Resolution of telecommunications access disputes

— a guide

May 2003
(revised)

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

RESOLUTION OF TELECOMMUNICATIONS ACCESS DISPUTES

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

Contents

Abbreviations and glossary

Act	*Trade Practices Act 1974* (Cwth)
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.
Access undertaking	An ordinary access undertaking or a special access undertaking. These terms are defined in ss. 152AC, 152BS(1) and 152CBA(2) of the Act. An ordinary access undertaking concerns a declared service and sets out the terms and conditions on which the access provider will comply with the applicable standard access obligations in s. 152AR of the Act. A special access undertaking concerns a service that is not declared. The undertaking provides that in the event that the carrier or carriage service provider supplies the service, it agrees to be bound by the standard access obligations and (in relation to those obligations) will comply with the terms and conditions set out in the undertaking.
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 (that is, 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	*Telecommunications Act 1997* (Cwth)
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 when the service provider requesting access and the access provider cannot agree on the terms and conditions of access.

This guide outlines the arbitration provisions of Part XIC and how the Commission administers them. It also explains how the Commission administers similar provisions under the *Telecommunications Act 1997*.

Special features distinguish telecommunications arbitrations from typical commercial arbitrations, making them more complex. Telecommunications arbitrations for declared services are often characterised by a lack of mutual commercial incentive to reach settlement, particularly when 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 decision by applying 'public interest' criteria rather than standard commercial criteria.

To improve the efficiency and effectiveness of its arbitration processes, the Commission engaged Phillips Fox in conjunction with Resolve Advisors to review these arbitration processes. This guide incorporates the review team's recommendations 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, including changes to the *Trade Practices Act 1974* effected by the *Telecommunications Competition Act 2002*.

The Commission proposes to make changes to its processes for dispute notification, handling of confidentiality claims, format and content of experts' reports, the holding of joint hearings and publication of arbitration determinations. It also proposes 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.

The guide was released in draft form before it was finalised, for industry comment. Subsequently, the first edition of the guide was published in October 2002. Following passage of the *Telecommunications Competition Act 2002*, the guide was revised to reflect the changes made by that legislation.

The revised guide represents the Commission's current views on the application of the provisions in Part XIC. These views may evolve over time, particularly as the Commission applies these provisions to a variety of practical situations or as the provisions are amended.

Accordingly, this guide will be under constant review by the Commission with updated editions or an addendum being issued from time to time. Normally the Commission releases a draft update for industry comment. Parties will also be able to comment on the Commission's processes at the completion of any arbitration in which they have been involved.

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 long distance 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 buy network services, and other associated services, from each other. Given that these carriers are also competing for the custom of end-users, disputes may arise about the terms and conditions on which those services are supplied. 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 for disputes concerning the supply of services that have been 'declared' by the Commission. In addition, under the *Telecommunications Act 1997* the Commission acts as the arbitrator of 'last resort' in resolving disputes concerning matters such as pre-selection and number portability.

The dispute resolution framework established by Part XIC of the Act reflects a negotiate/arbitrate model. If 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, especially if the access provider has no commercial incentive to provide access to the access seeker. If the parties cannot negotiate access arrangements or use consensual dispute resolution processes, the Commission can step in, if requested, and establish the terms and conditions that will govern their relationship.

This guide explains how the Commission generally exercises its dispute resolution powers under both statutes. The guide is mainly concerned with the Commission's powers under Part XIC of the Act, and reflects its experiences in the administration of those powers. The Telecommunications Act dispute resolution powers are addressed in appendix 4.

Included in this guide are the guidelines that the Commission is required to formulate and publish in relation to the backdating of arbitration determinations **(s. 152DNA(8))** and in relation to the deferral of an arbitration when considering an access undertaking that relates to the same matter **(s. 152CLA(5))**. These guidelines can be found at sections 7.4.2.-7.4.6. and 9.2.2. respectively.

