

ACCC staff

While the commission is responsible for making decisions in the arbitration, it is supported by staff drawn from the ACCC's regulatory and legal groups. Staff will generally perform three roles in an arbitration:

- First, some will perform a case management role as part of a team. This is a process role and does not involve staff providing advice to the commission on the merits of the substantive issues in dispute.
- Second, staff will provide advice to the commission and assist it in considering the substantive issues in dispute. This may involve providing oral or written advice to the commission and drafting correspondence. However, the commission will ultimately form its own view on the issues and any relevant considerations to be reflected in the determination and reasons for decision.
- Third, staff may facilitate and encourage conciliation or mediation for particular issues in dispute. However, this may be problematic because of the other roles of staff and therefore, the commission will consider the role of staff in this respect on a case by case basis, in consultation with the parties.

ACCC staff should be the contact point for all enquiries regarding an arbitration.

ACCC correspondence will identify the relevant staff member and contact details. In general, this will be the CMT leader.

Substantive phase of arbitration

2.8 Initial case management meeting

The CMT will contact parties regarding the initial case management meeting. These meetings are likely to be held within three weeks of the ACCC receiving the dispute notification.

These meetings are not initiated or governed by any specific statutory requirement but are conducted at the discretion of the commission and CMT in order to facilitate the arbitration. Accordingly, there will be flexibility in terms of having these meetings, the conduct and procedures adopted at meetings and which parties will be invited to attend.

That said, the commission is required to ensure that arbitrations are managed and conducted in a balanced and transparent manner such that all parties are given a fair and reasonable opportunity to present their case.

In the interests of transparency and procedural fairness, parties will not generally meet and discuss matters that are the subject of the dispute with the commission or ACCC staff outside of these case management meetings.

The CMT will determine the issues to be discussed with parties at the initial case management meeting. These may include:

- identifying the issues in dispute and the respective positions of the access provider and access seeker on those issues
- identifying attempts made by the access provider and access seeker to resolve the dispute, including the use of third party mediation
- whether the access provider or access seeker have any concerns with the ACCC's jurisdiction
- whether the access provider or access seeker have any concerns with the commissioner(s) or staff involved with the conduct of the arbitration
- the approaches that could be used to resolve the dispute—this could involve mediation by a third party, referral to an expert for determination or arbitration by the commission, or a mix of these methods
- consideration of requests received from persons who wish to become parties to the arbitration, and the views of the access provider and access seeker in this regard
- the flow of information between the parties, including proposed confidentiality arrangements
- whether the commission is conducting any other arbitrations or other matters involving the same or similar issues and the views of the parties toward these other matters
- identifying any potential barriers and delays to resolution of the dispute, as well as the skills that are likely to be necessary in order to resolve the dispute.

In organising the case management meeting, the CMT will:

- provide an agenda of the meeting to parties and seek a statement of issues from them in response to the agenda
- consider inviting persons who have applied to become a party to participate in the meeting, and to at least invite such parties to participate in any part of the meeting where their applications are discussed
- invite parties and ensure that their representatives at the meeting are empowered to make decisions regarding issues or process of the arbitration.

People who have applied to become a party to the arbitration will usually be invited to participate in the part of the meeting where their applications are discussed with the parties. Discussion of an application may only take 15–30 minutes and applicants may be given the option of participating by telephone rather than appearing in person. Applicants may also be invited to attend discussions of other items on the agenda.

Within one week of the meeting being held, the CMT will prepare a report on the meeting setting out the substance of the discussions. The report will be provided to the commission and to the parties to the arbitration. An extract of the report dealing with the applications to become a party to the arbitration will also be copied to the parties and to the other interested persons.

2.9 Initial hearing (including conferences) with commission (optional)

Once the initial case management meeting has been held, the commission arbitrating the dispute may decide to hold a hearing with the parties to the arbitration. Whether or not this hearing takes place is at the discretion of the commission hearing the dispute and will be determined by them having regard to the matters in dispute and the perceived best means of resolving them. The commission may also decide to meet with parties in conference, in addition to, or in lieu of these hearings where it thinks such a conference may expedite the dispute resolution process as well as clarify the issues in dispute.

When a hearing is considered necessary, it is likely to be held within two weeks following the case management meeting. The case management meeting report will be the main input for this hearing and is intended to enable the commission to better understand the background to the notification and focus on the issues in dispute, especially what strategies might be used to resolve the dispute.

A hearing may be conducted by telephone or closed circuit television (e.g. video conference facilities) **[s. 44ZF(4)]** and will be conducted in private, unless the parties agree otherwise **[s. 44ZD(1), (2)]**.

Hearing purpose

The purpose of the initial hearing is for the commission to make decisions on the process issues arising from the initial case management meeting. Generally, the parties to the arbitration will not be invited to provide submissions to the commission between the time of the initial case management meeting and the initial hearing with the commission. This is to ensure that all relevant matters are considered at the case management meeting, with the commission then being in a position to advance those matters at the hearing.

Issues that may be discussed at the hearing include:

- dispute resolution procedures (e.g. whether other dispute resolution options are continuing, or are planned by the parties)
- other applications to become a party to the arbitration
- timeframes for the making of submissions and whether they will be written or oral or both
- information requirements beyond the parties' submissions and how the information will be obtained (e.g. use of independent experts and fees)
- confidentiality arrangements and any other procedural/process issues relevant to the arbitration.

The commission may issue an opinion to the parties on the matters discussed at the hearing.

The commission will wish to ensure that all the persons who will be parties to the arbitration have been identified and are included in the process. People who have made a request to become a party may be invited to attend the hearing in order to discuss the basis for their request. If the commission is not in a position to make a decision on particular requests at the time of the hearing, then those people may be excluded for part of the hearing, with the commission subsequently providing its decision in writing.

Party representation

At an arbitration hearing a party may appear before the commission in person or be represented by someone else **[s. 44ZE]**. In many cases, the parties will wish to be represented by legal advisers. As a general rule, the commission would prefer parties to approach an arbitration bearing in mind that the objectives of the arbitration are to provide a dispute resolution process that is less formal, more expeditious and less costly than would be the case in legal proceedings.

When holding a hearing with the parties, the commission should seek to ensure the presence of a representative of each party who is authorised to make binding decisions.

Transcript

A full transcript of the hearing will be taken and provided to the parties as soon as practicable afterwards. If a party believes that the transcript is inaccurate in any way, it should provide a submission to the commission (copied to the other party or parties) setting out the areas of inaccuracy, along with suggested changes. This should occur within one week of receipt of the transcript. The commission will arrange for the areas of concern to be checked against the tape recording of the hearing.

2.10 Commission addresses requests for confidentiality

The commission will, at this stage of the process, seek to implement a regime for dealing with requests for confidentiality that would be intended to apply throughout the course of the arbitration (apart from exceptional circumstances). The Act provides a specific regime for the commission's treatment of confidentiality requests by a party, however, there is some scope for flexibility in how this aspect of an arbitration can be dealt with.

Confidentiality and matters regarding the disclosure of information are discussed in chapter 4.

2.11 Submissions from parties and from other persons (such as technical consultants)

The commission will write to parties seeking submissions on the issues identified as being in dispute. Submissions will set out the views or conclusion that the party believes the commission should adopt on particular issues, along with supporting reasons.

The commission will generally issue directions specifying the information that it requires from the parties **[s. 44ZG]**. When information is likely to be required over the course of an arbitration, the commission may issue several directions. Each party will be required to observe the directions, including any timeframes for the making of submissions. The ACCC may determine the periods that are reasonably necessary for the 'fair and adequate' presentation of the respective cases of the parties **[ss. 44ZF(2), 44ZG(1)(a),(f)]**. The timing of parties' responses will of course depend on the complexity of the issues under consideration.

Parties will generally be required to provide a copy of their submission to each other party to the arbitration, subject to any confidentiality orders.

The commission may require evidence or argument to be presented in writing and decide the matters on which it will hear oral evidence **[s. 44ZF(3)]**. However, the ACCC's experience with telecommunications arbitrations is that written submissions have been the primary means by which the commission receives argument from the parties. Detailed written submissions are particularly appropriate in disputes involving:

- complex questions of law
- methodology of calculating costs and/or charges
- analysis of detailed, or large amounts of, information that has been presented into evidence
- resolution of apparent conflicts in the evidence upon which an argument is based (for example, evidence on the availability of capacity or state of competition).

There is a risk that written submissions can delay the arbitration process especially when they are large or become a series of replies to the other party's submissions. Accordingly, in some instances, the commission may direct the parties to make submissions in summary only. The commission may give parties the opportunity to supplement summary submissions at hearings.

The commission may inform itself of any matter relevant to the dispute in any way it thinks appropriate **[s. 44ZF(1)(c)]**. The commission may seek information:

- voluntarily—that is, with consent of the parties
- by summons issued by the commission **[s. 44ZH(2)]**
- by conducting its own inquiries
- by referring a matter to an expert for an expert's report **[s. 44ZG(e)]**.

