



**Resolution of telecommunications
access disputes
— a draft guide**

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

RESOLUTION OF TELECOMMUNICATIONS ACCESS DISPUTES

**A DRAFT GUIDE TO DISPUTE RESOLUTION PROVISIONS UNDER
PART XIC OF THE *TRADE PRACTICES ACT 1974*
AND THE *TELECOMMUNICATIONS ACT 1997***

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Contents

Contents	ii
Abbreviations and glossary	vii
Preface	ix
Chapter 1. Introduction	1
1.1. Declared services	2
1.1.1. Methods of declaration	2
1.1.2. Declaration criteria.....	2
1.1.3. Declared services	3
1.1.4. Standard access obligations	3
1.2. Disputes about access to declared services	4
Chapter 2. Commencement of an arbitration — dispute notification	5
2.1. Pre-conditions for notification	5
2.2. ‘Unable to agree’	6
2.3. Contractual arrangements for dispute resolution	7
Chapter 3. Structure of an arbitration	8
3.1. Notification of parties	8
3.1.1. Who is a party?	8
3.1.2. Form of notice.....	9
3.2. Who arbitrates the dispute?.....	9
3.2.1. Constitution of the Commission	9
3.2.2. Decisions of the Commission	10
3.2.3. Reconstitution of the Commission.....	10
3.2.4. Disqualification of members.....	10
3.2.5. Commission staff	10
3.3. Phases of an arbitration.....	11
3.4. The ‘preliminary’ phase.....	11
3.4.1. Notifying other persons of the dispute.....	12
3.4.2. The initial case management meeting.....	12
3.4.3. Conference with the Commissioner(s).....	13

3.4.4.	Determining the appropriate dispute resolution process.....	14
3.4.5.	Sequencing of dispute resolution processes.....	16
3.4.6.	Mediation	17
3.4.7.	Expert determination.....	17
3.5.	The ‘substantive’ phase.....	18
3.5.1.	Information	18
3.5.2.	Submissions	19
3.5.3.	Decisions on key issues	19
3.5.4.	Case management meetings.....	20
3.5.5.	Conferences with the Commissioner(s).....	20
3.5.6.	Interim determinations	21
3.6.	The ‘determination’ phase	21
Chapter 4.	Procedure for an arbitration	22
4.1.	General.....	22
4.1.1.	Evidence.....	22
4.1.2.	Representation.....	23
4.1.3.	Privacy	24
4.2.	Use of experts	24
4.2.1.	Expert appointed by a party	24
4.2.2.	Expert appointed by the Commission.....	25
4.2.3.	The expert’s report.....	25
4.2.4.	Experts’ conference	26
4.2.5.	Experts’ costs.....	26
4.3.	Improper conduct.....	27
4.3.1.	Failure to attend or comply with an order of the Commission ...	27
4.3.2.	Failure to answer questions or produce documents	27
4.3.3.	Intimidation.....	28
4.3.4.	Presentation of false or misleading evidence or documents	28
4.3.5.	Disturbance of an arbitration hearing	28
4.4.	Fees	29
Chapter 5.	Joining parties, joint hearings and separate processes	30
5.1.	Joining parties to an arbitration.....	31
5.2.	Holding a joint hearing	32
5.3.	Establishing a separate process.....	34

Chapter 6.	Flow of information, procedural fairness and confidentiality	35
6.1.	Procedural fairness.....	35
6.1.1.	Reasonable opportunity to present the case.....	35
6.1.2.	Bias	36
6.2.	Confidentiality between the parties	36
6.3.	Withholding confidential information from a party and the requirements of s. 152DK.....	37
6.3.1.	Matters relevant to consideration of a s. 152DK request.....	38
6.3.2.	Procedure for a request in relation to s. 152DK.....	39
6.3.3.	Decision of the Commission in relation to requests under s. 152DK	40
6.4.	Disclosure of information by the Commission	41
6.4.1.	The existence of an access dispute.....	41
6.4.2.	Giving information to parties in another arbitration	41
6.4.3.	Information received by the Commission outside arbitrations ...	42
6.4.4.	Commission conducting joint arbitration hearings	43
6.4.5.	Commission publication of determination and reasons for a determination	43
6.4.6.	Commission using information obtained during an arbitration in relation to other Commission statutory activities	44
6.4.7.	Specific obligations on the Commission to disclose information.....	45
Chapter 7.	Determinations and termination of an arbitration	46
7.1.	Interim determinations	46
7.1.1.	Relevant matters.....	46
7.1.2.	Draft of the interim determination	48
7.1.3.	Duration of an interim determination	48
7.1.4.	Interim determinations when final determinations are stayed	49
7.2.	Final determinations.....	49
7.2.1.	Matters that the Commission must take into account	50
7.2.2.	Restrictions on access determinations	53
7.2.3.	Compensation for deprivation of a pre-notification right.....	54
7.2.4.	Process	54
7.3.	Backdating	54
7.3.1.	Rationale for backdating	55
7.3.2.	Approach to backdating	55

7.3.3.	From when?	56
7.3.4.	Interest.....	56
7.3.5.	Impact of interim determination on backdating.....	56
7.3.6.	Symmetry of approach.....	57
7.4.	Effect of determination	57
7.4.1.	When does it come into effect?.....	57
7.4.2.	Duration of determination.....	57
7.4.3.	Enforcement of determination	57
7.4.4.	Variation of determination.....	58
7.5.	Termination without a determination.....	58
7.5.1.	Termination by a party.....	58
7.5.2.	Termination by the Commission.....	58
Chapter 8.	Review	60
8.1.	Review by the Australian Competition Tribunal	60
8.2.	Review by the Federal Court	60
Appendix 1.	List of declared services	61
Appendix 2.	Notification of access disputes	62
A2.1.	Covering letter	62
A2.2.	Notification	63
Appendix 3.	Pricing principles	65
A3.1.	What are pricing principles?	65
A3.2.	Legislative requirements.....	65
A3.3.	Timing.....	66
A3.4.	Criteria	66
A3.5.	Pricing principles determined by the Commission	67
Appendix 4.	Telecommunications Act Arbitrations	68
A4.1.	Commencement of an arbitration.....	69
A4.2.	The arbitration process.....	69
A4.2.1.	The parties.....	69
A4.2.2.	Who arbitrates the dispute?.....	69
A4.2.3.	Procedure	69
A4.2.4.	Use of experts	69

A4.2.5.Improper conduct	69
A4.2.6.Fees	70
A4.3. Joining parties, joint hearings and separate processes	70
A4.3.1.Joining parties to an arbitration.....	70
A4.3.2.Holding a joint hearing	70
A4.3.3.Establishing a separate process	70
A4.4. Flow of information, procedural fairness and confidentiality.....	70
A4.4.1.Procedural fairness.....	70
A4.4.2.Confidentiality between the parties	70
A4.4.3.Withholding confidential information from a party.....	70
A4.4.4.Disclosure of information by the Commission	70
A4.5. Determinations and termination of an arbitration.....	71
A4.5.1.Final determination	71
A4.5.2.Termination of the arbitration	71
A4.6. Review	72
A4.6.1.Review by the Australian Competition Tribunal	72
A4.6.2.Review by the Federal Court	72

Appendix 5. Confidentiality undertaking 73

Abbreviations and glossary

Act	<i>Trade Practices Act 1974</i> (Cth)
Access provider	Carrier or carriage service provider who supplies declared services to itself or other persons — see s. 152AR of the Act.
Access seeker	Service provider who makes, or proposes to make, a request for access to a declared service under s. 152AR of the Act.
Carriage service provider	Defined in s. 87 of the Telecommunications Act. In summary, it means a person who supplies or proposes to supply a carriage service between two or more points (at least one of which is in Australia) using a network owned by one or more carriers or using a network in relation to which a nominated carrier declaration is in force.
Commission	Australian Competition and Consumer Commission
Conference	A meeting between the parties and one or more Commissioners.
Content service provider	Defined in s. 97 of the Telecommunications Act. In summary, it means a person who uses or proposes to use a carriage service between two or more points (at least one of which is in Australia) to supply a content service to the public.
Declared service	An eligible service declared by the Commission under s. 152AL of the Act. Once an eligible service is declared, access providers are required to supply the service to service providers (i.e. access seekers) upon request — see s. 152AR of the Act.
Eligible service	This term is defined in s. 152AL of the Act. An eligible service is a carriage service between two or more points (at least one of which is in Australia), or a service that facilitates the supply of a carriage service.
Hearing	The process of conducting the arbitration (by way of written and oral evidence and submissions), whereby one or more Commissioners hear the issues in dispute.
Party	A person who is a party to an arbitration under Part XIC of the Act — see s. 152CO.

Service provider	Defined in s. 86 of the Telecommunications Act. Means a carriage service provider or a content service provider.
SPAN	Service Providers Industry Association
Telecommunications Act	<i>Telecommunications Act 1997 (Cth)</i>
Tribunal	Australian Competition Tribunal

Preface

Part XIC of the *Trade Practices Act 1974* is a key component of the regulatory framework supporting the development of a competitive telecommunications industry. It establishes a regime under which service providers can access ‘declared services’ in order to supply competitive services to consumers. The Australian Competition and Consumer Commission is responsible for declaring services that are subject to this regime and for conducting arbitrations where the service provider requesting access and the access provider cannot agree on the terms and conditions of access.

The purpose of this guide is to outline the arbitration provisions of Part XIC and the Commission’s approach to administering those provisions. It also explains how the Commission administers similar provisions under the *Telecommunications Act 1997*.

There are special features that distinguish telecommunications arbitrations from typical commercial arbitrations. Telecommunications arbitrations concerning declared services are often characterised by a lack of mutual commercial incentive to reach settlement, particularly where the service is provided by means of infrastructure with natural monopoly characteristics and the access provider competes in downstream markets. Moreover, in arbitrating telecommunications disputes, the Commission must reach its determination through the application of ‘public interest’ criteria rather than standard commercial criteria. These factors typically make telecommunications arbitrations more complex than standard commercial arbitrations.

Recently, in order to improve the efficiency and effectiveness of its arbitration processes, the Commission engaged Phillips Fox in conjunction with Resolve Advisors to undertake a review of these arbitration processes. This guide incorporates recommendations made by the review team in order to improve the fairness, effectiveness, efficiency and speed of arbitrations. It also reflects the experience gained by the Commission and amendments made to Part XIC since 1997.

Relevant areas in which the Commission is proposing to make changes to its processes are dispute notification, handling of confidentiality claims, format and content of experts’ reports, the holding of joint hearings and publication of arbitration determinations. In addition, the Commission is proposing to introduce case management teams for arbitrations, and place increased emphasis on the use of alternative means of dispute resolution such as third party mediation and the referral of particular issues to expert determination.

This guide is being released in draft form prior to its finalisation, as a basis for consultation with the industry. The Commission is particularly interested to receive feedback on the proposed changes to its processes from persons who have experienced arbitrations ‘first hand’ as well as from persons who may need to use these processes at a future point in time.

Submissions should be made to the Commission by **no later than 5.00pm, Friday 14 June 2002**. Once all submissions are received, the Commission will place all non-confidential submissions on its website.

The Commission prefers that all written submissions be publicly available to foster an informed, transparent and robust consultative process. Accordingly, submissions will be treated as public documents unless otherwise specified. It is preferred that where industry participants wish to submit confidential information they should provide confidential and non-confidential versions of their submission.

Submissions should be addressed to:

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Director, Regulatory
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Australian Competition and Consumer Commission
GPO Box 520J
MELBOURNE VIC 3001

In addition to a hard copy, persons making submissions are encouraged to provide an electronic copy of the submission to ken.walliss@acc.gov.au.

Enquiries about this draft Guide, or about the making of submissions, can be directed to John Laughlin on (03) 9290 1864.

Chapter 1. Introduction

Delivery of telecommunications services in Australia increasingly requires access to either the services, or the network, of a competing carrier or carriage service provider. For instance, an end-user connected to Telstra's fixed line network may make a call to an end-user connected to the Cable & Wireless Optus HFC network. If the call is a long distance call then another carrier may be involved in trunking the call from one capital city to another.

Consequently, to supply telephone calls and carry data from one point to another, carriers often purchase network services, and other associated services, from each other. Given that these carriers are also competing for the custom of end-users, there is scope for disputes to arise as to the terms and conditions on which those services are supplied to each other. While there is a degree of interdependence which creates incentives for carriers to resolve these matters commercially, this is not always the case and disputes may arise.

The *Trade Practices Act 1974* (the Act) establishes a dispute resolution framework which can be used to resolve disputes concerning the supply of services that have been 'declared' by the Commission. In addition, the *Telecommunications Act 1997* provides for the Commission to act as the arbitrator of 'last resort' in resolving disputes concerning matters such as pre-selection and number portability.

The dispute resolution framework reflects a negotiate/arbitrate model. Where the parties both have an interest in establishing and maintaining a commercial relationship with each other, then they will often be able to negotiate access arrangements without recourse to arbitration. However, this will not always be the case, particularly where the access provider has no commercial incentive in providing access to the access seeker. In situations where the parties are unable to negotiate access arrangements or use consensual dispute resolution processes to assist them, the Commission can, if requested, step in and establish the terms and conditions that will govern their relationship.

The objective of this guide is to explain how the Commission will, in the general case, exercise its dispute resolution powers under both pieces of legislation. In the main, the guide is concerned with the powers conferred on the Commission by Part XIC of the Act, and reflects its experiences to date in the administration of those powers. The Telecommunications Act dispute resolution powers are addressed in Appendix 4.

Recently, the Commission engaged Phillips Fox, in conjunction with Resolve Advisors, to conduct an external review of its arbitration processes. This guide incorporates recommendations made by the review team in order to improve the fairness, effectiveness, efficiency and speed of arbitrations.

The Commission proposes to regularly review the effectiveness of its arbitration processes. This will involve seeking feedback from the parties at the conclusion of each arbitration in order to determine the processes that worked well, and identify areas where further improvements can be made.

This document is the third telecommunications guideline released by the Commission and complements the two other guidelines that the Commission has published concerning the exercise of its powers and responsibilities in respect of the telecommunications industry — *Telecommunications services – Declaration provisions: a guide to the declaration provisions of the Trade Practices Act* (July 1999) and *Anti-competitive Conduct in Telecommunications Markets — An information paper* (August 1999).

1.1. Declared services

As a general rule, there is no legal obligation on a firm to supply a service to another firm. Part XIC of the Act establishes a process for making exceptions to this rule, whereby particular services can be ‘declared’ with a view to imposing special obligations on the firm supplying those services. Once a service is declared, the supplier of the service is subject to ‘standard access obligations’.

1.1.1. Methods of declaration

The Commission may declare a service under s. 152AL¹ through one of two mechanisms:

- The Telecommunications Access Forum (TAF) may recommend that the Commission declare a service. The Commission may then declare the service if it is satisfied that the TAF has consulted with potential access seekers and consumer representatives. Declaration on TAF recommendation does not require the Commission to undertake a public inquiry.²
- The Commission may on its own initiative, or on request by any other person, hold a public inquiry into the declaration of a service or services and may declare that service or those services within 180 days of reporting on the inquiry if it is satisfied that the declaration would promote the long-term interests of end-users.

Declarations can also be varied or revoked. In order to vary or revoke a declaration, the Commission must hold a public inquiry (except for variations of a minor nature) and be satisfied that the variation or revocation will promote the long-term interests of end-users (s. 152AO).

