



Australian
Competition &
Consumer
Commission

Arbitrations

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

A summary guide

April 2006



Australian
Competition &
Consumer
Commission

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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.

Contents

Abbreviations	iv
Glossary of terms	v
About this summary guide	vi
1 How does Part IIIA work?.....	1
1.1 What is the ACCC's role in arbitrating access disputes?	2
1.2 What factors are deemed to constitute an access dispute for the purposes of Part IIIA?	3
2 How will the ACCC conduct the arbitration process?	4
2.1 What are the steps involved?.....	4
2.2 Who in the ACCC will conduct the arbitration?.....	8
2.3 How long will the process take?	9
2.4 What documents are required from the parties to the ACCC?	9
3 How will the ACCC deal with confidentiality requests?	10
4 What matters must the ACCC consider in making its final determination?	11
5 When does the ACCC's final determination take effect and is it enforceable?	12
5.1 Enforcement of determinations	12
ACCC contacts.....	13

Abbreviations

ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974</i>
CMT	Case management team
Federal Court	Federal Court of Australia
NCC	National Competition Council
Part IIIA	Part IIIA Access to Services in the <i>Trade Practices Act 1974</i>
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
Commission	Refers to those members of the ACCC who are constituted to conduct the arbitration
Declared service	A service (see definition of service) for which a declaration is in operation—see s. 44B of the Act
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 is 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
Provider	The entity that is the owner or operator of the facility that is used (or is to be used) to provide the service
Service	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

About this summary guide

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, after consideration of a recommendation by the National Competition Council (NCC), is responsible for determining whether a service should be declared.

In the first instance, terms and conditions for third party access to a declared service should be on the basis of terms and conditions commercially agreed between the access seeker and the provider of the infrastructure.

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. In arbitrating access disputes, the ACCC must reach its determination through the application of specific statutory criteria.

This summary guide is designed to be a useful resource to parties and their advisors who may be considering requesting the ACCC to arbitrate matters related to an access dispute that falls under Part IIIA of the Act. It provides a brief overview of the ACCC's powers in relation to arbitrating access disputes under Part IIIA and the way in which the ACCC is likely to conduct the arbitration process. It uses non-legal language wherever possible.

This summary guide explains how the ACCC will exercise its dispute resolution powers under Part IIIA of the Act. In particular, it addresses the following questions:

- How does Part IIIA of the Act work?
 - What is the ACCC's role in arbitrating access disputes?
 - What factors are deemed to constitute an access dispute for the purposes of Part IIIA?
- How will the ACCC conduct the arbitration process?
 - What are the steps involved?
 - Who will conduct the arbitration?
 - How long will the process take?
 - What documents are required from the parties to the ACCC?
 - How will the ACCC deal with confidentiality requests?
- What matters must the ACCC consider in making its final determination?
- When does the final determination take effect and is it enforceable?

A more detailed version of this guide is available ([click here](#)) or can be downloaded from the ACCC's website. It provides additional information and highlights particular sections of Part IIIA that impose specific obligations on both the parties to a dispute and the ACCC in arbitrating the dispute. Parties preparing to notify the ACCC of an access dispute for the purposes of arbitration under Part IIIA of the Act should refer to that guide for more detailed advice.

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.

1 How does Part IIIA work?

Part IIIA establishes a regime for 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.

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 facilities, communications networks and certain sea ports.

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

- declaration of a service
- access undertakings
- declaration that a state or territory access regime is effective.

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. 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.

1.1 What is the ACCC's role in arbitrating access disputes?

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. When 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. 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.

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 before the ACCC makes its final determination.

1.2 What factors are deemed to constitute an access dispute for the purposes of Part IIIA?

An access dispute is deemed to exist for the purposes of Part IIIA where a third party is 'unable to agree' with the provider on one or more aspects of access to the declared service.

The person notifying the ACCC of the dispute must provide information that indicates 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).

If 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.

2 How will the ACCC conduct the arbitration process?

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.

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. These matters are specified in Part IIIA of the Act. 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 **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.

2.1 What are the steps involved?

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.

However, a flow chart showing the possible structure and process of dispute resolution is presented in figure 1. For the reasons outlined above, the flow chart provides only a general guide as to how an arbitration is likely to be conducted.