The commission's powers to seek information and obtain evidence are discussed in chapter 3 of this guide.

2.12 Commission consults with other parties

The commission may undertake wider consultation when determining an access dispute. The form of consultation adopted by the commission will depend on the circumstances in each case. It should be noted that persons consulted will not become parties to the arbitration, nor will they have any rights to attend or become involved in the arbitration, as only parties to an arbitration have such rights.

More information about the powers of the commission to conduct its own inquiries is provided in section 3.5 of this guide.

2.13 Further case management meeting

It may be appropriate to hold further case management meetings in addition to the initial case management meeting. While the matters addressed at each case management meeting will depend on the case at hand, meetings may be called in order to:

- identify information relevant to matters the commission is deliberating, including claims for confidentiality
- identify and discuss issues that have subsequently emerged
- discuss reasons where major deadlines have been missed
- discuss future steps for progressing the arbitration.

These meetings are intended to ensure that the arbitration process is kept on track. In addition, where new issues arise during the substantive phase, case management meetings may enable the parties to reconsider the scope for mediation and expert determination.

2.14 Further hearings (including conferences) with commission (optional)

Further hearings with commissioners may be held to discuss parties' views on particular issues where this is likely to be more efficient than the commission receiving written submissions. These can also be used to supplement written submissions. Whether or not this hearing takes place is again at the commission's discretion.

In deciding whether to hold a hearing, the commission will consider whether there are benefits in getting the parties together to better understand each other's point of view.

To hold a hearing with commissioners, the CMT will:

- contact parties to the dispute
- organise the hearing to be conducted via video conference, telephone or in person
- prepare an agenda and send it to parties for comment/suggestions
- seek to ensure parties have a representative at the hearing who is authorised to make binding decisions on behalf of the company
- ensure a transcript of proceedings is taken.

After the hearing, the CMT will:

- prepare a report outlining the main issues discussed and any resolutions
- acquire commission sign-off on that report
- send the report to parties
- make the transcript available to the parties.

Consistent with section 2.9, the commission may also decide to meet with parties in conference outside of, or in lieu of, these formal hearings where it thinks such conferences may expedite the dispute resolution process as well as assist in clarifying the issues in dispute.

2.15 Commission makes decisions on key questions

Unless the commission terminates an arbitration under s. 44Y, the commission must make a written determination on access by the third party to the service **[s. 44V(1)]**.

It may be possible for the commission to make a decision in relation to a dispute in an 'all-in-one' inclusive manner. Depending on the dispute, however, the commission may, in the course of an arbitration be required to make a number of preliminary decisions that impact on the final determination (for example, deciding on a pricing model). Accordingly, resolution of issues during an arbitration process may be dealt with by the commission making decisions on individual issues in a staged manner throughout the course of the arbitration, which are then consolidated into a final determination.

2.16 Commission issues draft determination

Before making a determination, the commission is required to give a draft determination to the parties **[s. 44V(4)]**. A draft decision is issued only 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.

In issuing a draft determination, the commission will take into account the same matters as those that it is required to take into account in making a final determination. These are **[s. 44X(1),(2)]**:

- the legitimate business interests of the provider and its investment in the facility
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of all persons who have rights to use the service
- the direct costs of providing access to the service
- the value to the provider of extensions whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of the facility
- the economically efficient operation of the facility
- any other matters the commission considers to be relevant.

It should be noted that only some of these criteria have been judicially considered, and only in other contexts. Accordingly, in taking these matters into account, it has been necessary for the ACCC to form its own view as to what they mean.

Legitimate business interests and direct costs

The concept of legitimate business interests should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in the Act. Accordingly, it would cover the access provider's interest in earning a normal commercial return on its investment.

This does not extend to receiving compensation for loss of any 'monopoly profits' that occurs as a result of increased competition.[12]

12 This is the approach adopted to a similar provision in the telecommunications regulatory framework. In this regard, the Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 provides:

> ... the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

When considering the legitimate business interests of the access provider in question, the commission may consider what is necessary to maintain those interests. This can provide a basis for assessing whether particular terms and conditions in the determination are necessary (or sufficient) to maintain those interests.

The ACCC has previously discussed its approach to assessing the 'legitimate business interests of the provider' in the access undertakings guidelines (*Access undertakings: a guide to Part IIIA of the Trade Practices Act—Sept 1999*). In these guidelines the ACCC states that its consideration of 'legitimate business interest of the service provider' will focus on commercial considerations of the service provider. Further, in conducting this analysis the ACCC will take into account the provider's obligations to shareholders and other stakeholders, including the need to earn commercial returns on the facility. The ACCC also states that it would aim to ensure that any undertaking provides appropriate incentives for the provider to maintain, improve and invest in the efficient provision of the service.

The ACCC's approach to 'direct costs' in this context has been to rely on the concept as a basis for forming the view that the service provider should not be compensated for any costs (or lost profits) incurred as a consequence of increased competition in an upstream or downstream market.[13]

The public interest

'The public interest' is not defined in the Act. The wording in s. 44X(1)(b), '… the public interest, including the public interest in having competition in markets (whether or not in Australia) …', is also contained in s. 2.24(e) of the *National Third Party Access Code for Natural Gas Pipeline Systems 1997*. The Supreme Court of Western Australia commented that the notion of public interest in s. 2.24(e) was expressed first in its generality, and then more narrowly as the public interest in having competition in markets. The court suggested that consideration of the public interest would require that regard be had to wider considerations (than just competition in markets).[14]

In this regard the ACCC has historically taken a broad interpretation to concepts like public interest (and the more familiar public benefit test). The ACCC has provided a detailed consideration of the concept of public interest in its guide to access undertakings.[15]

In that guide the ACCC discussed the approach it would take to considering the 'public interest, including the public interest in having competition in markets (whether or not in Australia)' in the context of considering access undertakings. The ACCC considered that the public interest criterion looked beyond the immediate interests of service providers and potential third party users, exploring the extent to which an undertaking contributes to the improved welfare of other parties and the broader community. In assessing the public interest criterion, the ACCC stated that it would consider concerns raised and identified by the service provider, potential third

13 *Resolution of Telecommunications Access Disputes* guidelines. This is also expressed in the Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill 1996.

14 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd*, 2002, WASCA 231, p. 134.

15 *Access Undertakings—A Guide to Part IIIA of the Trade Practices Act—Sept 1999.*

party users and other interested parties. Further, it would draw on four sources in identifying the issues relevant to assessing the public interest:

- the wording used in Part IIIA itself, which specifies that the commission must have regard to 'the public interest including the public interest in having competition in markets (whether or not in Australia)'
- the objective of the Trade Practices Act as outlined in s. 2 of the Act '… to enhance the welfare of Australians through the promotion of competition and fair trading …'
- clause 1 (3) of the Competition Principles Agreement which provides a list of matters to be considered in the evaluation of a course of action under the Competition Principles Agreement
- a list of factors recognised by the ACCC and the Australian Competition Tribunal as public benefits for the purposes of the authorisation process.

Interests of persons who have rights to use the declared service

Persons who have rights to use a declared service will, in general, use that service as an input to supply services to end-users. In the ACCC's view, these persons have an interest in being able to compete for the custom of end-users on the basis of their relative merits. Terms and conditions that favour one or more service providers over others—and thereby distort the competitive process—may prevent this from occurring and consequently harm those interests.

Although s. 44X(1)(c) directs the commission's attention to those persons who already have rights to use the declared service in question, the commission can also consider the interests of persons who may wish to use that service. Where appropriate, the interests of these persons may be considered under s. 44X(2) as a relevant consideration.

Economically efficient operation of the facility

In the ACCC's view, the concept of economic efficiency consists of three components:

- **productive efficiency**—the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs
- **allocative efficiency**—the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers
- **dynamic efficiency**—the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC's view is that the phrase 'economically efficient operation' embodies the concept of economic efficiency as set out above. The commission may also consider general industry efficiency (and benchmarks) in applying this criterion.

To consider this matter in the context of a determination, the commission may consider whether particular terms and conditions enable a facility to be operated in an efficient manner. This may involve, for example, examining whether they allow for the provider supplying the declared service to recover the efficient costs of operating and maintaining the relevant infrastructure.

In general, there is likely to be considerable overlap between the matters that the commission takes into account in considering the interests of end-users and its consideration of this matter.

The operational and technical requirements necessary for the safe and reliable operation of the facility

An access price should not lead to arrangements between access providers and access seekers that will encourage the unsafe or unreliable operation of a facility.

Any other matters the commission considers relevant

The commission may take into account any other matter that it thinks is relevant.