1.1.2. Declaration criteria

In determining whether declaration will promote the long-term interests of end-users, the Commission must only consider the extent to which declaration will be likely to result in achievement of the following objectives:

¹ Unless otherwise stated, all section references are to those in the Act.

² The Telecommunications Access Forum (TAF) is a body declared by the Commission to be the TAF for the purposes of Part XIC — s. 152AI. This body was disbanded in January 2002, however the legislation retains this provision, and the Commission has not revoked the declaration. It is possible that the TAF will be re-constituted at some future time.

- promotion of competition in certain markets³, including, but not limited to, the removal of obstacles to end-users gaining access to services;
- achievement of any-to-any connectivity in relation to carriage services involving communication between end-users; and
- encouragement of the economically efficient use of, and economically efficient investment in, infrastructure by which the carriage services and services supplied by means of carriage services, are supplied (s. **152AB**).

1.1.3. Declared services

The Commission has declared services supplied by means of fixed and mobile telecommunications networks, as well as a broadcasting service. A full list of services declared as at 25 March 2002 is set out in Appendix 1. This list includes those services that were deemed to be declared in June 1997 as a transitional measure (and which still remain declared).

1.1.4. Standard access obligations

Once a service is declared, a carrier or carriage service provider who supplies the service to itself or another person is subject to standard access obligations in relation to that service (s. **152AR**). By way of summary, these obligations are:

- to supply the service upon request to another service provider;
- to take all reasonable steps to ensure that the services is supplied at a technical and operational quality equivalent to that which it supplies itself;
- to permit interconnection of facilities upon request for the purpose of enabling a service provider to be supplied with the service;
- to provide billing information in connection with matters associated with supply of the service upon request; and
- if the declared service is supplied by means of conditional access customer equipment, to supply any other service necessary to enable the service provider to supply carriage or content services by means of the declared service using that equipment.

There are limited exceptions to these obligations. For instance, the obligations do not apply if there are reasonable grounds to believe that the service provider would fail to comply with the terms and conditions of access or protect network integrity or the safety of individuals. Also, the Commission can exempt carriers and carriage service providers from particular standard access obligations (ss. **152AS and 152AT**).

³ That is markets for carriage services and services supplied by means of carriage services.

The details that describe how the carrier or carriage service provider complies with these obligations are to be articulated in the terms and conditions of access. These terms and conditions of access can be set out in:

- a contract, commercially agreed between access provider and access seeker;
- an access undertaking⁴; or
- an arbitration determination, made by the Commission.

In practice, a combination of these routes may be used in relation to particular services.

1.2. Disputes about access to declared services

When a carrier or carriage service provider, and the person to whom the services are to be supplied, cannot commercially agree on the terms and conditions of access, there are a number of avenues available to them in order to resolve their dispute. One of the avenues is to notify the Commission of an access dispute, with a view to initiating arbitration procedures set out in Part XIC of the Act.

In essence, arbitration is a process whereby each party puts its case to the Commission. The Commission then makes a determination that binds the parties. In making an arbitration determination, however, the Commission is not merely choosing between the position put by each of the parties but must consider the issues in terms of the ‘public interest’ criteria set out in s. 152CR of the Act. To do this, it may undertake its own analysis and seek material in addition to that provided by the parties. An arbitration, therefore, can be viewed as a deliberative process.

Chapters two to eight of this guide are concerned with arbitration by the Commission.

- Chapter two explains how arbitrations are commenced.
- Chapters three and four explain how the Commission conducts arbitrations. Chapter three describes the structural characteristics of an arbitration, whereas chapter four deals with the procedural matters.
- Chapters five and six cover two matters often faced by the Commission — how to deal with issues that are common to two or more arbitrations, and confidentiality. Here, the objective is to provide guidance on how the Commission has dealt with these matters, and how it proposes to deal with them in the future.
- Chapter seven describes the types of determinations that the Commission can make and factors relevant to those determinations.

⁴ While an undertaking sets out the terms of conditions of access, it does not establish the individual arrangements between the access provider and particular access seekers. This is achieved by incorporating those terms and conditions into an access contract or an arbitration determination. If an access undertaking is in operation, the Commission cannot make a determination which is inconsistent with the undertaking (s. 152CQ(5)).

- Chapter eight provides information about the review of arbitration determinations.

Chapter 2. Commencement of an arbitration — dispute notification

Under Part XIC, the arbitration process commences once the Commission is notified that an access dispute exists. Certain pre-conditions must be satisfied in order for a notification to be valid.

2.1. Pre-conditions for notification

Either the person receiving or seeking access to a declared service (i.e. the access seeker), or the carrier or carriage service provider supplying or proposing to supply the service (i.e. the access provider), may notify the Commission of an access dispute (s. 152CM(1) and (2)).

For the notification to be valid, the following conditions must exist:

- the access provider is supplying or proposes to supply a declared service;
- one or more standard access obligations apply or will apply to the access provider in relation to the declared service; and
- the access seeker is unable to agree with the access provider about:
 - the terms and conditions on which the access provider is to comply with those obligations (s. 152CM(1)); or
 - one or more aspects of access to the declared service (s. 152CM(2)).

Disputes should only be notified under s. 152CM(2) where s. 152CM(1) does not authorise the notification of the dispute (s. 152CM(4)).⁵

The Trade Practices Regulations (**reg. 28T**) set out a number of matters which must be addressed in the notification. While no notification form is prescribed by the regulations, a suggested format is set out in Appendix 2. Compliance with the suggested format is not mandatory; however, persons wishing to notify a dispute may find it useful and the Commission would prefer that the format is followed, to ensure all necessary information is provided.

⁵ Section 152CM(2) is arguably broader than s. 152CM(1) — it enables notification of a dispute where the issue in respect of which the parties disagree is not about the terms and conditions on which the access provider is to comply with the standard access obligations, provided that it is about an aspect of access. For instance, if the parties disagree about whether the capacity of a facility should be enhanced in order to enable access, then the dispute may be notified under s. 152CM(2) — see the Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996, pp. 65-66.

Upon receiving the notification, the Commission will examine it to see whether these conditions appear to have been met. If it appears that they have been met, the Commission will generally assume jurisdiction. That said, at the outset, the Commission will generally ask the parties whether there is any objection to the Commission's jurisdiction, and this is the time at which any objections should be raised (see section 3.4.2.).

2.2. 'Unable to agree'

In particular instances, the Commission has needed to consider rejecting a dispute notification on the basis that one of the pre-conditions for notification has not been met — the 'unable to agree' requirement.

Sub-sections 152CM(1) and (2) provide that the access seeker must be unable to agree with the access provider about the terms and conditions on which the access provider is to comply with the standard access obligations, or about one or more aspects of access to the declared service. In some cases, the Commission has been notified of access disputes within days or weeks of an agreement between the access provider and access seeker on the issues covered by the notification. In other cases, the Commission has been notified of a dispute where it appears the matters in the dispute have not been the subject of negotiation between the parties.

The Commission does not consider the 'unable to agree' threshold should be interpreted as a particularly high threshold. For example, the Commission considers that the existence of a contract in and of itself does not necessarily preclude a party from notifying an arbitration. Nevertheless, the person notifying the dispute must provide information that suggests that the parties are not able to reach agreement about one or more matters covered by the standard access obligations. For example, information showing that a party has sought to vary the contract and the other party has refused the request or refused to negotiate; or that the agreement was only a partial or conditional agreement.

By way of guidance, the Commission sets out the following 'rule of thumb' which it proposes to use in considering whether the access seeker is unable to agree with the access provider:

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

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

Seeking additional information from the notifier, or both parties, has the potential to delay commencement of the arbitration. Accordingly, the Commission suggests that the notifier ensure that all relevant information is included in the notification.

2.3. Contractual arrangements for dispute resolution

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

In instances where the Commission has considered such contractual provisions, it has formed the view that contractual provisions cannot preclude or modify the statutory right of a person to notify a dispute under Part XIC. In its view, a court would regard such a provision as being unenforceable. Therefore, a person can notify an access dispute even if there is a contractual provision precluding notification until a dispute resolution process has been completed provided that the parties are 'unable to agree'.

That said, the establishment of alternative means of resolving disputes is to be encouraged. Consequently, where the parties have not used a dispute resolution process established by contract, the Commission is likely to ask the parties for their views as to why this is the case and whether that process would assist in resolving the dispute.

The Commission would not wish such dispute resolution mechanisms to be used as a means of drawing out and delaying resolution of a dispute. Where, however, the contractual dispute resolution process may be a more expeditious means of resolving the matter, it is open to the Commission to make a direction under s. 152CT requiring a party to attend a conciliation or mediation conference in accordance with the process set out in the contract. Moreover, it is open to the Commission to terminate an arbitration if it thinks that a party has not engaged in negotiations in good faith or if it thinks that access should continue to be governed by the existing contract. These are matters that the Commission will generally explore with the parties in the preliminary phase of an arbitration (see section 3.4.).

Chapter 3. Structure of an arbitration

Where the Commission is notified of an access dispute, it must make a written determination on access unless the arbitration is terminated or the notification is withdrawn. In this guide, the ‘arbitration hearing’ refers to the conduct of the arbitration (which may be by way of written or oral evidence or submission). Meetings between the parties and one or more Commissioners (which may be face-to-face or by telephone or video conference) are referred to as ‘conferences’.

3.1. Notification of parties

Upon receiving a notification, the Commission must give written notice of the access dispute to:

- the carrier or provider, if the access seeker notified the access dispute;
- the access seeker, if the carrier or provider notified the access dispute;
- any person whom the Commission considers may be required to do something in order to resolve the dispute; and
- any other person whom the Commission thinks might want to become a party to the arbitration (s. 152CM(6)).

3.1.1. Who is a party?

Persons falling within the first three categories (above) automatically become parties to the arbitration. Any other person who wants to become a party must apply in writing to the Commission. If the Commission accepts that the applicant has a sufficient interest, then the applicant will also become a party to the arbitration (s. 152CO).⁶

There is no automatic right for persons not party to an arbitration to make submissions. However, there may be instances where other interested persons, such as government bodies, industry organisations or consumer groups, may wish to make their views known to the Commission. The Commission may, in its discretion, receive submissions from such persons.⁷ That said, if the person’s interest is sufficiently strong to warrant receipt of a submission it may be more appropriate for the person to seek admission as a party to the arbitration first. Alternatively, to facilitate broader participation, the Commission may establish a separate ‘industry-wide’ process whereby these issues can be addressed.⁸

⁶ The concept of ‘sufficient interest’ is addressed in Chapter 5.

⁷ Paragraph 152DB(1)(c) provides that the Commission may inform itself of any matter relevant to the dispute in any way it thinks appropriate.

⁸ The use of separate ‘industry-wide’ processes is addressed in Chapter 5.

3.1.2. Form of notice

In general, the Commission will give written notice to the carrier, provider or access seeker (as appropriate) by providing a copy of the notification.

In order to identify other persons to whom the Commission must provide written notice of a dispute, the Commission has often issued a media release in relation to the dispute. The Commission also asks the carrier, provider and access seeker whether there are any other persons who may have an interest in the dispute, with a view to notifying those persons in writing of the dispute.

The Commission is currently establishing a new process for notifying persons who may wish to become parties to an arbitration. In this regard, the Commission will maintain an electronic register of persons who wish to be notified of disputes. When the Commission receives notice of a dispute, it will send an e-mail to each of those persons identifying the access provider, access seeker and service, as well as providing a brief description of the nature of the dispute. Applications to become a party should be made to the Commission within three working days. It will be the responsibility of the persons registered to ensure that their details are properly maintained.

3.2. Who arbitrates the dispute?

If it appears that pre-conditions for notification of the dispute have been satisfied, the next step is to determine which Commissioners will arbitrate the dispute — this is known as ‘constituting the Commission’.

3.2.1. Constitution of the Commission

The Act provides that the Commission is to be constituted by one or more members⁹ nominated in writing by the Chairperson (s. 152CV). Where the Chairperson is one of those members, the Chairperson is to preside at the arbitration. If the Chairperson is not one of those members, the Chairperson must nominate a member to preside at the arbitration (s. 152CW).

Where the Commission is constituted by more than one member, the procedural powers can be exercised by a single member — this is the member presiding over the arbitration or another person nominated in writing by the Chairperson (s. 152CWA). Procedural powers are all powers of the Commission except the power to make, vary or revoke a determination, or the power to give a draft determination (s. 152CWA(3)).

As soon as the Commission has been constituted for the purpose of the arbitration, it informs all parties accordingly.

⁹ Associate Commissioners may be nominated to constitute the Commission for the purposes of an arbitration — s. 8A(4).

3.2.2. Decisions of the Commission

Where the Commission is constituted for an arbitration by two or more members, any question before the Commission is to be decided according to the opinion of the majority of those members, or, if the members are evenly divided on the question, according to the opinion of the member presiding (s. 152CY).

3.2.3. Reconstitution of the Commission

If a Commissioner arbitrating a dispute stops being a member of the Commission or for any reason is not available for the purpose of the arbitration, then the Chairperson must either:

- direct that the Commission be constituted for the purposes of finishing the arbitration by the remaining member or members; or
- direct that the Commission be constituted for that purpose by the remaining member or members together with one or more other members of the Commission (s. 152CX(1) and (2)).

The Commission as reconstituted must continue and finish the arbitration and may, for that purpose, have regard to any record of the proceedings of the arbitration made by the Commission as previously constituted (s. 152CX(3)).

3.2.4. Disqualification of members

A member of the Commission is not prohibited from constituting the Commission merely because the member has performed functions, or exercised powers, in relation to the matter or a related matter to that which is the subject of the arbitration dispute (s. 152CV(2)).

That said, the Commissioners arbitrating a dispute endeavour to disclose relevant interests and their involvement in related matters to the parties with a view to inquiring whether the parties have any objections to a particular Commissioner constituting the Commission for the purposes of an arbitration.

3.2.5. Commission staff

While it is Commissioners who are responsible for making decisions in the arbitration, they are supported by Commission staff drawn from the Telecommunications Group and the Legal Group of the Commission. Staff will generally perform three roles in the context of an arbitration.

First, those who are part of the case management team will perform a case management role (see section 3.4.). In essence, this role is a process role and does not involve staff providing advice to Commissioners on the merits of the substantive issues in dispute.

Second, staff will provide advice to Commissioners and assist Commissioners in consideration of the substantive issues in dispute. This may involve the provision of oral or written advice to Commissioners and the drafting of correspondence, directions, determinations and reasons for decision. However, it is Commissioners who must

ultimately form their own views on the issues and any relevant considerations will be reflected in their reasons for decision.

Third, Commission staff may perform a conciliation or mediation role in relation to particular issues which are the subject of the arbitration.

Commission staff should be treated as the contact point for **all inquiries** regarding an access dispute and to this end, correspondence to the parties will usually identify the relevant staff member. In general, this will be the leader for the case management team.

3.3. Phases of an arbitration

Based on the Commission's experience to date, broadly speaking there are three main phases to arbitrations — the preliminary, substantive and determination phases. While, at times, these phases can overlap, the Commission believes that it is useful to think of arbitrations in these terms as the tasks undertaken in each phase are qualitatively different.

