



***Guidelines relating to deferral of arbitrations and
backdating of determinations under Part IIIA of the
Competition and Consumer Act 2010***

I, Rodney Graham Sims, Chairman of the Australian Competition and Consumer Commission, make the following guidelines on behalf of the Australian Competition and Consumer Commission.

Dated: 28 August 2017

A handwritten signature in blue ink that reads 'RGSims'. The signature is written in a cursive, flowing style.

Rodney Graham Sims
Chairman
Australian Competition and Consumer Commission



Australian
Competition &
Consumer
Commission

**Guidelines relating to deferral of arbitrations and
backdating of determinations under Part IIIA of the
*Competition and Consumer Act 2010***

August 2017

Australian Competition and Consumer Commission
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Glossary of terms

Access seeker	A third party who makes a request for access to a service declared under Part IIIA of the CCA.
Access undertaking	Access providers may give an access undertaking to the ACCC. An undertaking may specify the terms and conditions on which access will be made available to third parties. An undertaking may provide for the ACCC to resolve disputes that arise under that undertaking. An access undertaking is able to be enforced in the Federal Court.
Arbitration	Refers to the process of arbitration of an access dispute by the commission under Part IIIA of the CCA.
commission	Refers to those members of the ACCC who are constituted to conduct the arbitration.
Declared service	A service (see definition of service) for which a declaration is in operation—see s. 44B of the CCA.
Final determination	A determination of the commission made pursuant to s. 44V of the CCA that is not an interim determination.
Interim determination	A determination that is expressed to be an interim determination.
Party	A person who is formally recognised as a party to an arbitration under Part IIIA of the CCA—see ss. 44B and 44U of the CCA.
Provider	The entity that is the owner or operator of the facility that is used (or is to be used) to provide the service (see definition of service)—see s. 44B of the CCA.
Service	As defined in s. 44B, the term service refers to ‘a service provided by means of a facility’ and includes the (a) use of an infrastructure facility such as a road or railway line; (b) handling or transporting things such as goods or people; and (c) a communications service or similar service, but excludes matters specified in the CCA.
Third party	In relation to a service (see definition of service), a person who wants access to the service or wants a change to some aspect of their existing access to the service—see s. 44B.

1. Introduction

Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the 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 a right to negotiate terms and conditions of access with the service provider and, failing agreement, a right to seek arbitration of the dispute by the Australian Competition and Consumer Commission (ACCC).

In 2011 the *Trade Practices Act 1974* (Cth) was remade as the Competition and Consumer Act 2010 (Cth). The majority of provisions relating to arbitrations under Part IIIA were unchanged in the transition.

Effective from 1 October 2006 Part IIIA was amended to allow the ACCC to defer arbitration of an access dispute where it is also considering an access undertaking on related issues. Further, the ACCC has the discretion to backdate a final determination and apply payment of interest to a backdated determination.

The ACCC has completed one arbitration under Part IIIA. To date, the ACCC has not been required to consider these guidelines in an arbitration.

1.1. About these guidelines

The purpose of these guidelines is to explain how the ACCC might exercise its powers to defer arbitrations or backdate final determination.

The guidelines on deferral and backdating were first developed in 2007 and remade in 2017. They are a legislative instrument under the *Legislative Instruments Act 2003* (Cth) which means that they are subject to disallowance and will sunset after ten years.

The purpose of these guidelines is to assist interested parties by setting out how the ACCC might apply the deferral and backdating provisions in the context of an arbitration under Part IIIA. The ACCC must have regard to these guidelines in deciding whether to defer consideration of an access undertaking or access dispute, backdate an arbitration determination and award interest. However, it should be noted that Part IIIA potentially covers a wide range of services. The application of these provisions will depend on the individual circumstances of the case and will need to be considered on a case-by-case basis.

These guidelines should be read with the ACCC's *Arbitrations: a guide to resolution of access disputes under Part IIIA of the Trade Practices Act* (April 2006). The ACCC is currently updating this guide in light of the imminent Part IIIA amendments. A revised guide will be issued for public consultation in 2017.

1.2. Structure of these guidelines

This section 1 explains the background to these guidelines and the relevant provisions of the CCA.

Section 2 sets out the ACCC's guidelines under s. 44ZZCB(6) of the CCA. These explain the ACCC's approach in deciding whether or not to suspend either an undertaking or arbitration process, if an undertaking is lodged after an arbitration has commenced.

