



Australian  
Competition &  
Consumer  
Commission

# Part IIIA access undertaking guidelines

Submitting, varying or withdrawing  
an access undertaking pursuant to  
Part IIIA of the Competition and  
Consumer Act 2010

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# Contents

1. Introduction .....	2
1.1. About this guideline.....	3
1.2. Review of the National Access Regime.....	3
1.3. Contacts and further information .....	3
2. Legislative regime for Part IIIA access undertakings .....	5
3. The ACCC’s assessment process .....	7
3.1. Pre-lodgement discussions .....	8
3.2. Formal lodgement.....	8
3.3. ACCC assessment.....	9
3.4. Time limit for ACCC decisions.....	12
3.5. Varying, extending or withdrawing an accepted access undertaking .....	13
4. Drafting an access undertaking .....	14
4.1. Statement of purpose and objectives .....	15
4.2. Scope and nature of services.....	16
4.3. Duration and variation.....	17
4.4. Pre-conditions for access.....	18
4.5. Negotiation and dispute resolution .....	19
4.6. Pricing.....	21
4.7. Capacity allocation and management .....	27
4.8. Investments and upgrades to facilitate access .....	29
4.9. User engagement .....	30
4.10. Performance incentives and accountability .....	31
4.11. Measures to address vertical integration concerns.....	33
4.12. Fixed principles .....	35
4.13. Compliance.....	37
5. Monitoring and enforcement of accepted access undertakings .....	38
Appendix A: The National Access Regime .....	39
Declaration / Arbitration.....	39
Access undertakings and industry access codes.....	40
State access regimes.....	40
Competitive tender process.....	40

# 1. Introduction

Part IIIA of the *Competition and Consumer Act 2010* (CCA), also known as the National Access Regime, establishes a legal regime to facilitate third party access to services provided through facilities with natural monopoly characteristics. The objects of Part IIIA are:

- to promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
- to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Part IIIA provides a number of mechanisms by which the terms and conditions of access to services may be determined. One way is for the relevant Minister to declare a service or services provided by means of a facility. If declaration occurs, access seekers have an enforceable right to negotiate terms and conditions of access with the service provider and, failing agreement, a right to arbitration of the dispute before the ACCC.

Alternatively, the service provider (or a person who expects to be the provider of a service) may give an access undertaking to the ACCC. An access undertaking sets out matters relevant to obtaining access to a particular service. These matters may include the terms and conditions on which the service provider will offer access, the price for the service, and dispute resolution processes in the event the parties cannot agree. Access undertakings are court enforceable.

Notably, if the potential for declaration and arbitration causes uncertainty for service providers or investors, an access undertaking enables a service provider to take greater control over the process for determining the terms and conditions of access. This is because, if the ACCC accepts the access undertaking, the service cannot be declared by the Minister and, in return, the service provider is required to offer third party access in accordance with the undertaking.

This document provides guidance about the process for drafting and submitting an access undertaking for assessment by the ACCC pursuant to Part IIIA of the CCA, and seeking to vary or withdraw an accepted access undertaking.

ACCC assessment of an access undertaking will involve different stages, which may include:

- pre-lodgement discussions
- formal lodgement
- industry consultation
- assessment
- draft decision and further industry consultation
- final decision.

The actual process for having an undertaking considered by the ACCC will depend on the circumstances, characteristics and complexity in each case.

## 1.1. About this guideline

Chapter 2 of this guideline sets out the legislative regime, in particular the matters the ACCC must have regard to in assessing an access undertaking application. Chapter 3 focuses on the ACCC's processes for assessing access undertaking applications. Chapter 4 discusses how to draft an access undertaking and covers the types of provisions that applicants may consider including in access undertaking applications. Chapter 5 outlines the ACCC's role in relation to accepted access undertakings.

The material in this guideline is based on the provisions in Part IIIA and the ACCC's experience assessing access undertakings under Part IIIA of the CCA (and previously the Trade Practices Act). Unless the context requires otherwise, if a term is defined in the CCA it has the same meaning in this guideline as given to it in the CCA.

The ACCC may vary this guideline from time to time and will publish the revised guideline on its website at [www.accc.gov.au](http://www.accc.gov.au).

Please note that this guideline does not apply to:

- decisions made by the ACCC under the telecommunications access regime in Part XIC of the CCA, or
- decisions made by the Australian Energy Regulatory (AER) pursuant to the national energy market legislation and rules.

## 1.2. Review of the National Access Regime

In 2013 the Productivity Commission (PC) undertook an inquiry into the National Access Regime, including Part IIIA of the CCA. The Government decided to respond to the PC's 2013 report following the competition policy review (the Harper Review). The Harper Review final report was released on 31 March 2015, and included one recommendation on the National Access Regime (recommendation 42).

The Government released its response to the PC and Harper Review recommendations on the National Access Regime on 24 November 2015. In summary, the response supported 12 PC recommendations, noted one, and supported the Harper Review's recommendation 42 in part.<sup>1</sup> The recommendations currently do not appear to affect the ACCC's process for assessing access undertaking applications. However, this guideline may be updated if necessary following any legislative changes to implement the recommendations.

Further information on the broader National Access Regime (within which the access undertaking provisions sit) is at Appendix A of this guideline.

## 1.3. Contacts and further information

For more information on submitting an access undertaking to the ACCC for assessment under Part IIIA of the CCA, please contact:

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<sup>1</sup> Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime, 24 November 2015, accessed at <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/National-Access-Regime-Response>.

The General Manager  
Infrastructure & Transport – Access & Pricing branch  
ACCC  
GPO Box 520  
MELBOURNE VIC 3001

Ph: 03 9290 6924

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

The ACCC cannot give legal advice. However, it can provide general information on the issues discussed in this guide.

## 2. Legislative regime for Part IIIA access undertakings

Division 6 of Part IIIA sets out that the provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to that service (the applicant). An undertaking may specify a number of things including the terms and conditions on which access will be made available to third parties and procedures for determining terms and conditions of access.<sup>2</sup>

If the ACCC accepts the undertaking:

- the service cannot be declared under Part IIIA, and
- in return, the access provider is required to offer third party access in accordance with the undertaking.

An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

The test the ACCC applies in deciding whether to accept an access undertaking application is set out in subsection 44ZZA(3) of the CCA (within Division 6 of Part IIIA). The ACCC may accept an access undertaking if it thinks it appropriate to do so having regard to the following matters:

- the objects of Part IIIA in section 44AA of the CCA, which are to:
  - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
  - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the pricing principles specified in section 44ZZCA of the CCA, which provide that:
  - regulated access prices should:
    - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service; and
    - include a return on investment commensurate with the regulatory and commercial risks involved; and
  - access price structures should:
    - allow multi-part pricing and price discrimination when it aids efficiency; and
    - not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
  - access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.
- the legitimate business interests of the provider of the service;

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<sup>2</sup> See the note to subsection 44ZZA(1) of the CCA.

- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

Subsection 44ZZA(7)(b) provides that the Commission will have regard to the same set of matters when deciding whether to consent to a variation of an accepted undertaking.

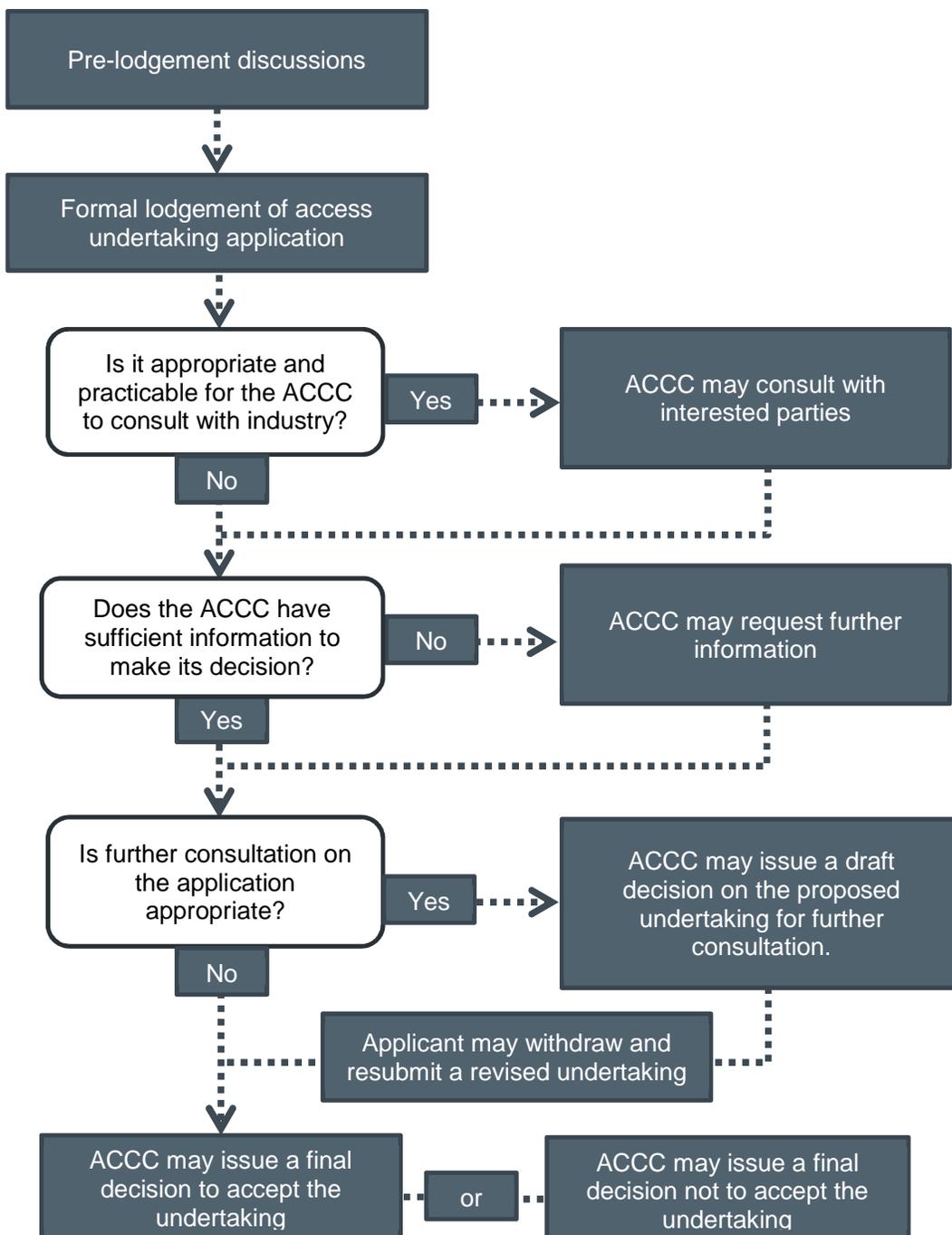
Part IIIA of the CCA also includes a number of provisions regarding the process by which the ACCC will assess an access undertaking application, including regarding timeframes and public consultation. The ACCC's assessment process is discussed at Chapter 3 of this guideline.

### 3. The ACCC's assessment process

The ACCC will undertake an assessment process in which it will consider whether it is appropriate to accept a proposed access undertaking, having regard to the matters listed at subsection 44ZZA(3) of the CCA. Each assessment process will be different and may include requests for information, consultation with interested parties and a draft decision, before the ACCC makes a final decision.

A diagram showing how each of the potential stages could interact is at Figure 1 below.