During the **preliminary phase**, the Commission seeks to ensure that the substantive issues in dispute, and the relevant parties, are identified with a view to deciding on the most appropriate way to resolve the dispute; i.e. the dispute resolution strategy. This could include mediation by a third party, referral to an expert for determination, arbitration by the Commission, or a mix of these methods. In addition, during the preliminary phase, the Commission will wish to resolve any jurisdictional issues so that they do not interfere with the subsequent consideration of the substantive issues.

The **substantive phase** involves the Commission deliberating on the issues in dispute (except for those which have been deferred pending mediation or expert determination). To assist in this regard, during this phase the Commission will generally seek information and submissions from the parties and may also seek expert advice on particular matters.

Once the Commission has deliberated on the issues in dispute, it is then in a position to make a determination. This occurs in the **determination phase** of the arbitration.

Each of these phases is discussed below. Where relevant, the discussion reflects modifications that the Commission proposes to make to its processes following the Phillips Fox review.

3.4. The 'preliminary' phase

Once the Commission receives notification of a dispute, Commission staff will first consider whether the pre-conditions for notification appear to have been satisfied (see sections 2.1. and 2.2.). If there is doubt in this regard, the Commission will seek further information from the person notifying the dispute (see section 2.2.).

If it appears that the pre-conditions for notification have been satisfied, the Commission will establish a **case management team** for the dispute. While the constitution of the

team will be determined on a case-by-case basis, it is likely to include two Commission staff (one of whom leads the team, with the other being an officer from the Commission's Legal Group). It may also include a person external to the Commission with experience relevant to the dispute (e.g. mediation experience). The team would be charged with managing the dispute resolution process (as distinct from providing advice on substantive issues). The use of a case management team is a new process to be introduced by the Commission. To an extent, it formalises an approach that the Commission has previously used in arbitrations but more clearly delineates the role of Commission staff in dealing with process issues as distinct from the substantive issues.

That said, the use of a case management team is also intended to improve the strategic focus of both the Commission and the parties in terms of choosing the most appropriate method for resolving the dispute — mediation, expert determination or arbitration by the Commission. Ideally, this should be determined at the outset rather than evolve over the course of the arbitration. This will not be possible in all situations, particularly where new issues arise during the arbitration. In this regard, the use of a case management approach is intended to provide a mechanism for ensuring that the dispute resolution strategy is actively addressed throughout the arbitration.

3.4.1. Notifying other persons of the dispute

The first task for the case management team will be for the leader to notify certain persons of the dispute. This will include the access provider/access seeker (as the case may be) and all persons on the Commission's register for dispute notification (see section 3.1.2.). If a person who is not the access provider or access seeker wishes to become a party, it should send a request to the leader by the specified deadline.

3.4.2. The initial case management meeting

The next step is for the case management team to hold a case management meeting with the access provider and access seeker jointly. At the meeting, the role of the case management team will be to ensure that the nature of the dispute is understood, as well as facilitate consensus between the access provider and access seeker on the dispute resolution process.

Specifically, at the meeting, the case management team will wish to:

- identify the issues in dispute and the respective positions of the access provider and access seeker on those issues;
- identify attempts made by the access provider and access seeker to resolve the dispute, including the use of third party mediation;
- discuss whether the access provider or access seeker have any concerns with the Commission's jurisdiction;
- discuss whether the access provider or access seeker have any concerns with the Commissioner(s) or staff involved in conducting the arbitration;

- discuss the approaches which could be used to resolve the dispute — this could involve mediation by a third party, referral to an expert for determination or arbitration by the Commission, or a mix of these methods;
- consider requests received from persons who wish to become parties to the arbitration, and the views of the access provider and access seeker in this regard;
- discuss whether the Commission is conducting any other arbitrations involving similar issues where it may be useful to hold joint hearings (see section 5.2.) and seek the views of the access provider and access seeker in this regard;
- identify any potential barriers and delays to resolution of the dispute, as well as the skills that are likely to be necessary in order to resolve the dispute.

The meeting will generally be held within two to three weeks of receiving the notification. Prior to the meeting, the Director will send an agenda to the access provider and access seeker, along with a request for them to provide a statement of issues in response to the matters listed on the agenda.

Persons who have applied to become a party to the arbitration usually will be invited to participate in that part of the meeting where their applications are discussed with the parties. Applicants will not, however, be able to attend discussions of other items on the agenda. Given that discussion of their applications may only take 15-30 minutes, applicants will be given the option of participating by telephone rather than appearing in person.

It should be noted that the case management team does not have the authority to decide whether a person should be made a party — this decision must be made by the Commissioner(s) hearing the dispute. Accordingly, the purpose of the discussion at the case management meeting is to identify the parties' views, and distil the relevant issues for consideration by the Commissioner(s).

Following the case management meeting, the leader will prepare a report on the meeting setting out the substance of discussions. The report will be provided to the Commissioner(s) hearing the dispute and copied to the access provider and access seeker. An extract from the report, dealing with joinder applications, will also be copied to the applicants seeking to be joined as parties.

Where the access provider and access seeker agree on the referral of particular issues to mediation or expert determination, this will be reflected in the report. Where they are not able to agree in this regard, the report will set out their views on particular dispute resolution approaches along with any observations or recommendations from the case management team.

3.4.3. Conference with the Commissioner(s)

Once the initial case management meeting has been held, the case management team will usually arrange for the Commissioner(s) hearing the dispute to hold a conference with the access provider and access seeker. The case management meeting report will be the main input for this conference and is intended to enable the Commissioner(s) to

focus on the issues in dispute, with particular reference to the strategy which is to be used to resolve the dispute.

The purpose of the conference will be for the Commissioner(s) to make decisions on process issues arising from the initial case management meeting. Generally, the access provider and access seeker **will not** be invited to provide submissions to the Commission between the time of the initial case management meeting and the conference with the Commissioner(s). This is to ensure that all relevant matters are considered at the case management meeting, with the Commissioner(s) then being in a position to advance those matters at the conference.

Two key matters that the Commissioner(s) will typically address will be the dispute resolution strategy and the identity of the parties to the arbitration.

- Where the access provider and access seeker have been unable to reach agreement on the use of particular dispute resolution approaches, the Commissioner(s) may wish to explore this with them. Particularly, the Commission will want to maximise the opportunity to use alternative dispute resolution methods such as mediation and expert determination where these are likely to lead to more timely dispute resolution.
- Moreover, the Commissioner(s) will wish to ensure that all the persons who will be parties to the arbitration have been identified. Usually, persons who have made a request to become a party will be invited to attend the conference in order to discuss the basis for the request. If the Commission is not in a position to make a decision on particular requests at the time of the conference, then those persons will be excluded from the remainder of the conference, with the Commission subsequently providing its decision in writing.

The conference may be conducted by telephone, closed circuit television, or any other means of communication (**s. 152DB(4)**).

When holding conferences with the parties, the Commission is likely to insist on the presence of a representative of each party who is authorised to make binding decisions.

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

Following the conference, the Commissioner(s) may issue directions to the parties. These directions might deal with the referral of particular matters to mediation or expert determination, processes for resolving issues to be arbitrated by the Commission, and confidentiality.

3.4.4. Determining the appropriate dispute resolution process

Arbitration is not the only method that can be employed to resolve a dispute and may not always be the most efficient means for doing so. Moreover, arbitration involves

imposing an arrangement on the parties which the Commission has determined rather than one for which they have ‘ownership’. Accordingly, the Commission will, where possible, seek to facilitate alternative methods of dispute resolution – including commercial negotiation.¹⁰

New s. 152CLA requires the Commission to have regard to the ‘desirability of access disputes being resolved in a timely manner (including through the use of alternative dispute resolution methods such as mediation and conciliation)’. The Government has stated that the object of this provision is to provide:

... the Commission with the flexibility to decide whether or not ADR [alternative dispute resolution] would be appropriate for the particular dispute at hand, taking into account the relative bargaining positions of the parties, and the issues raised in the dispute. It places a greater onus on the Commission to refer appropriate disputes to ADR, but empowers the Commission to use its discretion in a manner that promotes the timely resolution of disputes.¹¹

Dispute resolution mechanisms other than Commission arbitration include:

- referral of particular issues to mediation by a third party or determination by an expert, as agreed between the parties;
- issuing a direction with a view to facilitating negotiations — a direction may require one party to provide information to the other, or to attend a conciliation or mediation conference (**s. 152BBA and s. 152CT**);
- statutory mediation by the Commission (**s. 152BBC**);
- taking legal action where the dispute appears to involve a contravention of Part IV or Part XIB of the Act, or of the prohibition on hindering access to declared services (**s. 152EF**);
- taking legal action where the dispute appears to involve a contravention of the standard access obligations (**s. 152BB**).

Alternative methods of dispute resolution may (obviously) be used before a dispute has been notified to the Commission. In this regard, the Service Providers Industry Association (SPAN) is currently endeavouring to establish an ‘appropriate dispute resolution process’ for use by industry. This process potentially has significant benefits for the telecommunications industry. That a dispute has been notified to the Commission does not, of itself, indicate that the opportunities for using alternatives to arbitration have been exhausted.

The case management team will seek to facilitate agreement between the parties on the appropriate dispute resolution strategy at the initial case management meeting and at subsequent times throughout the arbitration process, as particular issues are raised. In

¹⁰ One method of facilitating negotiations is to improve the level and quality of information that is publicly available. This issue is currently being considered by the Commission in the course of developing regulatory principals for the public disclosure of ‘record-keeping rule’ information.

¹¹ Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 2001, p. 8.

this regard, two dispute resolution approaches which the parties will be encouraged to actively consider are mediation and expert determination with a view to agreeing to refer particular issues as appropriate.

While the Commission has power to make a direction requiring the parties to attend dispute resolution processes other than arbitration (e.g. mediation) without the consent of the parties, it will usually prefer to do this with their consent. This is because, genuine commitment will in many cases be necessary for the success of particular dispute resolution processes.

3.4.5. Sequencing of dispute resolution processes

Every opportunity will be given to the parties to conclude commercial negotiations, or engage in alternative dispute resolution processes for particular issues where they are likely to be a more efficient means of resolving the dispute.

Where an issue is referred to mediation or expert determination one question that needs to be addressed is whether the Commission should arbitrate that issue in advance of the outcome of the alternative dispute resolution process or whether it should defer consideration of that issue pending the outcome of that process.

For instance, where a dispute concerns both price and non-price issues, and the non-price issues are referred to mediation, the Commission may focus its arbitration efforts on the price issues and await the outcome of the mediation process. In doing so, it may set timeframes for the mediation process. If the mediation process does not resolve the dispute for the non-price issues, the Commission could then commence arbitrating those issues.

In considering whether it should await the outcome of particular alternative dispute resolution processes, relevant factors include:

- the extent to which the parties have previously resolved other issues in dispute;
- the extent to which concurrent arbitration of those issues will hinder resolution of the dispute through the alternative process; and
- the linkage between those issues and others in dispute. For instance, if the resolution of particular issues is necessary before other issues can be resolved, then it may be appropriate for the Commission to conduct a concurrent arbitration of those issues.

If the Commission is of the view that the alternative dispute resolution process is likely to have a reasonable chance of success, it is likely to await the outcome of those processes, particularly where it can arbitrate other issues in dispute in the meantime. Where possible, it will seek to facilitate the alternative dispute resolution processes, and make any necessary directions in order improve the chances of success for that process, as well as minimise the scope for delay should the process prove to be unsuccessful.

That said, the fact that the Commission is arbitrating particular issues should not prevent the parties from seeking to resolve the dispute themselves. In many cases the

Commission expects that commercial negotiation, mediation and other dispute resolution processes will continue in parallel with arbitration processes, and does not view these processes as being mutually exclusive.

3.4.6. Mediation

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

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

These matters would be set out in a ‘resolution contract’ between the parties. It is also open to the Commission to issue a direction under s. 152CT requiring the parties to attend a mediation conference; however, this may be unnecessary in practice if both parties agree to refer particular issues to mediation.

When referring particular issues to mediation in the course of an arbitration, the Commission will generally seek to ensure strict time limits for resolution of these issues. The discipline imposed by such time limits is, in the Commission’s view, more likely to result in timely resolution of these issues. In the event that mediation is not successful, within the time limit, the Commission generally will proceed to make a determination in regard to that issue.

The Commission understands that SPAN is establishing a list of mediators that the parties may wish to use for this purpose. There is, however, no requirement for the parties to use a mediator on that list.

3.4.7. Expert determination

As an alternative to mediation, the parties may agree to refer particular issues to expert determination. This is a consensual process whereby the parties would ask an expert to express a view on particular issues.

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

The referral of matters to expert determination would also be set out in a ‘resolution contract’ between the parties. This contract would set out:

- the issues requiring expert determination;

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

Although the expert determination could not bind the Commission, the Commission would generally act consistently with any such expert determination.

3.5. The ‘substantive’ phase

Where the dispute resolution strategy involves arbitration of particular issues by the Commission, then consideration of those issues progresses to the substantive phase of the arbitration.

In considering the issues, the Commission is not merely choosing between competing points of view expressed by the parties. Rather, it must form its own view as to what is the appropriate outcome in light of the statutory criteria in the Act (s. 152CR). To do this, the Commission will undertake its own analysis and may seek material in addition to that provided by the parties (e.g. expert opinions on particular issues). Consequently, this phase of the arbitration involves active deliberation by the Commission.

3.5.1. Information

In order to consider the issues that are the subject of the arbitration, the Commission will need information (e.g. information concerning service costs and prices). In some cases, it will be possible to identify the type of information required at the outset, whereas in other cases it may be necessary to resolve particular issues before it is clear what information will be required.

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

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

The Commission will generally issue directions specifying the information which it requires from the parties. Where information is likely to be required over the course of the arbitration then the Commission may issue several directions in this regard. Each party will generally be required to provide a copy of the information to all other parties, subject to any requests under s. 152DK (see section 6.3.).

Prior to issuing these directions, the Commission will often (but not always) ask the parties what they perceive as being the information requirements. This may be done in the context of a case management meeting, a conference with the Commissioner(s), or by way of written submission. That said, it is ultimately the Commission that must determine what information the parties are required to provide.

3.5.2. Submissions

In addition to information, the Commission will seek submissions from the parties. A submission sets out the view or conclusion that the party believes the Commission should adopt on particular issues, along with the supporting reasons.

Traditionally, written submission has been the primary means by which the Commission receives argument from the parties. Detailed written submissions are particularly appropriate in disputes involving:

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

That said, there is a tendency for the provision of written submissions to delay the arbitration process particularly where parties provide voluminous submissions or 'tit-for-tat' replies to each other's submissions. Accordingly, in some instances, the Commission may direct the parties that submissions should be provided in summary form only, with the parties then being given the opportunity to supplement them at conferences with Commissioners.

3.5.3. Decisions on key issues

In an arbitration it is often necessary to resolve certain issues before others can be considered.

- For example, where the parties are in dispute about both the nature of the service to be supplied and the price, provision by the Commission of its views on one issue (i.e. the service description) may enable the parties to focus on the material areas of dispute in determining price.
- Similarly, in resolving price issues, the parties may be in dispute about both the pricing model that should be used to determine access prices. By providing its views on the appropriate pricing model, this enables the parties to focus their submissions on the issues relevant to the data that should be used to populate the model.

Where this is the case, the Commission will generally provide the parties with its views on the issue in advance of making the final determination, thus providing a basis for

progressing the arbitration. In these cases, the statements made by the Commission during the substantive phase are intended to represent the decision that the Commission is likely to reach when making its determination.