Section 3 sets out the ACCC's guidelines under s. 44ZO(8) of the CCA. These explain the ACCC's approach to backdating a final determination and the awarding and calculation of interest.

2. Deferring arbitration of access disputes or consideration of access undertakings

2.1. General

This section explains the matters the ACCC will consider if, when arbitrating an access dispute, it must decide whether to defer the arbitration pending consideration of an access undertaking. Similarly, the commission may have to decide whether to defer the consideration of an access undertaking while it continues to arbitrate the dispute. It also outlines relevant considerations of the commission simultaneously considering an access undertaking and conducting an arbitration in relation to the same matter.

2.2. ACCC guideline

2.2.1 Legislative framework

Section 44ZZCB deals with the situation of the ACCC simultaneously considering an access undertaking and conducting an arbitration on the same matter. It provides that the ACCC may defer consideration of the arbitration 'in whole or in part' while it is considering the access undertaking. Alternatively, the ACCC may decide to defer consideration of whether to accept the undertaking 'in whole or in part' while it arbitrates the access dispute (s. 44ZZCB(1)(d)).

In considering whether to defer consideration of the arbitration, the ACCC must have regard to:

- the fact that the access undertaking, if accepted, will apply generally to all access seekers, not just those involved in the arbitration
- any guidelines that it has made, and which are in force, on the deferral of arbitration
- any other matter which the ACCC considers relevant (s. 44ZZCB(5)).

2.2.2 Deferrals of arbitrations—relevant considerations

In deciding whether to defer one or more arbitrations while considering an access undertaking that relates to the same matter, the ACCC will consider:

- the effect of the undertaking—the ACCC must consider the fact that an undertaking, if accepted, will apply generally to all access seekers (as noted above, consideration of this matter is a legislative requirement)
- whether the access undertakings process may enable the ACCC to deal with issues that are common to multiple arbitrations.

These matters are discussed below.

Effect of the undertaking

Primarily, the ACCC must consider the fact that the undertaking, if accepted, will apply generally to all access seekers. On the other hand, there may exist particular circumstances or other relevant matters which justify continuing with arbitrations while simultaneously considering the access undertaking. These circumstances are addressed in section 2.2.3.

In certain circumstances, the ACCC may decide to give priority to an access undertaking. One factor that the commission may consider is the extent to which pro-competitive outcomes of the access undertaking are available to all access seekers, compared with the outcomes of arbitration in which the benefits are likely confined to the parties to an arbitration.

Access undertakings process

Additionally, the access undertaking process may enable the ACCC to deal with issues that are (or potentially will be) common to multiple arbitrations (for example price).

From an administrative perspective, it may be more efficient to deal with these issues as part of a single industry-wide process. Also, assessment of an undertaking is a public process, thereby facilitating input from all interested persons and a greater degree of transparency. While it may be possible to address industry-wide issues in the arbitration context, where an access undertaking has been given to the ACCC this provides an alternative mechanism for doing so in an efficient manner.

Where the ACCC is considering an access undertaking and conducting one or more arbitrations that relate to the same matter, deferral of arbitration may free up the resources of the ACCC and the parties that can be used to comment on and assess the access undertaking. This should enable the undertaking to be assessed in a more timely fashion, and, if the access undertaking is subsequently accepted, the benefits to end-users would be realised sooner. The ACCC is mindful of the need to minimise, as far as possible, the costs incurred by access seekers and access providers where there are multiple processes underway.

2.2.3 Continuation of arbitrations—relevant considerations

The ACCC envisages several circumstances where it may be appropriate to continue with arbitrations, namely where:

- matters covered by the proposed undertaking have already been substantively considered in arbitrations
- the arbitrations deal with issues separate or additional to those covered in the undertaking
- consideration of the undertaking is likely to involve a long time frame.

Each of the circumstances is addressed below. Rather than establish prescriptive rules, and because the ACCC must exercise its discretion on a case-by-case basis, the guidelines explain how the ACCC would be likely to approach situations involving those circumstances.

These are not the only circumstances in which it may be appropriate to continue with arbitration, and others can be considered pursuant to s. 44ZZCB where relevant.