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

The Commission proposes to review regularly the effectiveness of its arbitration processes. This will include seeking feedback from the parties at the conclusion of each arbitration to determine the processes that worked well and the areas that need further improvement.

This is the third telecommunications guideline released by the Commission and complements the other two guidelines concerning the Commission's 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

Generally a firm is not legally obliged to supply a service to another firm. However, 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

Section 152AL of the Act deals with the declaration of services. It provides that the Commission may declare a service if, following a public inquiry into the declaration of the service, it is satisfied that the declaration would promote the long-term interests of end-users **(s. 152AL(3))**.

The declaration instrument must specify an expiry date for the declaration that is not more than five years after the declaration was made **(ss. 152ALA(1) and (2))**.[1] The expiry date can be extended for a period of not more than five years, and more than one extension is possible **(s. 152ALA(4))**. Where a final arbitration determination specifies an expiry date that occurs after expiry of the declaration, the determination remains in force despite expiry of the declaration **(s. 152DNC)**, although parties to the determination can no longer notify an access dispute in relation to the service (**s. 152DNC(3))**.

Where a carrier or carriage service provider give a special access undertaking to the Commission, which the Commission subsequently accepts, the service specified in the undertaking is deemed to be a declared service once the carrier or carriage service provider commences supply of the service **(s. 152AL(7))**. This ensures that the

[1] The requirement for the declaration instrument to specify an expiry date was introduced by the *Telecommunications Competition Act 2002*. Declarations made before the commencement of that Act did not specify an expiry date. However, the Commission must take all reasonable steps to ensure that, by 18 June 2003, those declarations include an expiry date which occurs on or before 18 June 2008 — see *Telecommunications Competition Act 2002*, Schedule 2, item 15.

standard access obligations and associated machinery in Part XIC apply to services covered by special access undertakings.[2]

Declarations can be varied or revoked. To do so, the Commission must hold a public inquiry and be satisfied that the variation or revocation promotes the long-term interests of end-users **(s. 152AO)**. The Commission is not required to hold a public inquiry, however, where the variation is of a minor nature or where the revocation concerns a service of minor importance **(ss. 152AO(1A) and (3)).**

1.1.2. Declaration criteria

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

- Promoting competition in certain markets[3], including but not limited to removing obstacles to end-users gaining access to services;
- Achieving any-to-any connectivity in relation to carriage services involving communication between end-users; and
- Encouraging the economically efficient use of, and 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. Appendix 1 sets out a full list of services declared as at 28 February 2003 including those that were deemed to be declared in June 1997 as a transitional measure (and which 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 on 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 on request to enable a service provider to be supplied with the service;

---

[2] Supplementary Explanatory Memorandum for the Telecommunications Competition Bill 2002, p. 10.

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

- to provide billing information in connection with matters associated with supply of the service on 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 example, 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, 152AT, 152ASA and 152ATA)**.

The details describing 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 undertaking[4]; or
- an arbitration determination, made by the Commission.

In practice, a combination of these routes may be used for 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 various avenues available to resolve their dispute. One is to notify the Commission of an access dispute, with a view to initiating arbitration procedures set out in Part XIC of the Act.

Arbitration is a process where each party puts its case to the Commission. The Commission then makes a determination that binds the parties. In doing so, however, the Commission is not merely choosing between the parties' positions but must consider the issues in terms of the 'public interest' criteria set out in s. 152CR of the Act. The Commission may therefore 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.

---

[4] While an access 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))**.

Chapters two to nine of this guide deal with arbitration by the Commission.

- Chapter two explains how arbitrations begin and how the Commission may be able to assist parties before a dispute is notified.
- Chapters three and four explain how the Commission conducts arbitrations. Chapter three describes the structural characteristics of an arbitration, and chapter four deals with 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. It provides 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.
- Chapter eight provides information about the review of arbitration determinations.
- Chapter nine addresses the interaction of arbitrations and access undertakings that relate to the same matter.