3.5.4. Case management meetings

During the substantive phase of an arbitration, it may be appropriate to hold one or more case management meetings. While the matters addressed at each case management meeting are likely to depend on the case at hand, meetings may be called in order to:

- identify the information that is relevant to the matters on which the Commission is deliberating, including claims for confidentiality;
- identify and discuss the issues which have subsequently emerged as being in dispute between the parties — these may be issues which have only recently emerged following a decision by the Commission on particular matters in the arbitration (e.g. following a decision on the pricing model);
- receive reports on the progress of matters that were referred to mediation or expert determination; and
- explore the reasons for missing major deadlines.

These meetings are intended to ensure that the arbitration process is kept ‘on track’. In addition, where new issues arise during the substantive phase (for instance, non-price issues that were not in dispute at the time of the notification), case management meetings enable the parties to consider the scope for mediation and expert determination.

3.5.5. Conferences with the Commissioner(s)

As with case management meetings, it may be useful to hold one or more conferences with the Commissioner(s) during the course of the arbitration.

These conferences may be called, for instance, to enable the parties to discuss their views on particular issues with the Commissioner(s) where this is likely to be more efficient than setting these out in written submissions. In such a case, the Commission might require a written summary of submissions, with the parties then supplementing those submissions at the conference.

Also, where significant process issues emerge during the substantive phase of an arbitration, it may be useful for the Commission to hold a conference with the parties. For instance, in building a pricing model, issues might include who should develop the model, and what should be the basic features of the model. It may be more productive to discuss these issues in a conference format rather than through written submissions.

In deciding whether to hold a case management meeting or conference with the Commissioner(s), the Commission will consider, amongst other things, whether there are benefits in getting the parties together to better understand the other’s point of view.

3.5.6. Interim determinations

During this phase, the Commission will often entertain requests for interim determinations, particularly where the process of deliberation is likely to take considerable time. Assessing requests for an interim determination does, however, divert resources from consideration of the substantive issues in dispute and this is something that parties requesting an interim determination should bear in mind. Interim determinations are addressed in section 7.1.

3.6. The ‘determination’ phase

It is the Commission’s general approach to ensure that all relevant factual material is available to the parties prior to making its determination (subject to confidentiality issues — see section 6.3.). Once the Commission has considered this factual material, along with submissions made by the parties, it will proceed to form its view on particular issues, applying the criteria set out in s. 152CR. These criteria are addressed in section 7.2.

The Commission must provide the parties with a copy of the determination and reasons for decision in draft form so that they can comment on any factual matters that they feel have been incorrectly considered by the Commission, as well as the Commission’s analysis (**s. 152CP(4)**). Once the Commission has considered submissions from the parties, it then completes the determination and reasons (**s. 152CP(5)**).

Chapter 4. Procedure for an arbitration

4.1. General

The Act provides flexibility in relation to the conduct of the arbitration. It provides that the Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute and may require that the cases be presented within those periods (**s. 152DB(2)**). Also, the Commission may determine whether evidence and argument should be provided in writing or orally (**s. 152DB(3)**).

The Commission will generally endeavour to hear and determine disputes with as little formality as possible. The process of hearing the dispute is usually conducted by means of written submissions on the matters in dispute, supplemented by response submissions as appropriate. In addition, there may be conferences with Commissioners to address particular issues.

The powers in relation to the conduct of an arbitration are relatively broad. For the purpose of arbitrating an access dispute, the Commission may:

- give a direction in the course of, or for the purposes of, an arbitration hearing;
- hear and determine the arbitration in the absence of a person who has been summoned or served with a notice to appear;
- sit at any place;
- adjourn to any time and place;
- refer any matter to an expert and accept the expert's report as evidence;
- generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the access dispute (**s. 152DC(1) and (2)**); and
- give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration, unless the person has the Commission's permission (**s. 152DC(3)**).

4.1.1. Evidence

The Commission is not a court, nor are arbitrations court proceedings, so the formalities associated with the courtroom may be neither helpful nor appropriate to arbitration hearings.

Specifically, the Commission:

- is not bound by technicalities, legal forms, or rules of evidence;
- must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and
- may inform itself of any matter relevant to the dispute in any way it thinks appropriate (**s. 152DB(1)**).

There are several means by which the Commission may obtain evidence or inform itself of matters relevant to the dispute.

First, it may obtain the evidence or information voluntarily from the parties or from other persons. This includes referring a matter to an expert and receiving the expert's report as evidence (see section 4.2.).

Second, the Commission may use its direction powers (**s. 152DC**) to require one or more parties to provide evidence or information. In general, it will require the evidence or information in documentary form.

Third, the presiding member of the Commission may summon a person to appear before the Commission to give evidence and to produce documents referred to in the summons (**s. 152DD(2)**). The summons must be served on the person by:

- delivering a copy of the summons to the person personally; and
- showing the original summons to the person when the copy is delivered to the person (**reg. 28V(2)**).

The Commission may take evidence on oath or affirmation and, for this purpose, a Commission member may administer an oath or affirmation (**s. 152DD(1)**).

Finally, the Commission may use its general information gathering powers (**s. 155**) to require a person to furnish information, produce documents or give evidence in relation to matters before it in an arbitration.

A person issued with a summons or a notice under s. 155 to appear before the Commission will be usually required to appear before the Commission in the context of a conference with the parties. As noted in section 3.4.3., a full transcript is taken for these conferences. That part of the transcript recording the appearance of the person answering the summons or notice will generally be provided to that person as soon as practicable afterwards.

4.1.2. Representation

Each party to the arbitration may appear in person or be represented by someone else (**s. 152DA**). In many cases, the parties will wish to be represented by legal advisers. However, as a general rule, the Commission would prefer parties to select their representatives bearing in mind that the objectives of the arbitration are to provide a

dispute resolution process that is less formal, more expeditious and less costly than would be the case in legal proceedings.

4.1.3. Privacy

Generally, the arbitration hearing is held in private (**s. 152CZ(1)**); i.e. only the parties themselves, their advisers, and the nominated Commissioners and staff will be present.

There are, however, two exceptions:

- Provided all parties agree, the Commission has the discretion to permit the hearing, or part of it, to be conducted in public (**s. 152CZ(2)**).
- Also, the Commission can decide to jointly hear two or more access disputes involving common issues.¹² This is addressed in section 5.2.

Where the hearing is conducted in private, the presiding member of the Commission may give written directions as to the persons who may be present (**s. 152CZ(3)**). In doing so, the member must have regard to the wishes of the parties and the need for commercial confidentiality (**s. 152CZ(4)**). If necessary, this power may be exercised to exclude certain parties from part of the hearing in order to maintain the commercial confidentiality of information being presented by another party.

Confidentiality issues in relation to information given to the Commission by the parties are addressed in section 6.3.

4.2. Use of experts

In order to better understand particular issues, or analyse factual material, it may be useful for either the Commission or the parties to engage an expert. The types of experts that may be useful include, but are not limited to, engineers, economists, accountants, lawyers, or persons experienced in an industry or trade.

Where the Commission agrees to the use of experts, the parties and experts should note the following requirements. These requirements are based on the *Guidelines for Expert Witness Statements in proceedings in the Federal Court of Australia*.¹³

4.2.1. Expert appointed by a party

Parties should indicate at the earliest possible time the expert witnesses they propose to use. In the interests of an expeditious resolution of the dispute, the Commission will generally seek the parties' consent in limiting each party to no more than two expert witnesses, with only one expert witness in any one field of expertise.

¹² While the provisions of s. 152CZ apply to a joint hearing, the hearing involves parties to other arbitrations.

¹³ The Federal Court is currently reviewing these guidelines and accordingly, it may be appropriate to update the requirements in this section in light of any changes by the Federal Court.

4.2.2. Expert appointed by the Commission

For the purpose of arbitrating an access dispute, the Commission may refer any matter to an expert and receive the expert's report as evidence (s. 152DC(1)(e)). When considering referring a matter to an expert, the Commission will generally seek comments from the parties before making the referral.

4.2.3. The expert's report

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

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

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

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

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

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

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

In general, where a party provides a copy of the expert's report to the Commission, it should provide a copy of the report to all other parties. If, after providing his or her report, the expert changes his or her view on a material matter (e.g. because the expert has read another expert's report, or because the expert receives further information), the change of mind should be communicated without delay to the Commission. See Chapter 6 for a more detailed discussion on the flow of information between the parties.

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

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

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

Where a party wishes to withhold a copy of the expert's report, or particular parts of the report, from other parties on the grounds that the report or parts of it contain confidential commercial information, it should make a request under s. 152DK of the Act.

4.2.4. Experts' conference

In cases where there are several experts' reports, it may be useful to convene a forum¹⁴ for the discussion of relevant issues, particularly where the experts express conflicting conclusions. In such a case, it would be improper for the expert to be given or to accept instructions not to reach agreement with others. If the experts cannot reach agreement, they should seek to specify the reasons for the differences between them.¹⁵ This then assists to further refine the areas of difference between the parties.

4.2.5. Experts' costs

Each party must meet the costs of engaging its experts. The Commission does not have the power to award costs incurred by a party to an arbitration. Where the Commission

¹⁴ This may be a private forum or, where the issues are being addressed publicly as part of an industry-wide process, the forum may be open to members of the public.

¹⁵ For instance, at the conclusion of a forum, each expert may be requested to summarise his or her position, whether he or she agrees with the views expressed by the other experts and if not, what he or she perceives as being the areas of difference between him or her and the other experts.

incurs costs in engaging an expert, it may recover those costs only as part of its general costs charge within the limits specified in the Trade Practices Regulations.

4.3. Improper conduct

4.3.1. Failure to attend or comply with an order of the Commission

If any party fails or refuses:

- to attend a conference; or
- to comply with any requirement of the Commission;

the Commission may nevertheless continue with the conference and ultimately determine the dispute.

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

- fails to attend as required by the summons; or
- fails to appear and report from day to day unless excused, or released from further attendance, by a member of the Commission (**s. 152DE**).

4.3.2. Failure to answer questions or produce documents

It is an offence with a penalty of imprisonment for up to six months, for a person appearing as a witness before the Commission, without reasonable excuse, to:

- refuse or fail to be sworn or to make an affirmation; or
- refuse or fail to answer a question that he/she is required by the Commission to answer; or
- refuse or fail to produce a document that he/she was required to produce by a summons properly served on him/her (**s. 152DF(1)**).

It is a reasonable excuse for an individual to refuse or fail to answer a question or produce a document on the ground that this might tend to incriminate the individual or to expose the individual to a penalty. This definition does not limit what constitutes a reasonable excuse for these purposes (**s. 152DF(2)**).

4.3.3. Intimidation

It is an offence with a penalty of imprisonment for up to 12 months for a person to:

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

because that other person:

- proposes to produce, or has produced, documents to the Commission; or
- proposes to appear, or has appeared, as a witness before the Commission (s. 152DI).

4.3.4. Presentation of false or misleading evidence or documents

It is an offence with a penalty of imprisonment for up to 12 months for a person, appearing before the Commission to give evidence under s. 152DD, to give evidence that to the knowledge of that person is false or misleading in a material particular (s. 152DG).

Similarly, it is an offence with a penalty of imprisonment for up to 12 months for a person, complying with a summons under s. 152DD, to produce a document that to the knowledge of that person is false or misleading in a material particular (s. 152DG). This, however, does not apply to a person who provides a signed written statement accompanying the document:

- stating that the document is, to the knowledge of the person, false or misleading in a material particular; and
- setting out, or referring to, the material particular in which the document is false or misleading (s. 152DH(1) and (2)).

4.3.5. Disturbance of an arbitration hearing

It is an offence with a penalty of imprisonment for up to six months for a person intentionally, in relation to the arbitration of an access dispute, to:

- insult or disturb a member of the Commission in the exercise of the member's powers or the performance of the member's functions or duties; or
- interrupt an arbitration hearing; or
- use insulting language to a member of the Commission exercising powers, or performing functions, as such a member; or
- create a disturbance, or take part in creating or continuing a disturbance, in a place where the Commission is holding an arbitration hearing (s. 152DJ(1)).

4.4. Fees

The Trade Practices Regulations set out particular fees that can be charged in relation to the hearing. These are:

- a notification fee of **\$2,750.00**, inclusive of GST, payable by the person notifying the dispute at the time of notification (**reg. 28T(2) and (3)**);
- a pre-conference fee of **\$10,850.00**, inclusive of GST, payable by the party notifying the dispute (to be paid prior to commencement of the conference); and
- a daily conference fee of **\$4,340.00**, inclusive of GST, payable by the parties in proportions determined by the Commission (**reg. 28W**). At the conference, it likely that the Commission will address apportionment of the conference fee between the parties. In general, the conference fee is split equally among the parties and accordingly, submissions should address whether this practice is (or is not) appropriate in the case at hand.

In some instances, the Commission jointly hears issues set out in two dispute notifications. For instance, where a dispute between the parties exists in respect of both an originating and a terminating service, two separate notifications are required, one for each declared service. However, if the issues for each service are the same, then they are usually heard together. In these situations, the Commission will generally only charge a single pre-conference fee and a single daily conference fee.

Chapter 5. Joining parties, joint hearings and separate processes

In some cases, the parties to a dispute raise issues that are common to one or more other arbitrations, or which are likely to arise in the context of other arbitrations. While there is no requirement for the Commission to adopt a consistent approach to an issue across all arbitrations, some issues are of such significance that it is likely to be desirable to do so.

Pricing is such an example. The price paid for a particular declared service is likely to have a significant effect on the manner in which an access seeker competes with the access provider and other service providers in downstream markets. Consequently, to use different pricing approaches across arbitrations for the same declared service would have the potential to create significant distortions in the competitive process.

Given the private nature of arbitration hearings (see Chapter 4), there are a number of downsides to the Commission considering an approach to a common issue within the context of separate arbitrations:

- Each time the Commission considered the issue in other arbitrations, the Commission would need to cover ‘old ground’. Also, parties to those arbitrations may be unaware of the Commission’s previous thinking in relation to the issue.
- Where parties in an arbitration raise a matter that influenced the Commission’s thinking on the issue, it would be necessary to inform parties to other arbitrations of this development, and then provide them with an opportunity to simultaneously comment on the issue.
- Where an access provider is party to several arbitrations for the same service, it will be privy to submissions from several access seekers, which may be useful in enabling it to develop and refine its arguments. On the other hand, each access seeker in those arbitrations will only receive the access provider’s submission and therefore be unaware of relevant points raised by the other access seekers.

These logistical challenges, while manageable, may result in unnecessary wastage of resources and delays. Consequently, where it is desirable to adopt a consistent approach to a particular issue, it may be preferable to use a single process that provides all interested persons with an opportunity to comment on the issue.

Moreover, because the Commission is required to take the ‘long-term interests of end-users’ into account, in matters of industry-wide significance it may also be desirable to enable persons (such as consumer groups) who are not ordinarily parties to an arbitration to provide submissions to the Commission.

In order to involve other persons in matters common to two or more arbitrations, there would appear to be three basic approaches that the Commission could employ. Two of these have been available since the inception of Part XIC and the third is now available due to recent amendments inserting s. 152DMA in the Act. They are:

- joining the parties to a single arbitration;
- holding a ‘joint hearing’; and
- establishing a separate process ‘outside’ the arbitration.

5.1. Joining parties to an arbitration

One of the first steps in an arbitration is to identify the relevant parties — see section 3.1.