Matters already substantively considered in arbitration

If the ACCC were to rigidly apply the principle of deferring arbitrations while considering an access undertaking on the same matter, then this could lead to adverse consequences. It could have the effect of creating an incentive for access providers to offer access undertakings only once arbitrations have progressed through

their substantive phase¹, with a view to delaying further progress or completion of the arbitration. To reduce the risk of an access provider attempting to delay arbitrations through submitting undertakings, the ACCC may decide to conduct the arbitration and undertaking processes concurrently.

In the ACCC's view, it is preferable for access undertakings to be provided as early as possible and at least prior to commencement of the substantive phase of arbitrations. This ensures that the ACCC, access seekers and other interested persons focus on the establishment of industry-wide access arrangements through a public and transparent process in a timely manner.

Where, matters in an access undertaking have already been substantively addressed in arbitration at the time the undertaking is given, deferring the arbitrations is likely to delay their completion. In this circumstance, it may be appropriate to continue with arbitration in order to make a final determination or at least put in place an interim determination reflecting the work undertaken to date.

When the ACCC decides to continue with arbitration, it can make an interim determination and then commence assessment of the access undertaking. If the access undertaking is accepted by the ACCC, the ACCC must terminate the arbitrations to the extent that the matters in dispute are dealt with in the undertaking. The ACCC would, in normal circumstances, continue with arbitration in order to make a final determination if there are matters still in dispute which are not dealt with in the undertaking (in relation to those matters only). If the access undertaking is not accepted by the ACCC, the interim determination would continue in effect unless revoked or until such a time as the ACCC issues a final determination in relation to the arbitration.

Where an access provider chooses to wait until after the ACCC has commenced the substantive phase of an arbitration before giving an access undertaking, there is a higher likelihood of the ACCC continuing with an arbitration even if only to make an interim determination, although the ACCC reserves the right to follow this course even where an access undertaking is submitted at an earlier stage.

Additional issues

Part IIIA provides general guidance on what should be included in an undertaking. An access undertaking might not deal with every aspect of access to a service. Consequently, where arbitrations deal with issues additional to those covered in the undertaking, it may be appropriate to continue the arbitral process on those issues, even where arbitration and access undertaking processes begin at a similar time. This approach is reflected in the provision of s. 44ZZCB(1)(c), which provides that an arbitration can be deferred in whole or in part.

For instance, in the case of a declared service, where the ACCC is conducting arbitrations on both price and non-price issues, it may be given an undertaking that only deals with price. The ACCC could therefore defer consideration of the price issues in the context of arbitrations (leaving this to be assessed as part of the access undertaking process) but proceed with consideration of the non-price issues. This

¹ The substantive phase of arbitration involves the ACCC shaping the processes relevant to the arbitration and receiving all the relevant information. For more information, see the ACCC's related guide, *Arbitrations: a guide to resolution of access disputes under Part IIIA of the Trade Practices Act* (April 2006). A copy can be downloaded from the ACCC's website at www.accc.gov.au.

would then enable the ACCC to finalise the arbitrations once the pricing issues covered by the access undertaking have been addressed.

In the case of a non-declared service, the acceptance of an access undertaking relating to the service will preclude the possibility of declaration. If a service provider submits an access undertaking for a non-declared service that only deals with terms and conditions related to price, alternative mechanisms to deal with non-price terms and conditions may be required. This may, for example, involve private commercial arbitration between the parties in the event of a dispute.

Arbitration time frame

While the CCA establishes a six-month time frame for consideration of an access undertaking, this can be extended, and more than one extension is possible. Further information about the time frame for completing an arbitration is included in the ACCC guide titled *Arbitrations: a guide to resolution of access disputes under Part IIIA of the Trade Practices Act* (April 2006). While the ACCC endeavours to consider access undertakings in an expeditious manner, it is possible that access undertakings involving complex issues could take longer to assess.

In such circumstances, it may be appropriate to continue the conduct of arbitrations in order to make interim determinations, particularly where this would enable greater certainty on access terms and conditions in a timely manner.

Access providers are expected to lodge all relevant information (including pricing models and data) with the ACCC at the time of lodging the undertaking, as part of detailed supporting information. This can help reduce the time frame for consideration of the undertaking. This also serves to indicate an intention on the part of the access provider to work with the ACCC in order to facilitate timely consideration of the undertaking.

2.2.4 Other relevant considerations

It is not possible to exhaustively describe all circumstances in which it will be appropriate to continue with an arbitration. Thus, the CCA specifically enables the ACCC to take account of other matters it considers relevant (s. 44ZZCB(5)). Where appropriate, the ACCC will give the parties an opportunity to comment on such matters prior to making its decision.