**Figure 1: Potential stages of an ACCC access undertaking assessment process**



The following sections provide further detail about the potential stages of an ACCC undertaking assessment process.

### 3.1. Pre-lodgement discussions

The ACCC encourages applicants to discuss their proposed access undertakings with the ACCC before formally lodging. This provides the applicant with an opportunity to engage with the ACCC about how best to draft their access undertaking such that it is more likely to be appropriate for the ACCC to accept.

Applicants are encouraged to contact the General Manager of the Infrastructure & Transport – Access & Pricing branch at [transport@acc.gov.au](mailto:transport@acc.gov.au) or (03) 9290 6924 in the first instance to arrange a meeting time.

Typical pre-lodgement discussions comprise:

- a preliminary meeting to discuss the types of issues that an undertaking should cover and answer any questions
- guidance about what should be included in a supporting submission – noting that failure to provide an adequate supporting submission at the time of lodgement of the undertaking will likely result in delays to the ACCC’s assessment process, and
- opportunity to comment on a draft undertaking(s) prior to formal lodgement in order to address any threshold issues (such as clarity and certainty) and ensure that the applicant has addressed all of the issues set out in this guideline.

Applicants can seek guidance if they are uncertain about what their access undertaking should include, what their supporting submissions should cover, or about the various steps in the ACCC process of assessing the proposed undertaking.

Pre-lodgement discussions can be confidential, and are therefore particularly useful in circumstances where there are commercial sensitivities (such as in relation to greenfield investment projects).

### 3.2. Formal lodgement

Once the applicant has its proposed access undertaking ready for submission it should be provided to:

General Manager  
Infrastructure & Transport – Access & Pricing branch  
ACCC  
GPO Box 520  
Melbourne VIC 3001

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

The ACCC prefers that access undertaking applications be sent via email in .doc or .docx format (although other text readable document formats will be accepted).

## Supporting submissions

It is important that a supporting submission accompanies the lodgement of an access undertaking. The supporting submission should explain, amongst other things:

- why the scope of the access undertaking is sufficient to include everything that an access seeker would require in order to access the service that is necessary in order to compete in the relevant market
- why the chosen term is appropriate
- why the chosen pricing model (e.g. negotiate/arbitrate or *ex ante* price setting) is appropriate
- measures in the undertaking to address the potential for self-preferential treatment by a vertically integrated firm
- if there are capacity constraints, how allocation of capacity is intended to be dealt with
- details of the applicant's engagement with stakeholders, to demonstrate both how it has engaged with stakeholders and how the views of stakeholders have been taken into account in drafting the proposed access undertaking
- how compliance with the undertaking will be monitored (i.e. auditing requirements, information-gathering requirements, etc.), and
- why the undertaking is appropriate to accept having regard to the matters in section 44ZZA(3) of the CCA.

Failure to provide sufficient information in a supporting submission will likely result in delays to the ACCC's assessment of an access undertaking application.

## Confidentiality

Documents or sections of documents submitted to the ACCC by an applicant that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis.

For information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*, available on the [ACCC's website](#).

### 3.3. ACCC assessment

Once an access undertaking has been formally lodged, the ACCC will undertake an assessment process in which it will consider whether it is appropriate to accept the undertaking having regard to the matters listed at section 44ZZA(3) of the CCA.

As noted above, each assessment process will be different depending on the complexity of the issues involved, the degree to which there is industry consensus, and whether there have been previous related assessments.

### 3.3.1. Threshold assessment

When an access undertaking is first received, the ACCC will check whether it complies with the conditions for lodgement set out in subsection 44ZZA(3A) of the CCA. These conditions include that the ACCC must not accept the undertaking unless:

- the provider, or proposed provider, is a corporation (or a partnership or joint venture consisting wholly of corporations)
- the undertaking provides for access only to third parties that are corporations, or
- the undertaking provides for access that is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

Additionally, the ACCC must not accept an undertaking if a decision is in force under section 44N of the CCA that a regime established by a state or territory for access to the service is an 'effective access regime'. An effective access regime is an access regime created by a state or territory for particular infrastructure services within their jurisdiction that has been certified by the relevant minister following a recommendation by the National Competition Council (NCC).

### 3.3.2. Consultation with interested parties

The ACCC will generally consult with interested parties for the purposes of assessing whether an access undertaking is appropriate. Where the ACCC consults under section 44ZZBD of the CCA, the consultation period will extend the ACCC's timeframe for assessing the access undertaking application.

This consultation will generally be in the form of a public consultation notice document calling for written submissions. The consultation notice will often be an issues paper noting particular matters of interest to the ACCC. The ACCC may also consult where it releases a draft decision to accept or not accept an access undertaking application (see section 3.3.4 below). The ACCC may also conduct stakeholder forums, meetings with interested parties, or a combination of these.

The length of the consultation period will vary depending on factors such as the complexity of the issues, any previous consultation, and the time of the year. However, the minimum period for a formal consultation process under subsection 44ZZBD(2) of the CCA is 14 days.

The ACCC will generally publish written submissions on its website (subject to the redaction of any confidential information in accordance with the ACCC's general confidentiality policy).

The ACCC encourages public submissions where possible, but recognises that in some circumstances it is appropriate for submissions (in whole or in part) to be treated as confidential. Where the ACCC rejects a confidentiality claim, it will notify the submitting party and provide the party an opportunity to withdraw the submission. If a submission is withdrawn the ACCC will not publish or have regard to that submission when making its decision.<sup>3</sup>

### 3.3.3. Requests for information

If the ACCC considers that it requires additional information from the applicant in order to properly assess whether it is appropriate to accept the access undertaking, the ACCC may

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<sup>3</sup> For more information see the *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*, available on the ACCC's website.

issue a written notice requesting that information in accordance with subsection 44ZZBCA(1) of the CCA. The written notice will specify the period within which the information must be provided. This information request period will extend the ACCC's timeframe for assessing the access undertaking application.

This notice, and the applicant's response, will be published on the ACCC's website (subject to the redaction of any confidential information in accordance with the ACCC's general confidentiality policy).

#### **3.3.4. Consultation on an ACCC draft decision**

The ACCC may form a preliminary view regarding whether it is appropriate to accept the access undertaking having regard to the matters at subsection 44ZZA(3) of the CCA. The ACCC may release a draft decision setting out its reasons for this preliminary view.

Situations in which the ACCC may issue a draft decision include where there is contention about the likely impact of accepting an access undertaking or where there are other outstanding issues that the ACCC considers may benefit from further consultation with industry.

Where the ACCC issues a draft decision, it will conduct further consultation to provide an opportunity for parties to comment on the draft decision and the reasons underpinning the ACCC's preliminary view. The length of the consultation period on a draft decision will extend the ACCC's timeframe for assessing an access undertaking.

#### **3.3.5. Options to address ACCC concerns**

If the applicant decides to make changes in response to any preliminary views of the ACCC and/or industry stakeholders or an ACCC draft decision, it may withdraw its proposed access undertaking and submit a revised access undertaking. An applicant may withdraw a proposed access undertaking at any time before the undertaking is accepted in writing by the ACCC.

If an applicant withdraws and resubmits its undertaking, the ACCC will finalise its assessment based on the revised access undertaking. The ACCC will take into account consultation and information provided on the previous access undertaking to the extent it remains relevant. In some cases the ACCC may conduct further consultation on the revised access undertaking. The time period for this further consultation will depend on the complexity of any outstanding issues and the extent to which parties have already had the opportunity to comment on the proposed arrangements.<sup>4</sup>

#### **3.3.6. Amendment notices**

The ACCC also has a power under section 44ZZAAA of the CCA to give a person an amendment notice setting out an amendment or amendments that the ACCC proposes be made to the access undertaking.<sup>5</sup> The ACCC may issue an amendment notice where it considers that the proposed undertaking should be amended in some respects in order for it to be acceptable to the ACCC having regard to the matters in subsection 44ZZA(3) of the CCA.

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<sup>4</sup> As noted at section 3.3.2 above, the minimum period for a formal consultation process under subsection 44ZZBD(2) of the CCA is 14 days.

<sup>5</sup> The ACCC is not required to propose (or consider proposing) amendments under section 44ZZAAA of the CCA when assessing an access undertaking – see subsection (10).

If the ACCC has issued an amendment notice, the applicant may submit a revised access undertaking incorporating one or more amendments of the nature proposed in the amendment notice.

### **3.3.7. ACCC final decision**

Once the ACCC has completed its assessment, it will release a final decision to accept or not accept the access undertaking. This final decision will set out the ACCC's reasons for accepting or not accepting the undertaking having regard to the matters at subsection 44ZZA(3) of the CCA. Section 44ZZBE of the CCA makes provision for confidential commercial information not to be published in the ACCC's decision. The ACCC will not release a final decision where an applicant withdraws its access undertaking application prior to the ACCC making a final decision.

Once accepted, the access undertaking will be placed on the public register in accordance with section 44ZZC of the CCA.

A final decision to not accept an access undertaking does not prevent a service provider submitting future access undertaking applications in relation to its services.

## **3.4. Time limit for ACCC decisions**

The CCA sets a time limit for the ACCC to make its final decision on access undertaking applications, including proposed access undertakings and applications to vary accepted access undertakings.

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within 180 days, beginning on the day that the application is formally lodged.

However, the 180 day period may be extended by 'clock stoppers', which are certain periods of time that are not counted when calculating the 180 day period. These 'clock stoppers' are set out at subsection 44ZZBC(2) of the CCA and include:

- where the ACCC requests information under subsection 44ZZBCA(1), as discussed at section 3.3.3 above
- where the ACCC conducts public consultation under subsection 44ZZBD(1), including on an issues paper or draft decision as discussed at sections 3.3.2 and 3.3.4 above
- where the ACCC and the applicant agree to stop the clock, as provided by subsection 44ZZBC(4), and
- where the ACCC publishes a decision to defer consideration of whether to accept the undertaking while it arbitrates a related access dispute.

If the ACCC does not publish a decision on the proposed undertaking within the 180 day period (extended to accommodate any 'clock-stoppers'), the CCA states that the application is deemed to have been rejected.

If an applicant decides to withdraw and resubmit a revised access undertaking application, a new 180 day period will commence on the day the revised application is lodged. However, in practice the ACCC's timeframe for assessing a revised application will often be significantly shorter, as the ACCC will take into account previous industry consultation and information provided on the original access undertaking application.

The total time taken by the ACCC will depend on whether the initial application and supporting submission is sufficiently clear and comprehensive, and whether the applicant

responds to any requests for further information by the ACCC in a timely manner. It will also likely depend on the complexity of the relevant markets and other issues relevant to consideration of whether an access undertaking is appropriate to accept, including issues raised by stakeholders.

To facilitate a timely assessment process, applicants are encouraged to review their proposed access undertaking against the issues listed at Chapter 4 of this guideline prior to lodgement, to ensure all relevant aspects have been considered.

### **3.5. Varying, extending or withdrawing an accepted access undertaking**

Subsection 44ZZA(7) of the CCA provides that an access provider with an accepted Part IIIA undertaking may only withdraw or vary the undertaking with the consent of the ACCC. Subsection 44ZZBB(1) provides that an access provider may apply to the ACCC to extend the period for which an accepted access undertaking is in operation. The CCA does not provide for the ACCC or other interested parties to initiate variations to, or extensions of, an accepted access undertaking.