The parties to an arbitration include any other person who applies in writing and who is accepted by the Commission as having a sufficient interest (s. 152CO(d)). Once a person becomes party to an arbitration, that person is privy to all relevant information received by the Commission in the context of the arbitration¹⁶, and is given the opportunity to provide submissions to the Commission on relevant issues.

The Act does not specify the subject matter in which the person must have a sufficient interest. In the context of a Part XIC arbitration, the Commission understands the expression sufficient interest to mean ‘sufficient interest in the determination(s) to be made in the arbitration’. Typically, the determination(s) will create rights and obligations between two persons (namely, a particular access provider and access seeker) in relation to supply of the declared service. Accordingly, the person seeking to become a party will need to demonstrate that it has a sufficient interest in those arrangements.

The expression ‘sufficient interest’ is not defined in the Act. Recently, the Australian Competition Tribunal was called upon to consider the meaning of the phrase in the context of reviewing two arbitration determinations of the Commission.¹⁷ There, the Tribunal drew a distinction between an interest that was ‘direct and immediate’ and an interest which was ‘indirect’. In the Tribunal’s view, an indirect interest could not be characterised as a sufficient interest:

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

¹⁶ This is subject to any decision made by the Commission under s. 152DK, withholding a document (or part of it) from one or more parties — see Chapter 6.

¹⁷ *Telstra Corporation Ltd* [2001] ACompT 1; (2001) ATPR 41-812.

as to allow the intervention by numerous people would frustrate the arbitration process envisaged by Part XIC, including the object of protecting commercially sensitive information to be achieved by requiring hearings to be in private under s 152CZ, and for the arbitration procedure to be expeditious: see s 152DB.¹⁸

The distinction drawn by the Tribunal between direct and indirect effects is one which the Commission has previously used and, in light of the Tribunal's decision, will continue to use in dealing with joinder applications.

On the basis of the Tribunal's decision, it can be said that the precedent effect of a determination, in itself, generally is not enough to provide a sufficient interest. Something more is required. In that instance, the extensive assistance provided by Optus in the cost modelling work, which was a central issue in dispute before the Tribunal, provided a basis for accepting that Optus had a sufficient interest in the matter.¹⁹

In addition, the Commission considers that the interests of a third person may be directly affected if, for instance:

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

While the precedent effect, or commonality of issues may not always provide a basis for joining parties to the same arbitration, in appropriate cases this may provide a basis for holding a joint hearing instead — see section 5.2. This enables the Commission to maintain privacy between the parties for issues that only concern them, while enabling common issues to be considered in a multilateral process.

5.2. Holding a joint hearing

Pursuant to recent amendments, where the Commission is conducting two or more arbitrations involving common issues, it can decide to hold a joint hearing (**s. 152DMA**). The joint hearing enables the common issues to be considered in the context of a single process.

In the explanatory memorandum, the Government explains the distinction between a joint hearing and joining persons as parties to a single arbitration:

¹⁸ Ibid, at [40].

¹⁹ The Tribunal also noted that what may not be a sufficient interest for one purpose may be so for another. In this regard, the Commission had previously refused Optus's request to become a party. The Tribunal noted that the rehearing differed from the original arbitration in that '[u]nlike the arbitration by the Commission, the re-arbitration by the Tribunal will directly raise for consideration the Commission's analysis contained in the Commission's public documents, and is intended, at least by Telstra to set an industry benchmark' (at [39]).

The joint arbitration hearing is a procedural mechanism that allows the Commission to hear matters common to more than one dispute at the same time. It is a joint hearing of matters common to more than one arbitration, not the joining of the parties into a single arbitration. At the end of each joint arbitration hearing the parties will return to their particular arbitration proceedings and the Commission will make an appropriate determination in relation to each particular arbitration.²⁰

It may, for instance, be appropriate to hold a joint hearing where:

- the Commission is developing or implementing a pricing model for several arbitrations;
- there are common technical issues across arbitrations (e.g. issues concerning interconnection and co-location of equipment, or access to subscriber equipment);
- there is an issue about network capacity limitations and how to ration access in accordance with those limitations.

The joint hearing process is set out in s. 152DMA. The Chairperson can make a written determination stating that the Commission is to hold a joint hearing for the disputes specified in the determination (**s. 152DMA(1)**). The Chairperson can only make such a determination if:

- the Commission is arbitrating two or more access disputes at that time;
- one or more matters are common to those disputes; and
- the Chairperson is of the view that holding the joint hearing is likely to result in the disputes (covered by the joint hearing) being resolved in a more efficient and timely manner (**ss. 152DMA(1) and (2)**).

The consent of the parties is not required.

The Commission can have regard to any record of the proceedings of the arbitrations covered by the joint hearing (**s. 152DMA(6)**).

In terms of procedure for the joint hearing:

- The Chairperson is to determine the Commissioner or Commissioners who are to conduct the joint hearing and can give written directions to the Commissioner presiding at the hearing (**ss. 152DMA(3) and (4)**).
- Commissioners conducting the joint hearing have the same powers as those conducting an arbitration hearing (**s. 152DMA(5)**). For instance, the Commission can make directions concerning the filing of submissions and other documents by parties to the joint hearing. And, if one of the parties to the joint hearing wants the Commission to withhold a document from the other parties, it could make a request under s. 152DK (see section 6.3.).

²⁰ Explanatory memorandum for the Trade Practices Amendment (Telecommunications) Bill 2001, p. 21.

Once the joint hearing has reached a conclusion, the Chairperson can give a direction terminating the joint hearing and returning the parties to their particular arbitration proceedings.²¹ The findings of fact made for the purposes of the joint hearing, and the record of proceedings, are incorporated within the arbitrations covered by the joint hearing (s. 152DMA(7)). The Commission would then proceed to finalise each of those arbitrations separately.

5.3. Establishing a separate process

The Commission may have previously considered, or be currently considering, issues relevant to one or more arbitrations in the context of a process separate to the arbitration. For instance, where the Commission has previously assessed pricing of a declared service in the context of an undertaking, or is currently doing so at the time of the arbitration, the Commission has drawn on that assessment process in its determination of pricing for the purposes of the relevant arbitration(s).

Also, the Commission may establish a process to specifically consider a matter common to several arbitrations. For instance, in situations where the Commission is conducting several arbitrations concerning the price of a particular declared service, the Commission has established a process separate to each arbitration whereby pricing principles can be considered with wider input from other access providers and seekers, and the public more generally. The work undertaken during that process is then incorporated within the relevant arbitrations. (For more information on pricing principles, see Appendix 3.)

In each of these cases, the process is typically as follows:

- A discussion paper is released, outlining the matter under consideration, and particular issues that the Commission wishes to explore.
- Submissions are invited from interested persons, including the parties to each arbitration. In general, submissions will be available to anyone upon request, thereby fostering a more robust and open deliberative process. That said, particular information may be treated as confidential, particularly financial information provided in the context of (say) assessing an undertaking.
- A draft report is released by the Commission outlining its initial views on the matter under consideration, and supporting reasoning.
- Further submissions are invited from interested persons.
- A final report is released by the Commission setting out its views on the matter under consideration, and supporting reasoning.

The Commission will then seek submissions from parties in each individual arbitration as to whether the final report should be applied in that arbitration.

²¹ *ibid.*

Chapter 6. Flow of information, procedural fairness and confidentiality

The receipt of information is crucial to the Commission's ability to arbitrate access disputes. The parties often provide information voluntarily to the Commission during the arbitration of an access dispute and the Commission also has an extensive range of statutory powers to compel the provision of information (see Chapter 4).²²

6.1. Procedural fairness

The precise requirements of procedural fairness (or natural justice) will vary and will depend on the circumstances of the access dispute and the requirements in Part XIC. There are, however, two key requirements which have a bearing on the manner in which arbitrations are conducted:

- First, the parties to an arbitration should have a reasonable opportunity to present their case to the Commission.
- Second, the arbitrator should be free from bias or the perception of bias.

6.1.1. Reasonable opportunity to present the case

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

All parties to an access dispute should ensure that copies of all submissions and any other information provided to the Commission are also provided to all other parties to the access dispute. While the Commission is empowered to withhold confidential information from a party, this is a power which the Commission is likely to use sparingly, and only after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information (see section 6.3.).

In the Commission's view, the requirements of procedural fairness may apply not only to consideration of the substantive issues in dispute, but also to certain process issues. For instance, where the Commission is considering establishing a process, or modifying a previously established process, concerning the manner in which the parties present their cases, it will generally seek the views of the parties where it is practical and appropriate to do so.

²² For further information on the flow of information within the Commission and the Commission's information gathering powers see ACCC, *Collection and Use of Information*, October 2000.

6.1.2. Bias

Another element of procedural fairness is the question of bias or the perception of bias. During the preliminary phase of an arbitration, generally the parties will be advised of any relevant interests or involvement in related matters of both the Commissioner(s) arbitrating the dispute, and of staff assisting Commissioner(s). If a party has any objection to a particular Commissioner or staff member taking part in the arbitration, this is the time to raise the matter (see section 3.4.2.).

6.2. Confidentiality between the parties

Arbitration hearings are to be held in private unless the parties otherwise agree (s. 152CZ). While this is a statutory requirement, the courts have noted that privacy is an ordinary incident of an arbitration and can be important to the efficacy of an arbitration.²³

Courts have, however, drawn a distinction between the private nature of an arbitration hearing and the question of confidentiality.²⁴ In the absence of a specific contractual or statutory provision, there is no general obligation of confidentiality in respect of information used in the conduct of an arbitration.

Parliament has given the Commission extensive arbitration powers, including the power to give a direction for the purposes of an arbitration hearing and to do all such things as are necessary or expedient for the speedy hearing and determination of the dispute (ss. 152DC(1)(a) and (f)). In addition, the Commission can order a person not to divulge specified information given to that person in the course of the arbitration without the Commission's consent (s. 152DC(3)). Contravention of these directions or orders is a criminal offence (s. 152DC(4)).

The Commission relies on these powers and, as standard practice in arbitrations, gives a confidentiality direction and order to the parties (including their employees, contractors and agents). The direction provides that they must not use or disclose any information obtained from the other party or the Commission in the course of the arbitration (other than information in the public domain) except to the extent that the use or disclosure is:

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

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

²³ *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

²⁴ *ibid.*

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

As with the confidentiality arrangements in place during the arbitration, the confidentiality arrangements after finalisation of an arbitration generally will provide for limited exceptions to enable disclosure of information:

- with consent;
- when required by law; or
- that is in the public domain.

In addition, the confidentiality arrangements will ordinarily enable the parties to disclose that they are subject to restrictions on the disclosure of information and explain the effect of any restrictions.

6.3. Withholding confidential information from a party and the requirements of s. 152DK

A statutory framework for resolving any disputes in relation to confidential commercial information has been included in Part XIC. Sub-section 152DK(4) gives the Commission a discretion to withhold a document, or part of a document, from another party to the dispute.

There are a number of circumstances in which the Commission may receive confidential commercial information during the course of an access dispute.

- The Commission may direct a party to provide certain information in relation to a particular access dispute. A party may, in response to the Commission's request, indicate that the request relates to information in a document which is confidential commercial information and which it does not want to provide to the other party.
- A party's written submission to the Commission on a range of matters in dispute may include particular items which that party considers are confidential commercial information, and which it does not want to provide to the other party.
- A party's oral or written submission to the Commission may require technical clarification. In order to clarify these issues, a party may need to refer to other information considered to be confidential.

Where a request is made in respect of information that is initially provided to the Commission orally, the following process generally applies:

- Prior to providing the information, the party must advise the Commission that it wishes to make a request under s. 152DK. Commission staff will then arrange for

the information to be provided during a private transcribed meeting with one or more Commissioners and Commission staff.

- The party will be provided with a full transcript after the meeting and can identify parts of the transcript that it believes contain confidential commercial information.
- The party can then make a request for confidentiality in relation to identified items in the transcript.

6.3.1. Matters relevant to consideration of a s. 152DK request

The Commission's starting point is generally that by disclosing information to all parties it is likely to facilitate a more informed decision making process. By not disclosing relevant information to all parties, the Commission cannot test the veracity of that information. However, the requirements of procedural fairness are not absolute and can be modified by the need for confidentiality.

The Commission notes that courts have generally balanced three factors when considering whether it is appropriate to allow access to information. In cases where a party has demonstrated that information is in fact confidential commercial information, the Commission will have regard to these three factors when assessing a request under s. 152DK:

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

The Commission will need to make an assessment on a case-by-case basis. However, based on the situations in which the Commission has considered requests under s. 152DK, the following is provided by way of guidance.

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

With respect to information about the costs of commercial operations, generally it will be appropriate to draw a distinction between current (or contemporaneous) information and past (or 'out of date') information. In the Commission's view, it is less likely that disclosure of past information would be likely to cause harm. Also, in general, it will be appropriate to draw a distinction between situations in which the cost information concerns operations that are similar to those conducted by the party from whom the

document is to be withheld. If the information does not concern competing operations, disclosure would be generally less likely to cause harm.

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

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

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

6.3.2. Procedure for a request in relation to s. 152DK

Section 152DK requires the Commission to consider a request for confidentiality, any objection to the request for confidentiality and any further submissions in relation to the request for confidentiality. The Commission must consider each document that is said to contain confidential commercial information individually under s. 152DK(4). Accordingly, a separate request must be made for each document provided to the Commission that contains confidential commercial information.

The Commission anticipates that there will normally be the following procedural steps:

- A party to the access dispute wanting to make a request for confidentiality should inform the Commission in writing that a specified part of a document contains confidential commercial information and request that the Commission not give a copy of the document to a particular party (**s. 152DK(1)**). The party making the request should also provide a submission describing the information as comprehensively as possible, setting out the grounds for its request and outlining the form of the proposed decision sought from the Commission.
- When the Commission has received a request, it must inform any other parties of the request and the general nature of the matters to which the part of the document relates (**s. 152DK(2)**). In general, this will involve providing those parties with a copy of the requesting party's submission setting out the grounds for the request. However, where the party making the request has not described the information in sufficient detail, the Commission will supplement the description so that the other

parties are able to adequately consider the request. The Commission will ask these parties whether there is any objection to the Commission complying with the request. The Commission will endeavour to do this **within seven days** of receiving the confidentiality request.

- If there is no objection to the request for confidentiality, the Commission will usually decide that the information be dealt with in accordance with the request.
- If there is an objection, a party objecting should inform the Commission in writing and provide a submission setting out reasons for the objection, along with the form of any proposed decision sought from the Commission. This should usually occur **within seven days** of receiving the notice of the request for confidentiality from the Commission. The party objecting to confidentiality should also provide a copy of the submission to other parties, including the party making the request.
- If there is an objection to the request for confidentiality, the Commission **may** ask the party making the request to reply to issues raised by the objection. This reply submission should usually be provided to the Commission (and copied to the other party) **within seven days** of the Commission seeking a reply submission.

6.3.3. Decision of the Commission in relation to requests under s. 152DK

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

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

Should the Commission not be satisfied that a party has produced confidential commercial information, it will decide that the specified part of the document must be disclosed to both parties, on the basis that the usual confidentiality direction and order offers sufficient protection.

Should the Commission be satisfied that a party has produced confidential commercial information, the Commission may decide to direct a modified form of disclosure. The types of disclosure that the Commission could direct include:

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

Where the Commission orders disclosure subject to confidentiality undertakings, then the persons who are entitled to receive the documents would be expected to execute a confidentiality undertaking as will be set out in Appendix 5. It is envisaged that such an agreement may be one of the outcomes of the SPAN alternative dispute resolution process. Accordingly, the Commission has decided not to publish a draft agreement at this time, but to await the outcome of the SPAN process.