2.2.5 Other issues

Use of arbitration information in assessment of the access undertaking

Confidential information obtained by the parties to arbitration as part of that process may be relevant to the assessment of an access undertaking on the same matter. Accordingly, the parties to the arbitration may wish to use or disclose this information in, or for the purposes of, their submissions to the ACCC regarding the access undertaking.

Before doing so, however, it may be necessary for the ACCC to grant its consent to such use or disclosure. This may be the case where, for example, confidential

information in an arbitration is subject to a confidentiality order made by the ACCC which limits use or disclosure of the information outside the arbitration context.²

If the ACCC's consent is required, the party wishing to use or disclose the confidential information should make a written request to the ACCC seeking consent for the proposed use or disclosure. The request should describe the information that the party wishes to use, the persons that would be provided with the information and the purpose of the disclosure.

In general, the ACCC will be inclined to consent, where possible, although before doing so it will seek the views of the other party or parties to the arbitration. In granting its consent, however, the ACCC will impose such conditions as are necessary to protect the confidential information and ensure that it is used and disclosed only for the purposes of the access undertaking assessment process.

Use of information obtained in assessment of the access undertaking (or other non-arbitration responsibilities) in an arbitration context

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

If there are no confidentiality issues around the use of such information, the ACCC will use the information, if it is relevant and subject to requirements of procedural fairness, in the arbitration. Where appropriate, the ACCC will provide an opportunity for parties to be heard in relation to the use of such information prior to the ACCC issuing a final determination.

The ACCC recognises that it is critical to adopt sound information handling practices to maintain the confidence of all parties to an access dispute. Therefore, if there are claims of confidentiality, the ACCC will consult with the person who provided the information and seek their views on providing the information to the parties. As noted in the *ACCC & AER Information Policy: Collection and Disclosure of Information* (June 2014), where the ACCC receives information on a confidential basis it will not publicly disclose that information without the consent of the provider. However, the ACCC does reserve the right to use that information for the purpose of performing other statutory functions. Issues related to the use and disclosure of information in an arbitration are discussed further in the ACCC's arbitration guidelines which are available on the ACCC's website.³

Coordination of decision making

Where the ACCC decides to defer the arbitration pending consideration of an access undertaking, it will be necessary to 're-activate' the arbitration once the ACCC has made its decision on the access undertaking. Also, where the arbitration has not been deferred, it will be appropriate to 'update' the arbitration to reflect that decision.

If the ACCC decides to accept the undertaking, it may be required to terminate the arbitration (s. 44ZZCB(2)). However, where the arbitration dispute is not withdrawn

² More information on use and disclosure of information obtained during an arbitration is in chapter 4 of the ACCC's related guide, *Arbitrations: a guide to resolution of access disputes under Part IIIA of the Trade Practices Act* (April 2006). The ACCC is currently reviewing these guidelines.

³ <https://www.accc.gov.au/publications/arbitrations-a-guide-to-resolution-of-access-disputes-under-part-iiia-of-the-act>.

(s. 44T) or terminated (s. 44Y), the ACCC will be required to proceed with the arbitration and make an interim or final determination that is consistent with the undertaking.

If the ACCC continues with the arbitration, the work that the ACCC has performed in respect of the undertaking may, as appropriate, be used for the purposes of making an interim or final determination in the arbitration. The terms and conditions of any final determination may include backdating provisions (where appropriate).

In the event that the ACCC has made a final determination on the arbitration prior to making its decision on the access undertaking, either party can seek a variation to the determination. If the other party refuses, then this can form the basis of a dispute notification and the ACCC can resolve the matter by way of arbitration (ss.44S, 44ZU).

Review of the undertaking by the tribunal

A person whose interests are affected by an ACCC decision on an access undertaking decision may apply in writing to the Australian Competition Tribunal for review of the decision (s. 44ZZBF(1)). The review by the tribunal is a reconsideration of the matter and will therefore add to the time involved in considering the access undertaking. In such a situation, it may be appropriate for the ACCC to make an interim or final determination in any arbitration previously deferred pending consideration of the access undertaking. The interim determination will usually be consistent with the ACCC's decision on the access undertaking.

If the ACCC has made an interim determination, once the tribunal has completed its review, the ACCC can either terminate the arbitration or proceed towards finalising the arbitration.