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

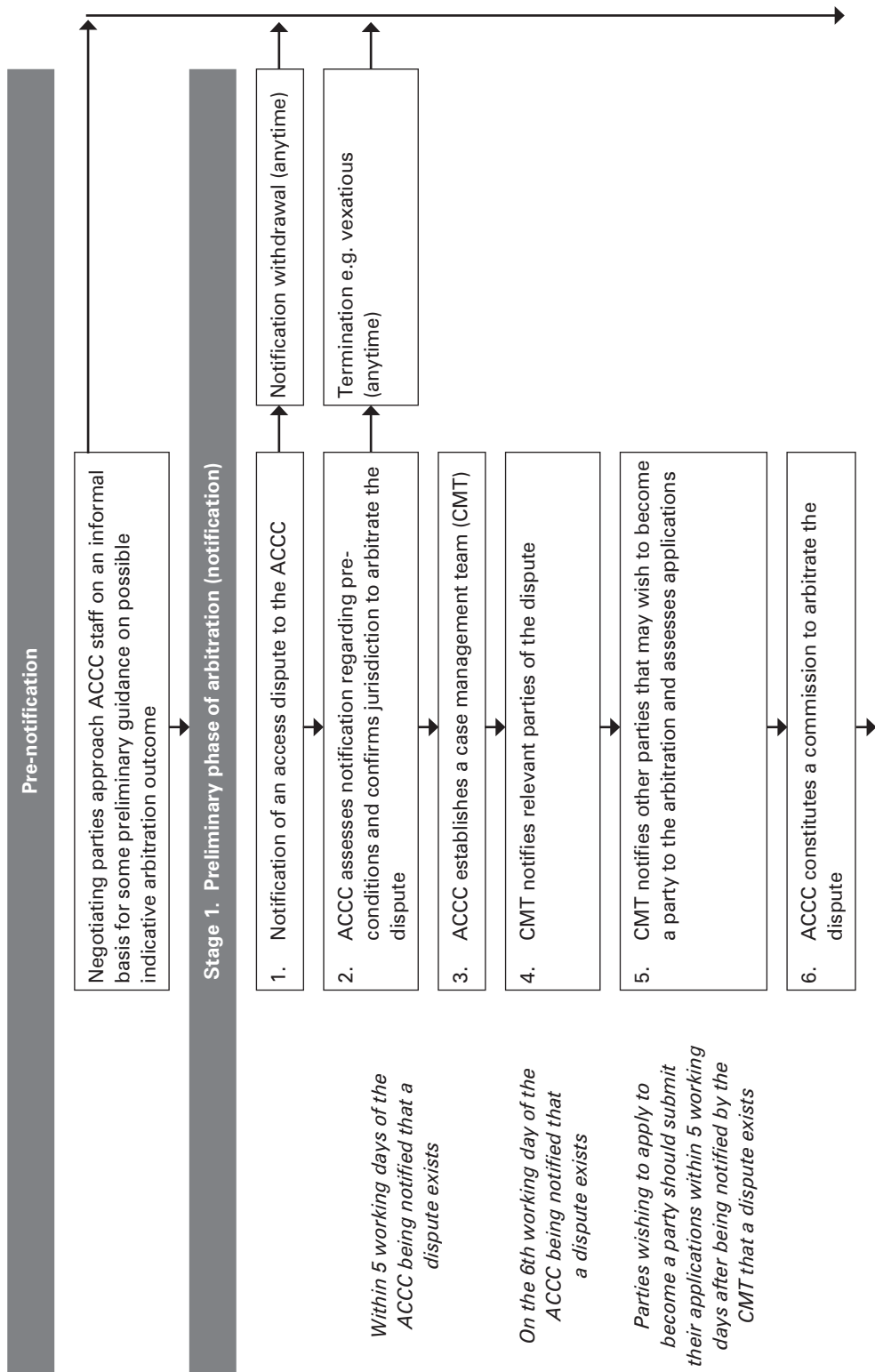


Figure 1 **Structure and process of dispute resolution system (a guide only) (cont'd)**