The ACCC's process for assessing a proposed variation, extension or withdrawal of an accepted access undertaking will be similar to its process for accepting the access undertaking. The statutory timeframes discussed in section 3.4 above also apply to variation, extension and withdrawal assessments. If a variation is of a minor nature the ACCC's assessment may be expedited. If an extension application is for a relatively short period and the substantive provisions of the undertaking remain largely unchanged, the ACCC's assessment may be similarly expedited. An expedited assessment may involve conducting fewer and/or shorter public consultation processes, and issuing a final decision without first releasing a draft decision for consultation.

The ACCC must apply the same test when deciding whether to consent to a variation of an accepted undertaking or extending the operation of the undertaking as it does when assessing the access undertaking. That is, the ACCC may consent to a variation or extend the operation of an undertaking if it is appropriate to do so having regard to the matters at subsection 44ZZA(3) of the CCA. Part IIIA does not allow for accepted access undertakings to be varied without the consent of the ACCC having regard to these matters, even if a variation is of a minor nature.

The ACCC will apply the same test when deciding whether to consent to withdrawal of an accepted undertaking. The ACCC will consent to withdrawal only when it is appropriate having regard to the same matters.

## 4. Drafting an access undertaking

This chapter discusses how to draft a Part IIIA access undertaking and the type of provisions that applicants may consider including. The material in this chapter is based on the ACCC's experience assessing access undertakings under Part IIIA of the CCA to date.

There is no single template setting out exactly what a Part IIIA access undertaking should contain. The note to subsection 44ZZA(1) of the CCA sets out a number of examples of the kinds of things that might be dealt with in the undertaking, including the terms and conditions on which access will be made available to third parties and procedures for determining terms and conditions of access.<sup>6</sup>

In considering whether a proposed Part IIIA access undertaking is appropriate, the ACCC will have regard to all the matters under section 44ZZA(3) of the CCA, including the interests of access seekers. The ACCC's experience is that access seekers are concerned to ensure that undertakings provide for (amongst other things):

- commitments to meet reasonably anticipated demand
- objective standards of quality and reliability
- efficient cost based pricing
- fair and timely handling and resolution of disputes.

An access undertaking will also need to reflect the specific circumstances of the industry and the services to which it relates. The circumstances of the facility owner may require additional concerns to be addressed in an undertaking, such as the potential for discrimination arising from vertical integration.

The following table sets out commitments which the ACCC would generally expect to see addressed in an appropriate Part IIIA access undertaking.

<b>Ref.</b>	<b>Title</b>	<b>Description</b>
<b>4.1</b>	Statement of purpose and/or objectives	A statement of the background, purpose and objectives of the undertaking, possibly including a statement of principles the undertaking seeks to promote.
<b>4.2</b>	Scope and nature of services	Definition of the scope and nature of the services to which the undertaking applies.
<b>4.3</b>	Duration and variation	Provisions specifying the duration of the undertaking and potential for renewal or variation of the undertaking.
<b>4.4</b>	Pre-conditions for access	Pre-conditions that access seekers must satisfy in order to be granted access to the service.
<b>4.5</b>	Negotiation and dispute resolution	Process for obtaining access including, for example, a standard-form access contract, provisions governing the negotiation process, the information to be shared in that negotiation, and the process for resolving disputes.

<sup>6</sup> See the note to subsection 44ZZA(1) of the CCA.

<b>Ref.</b>	<b>Title</b>	<b>Description</b>
4.6	Pricing	Rules or principles governing how access prices will be structured and set.
4.7	Capacity allocation and management	In the event the access provider has limited capacity, rules regarding the allocation of capacity.
4.8	Investments and upgrades to facilitate access	Rules governing how investment decisions will be made and costs recovered, including extension or expansion investments necessary to facilitate access.
4.9	User engagement	Rules governing on-going interaction between the access provider and access seekers.
4.10	Performance incentives and accountability	Provisions to ensure the access provider has incentives for cost efficiency, service quality, and innovation, and that access seekers have transparency about the access provider's performance.
4.11	Measures to address vertical integration concerns	Measures to address concerns about a vertically integrated access provider discriminating in favour of its own related business compared with upstream or downstream competitors.
4.12	Fixed principles	Provisions which apply for a specified period extending beyond the expiry date of the undertaking.
4.13	Compliance	Provisions to allow for effective regulatory oversight of the access provider's compliance with the undertaking.

Further explanation and practical examples are provided in the sections below. Previous ACCC decisions referenced in this chapter are available on the ACCC's website at [www.accc.gov.au/regulate-infrastructure](http://www.accc.gov.au/regulate-infrastructure).

Access providers should consider the appropriate level of detail to include in the access undertaking. The access undertaking should find an appropriate balance between the flexibility of principles-based arrangements and the clarity and certainty of more specific behavioural requirements.

The material in this chapter is not intended to be exhaustive, and it may be appropriate for a Part IIIA access undertaking to include additional commitments not discussed in this guideline.

#### **4.1. Statement of purpose and objectives**

Part IIIA access undertakings will often contain a statement regarding the background, purpose and objectives of the undertaking. This may also include a statement of principles the undertaking seeks to promote. Including a statement of purpose or objectives provides context for why the access undertaking exists.

### **Examples: statement of purpose and objectives**

Australian Rail Track Corporation's (ARTC's) Hunter Valley Access Undertaking (HVAU) accepted by the ACCC on 29 June 2011 includes an introduction at clause 1.1 setting out background information to the undertaking. A set of objectives regarding the intent of the undertaking is at clause 1.2. The objectives include that the undertaking is intended to establish certain frameworks, processes and methodologies related to access, and to reach an appropriate balance between the interests of various parties. The objectives also state that the undertaking is intended to:

*...operate consistently with the objectives and principles in Part IIIA of the CCA and the Competition Principles Agreement (subclause 1.2(f)).*

The wheat access undertakings accepted by the ACCC between 2009 and 2014 also included objectives covering similar matters. For example, the objectives of Viterro Operations Ltd's (Viterro's) September 2011 access undertaking set out at clause 1.2 are similar to those in the ARTC 2011 HVAU, and also refer to:

*...providing for a uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals (subclause 1.2(g)).*

## **4.2. Scope and nature of services**

An access undertaking under Part IIIA must relate to a service or services provided by means of a facility, which includes:

- the use of an infrastructure facility such as a road or railway line
- handling or transporting things such as goods or people
- a communications service or similar service

but does not include:

- the supply of goods, or
- the use of intellectual property, or
- the use of a production process

except to the extent that it is an integral but subsidiary part of the service.<sup>7</sup>

It is important that the access undertaking clearly defines the service or services to which access is being provided and that its qualities are clearly defined by objective commercial standards. Further, it is important that the definition is sufficiently broad so as to cover all the elements of the service to which access is required.

One way of achieving a sufficiently broad service description is to include the words '...and the use of all other associated infrastructure...' within the drafting of the scope of the service. This ensures that if the nature of the service changes over the years, requiring use of some different or altered infrastructure, that this infrastructure will be captured in the scope of the access undertaking.

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<sup>7</sup> Section 44ZZA of the CCA provides that an undertaking may be given to the Commission by the "provider of the service" in connection with the "provision of access to the service". The definition of "service" is in section 44B.

The service description should also include service quality and reliability dimensions where appropriate.

In cases where the undertaking is for a longer duration, the nature or range of the services to be provided may need to be updated over time. Ideally the access undertaking should set out how existing services should be varied, new services added, or existing services withdrawn.

**Examples: scope**

The service description at clause 2.1(a) of ARTC's 2011 HVAU states that:

*...access will include, in addition to the track, the benefits of Associated Facilities required to facilitate such Access.*

Associated Facilities is defined at clause 14.1 of the 2011 HVAU to mean:

*all associated track structures, over and under track structures, supports (including supports for equipment or items associated with the use of the Network), tunnels, bridges, train control systems, signalling systems, communication systems and associated plant, machinery and equipment from time to time but only to the extent that such assets are related to or connected with the Network but does not include any sidings or yards.*

The same service description is also used at clause 2.1(a) of ARTC's Interstate Access Undertaking (IAU) dated 30 July 2008.

### 4.3. Duration and variation

The access undertaking should clearly define the term over which access is provided and, if appropriate, stipulate a process for reviewing, amending and/or extending the term of the access undertaking.

There is no one appropriate length for all access undertakings. The appropriate length can vary depending upon the circumstances within which the undertaking is being submitted.

As a general principle, the ACCC considers regulatory arrangements should be designed so as to be effective and fit for purpose, and should include sufficient flexibility (e.g. via review mechanisms) to adapt to future changes in the industry.

As noted at section 3.5 of these guidelines, the CCA sets out the processes by which an accepted undertaking may be varied, extended or withdrawn. In each case the ACCC will have regard to the matters in subsection 44ZZA(3). The undertaking, and any documents which form part of the undertaking (such as standard contracts or operational documents), may not be varied without the consent of the ACCC having regard to the matters at subsection 44ZZA(3) of the CCA.

**Examples: duration of access undertakings**

The 2009 bulk wheat terminal access undertakings were for the relatively short period of two years. The ACCC decided that this was an appropriate length in the circumstances. The wheat industry was transitioning from a sole exporter and marketer of Australian wheat to a competitive exporting and marketing industry. The ACCC noted in its final decision on GrainCorp Operations Ltd's (GrainCorp's) 2009 access undertaking:

*In taking this view the ACCC notes the transitional state of the bulk wheat export industry and the desirability of avoiding the imposition of regulation that is not appropriate on a newly deregulated industry, which would not be in the public interest. The ACCC notes that, given*

*the transitional state of the industry, access arrangements that are appropriate now may not be appropriate in several years time. The ACCC considers that a short term undertaking (of two years) mitigates these risks.<sup>8</sup>*

GrainCorp, Viterra and Co-operative Bulk Handling Ltd (CBH) submitted new undertakings upon the expiry of their 2009 undertakings, this time with three year terms. The ACCC also accepted an access undertaking from Australian Bulk Alliance Pty Ltd (now Emerald Logistics Pty Ltd (Emerald)) for an initial term of two years at the Port of Melbourne.

The ACCC considered that a five-year period was reasonable for ARTC's 2002 IAU to balance providing certainty and flexibility given that the rail industry was undergoing substantial change. The ACCC considered that a five-year period provided an opportunity to reassess the IAU in light of developments in the industry and noted that this did not preclude ARTC and operators from entering longer term access arrangements.<sup>9</sup>

The ACCC accepted a longer regulatory term of ten years for ARTC's 2008 IAU. The ACCC considered a longer regulatory term was appropriate in the circumstances because, while the rail industry was still growing and evolving, the industry was not so unstable that a fresh assessment of access terms and conditions would be needed after five years.<sup>10</sup> Nevertheless, ARTC's 2008 IAU includes a five-year review process intended to provide stakeholders with an opportunity to raise concerns they may have with the functioning and effectiveness of the 2008 IAU.<sup>11</sup>

A five year term was considered more appropriate than a term of ten years for ARTC's 2011 HVAU given that particular features of the undertaking were yet to be developed at the time of acceptance and there was some uncertainty as to how parts of the undertaking would operate in practice. However, the ACCC acknowledged that in the appropriate circumstances a longer term may provide greater certainty to both the access provider and the access seeker.<sup>12</sup>

As an example of a longer term access undertaking outside of Part IIIA, the NBN Co Special Access Undertaking (SAU) has a term of close to 30 years, with different provisions applying in different phases to allow a balance between certainty about long-term cost recovery and flexibility to respond to changing circumstances. For example, the SAU specifies a process for NBN Co to periodically submit variations to the SAU for ACCC assessment, with each variation application to include NBN Co's proposals for its revenue requirement and the RAB roll-forward arrangements for 'regulatory cycles' of between three and five years. This SAU was provided under Part XIX of the CCA, and the approach was considered appropriate due to the particular circumstances of the National Broadband Network (NBN).<sup>13</sup>

#### 4.4. Pre-conditions for access

A service provider may wish to stipulate pre-conditions that access seekers must satisfy in order to be granted access to the service in question – for example, satisfying certain prudential requirements.