If the ACCC has already made a final determination, then the access undertaking will automatically prevail over the ACCC's determination to the extent of any inconsistency (s. 44ZZCC).

Review of arbitrations by the tribunal

A party to a final determination may apply in writing to the tribunal for review of the determination. The application must be made within 21 days after the ACCC has made the determination (ss. 44ZP(1), (2)). If a party does apply for a review, the determination is of no effect until the tribunal makes its determination on the review. A review by the tribunal is a re-arbitration of the access dispute and the tribunal has the same powers as the commission for the purposes of the review (ss. 44ZP(3), (4)). The decision of the tribunal will take effect as soon as it is made (s. 44ZP(8)).

3. Backdating of final determinations

3.1. General

This section explains the matters the ACCC will consider when deciding whether to backdate a final determination and the methodology that the commission is likely to adopt in awarding interest.

3.2. ACCC guideline

3.2.1 Legislative framework

Under s. 44ZO, the provisions of a final determination may be expressed to take effect earlier than the date on which the determination takes effect. In the case of a declared service, a final determination can be backdated to any date as long as the specified date is not earlier than the date on which negotiations commenced (s. 44ZO(4)(a)). If the parties commenced negotiations on access before the service became a declared service, then backdating is limited to a date that is on or after the day on which the declaration began to operate (s. 44ZO(4)(b)). In either case, a determination cannot be backdated to a day on which the access seeker did not have access to the service.

Section 44ZO also requires the ACCC to formulate guidelines about its approach to backdating and to have regard to those guidelines. These guidelines are set out below.

3.2.2 Rationale for backdating

Backdating of a determination only applies in certain circumstances and only where the access seeker already has access to the service. The objective of the backdating provisions is to remove an incentive to delay the negotiate/arbitrate process. Subject to s. 44ZO(4), in the case of a declared service, the price determined by the ACCC can be backdated to a specified date that is up to the day upon which negotiations commenced. The ability to backdate a dispute to the date when negotiations commenced means that, in certain cases, parties can continue to negotiate without needing to notify an access dispute in order to facilitate a backdated determination.

A determination cannot be backdated to a day on which the access seeker did not have access to the service. Therefore, the backdating provisions will not affect incentives to provide access in the first place but will lessen incentives to demand unreasonable terms and conditions.

3.2.3 Approach to backdating

Given that the backdating provisions are intended to improve incentives to not delay the negotiate/arbitrate process, the ACCC will, in general, be inclined to backdate determinations. That said, each case must be considered on its merits. In particular, the ACCC is likely to consider whether the manner in which the parties have conducted themselves before and during the arbitration provides grounds for not backdating the determination.

For instance, if, before notification of the dispute, the access provider offered the access seeker price and non-price terms and conditions that are substantially similar to those determined by the ACCC and the access seeker refused, then it may not be appropriate to backdate. Considering the parties' conduct in this way improves

incentives for the access provider to offer reasonable price and non-price terms and conditions, and reduces incentives for the access seeker to notify a dispute in the hope that the final price will be lower and backdated.

Similarly, if the access seeker has been tardy in responding to offers put forward by the access provider, then it may not be appropriate to backdate to the start of negotiation.

To minimise incentives for delay during the arbitration, the ACCC may indicate at the outset whether it is likely to backdate the final determination. However, the ACCC would expect to reconsider this issue towards the conclusion of the arbitration to see if there are any grounds for modifying its views on backdating.

The CCA provides for flexibility regarding the nature of the backdated terms and conditions. In some circumstances, it may be appropriate to provide that the same charges apply retrospectively and prospectively, while in others it may be better to have separate retrospective and prospective charges. For instance, if a price is cost-based, it may be appropriate to determine retrospective charges based on costs for the relevant year rather than current costs. These are matters on which the ACCC is likely to seek submissions from the parties.

3.2.4 Deciding on a backdated date

The extent to which any or all of the provisions of an arbitration determination can be backdated is limited to the following circumstances:

- (a) if the third party and provider commenced negotiations on access to the service after the service became declared, the specified day must not be earlier than the day on which negotiations commenced
- (b) if the third party and provider commenced negotiations on access to the service before the service became declared, the specified day must not be earlier than the day on which declaration began to operate.

In both cases, the specified day cannot be a day on which the third party did not have access to the service (s. 44ZO(4)).