Matters in a determination

A determination (and therefore a draft determination) may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute **[s. 44V(2)]**. These may include:

- requiring the provider to provide access to the service by the third party
- requiring the third party to accept and pay for access to the service
- specifying the terms and conditions of the third party's access to the service
- requiring the provider to extend the facility
- specifying the extent to which the determination overrides an earlier access determination **[s. 44V(2)]**.

However, a determination does not have to require the provider to provide access to the service by the third party **[s. 44V(3)]**.

When making a determination the commission must give the parties its reasons for the determination **[s. 44V(5)]**. The commission will usually provide its draft reasons for decision at the time of making its draft determination.

A draft determination does not need to be approved by the full commission (i.e. the ACCC), but is made by decision of the commission as constituted for the arbitration.

Restrictions of a determination

The commission must not make a determination that would have any one of the following effects:

- prevent an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified
- prevent a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements

- deprive any person of a protected contractual right
- result in the access seeker becoming the owner (or one of the owners) of any part of the facility, or extensions of the facility, without the consent of the provider
- require a provider to bear some or all of the costs of extending the facility, or maintaining extensions of the facility **[s. 44W(1)]**.

A determination will have no effect if it contravenes these restrictions.

The first two of these restrictions do not apply to the requirements and rights of the access seeker and provider when the commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the access seeker and provider **[s. 44W(2)]**.

Determination, compensation for loss of pre-notification right

If the commission makes a determination that has the effect of depriving a person (the second person) of a pre-notification right to require the provider to provide access to the declared service to that second person, the determination must also require the access seeker:

- to pay to the second person such amount (if any) as the commission considers is fair compensation for the deprivation
- to reimburse the provider and the Commonwealth for any compensation that the provider or the commonwealth agrees, or is required by a court order, to pay to the second person as compensation for the deprivation **[s. 44W(4)]**.

2.17 Further submissions and analysis period

Following release of the draft determination a period will be provided for the parties to make submissions on the draft and for the commission to undertake further analysis before a final determination is made.

During this period, if the circumstances require, the commission may:

- hold further case management meetings
- make further decisions on key issues
- hold further hearings with the parties
- refer any further matters to experts
- receive any expert reports.

In general, parties will be given an opportunity to comment on any new information or reports obtained by the commission that it proposes to use as a basis for its final decision.

In giving the parties time to comment on the draft decision, the commission will determine a period that will allow the parties a 'fair and adequate' opportunity to present their respective cases **[s. 44ZF(2)]**. Parties will usually be given a few weeks to provide a submission to the commission in which to respond to the draft determination.

2.18 Commission issues determination

Once the commission has considered and decided upon all the substantive issues, it will make its final determination.

Before making a final determination, the commission will:

- have issued a draft determination for comment **[s. 44V(4)]**
- ensured that all relevant factual material has been made available to the parties (subject to any confidentiality constraints)
- have considered the factual material and parties' submissions, including those made in response to the draft determination
- have taken into account the matters listed in section 2.16 of this guide
- considered the restrictions on access determinations listed in **s. 44W**.

The arbitration continues until a final determination is made, unless terminated or the notification is withdrawn prior to that time.

As noted earlier, a determination may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute **[s. 44V(2)]**.

Although not a requirement of the legislation, the commission would usually limit the duration of a determination to a certain period.

A final determination is made by the commission as constituted for the arbitration.

Upon making a final determination, the commission is required to give the parties to the arbitration its reasons for making the determination **[s. 44V(5)]**.

Part IIIA does not require the commission to publish a determination, but the commission would usually publish some form of statement (e.g. a press release publicly advising that it has made a determination in relation to the dispute).

The time taken by the commission to arbitrate the dispute and its final determination will depend on the nature of the dispute, the complexity of the issue under consideration as well as the conduct of parties in providing necessary information to the commission and to each other in a timely manner throughout the process. Given these factors, the timeframes herein are indicative only. However, the commission will generally seek to make a decision within six months of being notified of the access dispute provided it has been given sufficient information at each stage of the arbitration process, and depending on the time required for submissions.

To assist parties involved in an access dispute, appendix B lists the important milestones that are likely to occur during the ACCC's arbitration process.

Register of determinations

The ACCC is required to maintain a register of determinations which specifies the names of the parties to the determinations, the services to which the determinations relate and the date on which they were made **[s 44ZZL]**. People may request from the ACCC a copy of any document held on that register. A fee of $1 is payable for each page of the document. A person may also request a certified copy of a document on the register, in which case the fee payable would be $1 for each page of the document plus $10 for a certified copy **[rr. 6H, 28]**.

2.19 Applications for tribunal review

A determination takes effect 21 days after it is made if none of the parties to the arbitration apply to the Australian Competition Tribunal for review of the determination **[s. 44ZO(1)]**. For a discussion of tribunal review of determinations, see section 6.1. Further information on post-determination matters generally is presented in chapter 6 of this guide.

3 Conduct of arbitration hearings

3.1 General

The commission will seek to conduct the arbitration process with as little formality as possible. The commission is not a court, nor are arbitrations akin to court proceedings, so many of the formalities associated with court proceedings will generally not be appropriate.

An arbitration may be conducted via written or oral means or a combination of both **[s. 44ZF(3)]** and may cover:

- meetings with the parties
- written submissions
- hearings with commissioners
- other means used to address particular issues as may be considered appropriate.

An arbitration hearing may be conducted by:

- telephone
- closed circuit television (e.g. video conference facilities)
- any other means of communication as determined by the commission **[s. 44ZF(4)]**.

The commission may sit at any place **[s. 44ZG(1)(c)]** and adjourn to any time and place **[s. 44ZG(1)(d)]**.

Specifically, in conducting an arbitration, the commission:

- is not bound by technicalities, legal forms, or rules of evidence
- must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute
- may inform itself of any matter relevant to the dispute in any way it thinks appropriate **[s. 44ZF(1)]**.

3.2 Privacy

Arbitrations are generally conducted in private. This means that all information arising out of an arbitration, for example, the parties' written submissions, are not disclosed to anyone outside of the arbitration process.

Generally, only the parties, their advisers, the nominated commissioners and relevant ACCC staff review information arising out of an arbitration (for example, these would be the people who would be present at a hearing with the commission or would review written submissions).

To ensure the private nature of arbitrations, the commission will usually make an order preventing the parties from disclosing arbitration information beyond the arbitration.

Likewise, arbitration hearings are generally held in private, however, the parties may agree that all or part of an arbitration hearing be conducted in public **[s. 44ZD(2)]**. Courts have noted that privacy is an ordinary incident of an arbitration and can be important to the efficacy of an arbitration.[16]

Where a hearing is conducted in private, the presiding member of the commission may give written directions as to the persons who may be present **[s. 44ZD(3)]**. In doing so, the member must have regard to the wishes of the parties and the need for commercial confidentiality **[s. 44ZD(4)]**. If necessary, this power may be exercised to exclude certain parties from part of the hearing in order to maintain the commercial confidentiality of information being presented by another party **[s. 44ZD(4)]**.

3.3 Commission—power to give directions

The commission may give a direction for the purposes of arbitrating a dispute **[s. 44ZG(1)(a)]** and may generally give all such directions and do all such things as are necessary or expedient for the speedy hearing and determination of the access dispute **[s. 44ZG(1)(f)]**.

3.4 Commission—power to establish timeframes

The commission will use its direction making powers noted above to establish timeframes for dealing with disputes in a timely manner. In determining the timeframes for presenting arguments, the commission will determine periods that are reasonably necessary for the 'fair and adequate' presentation of the respective cases of the parties **[s. 44ZF(2)]**. In setting these timeframes, the commission is mindful of its obligation to act as speedily as a proper consideration of the dispute allows.

In doing so, however, it is equally mindful of observing the principles of procedural fairness in terms of giving the parties adequate opportunity to present their respective cases and respond to matters as the situation may require.

The commission will generally give directions and other requirements that set procedural time limits by specifying a particular calendar date. However, consistent with the *Acts Interpretation Act 1901 Cth*, where the last day of a prescribed period falls due on a weekend or public holiday then the next business day would be the due day.

As stated previously, the commission will generally seek to make a decision within six months of being notified of the access dispute, provided it has been given sufficient information at each stage of the arbitration process, and depending on the time required for submissions.

16 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

3.5 Commission—power to seek information

In order to consider the issues in dispute, the commission will need information (e.g. information concerning service costs and prices) from the parties and possibly other sources. In some cases, it will be possible to identify the type of information required at the outset, whereas in other cases it may be necessary to 'resolve' particular issues in advance before it is clear what information will be required.

For instance, if the arbitration involves determining the price for particular services, it may first be necessary to establish a pricing model (which implements relevant pricing principles). After the pricing model has been built, it would then be necessary to populate the model with relevant data.

In each step the information requirements are likely to be significantly different. The information required to build the pricing model is likely to differ in both qualitative character and the level of detail from that used to populate the model. Moreover, the information required for a subsequent step may depend on the approach adopted at the previous step. For example, the relevant data for the pricing model will be influenced by the level of disaggregation used in the model.