Pre-conditions can be appropriate where they reflect the reasonable commercial interests of the access provider, such as ensuring an access seeker is solvent before the provider is required to sign a contract for access.

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<sup>8</sup> ACCC, GrainCorp Final Decision, 29 September 2009, p. 67.

<sup>9</sup> ACCC, IAU Final Decision, May 2002, p. 61.

<sup>10</sup> ACCC, IAU Final Decision, July 2008, p. 55.

<sup>11</sup> ACCC, IAU Final Decision, July 2008, pp. 30-31.

<sup>12</sup> ACCC, HVAU Final Decision, p. 39.

<sup>13</sup> ACCC, NBN Co Special Access Undertaking, Final Decision, 13 December 2013, pp. 59-61.

Pre-conditions may be problematic, however, if they are used in an anti-competitive manner, such as to discriminate against certain types of users, or to set the 'bar' for obtaining access unreasonably high. Accordingly, it is important that any pre-conditions for access be clear, fair, reasonable and non-discriminatory. For transparency, it will likely be necessary to include the pre-conditions in the undertaking or standard terms.

Disputes regarding pre-conditions of access should generally be subject to a fair and transparent dispute resolution process (discussed at section 4.5.2 below).

#### **Examples: pre-conditions for access**

When assessing the first proposed access undertaking submitted by CBH (in April 2009) the ACCC did not think it was appropriate that CBH could, at any time before or during a process of negotiating with access seekers, require that access seeker to demonstrate that it could meet the prudential requirements. The ACCC felt it would be more appropriate if the undertaking:

*“...specifies a particular point in time at which the Applicant must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which CBH must confirm that those requirements have or have not been met.”*

Clause 7.4(a) of CBH's accepted 2009 access undertaking set out a number of eligibility criteria, which included that an applicant must be solvent and not in material default, have a legal ownership structure and an ability to pay access charges. Clause 7.5(b) set out timing constraints on when CBH could make a written request that an applicant demonstrate that it met the relevant eligibility criteria. Clause 7.5(e) provided that if CBH refused to negotiate with the applicant on the basis that it did not meet the eligibility criteria, the applicant could raise a dispute regarding that decision and seek arbitration under clause 8.4 of the undertaking.

## **4.5. Negotiation and dispute resolution**

The process through which an access seeker can apply for and obtain access should be clear and transparent.

To provide a starting point for the negotiation of the terms and conditions, Part IIIA access undertakings generally include a set of standard terms on which access seekers may obtain access. This set of standard terms (often referred to as an 'indicative access agreement') forms a template contract and functions as a transparent starting point for commercial negotiations regarding the terms of access. Final negotiated access agreements may vary from the standard terms in order to accommodate particular circumstances and preferences of an access seeker. The undertaking should also clearly set out the process by which an access seeker may either obtain access under the standard terms or negotiate alternative terms.

The following subsections provide more detail about standard terms and dispute resolution.

### **4.5.1. Standard terms**

It would be very unlikely for the ACCC to accept a Part IIIA access undertaking if it did not include a set of standard terms (or equivalent) or at least a requirement that such terms be published. The standard terms do not prevent negotiation of alternative terms in a contract with a particular access seeker. Rather, the standard terms form a transparent starting point to facilitate those negotiations.

The standard terms may cover issues that are more commercial in nature than the matters covered by the clauses in the access undertaking, such as:

- indemnities and liability

- insurance
- invoicing and payment
- confidentiality of information, and
- force majeure provisions.

The standard terms may include price terms, or may refer to prices that are published separately (often called 'reference prices'). Possible approaches to pricing are discussed at section 4.6 below. The access undertaking should establish a hierarchy in the event there is any inconsistency between the terms of the undertaking and associated documents such as the standard terms (generally the undertaking will take precedence).

Access providers will generally be required to consult and/or obtain the ACCC's approval if they wish to vary their standard terms.

#### **Examples: standard terms**

Each of the Part IIIA access undertakings approved by the ACCC to date include an indicative access agreement (sometimes termed indicative standard terms, standard agreement, access holder agreement or similar).

Examples of indicative access agreements can be located on the ACCC website at the public register of access undertakings accepted by the ACCC under Part IIIA.<sup>14</sup>

#### **4.5.2. Dispute resolution**

It is particularly important that a procedure be in place to deal with disputes that arise in the negotiation for access. Where an access seeker has no option but to use the services of a monopoly service provider, access seekers will be concerned that access arrangements may be put to them on a 'take it or leave it' basis. In order to address this concern, the undertaking should clearly set out the process by which access is negotiated and include a procedure to deal with disputes that arise regarding the terms and conditions of access. An effective dispute resolution mechanism will create incentives for a service provider to offer, and an access seeker to accept, reasonable access terms and conditions in commercially negotiated access arrangements.

The majority of access undertakings accepted by the ACCC under Part IIIA include recourse to arbitration as the final step in resolving disputes. Prior to arbitration, a dispute resolution process may also provide for senior managers to meet and attempt to resolve the dispute and refer the dispute to mediation.

It is important that an arbitration regime in a Part IIIA undertaking clearly set out who will be the arbitrator of disputes. Where there may be disputes about pricing, it is likely to be appropriate for the ACCC to have an option to be the arbitrator.

It should be noted that the ACCC has not, to date, been required to arbitrate on a dispute in relation to a Part IIIA access undertaking, although it has conducted an arbitration on a declared service under Part IIIA.<sup>15</sup> However, the ACCC nevertheless considers that recourse to arbitration is generally important to include in a Part IIIA access undertaking. Anecdotal evidence suggests that the option of arbitration by the ACCC has facilitated commercial

<sup>14</sup> See <http://registers.accc.gov.au/content/index.phtml/itemId/867739>.

<sup>15</sup> ACCC, Determination of the access dispute between Services Sydney and Sydney Water – Arbitration Report, 19 July 2007, available at <http://registers.accc.gov.au/content/index.phtml/itemId/852591>.

settlements in a range of disputes regarding access to services.<sup>16</sup> The ACCC also has experience conducting a number of arbitrations under the previous telecommunications regime.<sup>17</sup>

The ACCC considers that providing for arbitration as a backstop to negotiation can encourage both access providers and access seekers to engage in commercial negotiations and achieve effective outcomes. The publish-negotiate-arbitrate approach to access pricing is discussed further below.

#### **Examples: negotiation and dispute resolution**

The wheat port terminal undertakings accepted by the ACCC between 2009 and 2014 all included recourse to binding arbitration in the event of a dispute regarding the terms of access.

- Clause 6 of Viterra's 2011 undertaking set out the process by which agreements would be negotiated. This included that negotiations would be conducted in good faith and that the process would include a preliminary inquiry, an access application, a negotiation period and execution of an agreement.
- Clause 7 set out a dispute resolution process which included mediation and referral to arbitration. Clause 7.5(b) provided for the ACCC to advise Viterra that it wished to be the arbitrator of a dispute, effectively conferring on the ACCC a 'first right of refusal' to arbitrate a particular dispute. Clause 7.6 set out the procedure where the ACCC is the arbitrator, and clause 7.7 set out the procedure where the arbitrator is not the ACCC.

ARTC's HVAU and IAU also both provide for arbitration where there is a dispute regarding the terms of access. Clause 3 of ARTC's 2011 HVAU sets out the process for negotiating for access, including a dispute resolution process at clause 3.15. Similar to the wheat port undertakings, the HVAU provides for mediation and referral to arbitration. However, the HVAU provides that the arbitrator will be the ACCC rather than giving the ACCC a 'first right of refusal'.

## **4.6. Pricing**

A Part IIIA access undertaking should clearly set out how it deals with pricing for the service.

As outlined at Chapter 2 of this guideline, section 44ZZCA of the CCA sets out pricing principles that the ACCC must have regard to when considering an access undertaking. These pricing principles are high level and so there is some flexibility in how an access undertaking may deal with price.

The key objective of the pricing principles is to balance promoting competition and efficiency with ensuring that an access provider can generate expected revenue that is at least sufficient to meet their efficient costs. The Revised Explanatory Memorandum states:

*The motive for regulating access prices is that, in the absence of regulation, the exercise by infrastructure providers of monopoly power could result in prices that are inefficiently high. However, a pricing regime that sought to force prices continually down to costs would erode incentives for firms to drive costs down or to innovate. This principle aims to balance the setting of access prices to include a return*

<sup>16</sup> In 2010 Glencore stated that the option to seek arbitration under the bulk wheat port Part IIIA access undertakings had facilitated commercial outcomes to disputes with bulk wheat port providers. In 2011 Virgin Blue noted that recourse to arbitration can be a very effective mechanism in facilitating truly commercial negotiations between parties where there is a significant imbalance in market power. See Glencore, Submission to the PC on Wheat Export Marketing Arrangements, 2 May 2010, p. 12, and Productivity Commission Inquiry: Economic regulation of airport services, Submission by Virgin Blue, 18 April 2011, p. 34.

<sup>17</sup> See the ACCC's register of published arbitration determinations in Telecommunications at <http://registers.accc.gov.au/content/index.phtml/itemId/712456>.

*reflecting the commercial and regulatory risks associated with the investment (and thus not deter investment), while addressing monopoly pricing concerns.<sup>18</sup>*

A Part IIIA access undertaking can provide for prices to be determined upfront through an *ex ante* price setting or through a negotiate-arbitrate framework. The appropriate pricing approach will depend upon a number of factors, including the industry context.

The methodology for determining the level of prices will need to balance a number of considerations, including:

- providing access seekers with some assurance that they are not paying monopoly prices for the service
- providing the access provider with some assurance that it will be able to at least recover its efficient costs, and earn a return on investment commensurate with the regulatory and commercial risks involved.

Also, access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

#### **4.6.1. *Ex ante* price regulation**

Under an *ex ante* price regulation approach, access providers will need to consider who should bear the risk of demand fluctuations, whether the access provider should be allowed to adjust prices, and the rules governing those adjustments.

The regulation of access prices can be achieved via either a regulated revenue cap or a price cap, or in some circumstances a combination of the two.<sup>19</sup>

In the case of a revenue cap, the access provider bears no demand risk. If demand exceeds the forecast on which prices were based, the access provider must give the additional revenue back to customers. In the event of demand falling short of the forecast, the access provider may recover the costs from access seekers (e.g. by raising its prices in future periods).

In contrast, under a price cap the prices are set in advance for a particular period and are not adjusted to compensate for variations in actual demand. If demand is higher than forecast, the access provider has the opportunity to earn greater revenue, but if demand is lower than forecast the access provider may incur a loss. The access provider therefore faces greater risk under a price cap than a revenue cap, but also has the potential to earn higher revenue.