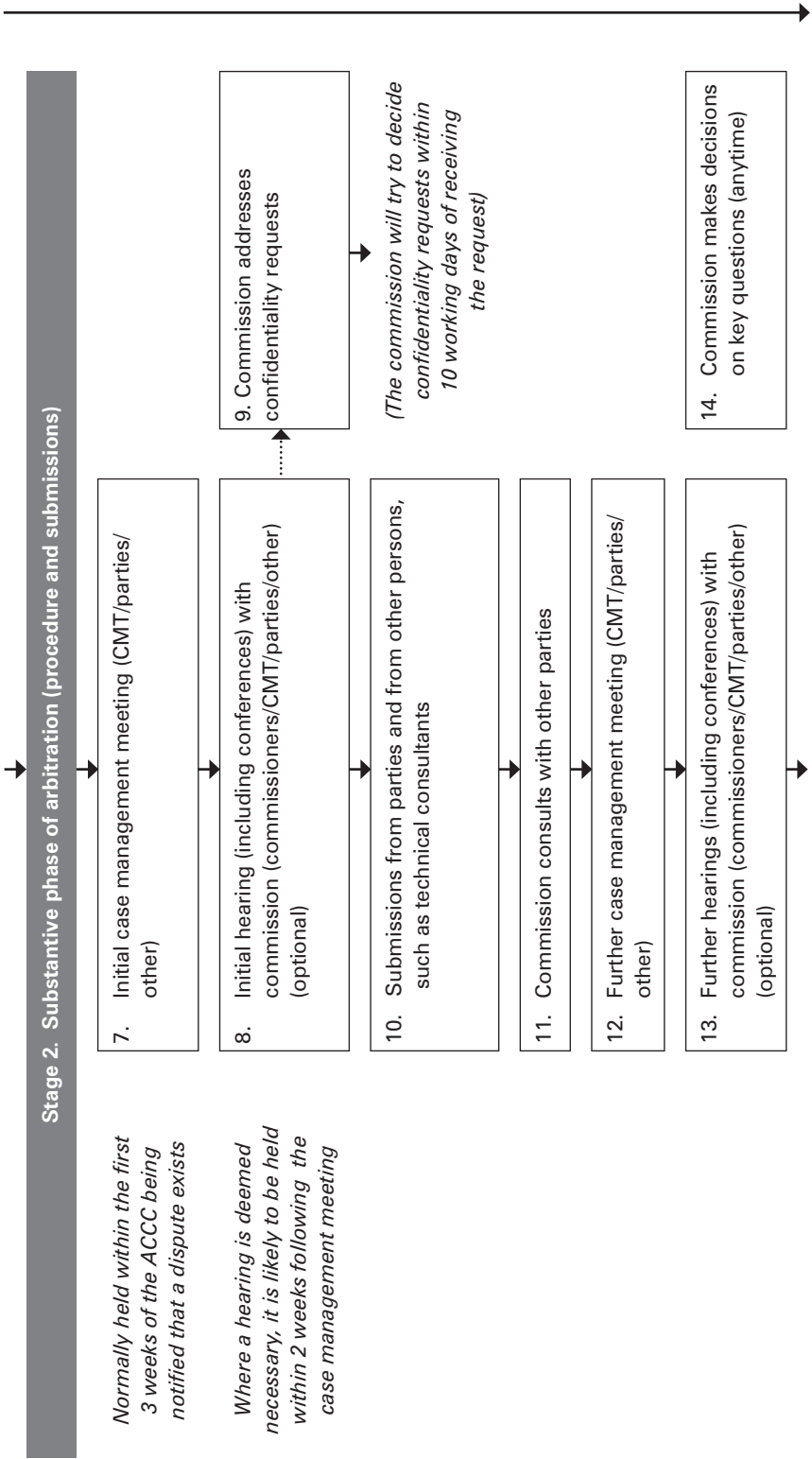
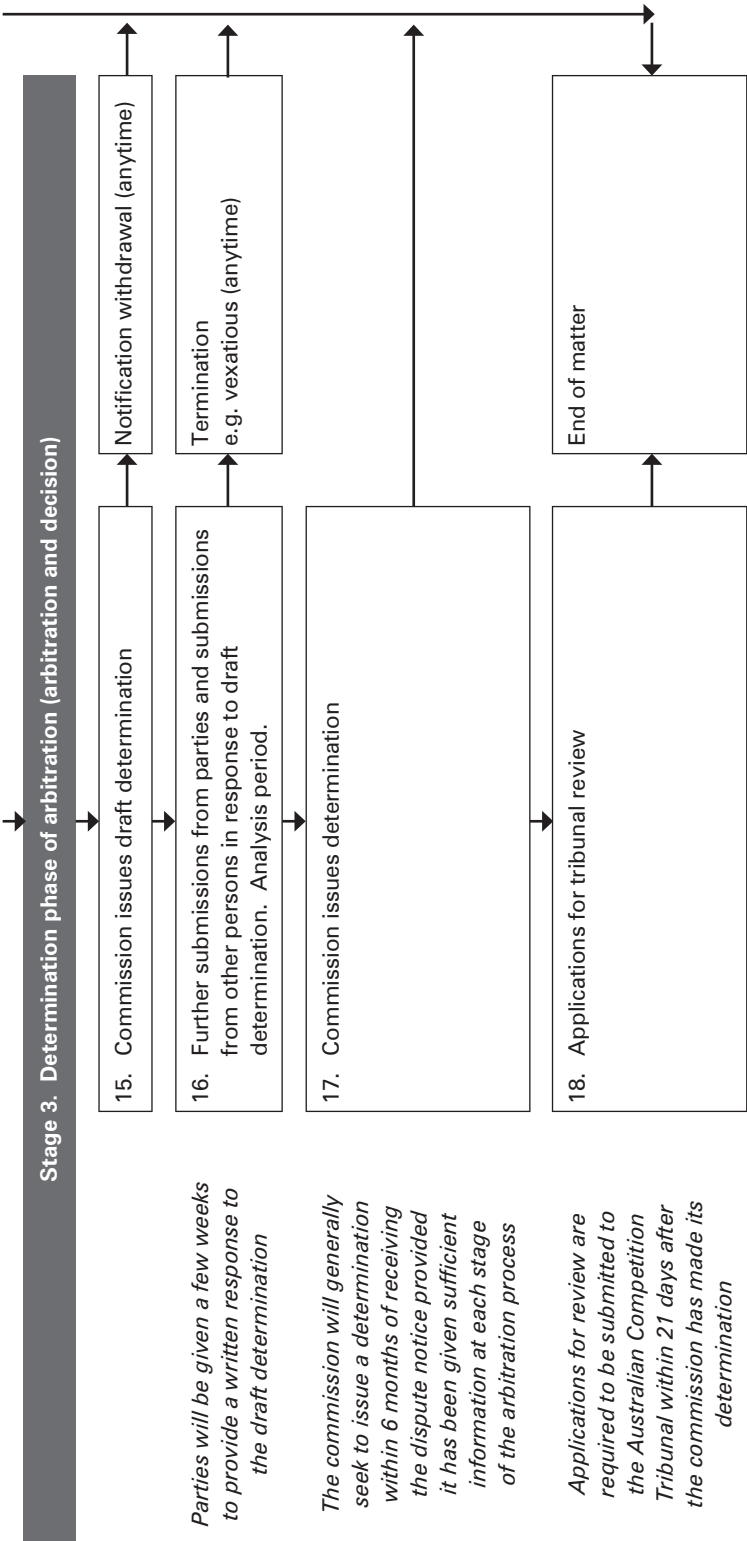