The commission may require the above information, evidence or argument to be presented in writing and may decide on which matters it will receive orally **[s. 44ZF(3)]**. It may take the oral evidence on oath or affirmation and, for this purpose, a member of the commission may administer an oath or affirmation **[s. 44ZH(1)]**.

The commission may obtain information:

- voluntarily—that is, with consent of the parties
- by summons issued by the commission
- by conducting its own inquiries
- by referring a matter to an expert for an expert's report.

That said, the commission may inform itself of any matter relevant to the dispute in any way it thinks appropriate **[s. 44ZF(1)(c)]**.

Voluntary

Parties may voluntarily supply information to the commission, or provide information upon the commission's request. However, the commission will generally issue directions indicating the nature of the information it requires from the parties. Parties may also engage their own experts to produce a report on a particular issue and submit that report to the commission as part of their argument.

Each party will generally be required to provide a copy of the information to all other parties, subject to any confidentiality orders.

Before issuing directions relating to information that the commission requests, the commission will usually ask the parties what they perceive as being the information requirements. This may be done in the context of a case management meeting, a hearing, or by way of written request. It will ultimately be for the commission to determine what information it considers as relevant to determining the matters in dispute.

Summons issued by the commission

The presiding member of the commission may summons a person to appear before the commission to give evidence and to produce documents in an arbitration hearing **[ss. 44ZH(2), (3)]**. The summons must be served on the person by:

- delivering a copy of the summons to the person personally
- showing the original summons to the person when the copy is delivered to the person **[r. 6E(2)]**.

A person issued with a summons to appear will be required to appear before the commission in an arbitration hearing. A full transcript is made of these hearings. That part of the transcript recording the appearance of the person answering the summons will be provided to that person as soon as practicable.

If a person summoned to provide evidence fails to appear, the commission has the power to hear and determine the arbitration in that person's absence **[s. 44ZG(1)(b)]**.

Commission conducting its own inquiries

When determining an access dispute, the commission may undertake wider consultation rather than confining itself to the direct submissions of the parties. There are two distinct approaches open to the commission in this regard.

One approach is to initiate a wider consultation but in the context of the actual arbitration process hearing and determining the matter. This may be in the form of public-wide or industry-wide consultation, or could be a more selective consultation with certain identified people. The consultation will be confined to matters relevant to the points in dispute and to people the commission thinks may be able to assist with its consideration of the matters. Relevant to this approach is:

- **s. 44ZF(1)(c)** which provides that in an arbitration hearing the commission may inform itself of any matters relevant to the dispute in any way it thinks appropriate
- **s. 44X(1)** which details matters the commission must take into account in making a determination, including requiring the commission to consider the public interest and the interests of all persons who have rights to use the service (which may in some cases necessitate wider consultation)
- **s. 44X(2)** which permits the commission to take into account any matters it thinks relevant and, dependant on what matters the commission considers relevant, may also necessitate wider consultation.

An alternative approach is for the commission to undertake a consultation process in the form of a separate stand alone inquiry, which is conducted outside the actual hearing of the dispute. Some matters may particularly lend themselves to a separate consultation, in particular matters that might have a wider impact or relevance

to matters outside of the arbitration itself. Once the information is gathered and conclusions reached, the work in this separate process can then be incorporated back into the arbitration process if considered appropriate.

The process may be as follows:

- a discussion paper is released outlining the matter under consideration and the particular issues the commission wishes to explore.
- submissions are invited from interested persons, including the parties to the arbitration.
- a draft report is released inviting comment.
- the commission releases a final report setting out its views and supporting reasons.
- the commission will seek submissions from parties to the arbitration about whether the report should be applied to the arbitration.

In practice the form of consultation adopted by the commission will be dependant on the circumstances in each case. It should be noted that persons consulted will not become parties to the arbitration, nor will they have any rights to attend or become involved in the arbitration other than to provide the specific further information required by the commission.

Referral of matter to an expert

In order to better understand particular issues or analyse factual material, it may be necessary to engage the assistance of an expert. Such experts could include economists, accountants, lawyers, or persons experienced in an industry or trade.

Experts appointed by parties

Parties should indicate at the earliest possible time the expert witnesses they propose to use. In the interests of an expeditious resolution of the dispute, the commission may ask the parties to limit themselves to no more than two expert witnesses, with only one expert witness in any one field of expertise.

Where experts are to be used, the parties and experts should note the requirements discussed below which are based on the *Guidelines for Expert Witness Statements in proceedings in the Federal Court of Australia*.

Experts appointed by the commission

For the purpose of arbitrating an access dispute, the commission may refer any matter to an expert and receive the expert's report as evidence **[s. 44ZG(1)(e)]**. Before referring a matter to an expert, the commission may seek comments from the parties on the terms of reference.

Expert reports

The evidence of an expert should be set out in the form of a report on the following matters:

- the qualifications and experience in support of the expert's expertise
- the questions or issues that the expert has been asked to address
- the factual material considered by the expert
- the assumptions made by the expert
- the process used by the expert to consider those issues (i.e. did it involve industry consultations and if so with whom)
- the expert's conclusions in respect of those issues along with full reasons in support of those conclusions
- where the expert is aware that other persons (including, but not limited to other experts) have expressed conflicting views on those issues, the reasons should explain why the expert believes the other views to be incorrect
- where the expert is of the view that additional information is necessary to resolve particular issues or to provide a firm conclusion, what that information is and how it is relevant to the issues or conclusion
- whether any question or issue falls outside his or her field of expertise.

At the end of the report, the expert should declare that he or she has:

> … made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Commission.

The expert should attach to the report or summarise within it:

- all oral and written instructions (original and supplementary) given to the expert that define the scope of the report
- the documents and other materials that the expert has been asked to consider.

Where an expert's report refers to calculations (including those set out in spreadsheets), photographs, plans or other reports, these should be provided along with the report.

In general, where a party provides a copy of the expert's report to the commission, it should provide a copy of the report to all other parties. If, after providing their report, the expert changes views on a material matter (e.g. because the expert has read another expert's report, or the expert receives further information), the change of opinion should be communicated without delay to the commission.

Similarly, where the commission engages an expert, their report will generally be provided to all parties. Where appropriate, the commission will also consider making a draft report of the expert available to the parties so that the expert can take account of, and comment on, the views expressed by parties. In most cases, comments should be provided in writing.

If the commission considers it appropriate, the expert may be required to attend an arbitration hearing or similar forum to answer questions by parties and, or, the commission.

If a party wishes to dispute the capacity or qualification of a person to give an expert opinion, it should give written notice to the other parties and to the commission immediately after it has become aware of the nominated expert. The written notice should set out the grounds upon which it disputes the expert's capacity and qualifications. If the party does not object at that time but waits until later, it may be appropriate for the commission to give less weight to the party's objections.

A party may request confidentiality of any expert reports that it provides to the commission **[s. 44ZL]**. A party may also request that confidentiality apply to expert reports that it commissioned and that the expert submitted directly to the commission.

A party may also request a confidentiality order be made with respect to expert reports provided by commission appointed experts.

Experts hearing

In cases where there are several experts' reports, the commission may consider it useful to convene a forum[17] for the discussion of relevant issues, particularly where the experts express conflicting conclusions. In these instances, the commission considers it improper for the expert to be given or to accept instructions not to reach agreement with other experts. If the experts cannot reach agreement, they should seek to specify the reasons for the differences between them.[18] This then assists the commission to understand and further refine the areas of difference between the parties.

Experts costs

Each party must meet the costs of engaging its experts. The commission does not have the power to award costs incurred by a party to an arbitration. Where the commission incurs costs in engaging an expert, it may recover those costs only as part of its general costs charge within the limits specified in the Trade Practices Regulations. In some instances, particularly when the parties are unable to reach agreement on a technical issue, the commission may engage an expert, and, with the consent of the parties, allocate the cost of engaging the expert between the parties.

3.6 Improper conduct

The Act prescribes a number of rules that govern the conduct of persons involved in an arbitration. These include rules relating to:

- doing any act or thing that would constitute a contempt of court
- the failure of a party to attend or comply with a commission order
- the failure of a person to answer questions or produce documents
- intimidation.

17 This may be a private forum or, where the issues are being addressed publicly as part of an industry wide process, the forum may be open to members of the public.

18 For instance, at the conclusion of a forum, each expert may be requested to summarise his or her position, whether he or she agrees with the views expressed by the other experts and if not, what he or she perceives as being the areas of difference between him or her and the other experts.

Contempt of court

A person must not do anything in relation to an arbitration that would be a contempt of court if the commission were a court of record **[s. 44ZG(2)]**. The commission may consider taking action against a person in response to such conduct.