The choice between a revenue cap and a price cap therefore affects the risk and incentives faced by the access provider, which will have implications for the appropriate approach to setting the level of the price or revenue cap. An access provider may retain discretion about the structure of prices for different services within the overall constraint of a price or revenue cap (discussed at section 4.6.2 below).

The level of the price or revenue cap can be set in different ways – most commonly using a cost-based revenue model, but also top down ‘retail-minus’ or benchmarking approaches.<sup>20</sup>

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<sup>18</sup> Revised Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2006, paragraph 22.6.

<sup>19</sup> A combination price and revenue cap is used in ARTC’s 2008 Interstate Access Undertaking.

<sup>20</sup> A benchmarking approach is currently used to determine prices for the domestic transmission capacity service – see <http://www.accc.gov.au/regulated-infrastructure/communications/transmission-services-facilities-access>.

The ACCC/AER currently regulates access prices in a number of industries, including telecommunications, electricity, rail, water, post and air services.

In determining the appropriate level of regulated revenue and/or charges under a cost-based approach, the ACCC often uses the 'building block' model (BBM).<sup>21</sup> This approach includes allowances for a return on assets, depreciation of assets and recovery of efficient operating expenditure. The BBM also requires a regulatory valuation of assets, which is then rolled forward annually to reflect that year's depreciation and prudent capital expenditure. Developing a BBM therefore involves a number of steps, including valuation of assets, determining an appropriate rate of return, forecasting capital expenditure, operating expenditure and demand, and constructing a financial model to incorporate these elements and thereby calculate access prices.

The intent of the BBM is to ensure a firm can recover its efficient costs and receive a return on its investment that will compensate it for the risks involved but is not in excess of what it would earn in a fully competitive market (i.e. the circumstance where monopoly pricing is not possible). This is consistent with the pricing principles in Part IIIA that access providers are entitled to recover their efficient costs.

There are a range of variations of the BBM. In assessing an undertaking the ACCC will seek to ensure that the chosen form of the BBM reflects the interests of the parties (access seekers and access providers) with respect to cost recovery, risk allocation, and incentives.

Some of the key considerations when implementing a BBM are:

- how the initial asset base will be valued
- how the asset base is rolled forward (including how the cost of new investments are included)
- what assumptions to make regarding the timing of cash flows
- what rate of return the firm will earn on its investment
- what methodology is used to determine depreciation
- what methodologies are used to allocate costs and revenues, and
- how demand is forecast.

The most common application of the BBM by the ACCC (and AER) has been via the post-tax revenue model (PTRM).<sup>22</sup> The specific application of the PTRM for a particular firm will depend upon the incentives that are required. For example, in some circumstances it may be appropriate to allow the firm to capitalise losses for future recovery during an initial period (such as while volumes are low) so as to facilitate investment in infrastructure ahead of demand (see the examples below). The impact of such arrangements on the risk faced by the firm (and therefore the appropriate rate of return) would also need to be considered.

The ACCC recognises that an appropriate rate of return is important for promoting efficient investment in infrastructure. Assessing a proposed rate of return involves researching the

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<sup>21</sup> Variations of this approach are used for ARTC's 2011 Hunter Valley access undertaking, Telstra's copper network, and under the National Electricity Rules. The ACCC's assessment of proposed charge increases by AirServices Australia and Australia Post is also informed by the building block model.

<sup>22</sup> For more information on the PTRM used by the AER, see <http://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/post-tax-revenue-models-transmission-and-distribution-january-2015-amendment>.

latest developments in economic and finance theory and ensuring the methodologies adopted reflect best practice.

The rate of return is usually estimated using the firm's weighted average cost of capital (WACC). Industry-specific factors and general economic and financial market conditions should be taken into account to develop up-to-date, valid estimates of the different risk profiles of regulated infrastructure service providers.

Once the overall annual revenue allowance is determined, prices may be set which, taking into account forecast demand for access services, yield a level of revenue which is expected to be equal to the annual revenue allowance. However, as discussed above actual demand for services may be higher or lower than forecast.

#### **Examples: approaches to *ex ante* price regulation**

##### *A hybrid price cap and revenue cap in ARTC's IAU*

ARTC's 2008 IAU incorporates a hybrid price-cap and revenue-cap model. Prices for reference 'indicative' services are set at the beginning of the regulatory period and adjusted each year for changes in the consumer price index. ARTC determines prices for other services by reference to the indicative prices. ARTC's aggregate revenue (which is dependent on actual volumes for all services) is also subject to a revenue cap. Within this model, ARTC has considerable discretion in differentiating access charges for non-indicative services.

In this instance, the ACCC took the view that it is legitimate to apply different prices to services with different characteristics, as those characteristics can have a significant impact on the cost of service delivery. In addition, the ACCC considered that permitting some price differentiation to allow ARTC to recover its full costs of providing services was appropriate.

##### *Loss capitalisation in ARTC's HVAU*

In ARTC's 2011 HVAU the ACCC approved a 'loss capitalisation' approach to determining the revenue cap for certain sections of the network (known as 'Pricing Zone 3'). Loss capitalisation allows ARTC to incorporate revenue shortfalls in any year into its regulatory asset base and recover those losses in later periods. For the remainder of the network the ACCC approved a standard revenue cap (based on the BBM).

In approving the loss capitalisation approach, the ACCC noted that Pricing Zone 3 served new mines in the Gunnedah Basin which were predominantly in the start-up phase. The ACCC considered that the use of loss capitalisation in these circumstances may facilitate ARTC investing in track infrastructure to service those mines and therefore facilitate increased coal exports via the Port of Newcastle. The ACCC also considered that ARTC would, in the foreseeable future, recover those initial revenue shortfalls as coal volumes from the region increased.

The ACCC noted that loss capitalisation should only apply in circumstances where it was evident that the revenue shortfalls would be likely to be recovered. Applying loss capitalisation in the circumstance where the revenue shortfalls were unlikely to be recovered would only add complexity to pricing for no benefit to the access provider or stakeholders.

##### *Incentive regulation and the Efficiency Benefit Sharing Scheme (EBSS)*

Using a network business' past information to set future targets can reduce the incentives of the business to lower costs, since the business knows that any cut in its expenditure will decrease its revenue allowance in the future. To alleviate this issue, the AER applies incentive-based regulation across all energy networks it regulates, consistent with the National Electricity Rules. Businesses that are able to improve their efficiency are rewarded with higher profits, while businesses that allow their efficiency to deteriorate earn lower-than-expected profits. The drive to maximise profit encourages the businesses to become more efficient and productive over time. New, improved expenditure levels become the base for the AER's next round of expenditure forecasts.

The EBSS adopted by the AER encourages electricity service providers to reduce operating

expenditure by allowing them to keep the benefits for a defined period. The EBSS seeks to provide a continuous incentive to reduce operating expenditure by allowing service providers to keep incremental gains (or losses) for an additional five years regardless of the year in which the gain (or loss) is made. After that, the gains (or losses) are passed on to consumers in the form of lower network charges. Under this approach, any increase or decrease in operating expenditure relative to the allowance is shared approximately 30:70 between a service provider and its consumers.

#### 4.6.2. Pricing structure

It may be appropriate for the access provider to retain discretion to set the structure of prices for particular services. For example, an access provider may have the flexibility to set prices provided they do not result in a breach of an overall revenue cap. An access provider subject to a price cap may also be able to adjust certain prices provided the adjustments do not increase the weighted average of a basket of prices.<sup>23</sup>

Where an undertaking provides for this discretion, it should specify how the access provider will set and publish prices and factors that will be taken into account. This may take the form of an annual process for publishing reference tariffs and a set of pricing principles or objectives that the access provider will consider when determining the structure of prices. For example, the access undertaking may set out:

- rules that require the revenue from any service or group of services to fall between the incremental cost and the stand-alone cost of that service or group of services
- rules governing the allowable extent of price discrimination.

The pricing principles in Part IIIA provide that multi-part pricing and price discrimination should be allowed where it aids efficiency. In general, cross subsidies between users competing in an upstream or downstream market are unlikely to be appropriate. If the access undertaking allows for the transfer of costs or revenue between different types of users on the basis that it aids efficiency, such transfers should be transparent.

##### **Example: constraints on pricing structure under a revenue cap**

Clause ARTC's HVAU includes a set of pricing objectives ARTC must have regard to in setting its charges within the constraints of its regulated revenue cap. The pricing objectives are at clause 4.13 and include achieving full recovery of the variable component of costs from all access holders on the basis of network usage, achieving maximum recovery of fixed and new capital costs from all users, and that the proportion of fixed capital costs recovered through a take or pay component should be consistently applied to all access holders within a pricing zone.

The ACCC accepted these pricing objectives as part of ARTC's undertaking having regard to the more general pricing principles in Part IIIA. The ACCC assesses ARTC's compliance with the revenue cap annually, but does not directly assess the level of ARTC's specific charges. However, if the ACCC considered that ARTC had not had regard to the pricing objectives in setting its charges, it could pursue enforcement action.

Pricing principles that relate to the structure of charges and principles of cost recovery could be relevant under either an *ex ante* price setting or a publish-negotiate-arbitrate regime.

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<sup>23</sup> This is sometimes referred to as 'weighted average price cap' (not to be confused with the revenue cap/price cap distinction discussed at section 4.6.1).

### 4.6.3. The publish-negotiate-arbitrate model

An alternative to *ex ante* price regulation is the publish-negotiate-arbitrate model. This model assumes that the prospect of independent arbitration can bring parties to the bargaining table. This is especially important where access seekers are concerned that an access provider has market power and might otherwise resist a commercial solution. Providing for arbitration under a Part IIIA access undertaking is discussed at section 4.5.2 above.

Where a negotiate-arbitrate model will cover price terms, it may be appropriate for the access provider to publish certain information to inform negotiations. For example, the access provider may publish a set of reference prices for the various services. These reference prices would form the starting point for commercial negotiations between the access provider and the access seeker. To facilitate informed negotiations, the access provider may also publish information in support of these reference prices, including:

- how the reference prices are calculated
- the costs on which reference prices are based
- where prices are bundled, a breakdown of the services covered by a particular price.

The access undertaking may also set out a process by which the access seeker can request information from the access provider in order to inform its negotiations.

The publish-negotiate-arbitrate model is generally seen as a more 'light-handed' regulatory approach to pricing. Whether this model is appropriate will depend on the circumstances of the particular access undertaking. For example, the ACCC is more likely to consider it appropriate to accept a negotiate-arbitrate approach if access seekers are able to negotiate prices, or if the likely benefits of setting upfront regulated prices would be outweighed by the likely costs of doing so (e.g. where the industry is in transition).

#### **Example: the publish-negotiate-arbitrate approach to pricing**

During the ACCC's assessment of the 2009 bulk wheat port undertakings, a key concern for industry was whether the ACCC would require *ex ante* formal price controls. The ACCC determined that *ex ante* price regulation was not necessary due to the specific circumstances of the transitioning wheat export industry. The ACCC also had regard to the relatively short duration of the initial access undertakings and the threat of more prescriptive regulatory requirements in any future access undertaking should the publish-negotiate-arbitrate framework not be effective.<sup>24</sup>

Instead, in 2009 and 2011 the ACCC approved a publish-negotiate-arbitrate model for determining access prices, where the prices themselves are not set by the ACCC.<sup>25</sup>

This model includes:

- obligations on the port operators to negotiate in good faith with eligible wheat exporters around price and non-price terms of access to port terminal services
- if negotiation fails, the ability of wheat exporters to seek mediation or binding arbitration on price and non-price terms of access to the port operators' port terminal services
- for those wheat exporters who wish to take a standard offer, a set of clear and certain minimum non-price terms and conditions of access to port terminal services; and an obligation on each port operator to publish its standard prices for port terminal services at least one month prior to

<sup>24</sup> ACCC, GrainCorp Operations Limited Port Terminal Services Access Undertaking: Decision to Accept, 29 September 2009, pp. 8-9.