Figure 1 Structure and Process of Dispute Resolution System (a guide only) (cont'd)



The commission established within the ACCC to arbitrate the dispute will 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 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.

The commission may sit at any place and adjourn to any time and place.

2.2 Who in the ACCC will conduct the arbitration?

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. The ACCC will inform all parties in writing once the commission has been constituted.

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.

While the commission is responsible for making decisions in the arbitration, it is supported by an internal case management team which comprises staff drawn from the ACCC's regulatory and legal groups. ACCC staff will be the contact point for all inquiries regarding an arbitration.

The commission arbitrating the access dispute 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 to the access dispute will not generally meet and discuss matters which are the subject of dispute with the commission or ACCC staff outside of case management meetings conducted at the discretion of the commission and ACCC staff in order to facilitate the arbitration.

2.3 How long will the process take?

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.

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.

During the course of the arbitration, each party will be required to observe the commission's 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. The timing of parties' responses will of course depend on the complexity of the issues under consideration.

2.4 What documents are required from the parties to the ACCC?

The commission arbitrating the dispute will generally issue directions specifying the information that it requires from the parties. The commission may require evidence or argument to be presented in writing and decide the matters on which it will hear oral evidence. 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 (e.g. 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.

3 How will the ACCC deal with confidentiality requests?

The receipt of information is crucial to the ACCC's ability to arbitrate access disputes. Matters of confidentiality, disclosure and use of information have an important bearing on the way in which arbitrations are conducted.

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.

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.

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.

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. 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 which is available in its more detailed guide on Part IIIA arbitrations (see [appendix C](#) of that guide).

4 What matters must the ACCC consider in making its final determination?

The commission is required to take into account the following matters when making its final determination:

- 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.

Only some of these criteria have been judicially considered, and in other contexts. Therefore, in taking these matters into account, it is necessary for the ACCC to form its own views as to what they mean. This is explained in the ACCC's detailed guide on Part IIIA arbitrations ([see section 2.16](#) of that guide).

When making a determination the commission must give the parties its reasons for the determination. Although not a requirement of the legislation, the commission would usually limit the duration of a determination to a certain period.

A 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. 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.

Before making a final determination, the commission is required to give a draft determination to the parties. This 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.

Under existing legislation, the commission is not required 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).

5 When does the ACCC's final determination take effect and is it enforceable?

The ACCC's 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. If a party does apply for a review, the determination is of no effect until the tribunal makes its determination on the review.

Information about the review of determinations is available in the ACCC's more detailed guide on Part IIIA arbitrations ([see section 6](#) of that guide).

5.1 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. 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.

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.

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