Failure to attend or comply with commission order

In the event that a person is summoned or served with a notice to appear as a witness before the commission, but fails:

- to attend
- to comply with the legitimate requirements of the commission

the commission may continue with the hearing and, or, arbitration and determine the dispute in that person's absence **[s. 44ZG(1)(b)]**.

In addition, it is an offence with a penalty of up to six months imprisonment for a person summonsed to appear as a witness before the commission, who without reasonable excuse:

- fails to attend as required by the summons
- fails to appear and report from day to day unless excused, or released from further attendance, by a member of the commission **[s. 44ZI]**.

Failure to answer questions or produce documents

Similarly, under **s. 44ZJ(1)**, it is an offence with a penalty of up to six months imprisonment for a person appearing as a witness before the commission, without reasonable excuse, to:

- refuse or fail to be sworn or to make an affirmation
- refuse or fail to answer a question that they are required by the commission to answer
- refuse or fail to produce a document required to produce by a properly served summons.

However, **s. 44ZJ(2)** provides that it is a reasonable excuse for an individual to refuse or fail to answer a question or produce a document on the ground that this might tend to incriminate the individual or to expose the individual to a penalty.

Intimidation

Under **s. 44ZK** it is an offence with a penalty of up to 12 months imprisonment for a person to:

- threaten, intimidate, or coerce another person
- cause or procure damage, loss, or disadvantage to another person

because that other person:

- proposes to produce, or has produced, documents to the commission
- proposes to appear, or has appeared, as a witness before the commission.

3.7 Joint hearings

Under Part IIIA the ACCC cannot require that two or more disputes be heard jointly. In terms of procedures, if all parties agreed to hear the disputes together, because for instance, one or more matters are common to the disputes, the ACCC may for practical purposes, conduct two or more arbitrations simultaneously. However, the ACCC would still be required to make a separate written determination in respect of each notified dispute.

3.8 Arbitration fees

A notification fee of $2750 is payable in respect of an access dispute notification **[r. 6C(2)]**.

In addition, the commission may levy fees on parties in relation to arbitrations to cover the costs incurred by the commission in conducting an arbitration **[s. 44ZN]**. The nature of these fees and the amounts are set out in the regulations **[r. 6F]**. The fees are as follows:

- a pre-hearing fee payable by the notifier on or before the commencement of the arbitration hearing **[r. 6F(3)]** of $2170 if the dispute relates to a variation of an existing determination
- a hearing fee of $4340 for every day or part thereof **[r. 6f(2)(a)]** apportioned between the parties appearing at the hearing on that day **[r. 6f(4)]**.

At the hearing, the commission will discuss the hearing fee and will generally invite submissions from parties as to how the fee might be apportioned.

In situations where issues are jointly heard, the commission will generally only charge a single pre-hearing fee and a single daily hearing fee.

4 Confidentiality, disclosure and procedural fairness

The receipt of information is crucial to the ACCC's ability to arbitrate access disputes. Matters of confidentiality, disclosure and use of information are therefore important parts of this process. Matters of procedural fairness will also have an important bearing on the way in which arbitrations are conducted. These issues are discussed below.

4.1 Confidentiality

The Act provides a specific regime for the commission's treatment of confidentiality requests by a party. After considering the request and any objections, the ACCC may decide not to give the information to the other party. A person who receives information of a confidential nature in circumstances of confidence must not make unauthorised use of that information. The information must be of a confidential nature and not be trivial, nonsensical or already in the public domain.[19]

In the context of arbitrating a dispute under Part IIIA, the exchange of information between the commission and parties to the arbitration is specifically governedby s. 44ZL, which establishes a regime for the treatment of confidential commercial information.

There is no expressed definition of 'commercial confidential information', however confidential information is generally considered to be facts or knowledge not in the public domain.[20]

In applying this regime, the commission may disclose or protect as much of a confidential document that it thinks should be disclosed **[s. 44ZL(4)]** according to the circumstances relevant to that information.

The commission, as standard practice, will give a general confidentiality direction and order to the parties (including their employees, contractors and agents) at an early stage of the arbitration. This general confidentiality direction provides that the recipient must not use or disclose any information obtained from the other party or the commission in the course of the arbitration (other than information in the public domain) except to the extent that the use or disclosure is:

- necessary for the purpose of the arbitration
- required by law (including any rules of a securities exchange)
- permitted by the ACCC or the provider of the information.

In the ACCC's view, issuing this type of direction and order at the commencement of an access dispute contributes to the establishment of an environment in which the parties can more openly discuss issues with each other and the ACCC.

19 *Castrol Australia Pty Ltd v Emtech Associates Pty Ltd* (1980) 33 ALR 31.

20 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

The commission may need to review the form of any confidentiality direction and order at the time of making a determination in relation to an access dispute, and the form of any variation will depend on the circumstances of the access dispute. However, in general the commission will seek to ensure that the confidentiality of information contained in correspondence or submissions exchanged during the arbitration remains protected even after finalisation of the arbitration.

Confidentiality arrangements between the parties

It is important that confidentiality not be an issue in the arbitration and a source of dispute between the parties and therefore a cause of delay. The general confidentiality order will protect the confidentiality of information arising in the arbitration from disclosure beyond the arbitration. The parties, however, may feel the need for further protection of information within the arbitration context. To this end, the commission will encourage the parties to agree on a confidentiality regime that will allow for the free flow of information between the parties beyond the general confidentiality order, if the parties require further protections.

Although there is a specific regime under Part IIIA for dealing with confidentiality requests, the commission prefers that matters of confidentiality be dealt with at an early stage of an arbitration and in a manner that does not require the commission to make decisions about disclosure or non-disclosure of information on a document-by-document basis.

Accordingly, when it is anticipated that there will be confidential information used in an arbitration, it is usually appropriate for the parties to provide and exchange confidentiality undertakings (acceptable to the commission). These undertakings may only allow identified persons from each party (usually consisting of limited internal regulatory personnel and external lawyers) to have access to all the confidential information of the other party. To facilitate this process, the commission has developed a standard form of confidentiality undertaking at appendix C. The commission will, however, consider modified forms of the undertaking to suit particular circumstances.

If the parties are not able to agree on a satisfactory regime for the exchange of information, the Act provides a process for dealing with specific confidentiality requests, and the commission can give directions in relation to such matters.

In some instances, there may be a need for the complete non-disclosure of confidential information (though very limited occasions), in which case, the party seeking such form of protection can make a request under s. 44ZL as discussed below.

Confidentiality requests under s. 44ZL

There are a number of circumstances in which the ACCC may receive confidential commercial information during the course of an access dispute. A party may request that confidentiality applies in respect of expert reports that the party provides to the ACCC or confidentiality apply to expert reports that it commissioned and which the expert submits directly to the commission. A party may also request that confidentiality applies to expert reports provided by commission appointed experts.

The commission may direct a party to provide certain information in relation to a particular access dispute and a party may, in response, indicate that the request relates to information that is confidential commercial information and that it does not want it disclosed to the other party. In either case, there is a specific statutory process for dealing with these situations that may be utilised in the absence of prior agreed approach to confidentiality. A description of the statutory process follows.

- A party claiming confidentiality should inform the commission in writing that a specified part of a document contains confidential commercial information and request that the commission not give a copy of the document to another party **[s. 44ZL(1)]**.
- The party making the request should provide the commission with a submission describing the information over which confidentiality is claimed as comprehensively as possible, setting out the grounds for its request and outlining the form of the proposed decision sought from the commission.

If the information is to be provided orally:

- The CMT may arrange for the information to be provided during a private transcribed meeting with one or more commissioners and staff.
- The party will be provided with a full transcript after the meeting and can identify parts of the transcript that it believes contain confidential commercial information.
- The party can then make a request for confidentiality in relation to identified items in the transcript.

Upon receiving a request for confidentiality, the commission must:

- inform the other parties to the arbitration that the request has been made and of the general nature of the matters to which the relevant information relates
- ask the other parties whether there is any objection to the commission complying with the request (usually within five working days of receiving the request) **[s. 44ZL(2)]**.

In general, this will involve providing those parties with a copy of the requesting party's submission setting out the grounds for the request. Where the party making the request has not described the information in sufficient detail, the commission may supplement the description or ask the requesting party to supplement the description so that the other parties are able to adequately consider the request.

The other party may object to the request for confidentiality. If there is an objection to the commission complying with a request, the party objecting may inform the commission of its objection and of the reasons for it **[s. 44ZL(3)]**, which should be done in writing. The party should also provide the form of any proposed decision sought from the commission. This should usually occur within five working days of receiving the notice of request for confidentiality. The party objecting to confidentiality should also provide a copy of their submission to all the other parties.

If there is an objection to the request for confidentiality, the commission may ask the party making the request to reply to the issues raised by the objection.

The commission must then consider:

- the request
- any objection
- any further submissions that any party has made in relation to the request **[s. 44ZL(4)]**

and make a decision (usually within 10 working days of receiving the original confidentiality request) on whether or not, or the extent to which, the information should be disclosed to another party.