<sup>25</sup> These undertakings were provided by Viterra Operations Ltd, Cooperative Bulk Handling Limited and GrainCorp Operations Limited in 2009 and 2011 and Australian Bulk Alliance Pty Ltd (now Emerald Grain Ltd) in 2011.

commencement of each new season.

The threat of arbitration was seen as providing a sufficient incentive for the port terminal operators to negotiate appropriate prices with access seekers. The ACCC also noted that an important consideration in accepting a publish-negotiate-arbitrate model was the clarity and transparency about the terms and conditions of access contained in the access undertakings.

## 4.7. Capacity allocation and management

In many cases the facility will have a finite capacity to provide services and demand may exceed that capacity, creating a capacity constraint. In this case it will be important for the access undertaking to specify how capacity will be rationed among competing access seekers.

Capacity should be allocated to access seekers on an efficient, reasonable and non-discriminatory basis. A proposed Part IIIA access undertaking should clearly set out the process by which capacity is allocated, especially where there are capacity constraint issues.

In its assessment of recent access undertakings the ACCC has noted that the particular circumstances of access providers and the characteristics of the markets in which they operate are particularly relevant to capacity management arrangements. Therefore infrastructure owners should carefully consider the best capacity allocation methodology that would suit the particular needs and demands of their industry.

In principle, problems of congestion can be addressed efficiently by allowing the price to rise at times of congestion to the point where demand just balances the available capacity, or by allocating tradeable capacity rights and limiting access at times of congestion to holders of capacity rights. Either approach will ensure that scarce capacity is allocated to those access seekers who value it most highly.

If it is likely that demand for capacity will exceed supply over the longer term, infrastructure owners should consider including options in the access undertaking to facilitate capacity expansions (see section 4.8).

The ACCC has accepted several different approaches to capacity allocation under Part IIIA access undertakings. These approaches take into account different market circumstances and supply chain considerations.

### Examples: capacity allocation systems

#### *'First in, first served' system for wheat port terminal capacity allocation*

The ACCC has accepted undertakings which utilised a 'first in, first served' (FIFS) approach to capacity allocation. For example, the ACCC considered in 2011 that a FIFS approach would be appropriate for GrainCorp and Emerald's bulk wheat port terminal facilities.<sup>26</sup>

Under the FIFS system, a port operator publishes all of the available windows to ship and then announces when an online system will open where exporters are able to nominate to secure a certain slot. The first nomination received will secure the slot. The system provided Emerald and GrainCorp

<sup>26</sup> The ACCC noted that: (i) throughput at Emerald's grain terminal is relatively constrained and the complexity and cost of an auction system would not be appropriate to the scale of Emerald's operation; (ii) Emerald operates in a competitive environment on the east coast, competing with GrainCorp in Geelong; (iii) Emerald's main competitor, GrainCorp Geelong, operates on a FIFS basis; and (iv) to Emerald's knowledge there had been no formal complaints about the operation of the FIFS system. See ACCC, Australian Bulk Alliance Pty Ltd Port Terminal Services Access Undertaking: Decision to accept, 28 September 2011, p. 18.

with some discretion to consider other matters when prioritising booking and changing vessel loading priority for operational reasons (for example, to maximise the use of storage facilities).

#### *The auction system for wheat port terminal capacity allocation*

The ACCC has also accepted undertakings that utilised an auction system for allocating capacity to access seekers:

- CBH's auction system covered provision to access to services for the export of bulk wheat at four grain terminals in Western Australia from 2009 to 2014.
- Viterra's auction system covered provision of access to services for bulk wheat export at six grain terminals in South Australia from 2012 to 2015.<sup>27</sup>

The auction systems gave every exporter the ability to bid for a certain shipping slot. The highest bidder 'wins' the slot, therefore allowing capacity to be allocated to the exporter who values it most. Any remaining capacity not bid on at auction was to be allocated through a FIFS system.

In determining that an auction system was necessary (rather than FIFS) the ACCC considered it relevant that capacity was constrained at the relevant port terminals, and that CBH and Viterra were operating with monopoly power in both the upstream market and at port.

In accepting the relevant access undertakings the ACCC took the view that these auction arrangements for allocating port terminal capacity provided an effective basis for management of capacity at CBH and Viterra's port terminals, as they promoted economic efficiency at peak times when demand for port terminal capacity exceeded the available slots.

The ACCC also considered that auctions were appropriate given the strong incentives for CBH and Viterra to favour their own wheat trading businesses in providing access to port terminal services. The ACCC also noted that at the time the auction system had widespread industry support.<sup>28</sup>

#### *Long term agreements for wheat port terminal capacity allocation*

The ACCC has also endorsed arrangements where capacity is allocated under long term agreements (LTAs), such as the systems introduced by GrainCorp in 2012 and by Viterra in 2015.<sup>29</sup>

Under GrainCorp's system it could allocate up to 60 per cent of its port capacity via LTAs to exporters willing to commit to minimum export volumes over a three-year period. At least 40 per cent of capacity per port, per month was to remain available to all exporters on an annual basis.

Under Viterra's system it can allocate port capacity to exporters for an initial period of three years with the ability to then run long term capacity allocation processes for each subsequent two year period, subject to certain caps on exporter's percentage of capacity. For example, the maximum percentage of long term capacity an exporter can apply for is 40 per cent at the Outer Harbor and Port Lincoln terminals, and 50 per cent at all other terminals, over the six month period from 1 January to 30 June each year. Viterra must also make available at least two million tonnes of short term capacity on an annual basis. Viterra's capacity allocation system also includes a mechanism for the ACCC to review and potentially object to the initial long term capacity allocation process. If the ACCC were to object, Viterra would be required to revert to the previous auction system.

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<sup>27</sup> Viterra's auction system was introduced in its Part IIIA access undertaking but was retained under the bulk wheat ports Mandatory Code of Conduct until the ACCC approved Viterra's long term agreement system in November 2015.

<sup>28</sup> ACCC, Viterra Operations Limited Port Terminal Services Access Undertaking: Decision to accept, 29 September 2011, pp. 2-3, 48-54.

<sup>29</sup> Regarding GrainCorp's 2012 system, see <https://www.accc.gov.au/media-release/accc-allows-graincorp-to-introduce-long-term-port-access-agreements>; regarding Viterra's 2015 system see <https://www.accc.gov.au/media-release/accc-approves-long-term-agreements-at-viterra%E2%80%99s-bulk-wheat-port-terminals>.

#### *Capacity allocation and supply chain alignment in the HVAU*

ARTC's 2011 HVAU contains numerous provisions regarding network capacity management, including provisions designed to facilitate alignment of capacity management of the Hunter Valley rail network with other components of the Hunter Valley coal supply chain.

In recognition that the Hunter Valley rail network is part of an integrated supply chain, the HVAU incorporates a process by which ARTC participates with other service providers and the Hunter Valley Coal Chain Coordinator (HVCCC).<sup>30</sup> This enables the development of 'System Assumptions' – the operating parameters and infrastructure that the HVCCC and Hunter Valley service providers agree will be required to meet contracted port terminal capacity within a given year. The HVAU envisages that the system assumptions should facilitate the 'correct' contracting of capacity on a whole of supply chain basis, therefore promoting alignment of contracted capacity entitlements and effective use of the chain overall.

The HVAU sets out a range of protocols for the management of capacity on the rail network. Those provisions that have an effect on overall system capacity are incorporated as non-negotiable terms into individual access holder agreements. This promotes a consistent approach to capacity management issues among all access seekers.

When seeking capacity, access seekers are required to submit an access application to ARTC. ARTC must undertake a 'capacity analysis' to determine if there is sufficient available capacity to meet the request. As part of the capacity analysis ARTC is required to consult with the HVCCC on a range of capacity management issues, which goes towards seeking to achieve a coordinated approach to the planning and daily management of coal chain throughput.

The HVAU also sets out that capacity remaining after allocation of capacity may be allocated at ARTC's discretion, but the exercise of such discretion must be consistent with objective of ensuring efficient utilisation of coal chain capacity and take into account recommendations of HVCCC.

#### **4.8. Investments and upgrades to facilitate access**

In some cases investment or innovation may be required to facilitate access to services. In the case of a rail line, for example, this could be in the form of a connecting spur line or upgrades to increase capacity on the main line. For other services, this may be in the form of changes or upgrades to electronic systems.

Drawing on the process that would apply if the ACCC was arbitrating a dispute over access to a declared service under Part IIIA, the ACCC may require an infrastructure service provider to extend the facility or permit interconnection to the facility by a third party.<sup>31</sup> The CCA includes restrictions – specifically, a third party cannot become the owner of any part of the facility (or extension) without the access provider's consent, and the access provider cannot be required to bear the costs of extending the facility or of maintaining extensions. To date the ACCC has not been required to exercise this power. While this power specifically applies to access disputes regarding declared services, the ACCC considers that access undertakings under Part IIIA should also provide for extensions and expansions to facilitate access where necessary.

It may therefore be appropriate for a Part IIIA access undertaking to outline how and when an access provider would invest or innovate to facilitate access, including how such investments would be funded. For example, including a user-funding model (or similar) to facilitate expansions of and investment in additional capacity where necessary.

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<sup>30</sup> The HVCCC is the body responsible for planning and co-ordinating the co-operative daily operation and long term capacity alignment of the whole Hunter Valley coal chain. Representatives from ARTC, coal producers, port service providers and above rail operators sit on its board.

<sup>31</sup> While Part IIIA only refers to 'extend', the Tribunal has interpreted 'extend' to include both geographic extensions of a facility and expansions of a facility's capacity.

In some cases, the expansion or upgrade of the access facility will be in the interests of some or all of the access seekers. In this case it may be appropriate for an access undertaking to set out a process for deciding which investment projects will be selected, and how the costs of those projects will be allocated across customers. In principle, costs should be allocated to customers based on the benefits they receive from a given investment.

**Example: investments and upgrades to increase capacity**

During the ACCC's assessment of the HVAU, stakeholders raised investment in the Hunter Valley rail network to ensure efficient and timely capacity expansion as a key concern. Stakeholders sought certainty that investment would occur to expand the capacity of the Hunter Valley rail network in alignment with capacity expansions at the coal terminals at the Port of Newcastle, thereby underpinning complementary investment in mines and mine expansions.

As such, ARTC included a capacity investment framework in the HVAU that incorporates the following features:

- engagement with stakeholders via the Rail Capacity Group (RCG). ARTC must seek the endorsement of the RCG for all capacity expansion projects, and must also plan expansions in cooperation with the HVCCC. This promotes efficient investment decisions and mitigates risks of 'gold-plating' by ARTC.
- a user-funding option to allow users to fund investment in new network capacity in circumstances where ARTC chooses not to. This provides certainty to coal producers that rail network capacity expansions will occur.