In the case of (a) above, the parties will need to demonstrate the date on which negotiations commenced. Parties may disagree about this date. For instance they may have differing views about the purpose of a particular meeting—one may assert that the meeting was concerned with negotiations for a new contract, whereas the other may say it was concerned with reviewing administrative matters. To minimise the scope for disagreement about the date on which negotiations began, the parties should consider evidencing negotiations in writing.

3.2.5 Interest

For backdating to act as a control on the incentive for delay, the ACCC believes the backdated payment should include an interest component. This is expressly permitted by s. 44ZO(6). Where backdating provides a mechanism for the adjustment of monies from the access provider back to the access seeker (in the case of overpayments), the ACCC considers that the inclusion of an interest component as part of that re-adjustment is appropriate. This should also apply in the case of underpayments made by the access seeker to the access provider whereby an interest component should also be included in the re-adjustment of monies between the parties.

If the ACCC backdates a determination and orders one party to pay money to the other with respect to the backdating period, it will generally also provide for the payment of interest on the backdated amount. In this regard, the ACCC proposes to adopt the following methodology for the calculation of interest:

- Interest will be calculated on the amounts of money that have been overpaid (or underpaid).
- These amounts usually will be calculated by reference to the volume of services supplied by the access provider to the access seeker over the backdating period and to the charges that the ACCC considers should have applied in respect of those services.
- The backdating period is the period between the date on which backdating commences and the date on which the determination takes effect.
- The rate of interest will be applied to those amounts from the date on which the overpayments (or underpayments) were made.

Rate of interest

If backdating of a determination is to have its intended effect—which is to lessen incentives on the access provider to delay the arbitration process—then the parties should be placed, to the greatest extent possible, in the position they would be in had the arbitrated price applied from the outset. Awarding interest is not intended to operate as a sanction or penalty on the party required to pay the money. The rate of interest should therefore reflect the opportunity cost of the overpayment—that is, the opportunities that the person making the payment has foregone by being deprived of the overpaid amount. This may be influenced by:

- the best alternative use available to the person making the overpayment—for instance the person making the overpayment may have instead preferred to use the money to reduce their overdraft or to finance new investment.
- the risk of not being repaid in the event that the person to whom the overpayment was made becomes insolvent.

Similar principles would also apply to the case of an underpayment.

Where the parties have reached agreement on an interest rate, the ACCC may have regard to this rate as evidence of the parties' estimate of the opportunity cost. If, however, the rate agreed by the parties appears to significantly depart from a reasonable estimate of the opportunity cost (for instance if it is more in the nature of a 'penalty'), or if no rate has been agreed, then the ACCC may base its calculations on the rate that would have been paid to raise the amounts by means of debt financing. As a general guide, the ACCC's preferred approach will be to adopt the variable indicator rate for large businesses that is published by the Reserve Bank of Australia.⁴

In determining the interest rate, it is also necessary to determine the frequency with which interest is compounded—daily, monthly or annually. In this regard, the ACCC will consider any approach agreed between the parties in respect of repayment of monies and, in the absence of agreement, the approach which would be adopted in a debt financing agreement. As a general guide, the interest rate period is likely to be determined by the timing of cash flows to the business that is owed the settlement.

⁴ The data series is publicly available on the Reserve Bank of Australia's website. See series F5, Indicator Lending Rates.

A decision to backdate a final determination and award interest raises a number of issues and it is possible that the ACCC may decide to invite or direct parties to make written submissions in order to fully consider the circumstances and extent to which such decisions should be made.

3.2.6 Impact of interim determinations on backdating

Where backdating is a satisfactory alternative to an interim determination, the ACCC will consider not granting an interim determination. However, the fact that an interim determination has been made does not mean that backdating is ineffective and therefore unnecessary. The interim determination helps to ensure that the objectives of Part IIIA are realised in the period leading up to the final determination. Backdating is, nevertheless, important in reducing incentives to delay progression towards the final determination.

3.2.7 Symmetry of approach

The situation generally envisaged involves an access provider 'refunding' to the access seeker the difference between the charges payable over the period leading up to the final determination and the charge set by the ACCC. However, it is conceivable that the reverse situation may occur, where the determination sets a charge higher than that currently being paid by the access seeker. In such a situation, backdating is still likely to be appropriate to reduce any incentives that an access seeker has to delay progression of the arbitration.

ACCC contacts

For more information on the relating to deferral of arbitrations and backdating of determinations under Part IIIA, please contact:

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