Other matters relevant to claims of confidentiality

The commission's starting point is generally that disclosing information to all parties will facilitate a more informed decision-making process. By not disclosing relevant information to all parties, the commission is less able to test the veracity of that information and therefore may be entitled to give less weight to that information.

Courts have generally balanced three factors when considering whether it is appropriate to allow access to information. In cases where a party has demonstrated that information is, in fact, confidential commercial information, the commission will have regard to these three factors when assessing a request under s. 44ZL:

- the extent to which disclosure will be likely to harm the legitimate commercial interests of the information provider
- the extent to which non-disclosure will be likely to harm the party who does not have access to the information and therefore is not able to comment on matters affecting its interests
- the extent to which non-disclosure will be likely to hinder the ability of the commission to perform its functions (i.e. in this context, to assess the veracity of the information).

The commission will need to make an assessment on a case by case basis. However, based on prior experience in the telecommunications sector under the equivalent s. 152DK of Part XIC, the following is provided by way of guidance.

Disclosure will cause harm

To establish that disclosure will be likely to cause harm, it is not sufficient to assert that the information is confidential. Rather, it must be shown how the information could be used by that other party and that this would be likely to cause harm to the provider's legitimate commercial interests. The onus of establishing these matters will generally rest with the person making the request.

With respect to information about the costs of commercial operations, generally it will be appropriate to draw a distinction between current (or contemporaneous) information and past (or 'out of date') information. It is less likely that disclosure of past information would cause harm. Also, in general, it will be appropriate to draw

a distinction between situations in which the cost information concerns operations that are similar to those conducted by the party from whom the document is to be withheld. If the information does not concern competing operations, disclosure would be generally less likely to cause harm.

With respect to information concerning the prices at which services are supplied to competitors, in general the commission does not consider that disclosure would be likely to cause harm merely because it would improve the state of knowledge of the party from whom it is to be withheld.

Existing restrictions are inadequate

It should be established that existing restrictions on the use of information (e.g. those set out in the standard confidentiality direction made at the commencement of the arbitration) are insufficient to prevent or minimise the likelihood of harm. In the event that the existing restrictions are insufficient, it may be possible to strengthen them by limiting disclosure to certain internal staff of the party and external advisers, with a prohibition on those persons communicating contents of the documents to other staff. In rare situations, in order to minimise the likelihood of harm, it may be appropriate to limit disclosure to external advisers only. This is the most limited form of disclosure that the commission usually orders.

Whether the information is material

The commission will consider the materiality of the information. Where the information is likely to have a material bearing on the commission's arbitration determination, then the case for providing the document to the party in question will be stronger. This is because non-disclosure is likely to cause greater harm to that party than in other situations. Moreover, limiting disclosure to external advisers could constrain the ability of the party to adequately provide instructions to its advisers and therefore hamper its ability to provide submissions to the commission.

Commission decisions on confidentiality requests

After the commission has considered the request, any objection in relation to the request and any reply submission, it may decide that the document:

- does not contain confidential commercial information
- does contain confidential commercial information, but it is nevertheless appropriate to give other parties a copy of those parts of the document
- does contain confidential commercial information, and it is not appropriate to give other parties a copy of those parts of the document.

If the commission is not satisfied that a document contains confidential commercial information, it will usually decide that the specified part of the document must be disclosed to all parties, on the basis that the usual confidentiality direction and order offers sufficient protection.

If the commission is satisfied that the document contains confidential commercial information, it may decide to direct a modified form of disclosure **[s. 44ZL(4)]**. The types of disclosure it could direct include:

- an order to disclose the specified part of the document to a limited number of internal representatives of the party, subject to satisfactory confidentiality undertakings
- an order to disclose the specified part of the document to identified external representatives of the party (usually legal advisers and/or technical experts), subject to satisfactory confidentiality undertakings
- a combination of both.

Where the commission orders disclosure subject to confidentiality undertakings, then the people who are entitled to receive the documents would be expected to provide the other party with a confidentiality undertaking in a form acceptable to the parties and commission. Where the commission decides that limited disclosure is appropriate, it can also order a person not to communicate to anyone else specified information that was given to the person in the course of the arbitration unless the person has the commission's consent **[s. 44ZG(4)]**. In practice, however, the confidentiality undertaking is likely to be sufficient.

Any person who contravenes an order not to disclose information (issued under s. 44ZG(4)) is guilty of an offence punishable on conviction by imprisonment for a term not exceeding six months **[s. 44ZG(5)]**.

The commission may provide confidential information to its own experts, subject to confidentiality undertakings, or pursuant to an order under **s. 44ZG**.

The commission does not adopt a particular default position in regard to the treatment of information. If a party specifies that a document contains confidential commercial information, then the commission's treatment of that document will depend on the type of document, the nature of the information in the document and the significance of the document to the arbitration along the aforementioned basis.

Confidentiality during consultation with other parties

Section 44ZL establishes a procedure that governs the exchange of information between the commission and parties to the arbitration. As noted earlier, the commission is entitled to inform itself of any matter relevant to the dispute in any way it thinks appropriate **[s. 44ZF(1)(c)]**. Accordingly, the commission may decide to consult with people other than the parties. This course of action may raise the need for the disclosure of confidential information.

As a matter of practice the commission will alert parties of its decision to conduct wider consultation at the earliest opportunity. It may be that the information necessary to enable meaningful consultation in a wider forum is in the public domain, e.g. the names of the parties, the nature of the service and brief description of the dispute.

Where the consultation would require the disclosure of confidential information, as a general rule, the commission will seek to first advise any party who has provided confidential information and explain the need for and extent of the proposed disclosure. In this regard, the commission has a broad duty to consider whether to

consult with the provider of that information before deciding to disclose it. In making any decision to disclose confidential information, the commission will always try to balance the need for informed decision-making with the need to respect the confidentiality of information and therefore the overall confidence of providers of information to the commission.

4.2 Disclosure and use of information

Disclosure

As noted above, the parties are usually bound by a general confidentiality order that imposes restrictions on the disclosure and use of information arising from an arbitration as well as any specific confidentiality requirements that the commission may impose. The commission will not generally discuss matters in the arbitration with anyone beyond the parties to the arbitration. When there is a need to discuss the arbitration with people other than the parties, such as when the commission may wish to consult more broadly, the commission will generally observe the usual confidentiality obligations.

Specific disclosure obligations on the commission

The commission can be compelled to produce material provided to it during the conduct of an access dispute:

- in response to a request under the *Freedom of Information Act 1988*
- as part of its duty to provide discovery or comply with a notice to produce in proceedings it commences or in proceedings against it
- in response to a subpoena in relation to proceedings between third parties
- in response to statutory disclosure obligations or its obligations as a government body.

Before complying with such requirements the commission will first seek to advise a party who has provided confidential information. However, the commission will not seek to consult with parties in relation to the release of non-confidential information. That said, in circumstances where a party has not requested confidentiality, the commission may consider that the information may be confidential in nature and, accordingly, will seek to clarify this with the provider.

Courts and tribunals understand the need to protect the confidentiality of information where appropriate and the commission can, in consultation with the provider of information, seek to ensure that the disclosure of information is subject to a court-imposed confidentiality regime.

Use of information

Obtained during an arbitration for other commission activities

The commission and its staff are subject to a number of general limitations in respect of the use of information:

- ACCC staff cannot make improper use of information.[21]
- Where information provided under a statutory power is confidential, the commission must comply with any specific statutory restrictions on disclosure.

The commission recognises that it is critical to adopt sound information handling practices to maintain the confidence of all parties to an access dispute. However, if the commission has legitimately obtained information using its powers for one purpose, and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other statutory function.[22]

Obtained in other commission activities for use in an arbitration

The commission may receive information relevant to an arbitration in the context of performing other (non-arbitration) responsibilities. This could occur, for example, when assessing an access undertaking proposal.

If the commission wishes to use this information in an arbitration, then the appropriate course of action would usually be to give it to the parties. Before doing so, however, the commission would normally advise the person who provided the information and seek their views on providing the information to the parties.

If the information provider objects, the commission would need to consider whether there are any restrictions on disclosure without the provider's consent. If the commission is restricted in its use of the information, then it would need to consider whether to use its information gathering powers (for example, the summons power under s. 44ZH) to re-obtain the information for the arbitration at hand.

4.3 Procedural fairness

Arbitration will be conducted in accordance with the requirements of procedural fairness (or natural justice).

The precise requirements of procedural fairness, however, will vary and depend on the provisions of Part IIIA and the circumstances of the access dispute.

21 See Public Service Regulations 1999 reg. 2.1, *Crimes Act 1914* s. 70 and the *Privacy Act 1988*.

22 For further information see ACCC, *Collection and Use of Information*, October 2000.

There are two key elements that have a bearing on the manner in which arbitrations are conducted:

- The parties to an arbitration should have a reasonable opportunity to present their case to the commission.
- The arbitrator should be free from bias or the perception of bias.