The capacity investment framework is set out at clauses 7 to 11 of ARTC's 2011 HVAU.

## 4.9. User engagement

Part IIIA access undertakings will often require the access provider to engage with industry stakeholders or provide for users to have input into operational and investment decisions. This may also include consultation with users on pricing changes. Operational and investment decisions may impact the efficient operation, use of and investment in infrastructure (or other relevant matters), and effective user engagement may help to ensure efficient outcomes from these types of decisions. However, while the ACCC will have regard to the views of users, it remains the ACCC's role to monitor and enforce an access provider's compliance with its undertaking.

The extent to which an access provider undertakes to engage effectively with users will inform the ACCC's assessment of whether the undertaking is appropriate to accept, having regard to the interests of access seekers.

**Examples: user engagement**

As noted above, ARTC's HVAU includes a consultative forum called the RCG. The RCG is a representative group of Hunter Valley stakeholders. Where investment proposals are endorsed by the RCG, ARTC may include the capital expenditure in its regulated asset base and recover it through access charges. In the event that the RCG does not endorse a project proposed by ARTC, the ACCC may determine that the capital expenditure should not be included in ARTC's regulated asset base. In the absence of this industry endorsement ARTC may seek a ruling from the ACCC as to whether the project is prudent and it would be appropriate to proceed.

The HVAU also provides a role for the HVCCC, an industry-funded supply chain coordination body, to promote and facilitate coordination across the entire Hunter Valley coal supply chain.

Access providers considering including user engagement processes in their access undertakings may also wish to consider the AER Better Regulation program consumer engagement guideline, which provides guidance on the AER's expectations of consumer engagement. The guideline identifies

components of best practice for consumer engagement by regulated businesses. Four principles support each of these components of best practice:

- Clear, accurate and timely communication—the AER expects the businesses to provide information to consumers that is clear, accurate, relevant and timely, recognising the different communication needs and wants of consumers.
- Accessible and inclusive—the AER expects the businesses to recognise, understand and involve consumers early and throughout the expenditure process
- Transparent—the AER expects the businesses to clearly identify and explain the role of consumers in the engagement process, and to consult with consumers on information and feedback processes.
- Measurable—the AER expects the businesses to measure the success, or otherwise, of their engagement activities.<sup>32</sup>

When submitting regulatory proposals to the AER, network service providers must describe how they have engaged with consumers, and how they have sought to address any relevant concerns identified as a result of that engagement. When assessing regulatory proposals the AER will have regard to how a service provider engaged with its consumers.<sup>33</sup>

## 4.10. Performance incentives and accountability

Access seekers may be concerned that a monopoly service provider does not have competitive pressure to provide its service in the most efficient manner. Further, where a monopoly service provider is subject to price regulation, it may have an incentive to reduce costs by reducing the quality of the service it provides and thereby increase profits. For this reason, it is likely to be appropriate for an access undertaking to include measures that:

- provide the access provider with incentives for cost efficiency, service quality, and innovation, and
- provide transparency to access seekers about the access provider's performance.

Where the service provider is vertically integrated it is unlikely to reduce service quality for its own related business, which may mitigate this concern to some extent. However, access seekers' concerns will remain if there is scope for the service provider to offer a lower quality service to its competitors.

The ACCC's assessment of specific aspects of a performance and accountability regime will generally be informed by industry consultation.

### 4.10.1. Performance incentives

The incentive implications of a given access undertaking depend on a range of features, including the duration and approach to pricing in the undertaking. It is therefore difficult to envisage what types of performance indicators or incentives may be necessary in a particular access undertaking in isolation from other pricing and access obligations (and the incentives they create).

In assessing a proposed access undertaking the ACCC will generally consider the nature and extent of incentives to:

- maintain or improve service quality

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<sup>32</sup> AER, *Better Regulation: Consumer Engagement Guideline for Network Service Providers*, November 2013, p. 7.

<sup>33</sup> *Ibid.*

- minimise operating expenditure (without sacrificing service quality or reliability), including maintaining an efficient balance between operating and capital expenditure
- maintain an efficient programme capital expenditure, including selecting efficient investment projects and carrying them out efficiently
- innovate in services delivered and the way they are provided.

For example, performance incentives can address undesirable incentives created by some forms of price regulation, such as incentives to cut costs and increase profits by lowering service quality, or to inflate costs to increase future revenue allowances.

**Example: performance incentives**

Parties submitting access undertakings may wish to consider incentive regimes in other industries.

For example, the AER applies a service target performance incentive scheme (STPIS) which provides incentives for service providers to improve or maintain a high level of service, benefiting end users.

The STPIS is made up of three components: a service component which acts as a key indicator of network reliability; a market impact component to encourage service providers to minimise the impact of outages on the dispatch of generation; and a network capability component that encourages service providers to undertake priority projects of benefit to customers that they would not otherwise undertake. The STPIS provides for a potential adjustment to the revenue that the service provider may earn depending on how it performs relative to each parameter. The AER assesses the service provider's performance against the STPIS parameters for the preceding calendar year and verifies the financial reward or penalty to be recovered by the service provider.

**4.10.2. Performance accountability**

An obligation to report on key performance indicators (KPIs) is a standard part of a Part IIIA access undertaking. KPIs are useful in providing transparency over the level of service provided to access seekers and increase the accountability of the service provider. The KPI's could cover commitments to equivalent and/or minimum standards on quality of service, timeliness etc.

Where the service provider is vertically integrated, KPIs can provide transparency regarding the level of service provided and may enable access seekers and/or regulators to identify deliberate or inadvertent discrimination against access seekers. If there are specific concerns, KPIs could be published that compare the relative performance of the access provider for its own entity as compared to third party access seekers.

**Examples: performance accountability**

Reporting against KPIs was also required in the wheat access undertakings accepted between 2009 and 2014. The ACCC said in relation to Viterra's (then ABB's) 2009 undertaking:

*Such reporting (on ABB's website) would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.<sup>34</sup>*

Clause 10.3 of Viterra's 2011 undertaking sets out a list of the performance indicators Viterra was required to publish, which included daily road receipt volumes, average time taken to assess bookings, the number of port block-outs, and total number of vessels failing survey.

ARTC's HVAU includes an obligation to report against network performance indicators listed at

<sup>34</sup> ACCC, ABB Further Draft Decision, September 2009, p. 273.

Schedule D, including train transit time (for traversing the relevant rail network) and quantity and cause of coal chain capacity losses.

## 4.11. Measures to address vertical integration concerns

A vertically integrated firm will have incentives to engage in self-preferential treatment when providing access to its own related business compared with its upstream or downstream competitors. One of the objects of Part IIIA is to promote effective competition in upstream and downstream markets, which may be limited if an access provider is able to engage in such anti-competitive leverage into related markets.

Behavioural arrangements to address these vertical integration concerns cannot replace full structural separation. Structural separation requires that the monopoly service provider and the competitive upstream and/or downstream operations be completely separate entities with no overlapping economic interests. Full structural separation goes beyond ring-fencing type arrangements and removes the vertical integration altogether. The ACCC encourages parties submitting Part IIIA access undertakings to consider structural solutions to fully address any vertical integration concerns.

However, in circumstances where full structural separation is not the approach taken, a Part IIIA undertaking will generally include measures to address concerns about self-preferential treatment. There are a number of regulatory measures which can be used to address these concerns, including:

- a robust and enforceable non-discrimination requirement (see section 4.11.1)
- capacity allocation systems (see section 4.7), and/or
- ring-fencing arrangements (see section 4.11.2).

### 4.11.1. Non-discrimination requirement

A robust non-discrimination requirement is a regulatory tool that can be used to address concerns regarding the behaviour of a vertically integrated owner of a key infrastructure facility.

The requirement can be drafted to allow the service provider to engage in price discrimination where it aids efficiency. This is recognised by the pricing principles specified in section 44ZZCA of the CCA.

For a non-discrimination requirement to be effective, there should also be provisions to enable monitoring of compliance with the requirement. Given that discriminatory conduct can be subjective and a degree of judgement may be required, an audit provision may complement, but should not replace, general compliance monitoring and enforcement. Specific behavioural requirements may also be appropriate to support the non-discrimination provision (for example, the capacity allocation requirements in the wheat access undertakings which are described in section 4.7).

#### Examples: non-discrimination requirement

A non-discrimination clause is often included in access undertakings, such as in the wheat port access undertakings accepted by the ACCC pursuant to Part IIIA from 2009-2014. These clauses address the potential for the relevant port terminal business to discriminate in favour of its wheat exporting business. As an example, clause 6.4(a) of Emerald's 2013 access undertaking specified:

*In providing access to Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users in favour of its own Trading Division, except to the*

*extent that the cost of providing access to other Applicants or Users is higher.*

The latter part of the clause reflects that it may be appropriate for Emerald to charge higher prices if they are reflective of higher costs.

The non-discrimination clauses in each of the wheat access undertakings were supported by a requirement that the ACCC be able to appoint an auditor to provide a report of the access providers' compliance with the non-discrimination clause.

#### **4.11.2. Ring fencing measures**

Ring-fencing measures may be necessary to address concerns about self-preferential treatment. Whether or not any or all of these measures are required will depend upon the particular characteristics of the relevant market/s.

In some cases, ring-fencing measures may result in some duplication of systems between the ring-fenced division and the rest of the organisation and thereby reduce operational efficiency. Where this may occur, the ACCC's assessment will consider whether such efficiency costs would be outweighed by the benefits of reducing self-preferential treatment.

Depending on the circumstances, ring-fencing measures that could be considered appropriate (in addition to a non-discrimination clause) include:

- a requirement that the service provider's business dealings with its upstream or downstream operations are conducted in the same way as their dealings with unrelated third parties (i.e. at arm's length)
- an effective functional separation regime. This would involve creating or designating discrete organisational divisions which are assigned responsibility for specified operations. These can either be a division of the existing firm or a subsidiary company. Each of these affiliates would be ring-fenced from other affiliates of the firm. Each business unit would be required to have separate business systems which assign control over necessary infrastructure, operational support systems and information systems (e.g. accounting systems) to the ring-fenced divisions. Separate accounting systems should be designed and implemented in a way that prevents cross subsidies<sup>35</sup>
- equivalence measures, including:
  - price equivalence measures requiring that affiliates pay the same for their access to the service as other wholesale customers. This involves establishing a transfer pricing system and the preparation of separate accounts for the ring-fenced affiliates and retail affiliates of the firm that are prepared on the basis of these transactions
  - non-price equivalence measures requiring that the same access products are offered, and the same processes and systems are used in providing the service, to affiliates and other wholesale customers
- governance arrangements where each business unit employs separate staff. That is, staff would be prevented from being employed within more than one business unit, or transferring between them. This could also be accompanied by other measures such as physical location requirements, restrictions on corporate branding, etc.
- equivalence of information whereby access seekers and ring-fenced affiliates have equivalent access to information. It is also important that confidential information from

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<sup>35</sup> See section 4.6.2 of these guidelines.

access seekers is not disclosed to, or used for the benefit of, the service operator's upstream or downstream operations.

### **Examples: ring-fencing**

The ACCC did not require implementation of ring-fencing measures in the bulk wheat port access undertakings accepted between 2009 and 2014. This was in part because the industry was going through a transition to competition and the legislation governing the transition was subject to review in 2010.