Also, where the Commission decides that limited disclosure is appropriate, it can order a person not to communicate to anyone else specified information that was given to the person in the course of the arbitration unless the person has the Commission's consent (s. 152DC(3)). In practice, however, the confidentiality undertaking is likely to be sufficient.

6.4. Disclosure of information by the Commission

6.4.1. The existence of an access dispute

Upon being notified of a dispute, the Commission will send a copy of the notification to the access provider or access seeker (as the case may be).

In addition, the Commission will send an e-mail to all persons registered with the Commission for the purposes of dispute notification. The e-mail will identify the access provider, access seeker and service, as well as provide a brief description of the dispute.

Also, the Commission proposes to establish a register of access arbitrations. This will be maintained on its web-site and will identify the parties and services for each arbitration, along with a brief description of the matters covered by the arbitration.

6.4.2. Giving information to parties in another arbitration

The Commission may receive information relevant to an arbitration:

- in the context of other arbitrations (e.g. other arbitrations concerning the same service); or
- in the performance of other responsibilities (e.g. the assessment of an undertaking for the same services or other declared services).

Recent amendments to the Act provide that the Commission is able to give parties to one arbitration information and documents provided to the Commission in the course of another arbitration (s. 152DBA(1)). The Commission may only do so if it considers that this would be likely to result in the arbitration being conducted in a more efficient and timely manner (s. 152DBA(2)).

The object of this provision is to facilitate the conduct of an arbitration in a more efficient and timely manner. In particular, this provision will:

... be useful where there are separate arbitrations in relation to a common service, either because one of the arbitrations has already been completed or hearings have already commenced. The amendment would also apply in situations where there are not common services, but information derived from one arbitration is nevertheless relevant to another arbitration.²⁵

To determine whether giving the parties information and documents from another arbitration would be likely to result in the present arbitration being conducted in a **more** efficient and timely manner, the Commission will generally consider the alternative scenario. This alternative scenario could involve the Commission issuing a direction or summons to the person who originally provided the information and documents.

Where the Commission is of the view that giving the parties information and documents from another arbitration would be more timely and efficient, it nevertheless has a discretion to decide not to do so if there are grounds for not adopting this course of action. In this regard, the Commission must have regard to:

- any objections from the person who provided the information or documents to the Commission;
- confidentiality requirements currently applying to the information or document (e.g. pursuant to an order or direction under s. 152DC or a decision under s. 152DK);
- any other matter that the Commission considers relevant.

If the Commission provides information and documents to the parties, the Commission can make directions and orders under s. 152DC limiting the use and disclosure of the information and documents by those parties.

6.4.3. Information received by the Commission outside arbitrations

As noted in section 6.4.2., the Commission may receive information relevant to an arbitration in the context of performing other (non-arbitration) responsibilities. This could occur, for example, in the context of assessing an undertaking.

If the Commission wishes to use this information in the arbitration context, then the appropriate course of action will usually be to provide it to the parties. Before doing so, however, the Commission would normally advise the person who provided the information and seek that person's views on providing the information to the parties.

If the information provider objects, the Commission would need to consider whether there are any restrictions on disclosure without the provider's consent. In the event that the Commission is restricted in its use of the information, then it would need to

²⁵ Explanatory memorandum for the Trade Practices Amendment (Telecommunications) Bill 2001, p. 9.

consider whether to use its information gathering powers (e.g. the summons power — s. 152DD) in order to acquire the information in the context of the arbitration at hand.

6.4.4. Commission conducting joint arbitration hearings

Where the Commission conducts a joint hearing pursuant to s. 152DMA (see Chapter 5), it is able to have regard to the record of proceedings for any arbitration covered by the joint hearing (**s. 152DMA(6)**). In these circumstances, the Commission may consider it appropriate to disclose information to all parties to the joint hearing. To do this, the Commission would usually follow the process set out in s. 152DBA (see section 6.4.2.).

6.4.5. Commission publication of determination and reasons for a determination

The Commission must maintain a register setting out the following information for each arbitration determination:

- the names of the parties;
- the declared service; and
- the date on which the determination was made (**s. 152EA**).

The register is a public register and persons wanting certified true copies of documents on the register can make a request in person or in writing (**reg. 28Z(2)**).²⁶

In addition, the Commission is able to publish (in whole or part) an arbitration determination and the reasons for making the determination. (**s. 152CRA(1)**).

This provision is intended to assist in the establishment of market conditions such that:

... [it] would help guide future commercial negotiations between access seekers and access providers. By providing certainty with regards to the likely outcome of [a] Commission arbitration, the parties are more likely to find a mutually acceptable price. This will reduce the need for arbitration, allow disputes to be resolved quickly, and is consistent with the philosophy of the access regime to promote commercial negotiation.²⁷

Before publishing the determination and reasons, the Commission will provide each party with a copy of the determination and reasons marked-up so as to show those parts which the Commission intends to publish. Each party will then have 14 days in which to provide a written submission identifying any parts which should not be published along with reasons for that view.

²⁶ A fee applies; it is \$10 for certification plus \$1 for each page copied.

²⁷ Explanatory memorandum for the Trade Practices Amendment (Telecommunications) Bill 2001, p. 10.

In deciding whether to publish a determination and reasons (or part of them), the Commission must have regard to the following matters:

- any objections from the parties;
- whether publication would be likely to promote competition in markets for listed carriage services²⁸;
- whether publication would be likely to facilitate the operation of Part XIC; and
- any other matter that the Commission considers relevant.

Publication of a determination and the accompanying reasons is usually likely to enable other access seekers to estimate, with greater certainty, the likely outcome of an arbitration. In the Commission's experience with Part XIC, negotiations are more likely to be successful where the outcome of an arbitration can be predicted within relatively narrow boundaries. Thus publication of a determination might be expected to result in access arrangements being settled in a more timely manner, through negotiation rather than by means of arbitration. Given that Part XIC is concerned with enabling access to declared services, measures that enable access arrangements to be settled in a more timely manner seem likely to facilitate the operation of Part XIC.

Moreover, publication of a determination can promote competition where it will assist in establishing conditions or an environment for improving competition.²⁹ For instance, where there are difficulties in concluding access arrangements due to the lack of cost or price information and this is affecting competition in downstream markets, then publication of a determination setting out this information may assist in establishing conditions for improved competition in those markets.

These matters will generally indicate that the determination and the accompanying reasons should be published. However, where the objections of the parties establish grounds for not publishing the determination and reasons (or particular parts of those documents) then the Commission will consider whether those grounds outweigh the benefits from publication in that particular case.

6.4.6. Commission using information obtained during an arbitration in relation to other Commission statutory activities

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

- Commission staff cannot make improper use of information.³⁰

²⁸ The expression 'listed carriage service' is defined in s. 16 of the Telecommunications Act. In essence, it is a service involving the carriage of communications within Australia or between Australia and another country.

²⁹ See *Sydney International Airport* [2000] ACompT 1, at [106]; (2000) ATPR 41-754.

³⁰ See Public Service Regulations 1999 reg. 2.1, *Crimes Act 1914* s. 70 and the *Privacy Act 1988*.

- Where information provided under a statutory power is confidential, the Commission must comply with any specific statutory restrictions on disclosure.

The Commission recognises that it is critical to adopt sound information handling practice in order to maintain the confidence of all parties to an access dispute. However, the Commission takes the view that if it has legitimately obtained information using its powers for one purpose, and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other statutory function.³¹

6.4.7. Specific obligations on the Commission to disclose information

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

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

As a general rule, before complying with such requirements, the Commission will first seek to advise a party who has produced confidential information. The Commission will not, however, seek to consult with parties in relation to the release of non-confidential information. That said, in circumstances where a party has not requested confidentiality, the Commission may consider that the information may be confidential in nature and, accordingly, will seek to clarify this with the provider.

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

³¹ For further information see ACCC, *Collection and Use of Information*, October 2000.

Chapter 7. Determinations and termination of an arbitration

7.1. Interim determinations

At any time prior to issuing the final determination, the Commission has the power to issue an interim determination. Such an interim determination does not terminate an arbitration, nor does it relieve the Commission of its duty to make a final determination (s. 152CPA(2)). It merely enables the Commission to establish terms and conditions for access whilst it conducts an arbitration.

The Commission sees interim determinations as an important tool for the smooth operation of the access regime, as they will help ensure access seekers attain timely access to declared services. This is because access providers may see arbitration disputes as a means to delay access as arbitration processes can be lengthy due to the need for detailed analysis of the views presented to the Commission. As noted by the Government, when introducing the Bill for s. 152CPA:

Because an access provider has a superior negotiating position and the most to lose from providing access, it may have an incentive to obstruct commercial negotiation and create an access dispute. To avoid the undesirable consequences of a dispute, access seekers may enter into agreements which are not optimal. A delay in the provision of access or in the variation of existing terms and conditions of access may disadvantage an access seeker and the public interest in the development of competition.³²

7.1.1. Relevant matters

In deciding whether to make an interim determination, the Commission **may** choose to consider any matters it thinks relevant, including those that it must consider when making a final determination (s. 152CR(3)). However, the Commission does not have a duty to consider whether to take into account matters that it must consider when making a final determination (s. 152CR(4)).

Interim determinations, therefore, enable the Commission to strike a balance between conducting a thorough examination of the matters the Commission must take into account when making a final determination and ensuring timely access to those services that are the subject of arbitration disputes.

Generally, the Commission has found it useful to focus on two matters:

- whether the Commission is satisfied that it has sufficient information on which to make an interim determination; and

³² Supplementary explanatory memorandum for Telecommunications Legislation Amendment Bill 1998, p. 24.

- whether the Commission is satisfied that, in all the circumstances, it is appropriate to make an interim determination.

Sufficient information

In terms of sufficient information, the Commission considers that it does not need to have all the information necessary for making the final determination, nor for it to have reached a view on all outstanding issues between the parties. To set the information threshold at that level would seem to unnecessarily restrict the Commission's ability to make interim determinations. Rather, the Commission considers that the information should provide a reasonable basis for the terms and conditions set out in the interim determination.

Appropriate in all the circumstances

In considering whether an interim determination is appropriate in all the circumstances, the Commission has had regard to a range of matters, depending on the circumstances of the arbitration. They have included:

- the nature of any contractual arrangements between the parties;
- whether backdating a final determination would provide an adequate alternative to making an interim determination;
- the likely impact of an interim determination on end-users (this matter is related to the previous one — see below); and
- the timing of the final determination.

Where the parties have entered into a contractual arrangement for the declared service, making an interim determination may have the effect of over-riding that arrangement. In the Commission's view, its arbitration powers, including its power to make an interim determination, are not limited (expressly or by implication) where there is a contractual arrangement between the parties. This is because:

- Part XIC specifically envisages the Commission conducting an arbitration when there is an existing contract between the parties (see s. 152AG(3), s. 152CS(1)(d), and also reg. 28T).
- In such a situation, the arbitration would be conducted on the basis that the parties are no longer in agreement with the terms and conditions of the contract. For instance, one party may have sought a variation to those terms and conditions, and the other party may have refused.

An important objective of the Part XIC regime, however, is to encourage commercial negotiation between the parties where possible. Accordingly, where the parties have entered into contractual arrangement specifically in lieu of an interim arrangement, the Commission is likely to be reluctant to over-ride this arrangement. That said, there may be a case for making an interim determination which varies that arrangement where it can be demonstrated that there has been a material change of circumstances. Also, in some instances, there may be a case for making an interim determination if the

terms of the arrangement reflect a significant disparity in bargaining position of the parties which is unlikely to be ameliorated through the making of a final determination in the near future.

In some instances, backdating may provide an alternative to making an interim determination. Where, however, backdating would be a poor substitute, there is a stronger case for making an interim determination. For instance, if an interim determination enables the access price to be reduced towards the price that the Commission is likely to set in a final determination, this can assist in improving the conditions for competition. In the event that these price changes flow through to end-users, this enables the benefits to be realised more quickly than would otherwise be the case. Although backdating a final determination could compensate a party that has paid higher prices during the period until a final determination is made, it would not have the effect of promoting more appropriate outcomes during that period.

Where the making of a final determination is to occur within a relatively short period of time (say two to three months), then there is likely to be a weaker case for making an interim determination. Also, in such a case, the making of an interim determination uses resources that would otherwise be used to finalise the arbitration, thereby potentially delaying finalisation of the arbitration, and this is something that the parties should bear in mind.

7.1.2. Draft of the interim determination

Before making an interim determination, the Commission must issue a draft to the parties. The Commission also provides the parties with a draft statement of reasons; this enables them to focus their submissions on issues that the Commission has (so far) considered relevant but does not limit the submissions that the parties may make.

7.1.3. Duration of an interim determination

An interim determination has effect on the date specified in the determination (s. 152CPA(4)). An expiry date is specified in the interim determination, and this must not be longer than 12 months (s. 152CPA(5)).

The determination remains in force unless one of the following events occurs:

- a final determination is made and takes effect;
- the interim determination is revoked by the Commission either on request by the parties or at the Commission's discretion; or
- the notification of the dispute is withdrawn (s. 152CPA(6) to (9)).

The Commission **must** revoke an interim determination if requested to do so by the parties to the determination (s. 152CPA(7)). This leaves open the opportunity for the parties to a dispute to negotiate their own alternative interim commercial agreements pending a final determination. This is particularly important as the Commission will generally base its interim determination on less information than it will use in arriving at its final determination. Parties to a dispute should not be discouraged from reaching such agreements of their own volition.

7.1.4. Interim determinations when final determinations are stayed

The power to make an interim determination also covers the situation where a final determination is being reviewed by the Australian Competition Tribunal.

If the Australian Competition Tribunal makes an order to stay or otherwise affect the operation or implementation of the final determination, and an interim determination was in force immediately before the final determination took effect, the interim determination will remain in force until whichever is earliest of:

- the end of any period for the operation of the order that is specified in the order; or
- the finalisation of the review; or
- the revocation of the interim determination (**ss. 152DN(5)**).

If an interim determination was not in force immediately before the final determination took effect, the Commission can make an interim determination relating to the access dispute while a Tribunal order is in place. Such an interim determination will cease to have effect whichever is the earliest of:

- the end of the period for the operation of the order; or
- the finalisation of the review; or
- the revocation of the interim determination (**ss 152DN(6)**).

However, the Tribunal also has the power to make, vary or revoke an interim determination (**s. 152DO(4)**).

7.2. Final determinations

The arbitration continues until a final determination is made, unless terminated or the notification withdrawn prior to that time. The determination may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute (**s. 152CP(2)**).

The legislation lists several examples of matters with which the determination may deal. The determination may:

- require the carrier or provider to provide access to the declared service by the access seeker;
- require the access seeker to accept, and pay for, access to the declared service;
- specify the terms and conditions on which the carrier or provider is to comply with any or all of the standard access obligations applicable to the carrier or provider;
- specify any other terms and conditions of the access seeker's access to the declared service;

- require a party to extend or enhance the capability of a facility by means of which the declared service is supplied;
- specify the extent to which the determination overrides an earlier determination relating to access to the declared service by the access seeker (s. 152CP(2)).