Reasonable opportunity to present the case

As a starting point, the commission will disclose all relevant matters (subject to confidentiality requests) to parties involved in the arbitration of any access dispute. If the commission receives information from one party without providing other parties with an opportunity to comment on this information, this may impair the ability of other parties to present their case and may affect the weight that the commission ought to give to that information.

All parties to an access dispute should ensure that copies of all submissions and any other information provided to the commission are also provided to all other parties to the dispute. Although the commission is empowered to withhold confidential information from a party, it is likely to use this power sparingly, and only after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information.

The requirements of procedural fairness may apply not only to the substantive issues in dispute, but also to certain process issues. For instance, when the commission is considering establishing a process, or modifying a previously established process, concerning the manner in which the parties present their cases, it will generally seek the views of the parties.

In resolving any procedural issues, the commission must balance a number of competing considerations, including the detriment to the party raising the issue, and the need to act as speedily as a proper consideration of the dispute allows **[s. 44ZF(1)(b)]**.

The requirement for parties to have a reasonable opportunity to present their case is also relevant in setting time frames for the making of submissions. The commission must determine periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties **[s. 44ZF(2)]**. Likewise, the commission may give directions and do all such things as are necessary or expedient for the speedy hearing and determination of the access dispute **[s. 44ZG(1)(f)]**.

Bias

A further element of procedural fairness is the issue of bias or the perception of bias by the commission. During the preliminary phase of an arbitration, the parties will generally be advised of any interests or involvement commissioners (and assisting staff) hearing the dispute may have in related matters. If a party has any objection to a particular commissioner or staff member taking part in the arbitration, this should be raised in the preliminary phase of the arbitration.

During the arbitration, parties to the dispute will likely be invited by the commission to attend one or more case management meetings (with ACCC staff) and a hearing (with ACCC staff and the commission conducting the arbitration). In the interests of transparency and procedural fairness, parties to the dispute will not generally meet with staff or commissioners outside of these forums to discuss the dispute without at least the knowledge of the other party.

A perception of bias can also arise where public comments are made about issues in dispute. To avoid the perception of bias, the commission does not generally make public comment about an arbitration until the arbitration has been completed, and after the determination for that arbitration has been published—if it is to be published. Likewise, parties will be precluded from making public comment in relation to a dispute.

The parties should be aware that the commission has other regulatory roles concerning key infrastructure services. It will therefore be necessary, from time to time, for the commission to make comment in relation to those roles despite the existence of arbitration disputes.

5 Termination of an arbitration

Arbitration may be terminated by the commission or in certain circumstances withdrawn by a party to the dispute.

5.1 Termination by the commission

The commission may terminate an arbitration at any time without making a determination, if it thinks that **[s. 44Y]**:

- the notification of the dispute was vexatious
- the subject matter of the dispute is trivial, misconceived or lacking in substance
- the party who notified the dispute has not engaged in negotiations in good faith
- access to the declared service should continue to be governed by an existing contract between the provider and the access seeker
- if the dispute is about varying an existing determination, there is no sufficient reason why the determination should not continue in its present form.

The commission will consider on a case-by-case basis whether a dispute meets any of the above criteria and should be terminated.

The commission may also consider rejecting a dispute notification if it considers the parties have not established that they have been unable to agree in regard to the matter under dispute.

Generally, parties whose interests will be affected by a decision to terminate an arbitration will be notified of the commission's intention to terminate and will be given the opportunity to make submissions as to whether the commission ought to continue with the arbitration.

5.2 Withdrawal of notification by parties

There are certain circumstances under which a party to the dispute may withdraw a notification **[s. 44T]**. 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.

A notification may be withdrawn by a provider at any time before the commission makes its determination if the provider notified the dispute **[s. 44T(1)(a)(i)]**.

The access seeker may withdraw a provider's notification at any time after the commission issues a draft determination but before it makes the final determination **[s. 44T(1)(a)(ii)]**. However, the access seeker cannot withdraw a provider's notification in cases where the dispute is over a variation of a determination **[s. 44T(2)]**.

The access seeker may withdraw the notification at any time before the commission makes its determination if it notified the dispute **[s. 44T(1)(b)]**.

A notice of withdrawal by a party must be made in writing to the commission **[r. 6D]**. It must include the following information **[r. 6D(1)]**:

- the name of the person withdrawing the notification
- whether the person withdrawing the notification is the access provider, or the access seeker
- a short description of the access dispute to which the notification relates
- a reference to the relevant criteria in s. 44T(1) under which the person claims to be authorised to withdraw the notification.

At the time of giving the notice of withdrawal to the commission, the person giving the notice must also give a copy to any other party to the arbitration. The notice of withdrawal takes effect when it is received by the commission **[r. 6D(3)]** and the notification is taken for the purposes of Part IIIA never to have been given **[s. 44T(3)]**.

The commission may issue a media release advising that the dispute notification has been terminated.

6 Post-determination matters

This chapter provides information about the review of arbitration determinations. It also outlines the role of the Federal Court in enforcing determinations. Arbitration determinations can also be varied by the commission in certain circumstances. These issues are discussed below.

6.1 Review of determinations

Review by the Australian Competition Tribunal

A party to the determination may apply in writing to the tribunal for review of the determination. The application must be made within 21 days after the commission made the determination **[ss. 44ZP(1), (2)]**. If a party does apply for a review, the determination is of no effect until the tribunal makes its determination on the review **[44ZP(4)]**. A review by the tribunal is a re-arbitration of the access dispute and the tribunal has the same powers as the commission for the purposes of the review **[ss. 44ZP(3), (4)]**.

The tribunal may either:

- affirm the commission's determination
- vary the determination **[s. 44ZP(6)]**.

In the course of the review, the tribunal may require the commission to give information and other assistance and to make reports as required **[s. 44ZP(5)]**.

For Part IIIA the outcome of the review will be taken to be a determination of the commission, whether the tribunal affirms or varies the original determination **[s. 44ZP(7)]**.

A commission determination has no effect until the tribunal makes its determination on the review **[s. 44ZO(2)]**. The decision of the tribunal will take effect as soon as it is made **[s. 44ZP(8)]**.

No application for tribunal review

If none of the parties to the arbitration apply for tribunal review of the commission's decision, the determination has effect 21 days after the determination is made.

Review by the Federal Court

Appeal of the tribunal's decision

Parties to the arbitration may appeal the tribunal's decision to the Federal Court of Australia. The appeal must be instituted within 28 days of the tribunal decision and be made in accordance with the Rules of the court (made under the *Federal Court of Australia Act 1976*). An appeal is limited to questions of law **[ss. 44ZR (1), (2)]**.

An appeal to the Federal Court does not automatically mean that the decision of the tribunal is affected or that action to implement the decision must cease. In the event of an appeal, the decision of the tribunal 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 **[s. 44ZS]**.

The Federal Court may make orders:

- affirming the decision of the tribunal
- setting aside the decision of the tribunal
- referring the matter back to the tribunal to be decided again in accordance with the directions of the Federal Court
- any other order that the court considers appropriate **[s. 44ZR(3), (4)]**.

Appeal of commission decision under the Administrative Decisions (Judicial Review) Act 1977

A person may be able to seek judicial review of a commission determination by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. An application for review must be made within 28 days of the making of a decision or the furnishing of a statement of reasons for the decision, or within the period allowed by the Federal Court. Although the court has some jurisdiction to review the decision, it may, in its discretion, decline to exercise jurisdiction when the applicant is entitled to seek review of the commission's decision before the tribunal.

6.2 Prohibition on hindering access

The provider or a user of a service to which a third party has access under a determination may not engage in conduct which is for the purpose of preventing or hindering the third party's access under that determination **[s. 44ZZ(1)]**. This prohibition extends to related corporate bodies. A person's conduct may be used to infer the existence of this proscribed purpose.

A person may apply to the Federal Court if it believes that access is being hindered by a provider or user of the service **[s. 44ZZE]**. The court may make all or any of the following orders:

- an order granting an injunction on such terms as the court thinks appropriate, restraining the other person from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other person to do that thing
- an order directing the other person to compensate a person for loss or damage suffered as a result of the contravention
- any other order that the court thinks appropriate **[s. 44ZZE]**.

6.3 Enforcement of determinations

A party to a determination can apply to the Federal Court if it believes that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination **[s. 44ZZD]**. In dealing with the application, the Federal Court may make the following orders:

- an order granting an injunction on such terms as the court thinks appropriate, restraining the other party from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other party to do that thing
- an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention
- any other order that the court thinks appropriate.