In 2009 the ACCC noted the possibility that any ring-fencing measures that were implemented at that point in time may need to be revised in the medium term in accordance with any regulatory changes (which would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition). The ACCC also noted the short duration of the undertakings, and stated that it would closely monitor the effectiveness of the undertaking in ensuring against anti-competitive discrimination during its operation. The ACCC included a caveat in its final decision to accept Viterra's (then ABB's) 2009 undertaking that:

*It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid-2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia, and that the arrangements can be revisited in two years.<sup>36</sup>*

The ACCC has not included ring-fencing requirements in either of ARTC's access undertakings as to date ARTC has not been vertically-integrated in any related market(s).

Parties considering including ring-fencing arrangements in a Part IIIA access undertaking may wish to consider the AER ring-fencing arrangements (the guideline is currently under review, with a final guideline expected to be published in November 2016).<sup>37</sup>

## **4.12. Fixed principles**

Subsection 44ZZAAB provides that access undertakings under Part IIIA may include fixed principles. Fixed principles apply for a specified period which extends beyond the expiry date of the undertaking, and can relate to any aspect of the undertaking. The ACCC may consent to the revocation or variation of a fixed principle if it considers it appropriate to do so having regard to the matters in subsection 44ZZA(3).<sup>38</sup> The ACCC's process for assessing an access provider's proposal to revoke or vary a fixed principle will be similar to its process for assessing variations to other terms of the undertaking (see section 3.5 of these guidelines). If the ACCC has accepted an undertaking that contains fixed principles, it cannot accept a later undertaking unless that undertaking includes the same fixed principles covering the same period.

In general, the ACCC considers that a decision on whether it is appropriate to accept a fixed principle in an access undertaking will need to carefully balance considerations of providing regulatory certainty with retaining regulatory flexibility and discretion. The Explanatory Memorandum states:

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<sup>36</sup> ACCC, Decision to Accept ABB 24 September 2009 Part IIIA access undertaking, 29 September 2009, page 8.

<sup>37</sup> AER, Electricity ring-fencing guideline 2016, see <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/electricity-ring-fencing-guideline-2016>.

<sup>38</sup> Subsection 44ZZA(7) of the CCA deals with a variation to fixed principles when an undertaking is in operation, and subsection 44ZZAAB(7) deals with a variation to fixed principles when there is no undertaking in operation (e.g. where an expired undertaking contained a fixed principle that is still applicable to any later undertaking).

*Regulatory risk for infrastructure investors would be reduced if access undertakings were allowed to contain fixed principles, which apply to subsequent access undertakings for that infrastructure service. When important variables are fixed, service providers and access seekers can more easily extrapolate the terms and conditions for access under future access arrangements and have more certainty in their investment and business planning.<sup>39</sup>*

Conversely, a lack of flexibility in an access undertaking can also be detrimental, particularly where the regulatory approach is unable to adapt to changing circumstances or where imperfect information at the outset results in sub-optimal arrangements being locked in.

The ACCC considers that it is important to identify the risks and benefits that may arise from making a fixed principle in order to determine an appropriate balance between certainty and flexibility. Accordingly, the ACCC considers that there are a range of factors that should be considered when deciding to accept a fixed principle in an access undertaking. A fixed principle may be appropriate where, for example, it would create or strengthen incentives for efficient investment and expenditure. On the other hand, a fixed principle may not be appropriate where, for example, there is a particular lack of certainty during the term of the fixed principle. This may involve uncertain industry developments, changing technology, and potential changes in the policy environment.

#### **Examples: fixed principles**

To date the ACCC has not accepted a fixed principle in an access undertaking under Part IIIA.

The ACCC has a similar power to make fixed principles under Part XIC of the CCA, which relates to the telecommunications industry. The ACCC included fixed principles in its 2011 Final Access Determinations (FADs) for Telstra's fixed line services. The fixed principles relate to an initial RAB and RAB roll-forward mechanism, components of the revenue requirement, the use of a vanilla WACC using the capital asset pricing model (but not specifying values for any parameters) and principles that apply to the determination of cost allocation factors. The fixed principles also specify matters relevant to assessing expenditure and demand forecasts. The fixed principles include a provision that the FADs must not be varied so as to alter or remove any of the fixed principles provisions except in certain circumstances. These fixed principles that give form to the building block pricing framework were set to apply for a period of ten years to June 2021 to give industry pricing certainty during the transition to the NBN.

NBN Co's 2013 SAU also specifies certain terms and conditions as fixed principles. The ACCC considered that only certain matters relating to long-term cost recovery should be specified as fixed principles, including the regulated asset base and initial cost recovery account roll-forward equations, and certain components for calculating the annual revenue requirement. These fixed principles will apply until 30 June 2040, which aligns with the expiry date of the SAU.

The SAU also specifies 'qualifying circumstances' in relation to these fixed principles. The qualifying circumstances are that the ACCC is satisfied that there is a manifest and material error in the fixed principles or any information on which the fixed principles was based was false or misleading in a material respect. If these qualifying circumstances exist, then the restrictions on the ACCC's assessment of a later SAU (i.e. that it cannot reject the later undertaking for a reason that concerns the fixed principles) will not apply.

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<sup>39</sup> Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2009, paragraph 3.3.

### 4.13. Compliance

To allow for effective regulatory oversight, access undertakings should generally include provisions that provide transparency over the service provider's compliance. These provisions may include:

- an audit provision, requiring an independent audit of compliance with the arrangements at the regulator's direction
- information gathering requirements, which may either specify certain information that must be provided to a regulator on an ongoing basis, or require the service provider to comply with a request for information by the regulator
- record keeping rules, requiring the service provider to keep certain records for specified periods of time (these records may then be requested by a regulator or court in the event of enforcement action, or there may be a compulsory self-reporting mechanism).

Compliance provisions can be tailored to suit the level of regulation and may be relatively light handed.

#### **Examples: compliance provisions**

The bulk wheat access undertakings accepted by the ACCC from 2011 included a requirement that the port terminal service providers respond to information requests by the ACCC. For example, clause 5.7 of Viterra's 2011 undertaking provides that:

*The ACCC may, by written notice, request the Port Operator to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions in relation to this Undertaking.*

*The Port Operator will provide any information requested by the ACCC under clause 5.7(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.*

Clause 4.10 of ARTC's HVAU requires that ARTC provide specified information to the ACCC by 30 April each year in order for the ACCC to carry out an assessment of ARTC's compliance with the financial model set out in the HVAU. Clause 3 of Schedule G also provides for the ACCC to request additional information from ARTC in order to carry out the compliance assessment.

## 5. Monitoring and enforcement of accepted access undertakings

The ACCC closely monitors compliance with accepted Part IIIA access undertakings throughout their entire duration.

Section 44ZZJ of the CCA provides that if the ACCC thinks that the provider of an access undertaking has breached any of its terms, the ACCC may apply to the Federal Court to enforce the access undertaking. The Court may:

- make orders directing the provider to comply with the undertaking
- make orders directing the provider to compensate any other person who has suffered loss or damage as a result of the breach, and/or
- make any other order that the Court thinks appropriate.

Where the ACCC receives a complaint of non-compliance with an undertaking, the ACCC has discretion in relation to how it will investigate the complaint. The ACCC's general compliance and enforcement policy is available on its website.<sup>40</sup>

The undertaking itself can provide for a process where the ACCC undertakes a regular compliance assessment. For example, ARTC's HVAU provides for the ACCC to conduct an annual assessment to determine whether ARTC has complied with the financial model in the HVAU. As noted in section 4.13 of this guideline, an access undertaking may also include information gathering requirements which would facilitate the ACCC's consideration of any non-compliance complaints.

Subsection 44ZZA(6A) of the CCA provides that where the ACCC performs functions or exercises powers that are provided for in an undertaking, it must do so in accordance with the undertaking. In applying the relevant provisions of an undertaking the ACCC will seek to take a consistent approach over time having regard to the circumstances in each application and relevant information as it becomes available.

The provisions of the CCA relating to restrictive trade practices, including section 46 regarding misuse of market power and section 47 regarding exclusive dealing, will continue to apply to an access provider where there is an accepted access undertaking in place under Part IIIA.

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<sup>40</sup> The ACCC's Compliance & enforcement policy is available at <http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>.

## Appendix A: The National Access Regime

Access undertakings under Division 2A of Part IIIA of the CCA form part of the broader National Access Regime set out in Part IIIA. Other pathways to access under the National Access Regime include declaration and arbitration, access codes, state access regimes, and competitive tender processes.

### Declaration/Arbitration

A person may apply to the National Competition Council (NCC) for a recommendation that a service be declared pursuant to Division 2 of Part IIIA. After considering the NCC's recommendation, the relevant minister may declare the service.

The NCC cannot recommend that a service be declared unless it is satisfied of all of the following matters (in section 44G of the CCA):

- that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service
- that it would be uneconomical for anyone to develop another facility to provide the service
- that the facility is of national significance, having regard to:
  - (i) the size of the facility, or
  - (ii) the importance of the facility to constitutional trade or commerce, or
  - (iii) the importance of the facility to the national economy
- that access to the service is not already the subject of [an access regime that has been certified as effective unless there have been substantial modifications to the regime or the relevant principles since the regime was certified]
- that access (or increased access) to the service would not be contrary to the public interest.

Subsection 44H(4) of the CCA specifies that the designated minister cannot declare a service unless he or she is satisfied of the same matters.

There has been a considerable amount of judicial consideration of the interpretation of the matters in section 44G of the CCA, including by the High Court of Australia in *The Pilbara Infrastructure Pty Ltd & Ors v Australian Competition Tribunal & Ors* [2012] HCA 36. Given that the ACCC has no formal role in the declaration process this publication does not seek to provide guidance on this issue. For information on the interpretation of the matters in section 44G parties are encouraged to contact the NCC.

If, following declaration, the access seeker and service provider cannot reach agreement on terms and conditions of access, either party may notify the ACCC of a dispute. The ACCC makes an arbitration determination which then sets the terms and conditions of access. The ACCC's process for making arbitration determinations is set out in a separate guideline

available on the ACCC's website.<sup>41</sup> The minister's and the ACCC's decisions may be reviewed by the Australian Competition Tribunal (Tribunal).

## **Access undertakings and industry access codes**

A service provider may avoid the risk of declaration by having an undertaking accepted by the ACCC setting out the terms and conditions of access (more than just a right to arbitration which the access seeker would have if the service was declared) pursuant to Division 2A of Part IIIA. The ACCC's decision on whether to accept the undertaking may be reviewed by the Tribunal.

This guideline provides guidance on this specific issue - that is, on the submission and acceptance of access undertakings pursuant to Division 2A of Part IIIA.

In addition, an industry body may give a code to the ACCC setting out rules for access to a service. If the ACCC accepts the code, this facilitates the acceptance of undertakings submitted in accordance with the code.

## **State access regimes**

A state/territory may apply to the NCC for a recommendation to the Commonwealth minister that a state/territory regime be certified as an effective access regime. If a service is subject to a certified state/territory regime it cannot be declared under Part IIIA. The minister's decision on whether to certify the regime may be reviewed by the Tribunal.

## **Competitive tender process**

Another pathway to access which does not involve declaration is to establish arrangements for access to government owned infrastructure services through a competitive tender process that has been approved by the ACCC pursuant to Division 2B of Part IIIA.

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<sup>41</sup> See <https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure/national-access-regime-under-part-iiia#access-disputes>.