7.2.1. Matters that the Commission must take into account

The Commission must take the following matters into account in making a final determination:

- whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of the access provider and its investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct costs of providing access to the declared service;
- the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network, or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network, or a facility (s. 152CR(1)).

The Commission may additionally take into account any other matters that it thinks are relevant in making a determination (s. 152CR(2)).

Set out below is a summary of the key phrases and words used in the above matters. While, in general, these phrases and words have not been the subject of judicial interpretation, in order to have regard to those matters it is necessary for the Commission to form a view as to what they mean.

Long-term interests of end-users

The Commission has published a guideline explaining what it understands is meant by the phrase ‘long-term interests of end-users’ in the context of its declaration responsibilities.³³ A similar interpretation would seem to be appropriate in the context of making a determination.

In the Commission’s view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of goods and services at

³³ Australian Competition and Consumer Commission, *Telecommunications services — Declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999.

lower prices, higher quality, or towards the provision of greater diversity of goods and services.³⁴

To consider the likely impact of particular terms and conditions in a determination, the Commission must have regard to the extent to which the determination is likely to result in the achievement of the following objectives:

- the objective of promoting competition in markets for carriage services and services supplied by means of carriage services;
- for carriage services involving communications between end-users, the objective of achieving any-to-any connectivity; and
- the objective of encouraging the economically efficient use of, and economically efficient investment in, infrastructure by which carriage services and services provided by means of carriage services are supplied (**s. 152AB(2)**).

Declared services tend to be inputs used in the supply of downstream telecommunications (and other) services to end-users. Access to these inputs, or improving the terms and conditions on which they are supplied, can promote competition in markets for these downstream services by creating conditions conducive to the entry of efficient firms. The Tribunal has stated that promoting competition involves ‘creating conditions or [an] environment for improving competition’.³⁵

Any-to-any connectivity is the ability of end-users to communicate with each other, irrespective of the network to which they are connected. It benefits end-users by allowing end-users of one network to communicate with end-users of other networks.

In the Commission’s view, the phrase ‘economically efficient use of, and the economically efficient investment in, the infrastructure’ refers to the concept of economic efficiency. This concept consists of three components:

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

³⁴ *ibid*, at pp. 32—33.

³⁵ Sydney International Airport [2000] ACompT 1, at [106]; (2000) ATPR 41-754.

Legitimate business interests and direct costs

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

This does not, however, extend to receiving compensation for loss of any ‘monopoly profits’ that occurs as a result of increased competition. In this regard, the Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996 states:

... the references here to the ‘legitimate’ business interests of the carrier or carriage service provider and to the ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.³⁶

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

Interests of persons who have rights to use the declared service

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

While s. 152CR(1)(c) directs the Commission’s attention to those persons who already have rights to use the declared service in question, the Commission can also consider the interests of persons who may wish to use that service. Where appropriate, the interests of these persons may be considered to be ‘any other relevant consideration’.

Economically efficient operation of a carriage service, etc

In the Commission’s view, the phrase ‘economically efficient operation’ embodies the concept of economic efficiency set out above. It would not appear to be limited to the operation of carriage services, networks and facilities by the access provider supplying the declared service, but would seem to include those operated by others (e.g. service providers using the declared service).

To consider this matter in the context of a determination, the Commission may consider whether particular terms and conditions enable a carriage service, telecommunications

³⁶ p. 44.

network or facility to be operated in an efficient manner. This may involve, for example, examining whether they allow for the access provider supplying the declared service to recover the efficient costs of operating and maintaining the infrastructure used to supply the declared service under consideration.

In general, there is likely to be considerable overlap between the matters that the Commission takes into account in considering the long-term interests of end-users and its consideration of this matter.³⁷

The operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

An access price should not lead to arrangements between access providers and access seekers that will encourage the unsafe or unreliable operation of a carriage service, telecommunications network or facility. This criterion may often be more relevant to consideration of non-price terms and conditions.

7.2.2. Restrictions on access determinations

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

- preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time the dispute was notified;
- preventing the access provider from obtaining a sufficient amount of the service to be able to meet its reasonably anticipated requirements, measured at the time the dispute was notified;
- preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient level of access to the declared service, to be able to meet the person's actual requirements;
- depriving any person of a protected contractual right;³⁸
- resulting in the access seeker becoming the owner (or one of the owners) of any part of a facility without the consent of the owner of the facility;
- requiring a party (other than the access seeker) to bear some or all of the costs of extending or enhancing the capability of the facility, or maintaining extensions or enhancements to the facility;

³⁷ Relevantly, in considering whether particular terms and conditions will promote the long-term interests of end-users, the Commission must have regard to their likely impact on the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.

³⁸ A protected contractual right is a right under a contract that was in force at the beginning of 13 September 1996 (s. 152CQ(9)).

- requiring the access provider to provide the access seeker with access to a declared service if there are reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider provides, or is reasonably likely to provide that access;
- requiring the access provider to provide the access seeker with access to a declared service if there are reasonable grounds to believe that the access seeker would fail, in connection with that access, to protect the integrity of a telecommunications network or to protect the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility (s. 152CQ(1)).

The first four of these restrictions do not apply to the requirements and rights of the access seeker and the access provider when the Commission is making a determination in arbitration of an access dispute relating to an earlier determination of an access dispute between the access seeker and the access provider (s. 152CQ(2)).

7.2.3. Compensation for deprivation of a pre-notification right

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

- to pay to the second person such amount (if any) as the Commission considers is fair compensation for the deprivation; and
- to reimburse the carrier or provider and the Commonwealth for any compensation that the access provider or the Commonwealth agrees, or is required by a court order, to pay the second person as compensation for the deprivation (s. 152CQ(8)).

7.2.4. Process

Before making a determination, the Commission must give a draft determination to the parties (s. 152CP(4)). A draft determination will usually set out the Commission’s proposed decision. In addition, the Commission provides a draft statement of reasons.

Parties will generally be given 14 days to comment on the draft and a further seven days to reply to each other’s responses. Once a draft determination is given to the parties, there may be an additional opportunity to allow commercial negotiations to resume.

Once a final determination has been made by the Commission and given to the parties, the process of arbitration ends.

7.3. Backdating

Section 152DNA provides that the provisions of a final determination may be expressed to take effect prior to the date on which the determination takes effect. Backdating is limited to the date on which the parties commenced negotiations with a view to agreeing on the terms and conditions of access (s. 152DNA(2)).

7.3.1. Rationale for backdating

Where an access seeker notifies the Commission of an access dispute, the access provider is automatically a party to the arbitration and therefore, effectively compelled to participate in the arbitration. If the access provider has a lot to lose, this can create incentives for it to delay progress of the arbitration. The objective of the backdating provisions is to reduce the incentives for delay.

As noted in the Explanatory Memorandum these provisions are intended to:

...encourage commercial agreement and co-operation during access arbitrations by removing incentives for delay and to ensure a considered and reasonable outcome is ultimately applied to the interim period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.³⁹

7.3.2. Approach to backdating

Given that the backdating provision is intended to improve incentives, in general the Commission will be inclined to backdate determinations. That said, each case must be considered on its merits. In particular, the Commission is likely to consider whether the manner in which the parties have conducted themselves prior to and during the arbitration provides grounds for not backdating the determination.

For instance, if prior to notification of the dispute, the access provider offered the access seeker a price and non-price terms and conditions that are substantially similar to those determined by the Commission and the access seeker refused, then it may not be appropriate to backdate. Consideration of 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 commencement of negotiations.

To minimise incentives for delay during the arbitration, at the outset the Commission may indicate whether it is likely to backdate the final determination. That said, the Commission 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 Act provides flexibility as to nature of the retrospective 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 appropriate 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 Commission is likely to seek submissions from the parties at the appropriate time.

³⁹ Supplementary Explanatory Memorandum for the Telecommunications Legislation Amendment Bill 1998, p. 33.

7.3.3. From when?

Backdating is limited to the date on which negotiations commenced.

The parties will need to demonstrate the date on which negotiations commenced, and this is a matter over which there may be disagreement. For instance, the parties may have differing views as to the purpose of a particular meeting — one party may assert that the meeting was concerned with negotiations for a new contract, whereas the other may assert it was concerned with reviewing administrative matters. To minimise the scope for disagreement as to the date on which negotiations commenced, the parties should consider evidencing this in writing.

Section 152DNA(2) establishes a maximum period of retrospectivity. This does not, however, mean that it will always be appropriate to adopt that maximum period, and the appropriate period of retrospectivity is likely to depend on the circumstances of the case. For instance, if the negotiations are about a future contract for supply of the declared service, then it may be appropriate for backdating to be limited to the date on which that contract was intended to commence (e.g. immediately after expiry of the current contract).

7.3.4. Interest

In the Commission's view, for backdating to effectively remove the incentive for delay, the backdated payment should include an interest component.

For instance, suppose that the Commission were to determine that a particular declared service should have been supplied over the previous twelve months at a price that is 1 cent per minute lower than the price at which it was supplied, and that 1 billion minutes of the service were supplied over that 12 month period. If the backdated payment were calculated by multiplying 1 billion minutes by 1 cent per minute, then the back-payment would be \$10 million. However, \$10 million is worth less now than it was 12 months ago due to inflation. Moreover, the access provider would have had the benefit of using the \$10 million over that time — not awarding interest would effectively constitute a 'free' loan.

Consequently, where the Commission expresses a determination to take effect on an earlier date, it will generally also provide for the payment of interest on the backdated amount. In its view, this would appear to be within the scope of s. 152CP(2) which provides that the determination can deal with any matter relating to access, particularly when considered in the context of the backdating provisions (s. 152DNA). The appropriate interest rate, and the basis for setting that rate, are matters that would be considered in the light of submissions at the relevant time.

7.3.5. Impact of interim determination on backdating

Where backdating is a satisfactory alternative to an interim determination, this may provide a reason for not granting an interim determination. That said, the fact that an interim determination has been made does not mean that backdating is ineffective and is therefore unnecessary. The interim determination helps to ensure that more appropriate outcomes 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.

7.3.6. 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 (lower) charge set by the Commission. That said, 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 nevertheless likely to be appropriate in order to reduce any incentives that an access seeker has to delay progression of the arbitration.

7.4. Effect of determination

7.4.1. When does it come into effect?

A final determination has effect 21 days after the determination is made (**s. 152DN(1)**).

A party can apply to the Australian Competition Tribunal for review of the Commission’s final determination. The Tribunal may then make orders staying or otherwise affecting the operation or implementation of the final determination, as it sees appropriate, to secure the effectiveness of the review (**s. 152DN(2)**). In such a case, the operation of any interim determination may re-commence (see section 7.1.4.).

If the determination is appealed to the Federal Court, the Court cannot make orders staying or otherwise affecting the operation or implementation of the Commission’s determination pending finalisation of the appeal (**s. 152DNB**).

7.4.2. Duration of determination

Although not a requirement of the legislation, the Commission would usually expect to limit the duration of a determination to a certain period. A provision of a determination may be expressed to terminate on a specified date (**s. 152DNA(4)**).

7.4.3. Enforcement of determination

If any party to the determination believes that another party has engaged, is engaging, or is proposing to engage, in conduct that constitutes a contravention of the determination, the first party may apply to the Federal Court for all or any of the following orders:

- an order granting an injunction on such terms as the Court thinks appropriate, restraining the other party from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other party to do that thing;
- an order directing the other party to compensate the applicant for loss or damage suffered as a result of the contravention;
- any other order that the Court thinks appropriate (**s. 152DU(1)**).

7.4.4. Variation of determination

Any party to a determination may apply to the Commission for a variation of the determination. Upon receiving an application for a variation, the Commission must notify and seek the consent of all other parties to the arbitration. If any party objects to the variation, the variation must not be made (**s. 152DT(1)**). If the parties cannot agree on a variation, a new access dispute may be notified.

Before making a variation, the Commission must take into account the same matters as for an arbitration (**s. 152DT(2)**).

7.5. Termination without a determination

7.5.1. Termination by a party

Subject to the consent of the other party, or the Commission, the party who has notified an access dispute will be able to withdraw the notification any time before the Commission makes a final determination (**s. 152CN(1) and (2)**). Once a notification is withdrawn, the Commission is precluded from subsequently making an interim or final determination (**s. 152CN(3)**).

A notice of withdrawal must be made in writing to the Commission and takes effect when it is received (**reg. 28U(3)**). The notice must include the following information:

- the name of the person withdrawing the notification;
- whether the person withdrawing the notification is the access provider, or the access seeker;
- a short description of the access dispute to which the notification relates;
- a reference to the relevant paragraph or sub-paragraph of s. 152CN under which the person claims to be authorised to withdraw the notification (**reg. 28U(1)(b)**).

At the time of giving the notice of withdrawal to the Commission, the person giving the notice must also give a copy to any other party to the arbitration. Also, the Commission must give a copy of the withdrawal to each person to whom it notified the dispute (**reg. 28U(4)**).

The Commission may issue a media release advising that the arbitration has been terminated.

7.5.2. Termination by the Commission

The Commission may terminate an arbitration at any time without making a determination, if it is satisfied that:

- the notification of the dispute was vexatious;
- the subject matter of the dispute is trivial, misconceived or lacking in substance;

- a party – in practice the notifier of the dispute – to the arbitration of the dispute has not engaged in negotiations in good faith; or
- access to the declared service should continue to be governed by an existing contract between the carrier or provider and the access seeker (**s. 152CS(1)**).

In the case of a dispute notified under s. 152CM(2), the Commission may terminate the arbitration if it thinks the arbitration should be terminated on the grounds that:

- the arbitration is not likely to make a significant contribution to competition in a market (whether or not in Australia); or
- the access seeker's carriage service or content service is not of significant social and/or economic importance (**s. 152CS(1)(e)**).

In addition, if the dispute is about varying an existing determination, the Commission may terminate the arbitration if it thinks that there is no sufficient reason why the existing determination should not continue to have effect in its present form (**s. 152CS(2)**).

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

Chapter 8. Review

8.1. Review by the Australian Competition Tribunal

Within 21 days of the Commission's final determination, a party to the determination may apply in writing to the Australian Competition Tribunal for review of the determination (s. 152DO(1) and (2)). 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 (s. 152DO(3) and (4)).

The material which the Tribunal may consider during a re-arbitration is limited to:

- any information given, documents produced or evidence given to the Commission in connection with the making of the final determination; and
- any other information that was referred to in the Commission's reasons for making the determination (s. 152DOA).

The member of the Tribunal presiding at the review may require the Commission to give information and other assistance and to make reports as specified for the purposes of the review (s. 152DO(5)).

Parties to the arbitration may appeal Tribunal decisions to the Federal Court on questions of law (s. 152DQ(1)). The Federal Court cannot stay the operation or implementation of the Tribunal's decision pending finalisation of the appeal (s. 152DPA).

8.2. Review by the Federal Court

A person who is adversely affected by a decision of the Commission may be able to seek reasons for that decision and a review of the legality of the decision by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. An application for review must be made within 28 days of the making of a decision or the furnishing of a statement of reasons for the decision, or within such period as the Federal Court allows. While the Court has jurisdiction to review the decision, it may, in its discretion, decline to exercise jurisdiction where the applicant is entitled to seek review by the Australian Competition Tribunal.