6.4 Variation of determinations

Any party to a determination may apply to the commission for a variation of a determination **[s. 44ZU]**. On receiving an application for a variation, the commission must notify and seek the consent of all other parties to the arbitration. If any party objects to the variation, the variation must not be made **[s. 44ZU(1)]**. If the parties cannot agree to a variation, a new access dispute may be notified. The commission may terminate such a notified dispute if it thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form **[s. 44Y(2)]**.

Before making a variation, the commission must take into account the same matters as for an arbitration as set out in ss. 44W and 44X **[s. 44ZU(2)]**.

Appendix A Notification of access disputes (template)

A.1 Covering letter

<Date>

General Manager
Transport and Prices Oversight Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Sir/Madam

I enclose notification of access disputes with <Name of company> under Part IIIA of the *Trade Practices Act 1974*.

A cheque for dispute notification fees is enclosed.

Yours sincerely

<Signatory>

Attachment: Notification

A.2 Notification of dispute to ACCC (template)

Notification of an access dispute under Part IIIA of the *Trade Practices Act 1974*

Between

1. <name of notifying company> of <address of notifying company>

   Contact: <name and position of contact>

   Telephone: <contact phone number>; facsimile: <contact fax number>; email: <email address>

and

2. <name of other company> of <address of other company>

   Contact: <name and position of contact—if known>

   Telephone: <contact phone number—if known>; Facsimile: <contact fax number—if known>; Email: <email address—if known>

<specify which party is the access seeker and which party is the service provider>

<the notification should specify the name of the owner(s) of the facility used to supply the declared service; where each owner is a legal entity separate from the person specified above, the notification should separately identify the facility owner(s), if known>

Notifier's address for delivery of documents

<specify street address>

Details of the declared service to which the dispute relates

<provide a short description of the notifier's existing and anticipated business>

<specify the declared service, and any standard access obligation that applies to the service or service provider, to which the dispute relates>

Details of the dispute and dispute resolution efforts

<specify in detail the nature of the dispute>

Note: The information included in the notification should establish that the access seeker is unable to agree with the access provider about one or more aspects of access to the declared service. Relevant details may include:

- whether the dispute is about varying existing access arrangements or about future arrangements
  - whether the access provider is currently supplying the declared service to the access seeker, and if so, a description of the supply arrangements (for example, contract date and term, key terms and conditions)
- the terms and conditions of supply, or aspects of access, on which the access seeker and access provider **have agreed**
- the terms and conditions, or aspects of access, on which the access seeker and access provider **are unable to agree**, including details of the most recent offers put forward by each of them

- efforts that have been made to reach agreement
  - should include a history of negotiations (particularly details, and evidence, of when negotiations commenced) and indicate whether the parties have used dispute resolution mechanisms (for example, conciliation, mediation). A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful
  - details of any options or proposed solutions put forward during negotiations, or in the context of dispute resolution mechanisms, and the parties' responses
- particulars of existing users and those with rights to use the service, and a brief description of how access may affect these other users
- whether access would involve extending the facility
- an estimate or description of the direct costs of providing access to the service and who will bear those costs
- whether access will involve the third party becoming the owner of any part or extension of the facility
- description of one or more methods by which access to the service can be provided and details of any risk to human health or safety caused by that method
- the outcome sought by the notifying party (e.g. the price for supply of the declared service), and the justification for that outcome—should include a short description of the benefits from allowing access to the service or increased access to the service.

Signature of person notifying dispute

_____

<name of signatory and position>

<date>

Appendix B Important milestones during arbitration for parties to an access dispute

Step/action during arbitration	Indicative timeframe/milestone
Pre-notification	
• Negotiating parties approach ACCC staff on an informal basis for preliminary guidance on possible indicative arbitration outcome.	• Anytime before to formal notification to ACCC of dispute.
Notification	
• Either party notifies ACCC of an access dispute.	• Template documentation is provided at appendix A.
• ACCC's case management team (CMT) will notify relevant parties that a dispute exists.	• On the 6th working day of the ACCC being notified that a dispute exists.
Procedure and submissions	
• ACCC's CMT will contact parties to attend initial case management meeting (CMT/parties/other). – The CMT will circulate minutes of the meeting to attendees and provide opportunity for comment.	• These meetings are normally held within the first 3 weeks of the ACCC being notified that a dispute exists.
• ACCC's CMT will contact parties to attend initial hearing (including conferences) with commission (optional) (commissioners/CMT/parties/other). – The CMT will circulate minutes of the meeting to attendees and provide opportunity for comment.	• When a hearing is deemed necessary it is likely to be held within 2 weeks following the initial case management meeting.
• Commission will invite submissions from parties.	• Timeframes to be determined by commission arbitrating the dispute.
• Parties may submit confidentiality requests to commission for consideration.	• The commission will try to decide confidentiality requests within 10 working days of receiving the request. • A standard confidentiality undertaking template is provided at appendix C.

Step/action during arbitration	Indicative timeframe/milestone
Procedure and submissions (cont'd)	
• Further case management meetings and hearings may be held if necessary.	• Timeframes to be determined by commission arbitrating the dispute.
• Commission makes decisions on key questions.	• Anytime.
Arbitration and decision	
• Commission issues draft determination	
• Parties invited to provide submissions in response to draft determination.	• Parties will be given a few weeks to provide a written response to the draft determination.
• Commission issues final determination.	• Commission will generally seek to issue a determination within six months (provided it has been given sufficient information at each stage of the process).

Appendix C Draft confidentiality undertaking

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974

IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

ACCESS DISPUTE NOTIFIED BY:	[X] (ACCESS SEEKER/ACCESS PROVIDER]
OTHER PARTIES:	[X] (ACCESS PROVIDER/ACCESS SEEKER)
	[X—IDENTIFY OTHER PARTIES]
DATE OF NOTIFICATION:	[X]
DECLARED SERVICE:	[X]

NOTIFIED UNDER: Part IIIA of the *Trade Practices Act 1974* (Cwlth) [s. 44S]

CONFIDENTIALITY UNDERTAKING

I, of undertake to [INFORMATION PROVIDER] and to the Australian Competition and Consumer Commission (**the ACCC**) that:

1. Subject to the terms of this undertaking and any order of the ACCC, I will keep confidential at all times the information provided by [INFORMATION PROVIDER] listed at Attachment 1 to this undertaking (**'the** [INFORMATION PROVIDER] **confidential information'**).
2. I will only use the [INFORMATION PROVIDER] confidential information for the purposes of this arbitration.
3. Subject to paragraph 4 below, I will not disclose any of the [INFORMATION PROVIDER] confidential information to any other person without the prior written consent of [INFORMATION PROVIDER] or without first obtaining an order authorising such disclosure from the ACCC.
4. I acknowledge that I may disclose the [INFORMATION PROVIDER] confidential information to which I have access to:
   (a) the ACCC
   (b) any employer, internal legal advisor, external legal advisor or independent expert currently employed or retained by [PARTY] for the purposes of the conduct of the arbitration provided that:
      i. the person to whom disclosure is proposed to be made (the person) is named in attachment 2 or has otherwise been approved of by [INFORMATION PROVIDER] in writing, or by order of the ACCC
      ii. the person has signed a confidentiality undertaking in the form of this undertaking or in a form otherwise acceptable to [INFORMATION PROVIDER]

iii. a signed undertaking of the person has already been served on [INFORMATION PROVIDER]

(c) any person to whom I am required by law to disclose the information.

5. Except as required by law and subject to paragraph 6 below, within a reasonable time after:

(a) The finalisation of this arbitration.

(b) My ceasing to be employed or retained by a part to this arbitration.

I will destroy or deliver to [INFORMATION PROVIDER] the [INFORMATION PROVIDER] confidential information and any documents or things (or parts of documents or things) recording or containing any of the [INFORMATION PROVIDER] confidential information in my possession custody or control.

Note: For the purpose of paragraph 5(a) above, this arbitration may be finalised where:

(c) The notification is withdrawn under s. 44Tof the Trade Practices Act 1974 (Cwlth) (**the Act**)

(d) The ACCC terminates this arbitration under s. 44Y of the Act

(e) The ACCC make a final determination under s. 44V of the Act.

6. Nothing in this undertaking shall impose an obligation upon me in request of information:

(a) which is in the public domain

or

(b) which has been obtained by me otherwise than from [INFORMATION PROVIDER] in the course of this arbitration provided that the information is not in the public domain and/or has not been obtained by me by reason of, or in circumstances involving, any breach of a confidentiality undertaking in this arbitration or a breach of any other obligation of confidence in favour of [INFORMATION PROVIDER] or any other unlawful means.

Signed:_____ Dated:_____

ACCC contacts

The ACCC cannot give legal advice. However, it can give you information on the issues discussed in this guide. For more information contact the ACCC.

The General Manager
Transport and Prices Oversight Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001

Tel: (03) 9290 1800
Email: transport.prices-oversight@accc.gov.au

For all general business and consumer inquiries

ACCC Infocentre: 1300 302 502

email: infocentre@accc.gov.au

website: www.accc.gov.au