Appendix 1. List of declared services

Service	Date decision made	Process for decision making
Declared services		
Domestic PSTN originating and terminating access	June 1997	Deeming
Domestic GSM originating and terminating access ^a	June 1997	Deeming
Domestic AMPS originating and terminating access	June 1997	Deeming
Domestic transmission capacity service ^{b c}	June 1997	Deeming
Digital data access service ^c	June 1997	Deeming
Conditioned local loop service	June 1997	Deeming
AMPS to GSM diversion service	June 1997	Deeming
Broadcasting access service	June 1997	Deeming
ISDN originating and terminating service	November 1998	TAF referred to ACCC
Unconditioned local loop service	August 1999	TAF referred to ACCC
Local carriage service	August 1999	TAF referred to ACCC
Local PSTN originating and terminating service	August 1999	ACCC initiated public inquiry
Analogue subscription television (pay TV) broadcast carriage service	September 1999	ACCC initiated public inquiry
Services currently under consideration for declaration/ exemption/ revocation/ variation		
Line Sharing	Draft Decision April 2002	ACCC initiated public inquiry
Local carriage service	Being considered	Telstra initiated exemption
Domestic AMPS originating and terminating access	Being considered	ACCC initiated revocation
AMPS to GSM diversion service	Being considered	ACCC initiated revocation

^a Service varied in April 2002.

^b Service varied in May 2001.

^c Service varied in November 1998.

Appendix 2. Notification of access disputes

A2.1. Covering letter

<Date>

General Manager
Telecommunications Group
Australian Competition and Consumer Commission
GPO Box 520J
Melbourne Vic 3001

Dear Sir/ Madam

I enclose notification of access disputes with <Name of company> under <Part XIC of the *Trade Practices Act 1974 / Telecommunications Act 1997*>.

A cheque for dispute notification fees is enclosed.

Yours faithfully

<Signatory>

Attached: Notification

A2.2. Notification

NOTIFICATION OF AN ACCESS DISPUTE UNDER <PART XIC OF THE TRADE PRACTICES ACT 1974 / TELECOMMUNICATIONS ACT 1997>

Between

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

Contact: <name and position of contact>

Telephone: <contact's phone number>; Facsimile: <contact's fax number>;
E-mail: <e-mail address>

And

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

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

Telephone: <contact's phone number – if known >; Facsimile: <contact's fax number – if known >; E-mail: <e-mail address – if known>

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

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

Notifier's address for delivery of documents

<specify street address>

Details of the declared service, and applicable standard access obligations, to which the dispute relates

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

Dispute notified under sub-section 152CM(1) or (2)?

<specify the sub-section under which the dispute is notified>

Details of the dispute and dispute resolution efforts

<specify in detail the nature of the dispute>

Note — The information included in the notification should establish that the access seeker is **unable to agree** with the access provider about the terms and conditions on which the access provider is to comply with applicable standard access obligations, or about one or more aspects of access to the declared service. Relevant details may include:

- whether the access provider is currently supplying the declared service to the access seeker, and if so, a description of the supply arrangements (e.g. contract date and term, key terms and conditions);
- whether the dispute is about varying those arrangements or about future arrangements;
- the terms and conditions, or aspects of access, on which the access seeker and access provider are unable to agree, including details of the most recent offers put forward by each of them;
- efforts that have been made to reach agreement. This should include history of negotiations and indicate whether the parties have used dispute resolution mechanisms (e.g. conciliation, mediation). A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful; and
- the terms and conditions of supply, or aspects of access, on which the access seeker and access provider have agreed.

Signature of person notifying dispute

<name of signatory and position>

<date>

Appendix 3. Pricing principles

A3.1. What are pricing principles?

Determination of the price for a declared service usually involves the following steps:

- determination of the basic approach to be used to calculate the price; i.e. the pricing principles;
- use of the pricing principles to derive the formulae which can be used to calculate the price;
- populating the formula with data (inputs) in order to derive the price.

Each of these steps involve a number of complex issues; breaking the pricing process into definable steps assists management of the pricing task.

For instance, if the pricing principles provide that the price should be equal to efficient costs, the second step involves deriving the formulae to determine that cost. This would involve multiple spreadsheets containing formulae for determining the volume of capital that an efficient operator would use to satisfy demand, the cost of that capital, and the unit cost. The formula is generally referred to as a ‘cost model’. The third step involves entering the relevant data into the cost model (e.g. volume of demand, cost of capital, and so on) in order to derive a unit cost.

Determination of pricing principles is, therefore, the first step in calculation of the price. All subsequent steps flow from the pricing principles that are selected. For instance, if the pricing principles provided that the price should equal ‘retail price minus retail costs’ the formula would be totally different to that used to calculate a price equal to efficient costs, as would the data that is needed to populate the formula.

A3.2. Legislative requirements

The Commission has previously determined pricing principles as the need arose in the context of assessing an undertaking or arbitrating an access dispute. However, under amendments introduced by the *Trade Practices Amendment (Telecommunications) Act 2001*, s. 152AQA requires the Commission to determine pricing principles relating to the price of a declared service at the time that, or as soon as practicable after, the service is declared or the declaration is varied. The pricing principles determination may also include price related terms and conditions.

The purpose of determining and publishing pricing principles for specific services is to inform industry, government and other interested parties on the principles that are likely to guide the Commission when considering an access dispute or assessing an undertaking in relation to the relevant declared service. An indication of the approach the Commission will take in arbitrating an access dispute for a declared service is important, as it may assist parties in commercial negotiations by narrowing the

boundaries for those negotiations. For the same reason, pricing principles may also be a useful tool in alternative dispute resolution processes.

A3.3. Timing

The determination of pricing principles is to occur at the same time, or as soon as practicable after, a service is declared or a declared service is varied. The Commission is conscious of the need for reaching timely decisions in declaring services and determining pricing principles for those services and will therefore generally seek to determine pricing principles in the course of declaring a service. However, in the event that further discussion and debate is needed to determine the appropriate pricing principles, then the Commission may proceed with declaration and determine the pricing principles as soon as practicable thereafter.

Before making a pricing principles determination, s. 152AQA(4) provides that the Commission must:

- publish a draft of the determination and invite submissions on the draft determination; and
- consider any submissions that are received on the draft determination.

The pricing principles determination is to be published in such manner as the Commission considers appropriate. In general, this will involve making the document available from the Commission's web-site and advising persons likely to be interested in it accordingly.

A3.4. Criteria

Because pricing principles guide the Commission in the decision it must make in an arbitration, or in the assessment of an undertaking, it is useful to consider the pricing principles against the criteria for those decisions. The criteria are broadly similar and involve considering:

- whether the terms and conditions promote the long-term interests of end-users;
- the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or carriage service provider's investment in facilities used to supply the declared service concerned;
- the interests of persons who have rights to use the declared service concerned;
- the direct costs of providing access to the declared service concerned;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility (**s. 152AH(1)**).

See Chapter 7 for a discussion of particular criteria.

In addition, the Commission may have regard to any other matters that it considers relevant (s. 152AH(2)).

A3.5. Pricing principles determined by the Commission

To date, the Commission has determined and published pricing principles (and in some cases, indicative prices) for four specific telecommunications services and a generic set of pricing principles:

Service Type	Date
Final (or revised) reports on pricing principles or methodologies	
Local carriage service	April 2002
Unconditioned local loop services	April 2002
PSTN originating and terminating access for non-dominant or smaller fixed networks	January 2002
GSM termination	July 2001
General Pricing Principles	July 1997

The reports on pricing principles for the GSM, PSTN, LCS and ULLS services are available from the Commission's web site: <http://www.accc.gov.au/telco/access.html>

Appendix 4. Telecommunications Act Arbitrations

In addition to its responsibilities for the arbitration of access disputes under Part XIC of the Act, the Commission is also responsible, as the arbitrator of ‘last resort’, for the arbitration of disputes under various provisions of the *Telecommunications Act 1997* (the Telecommunications Act).

The relevant provisions of the Telecommunications Act and the matters with which they deal are:

- sub-section 335(5) relating to supply of carriage services for defence purposes;
- sub-section 351(3) relating to provision of pre-selection;
- sub-section 462(3) relating to provision of number portability;
- sub-clause 18(2), Schedule 1 relating to access to supplementary facilities;
- sub-clause 27(2), Schedule 1 relating to access to network information;
- sub-clause 29(5), Schedule 1 relating to consultation on re-configuration of networks;
- sub-clause 36(4), Schedule 1 relating to access to telecommunications transmission towers and underground facilities;
- sub-clause 5(3), Schedule 2 relating to provision of operator services; and
- sub-clause 8(3), Schedule 2 relating to provision of directory assistance services.

Where the Commission is required to arbitrate a dispute under the Telecommunications Act, the *Telecommunications (Arbitration) Regulations 1997* (the Telecommunications Regulations) apply. The Telecommunications Regulations establish the framework of rules and procedures in relation to the notification of disputes to the Commission and the conduct of an arbitration by the Commission.

The Telecommunications Regulations are based on relevant provisions of the Act, particularly Division 8 of Part XIC, and the Trade Practices Regulations with certain modifications, for the purposes of the arbitration of disputes under the Telecommunications Act. Accordingly, the procedures for conducting an arbitration under the Telecommunications Act will generally be the same as for the conduct of an arbitration under Part XIC of the Act. Any departures from this are discussed below.

Generally, under the Telecommunications Act, the Telecommunications Regulations do not apply where parties agree to appoint an arbitrator other than the Commission or to resolve their dispute by means other than arbitration.

A4.1. Commencement of an arbitration

When notifying a dispute under the Telecommunications Act, the notifying party should provide the Commission with the same information that is required when notifying a dispute under Part XIC of the Act. However, the notification should be clearly marked both in the covering letter and the notification of dispute with the details of which provision of the Telecommunications Act it is concerned.

A4.2. The arbitration process

A4.2.1. The parties

As is the case for arbitration under Part XIC of the Act, upon notification of a dispute the Commission will send an e-mail to all persons registered with the Commission for the purposes of dispute notification. The e-mail will identify the service provider, service seeker and the service, as well as a brief description of the dispute (**reg. 3**).

Requirements governing who can be a party are the same as those for arbitrations under Part XIC of the Act which is described in section 3.1.1. of this guide (**reg. 5**).

A4.2.2. Who arbitrates the dispute?

The Commission is to be constituted by one member or three members of the Commission. If the Chairperson of the Commission is a member, he or she must preside at the arbitration. If the Chairperson is not a member, he or she must nominate a member to preside (**reg. 6**).

A4.2.3. Procedure

The procedures are substantially the same as those for arbitrations under Part XIC of the Act, which is described in section 4.1. of this guide.

A4.2.4. Use of experts

The Commission proposes to impose the same requirements for experts reports as those applying to arbitrations under Part XIC of the Act, which is described in section 4.2. of this guide.

A4.2.5. Improper conduct

Improper conduct in the course of arbitration under the Telecommunications Act is generally in accordance with the description in section 4.3. of this guide. However, the penalty for improper conduct in the course of arbitration under the Telecommunications Act is 10 penalty units. (**regs. 21-26**).

A4.2.6. Fees

The Commission may charge the parties for its costs incurred in conducting an arbitration and may apportion the amount of the charge between the parties. (**reg. 15**).

A4.3. Joining parties, joint hearings and separate processes

A4.3.1. Joining parties to an arbitration

As is the case with arbitration under the Act, the parties to an arbitration may include any other person who applies in writing and who is accepted by the Commission as having a sufficient interest (**reg. 5(d)**).

A4.3.2. Holding a joint hearing

Unlike arbitration under Part XIC the Act, there is no provision in the Telecommunications Regulations for holding joint hearings where common issues are present in two or more arbitrations notified under the Telecommunications Act.

A4.3.3. Establishing a separate process

If the Commission were to consider establishing a separate process for dealing with particular issues with multipartite dimensions, it is likely that it would adopt the process set out in section 5.3. of this guide.

A4.4. Flow of information, procedural fairness and confidentiality

A4.4.1. Procedural fairness

The approach which the Commission adopts is the same as for arbitrations under Part XIC of the Act, described in section 6.1. of this guide.

A4.4.2. Confidentiality between the parties

The approach which the Commission adopts is the same as for arbitrations under Part XIC of the Act, described in section 6.2. of this guide.

A4.4.3. Withholding confidential information from a party

The approach which the Commission adopts is the same as for arbitrations under Part XIC of the Act, described in section 6.3. of this guide (**reg. 13**).

A4.4.4. Disclosure of information by the Commission

Other provisions for the disclosure of information by the Commission that are discussed in section 6.4. of this guide (such as giving information to parties in another arbitration, conducting joint hearings, and the publication of determinations) do not apply to arbitrations under the Telecommunications Act.

A4.5. Determinations and termination of an arbitration

A4.5.1. Final determination

Unless notice of the dispute is withdrawn (**reg. 4**), or is terminated (**reg. 10**), the Commission must make a written determination that includes its reasons for the determination, and must give a copy of the determination to each party. Before making a determination, the Commission must give a draft determination to the parties (**reg. 9**).

Unlike arbitrations under Part XIC of the Act, in an arbitration notified under the Telecommunications Act, there is no provision for interim determinations or for backdating a determination.

A4.5.2. Termination of the arbitration

Termination by a party

As is the case with an arbitration under the Act, in certain circumstances the parties may wish to withdraw the notification of dispute, thus ending the arbitration process before the Commission has given the parties a final determination. However the circumstances under which the notification of dispute can be withdrawn are not the same under the Telecommunications Act as they are under Part XIC of the Act.

Under the Telecommunications Regulations, a notice of dispute can be withdrawn in the following manner:

- if the service seeker notified the dispute, the service seeker may withdraw notice of the dispute before the Commission makes a determination (**reg. 4(1)(a)**);
- if the service provider notified the dispute:
 - the service provider may withdraw notice of the dispute before the Commission makes a determination (**reg. 4(1)(b)(i)**); and
 - the service seeker may withdraw notice of the dispute after the Commission issues a draft determination, but before it makes its final determination (**reg. 4(1)(b)(ii)**).

If the service provider gave notice of a dispute about a variation of a determination, the service seeker cannot withdraw notice of the dispute (**reg. 4(2)**).

Other provisions such as the form of the withdrawal notice, and when it will take effect are the same as under Part XIC of the Act, as described in section 7.5. of this guide.

Termination by the Commission

As for arbitration under Part XIC of the Act (which is described in section 7.5.2. of this guide), the Commission may terminate an arbitration under the Telecommunications Act if it is satisfied that:

- the notification of the dispute was vexatious;

- the subject matter of the dispute is trivial, misconceived or lacking in substance;
- a party – in practice the notifier of the dispute – to the arbitration of the dispute has not engaged in negotiations in good faith; or
- access to the declared service should continue to be governed by an existing contract between the carrier or provider and the access seeker (**reg. 10**).

A4.6. Review

A4.6.1. Review by the Australian Competition Tribunal

Unlike an arbitration conducted under Part XIC of the Act, the Commission's final determination in an arbitration under the Telecommunications Act is not subject to review by the Australian Competition Tribunal.

A4.6.2. Review by the Federal Court

As for arbitration under Part XIC of the Act (see section 8.2. of this guide), a party may be able to seek review by the Federal Court of a decision by the Commission.

Appendix 5. Confidentiality undertaking

The Commission intends to introduce a 'standard form' confidentiality agreement for use in the arbitration of telecommunications disputes. However, it is envisaged that such an agreement may be one of the outcomes of the SPAN alternative dispute resolution process. Accordingly, the Commission has decided not to publish a draft agreement at this time, but to await the outcome of the SPAN process.