Chapter 2. Commencing an arbitration—dispute notification

Under Part XIC the arbitration process begins once the Commission is notified that an access dispute exists. However, the Commission may also help the negotiating parties before a dispute is notified. For example, it may be able to assist the parties in their commercial negotiations by improving the level and quality of information that is publicly available.[5] Moreover, the Commission can issue procedural directions in negotiations, and Commission staff may be able to provide an 'advisory view' as to the Commission's likely approach to a particular issue.

2.1. Procedural orders

The Commission may, if requested in writing (by either the access seeker or access provider), give a party a written procedural direction requiring the party to do, or refrain from doing, a specific act or thing relating to the conduct of negotiations **(s. 152BBA(2))**. The types of directions that may be given include:

- requiring a party to give relevant information to the other party;
- requiring a party to carry out research or investigations in order to obtain relevant information;
- requiring a party not to impose unreasonable procedural conditions on the party's participation in negotiations;
- requiring a party to respond in writing to the other party's proposal or request in relation to the time and place of a meeting;
- requiring a party, or a representative of a party, to attend a mediation conference; or
- requiring a party, or a representative of a party, to attend a conciliation conference **(s. 152BBA(3))**.

2.2. Advisory opinion

The Commission has observed that negotiations are more likely to be successful when the scope of issues in dispute is reduced. Accordingly, in some circumstances, it may be possible for Commission staff to help parties that are in commercial negotiations by providing an informal, and non-binding, advisory opinion about the Commission's likely approach to, or view on, a particular issue.

---

[5] 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.

If seeking such a view, the parties should approach the Commission jointly, in writing, setting out the issue in dispute and each party's position. Commission staff will then meet with the parties to explain informally the Commission's likely approach to the issue. It should be noted that the advisory view will:

- be the view of staff, not the Commission;
- not be binding on the Commission;
- not preclude either party from notifying a dispute; and
- not prevent the Commission from arbitrating a dispute.

In some circumstances, the Commission may not be able to provide a view. Whether or not, and how quickly, a view can be provided will depend on several factors, including the extent to which the Commission has considered the particular (or a similar) issue in the past.

When considering a request for an opinion, the Commission will also consider the extent to which its approach to the particular issue may have implications that extend beyond the particular bilateral negotiations in which it has arisen. In such a case, it will generally seek to make the advisory opinion available to the wider industry participants. In doing so, it will usually seek the views of the parties raising the issue.

2.3. Pre-conditions for notification

Either the person receiving or seeking access to a declared service (that is, the access seeker), or the carrier or carriage service provider supplying or proposing to supply the service (that is, 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)).**[6]

---

[6] 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

2.4. Form of notification

The Trade Practices Regulations **(reg. 28T)** set out several matters that must be addressed in the notification. While no notification form is prescribed by the regulations, a suggested format is set out in appendix 2. Although compliance with the suggested format is not mandatory the Commission would prefer that the format is followed to ensure all necessary information is provided.

Once it receives 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 then 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 (see section 3.4.2.).

2.5. 'Unable to agree'

In particular instances, the Commission has considered rejecting a dispute notification because one of the pre-conditions for notification has not been met—the 'unable to agree' requirement.

Subsections 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 when 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 demonstrating 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. However, even if the 'unable to agree' threshold is satisfied, the Commission can 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 (see section 7.6.2.).

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:

---

access. For instance, if the parties disagree about whether the capacity of a facility should be enhanced 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.

- 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 (for example, where the other party has not responded to the request or proposal within a reasonable time).

When there is insufficient information in the notification for the Commission to be satisfied that the access seeker cannot 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, can potentially delay the start of arbitration. Accordingly, the Commission suggests that the notifier ensures that all relevant information is included in the notification.

2.6. 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 cases where the Commission has considered such contractual provisions, it formed the view that, in those particular cases, the conditions in s. 152CM for a valid notification had been satisfied. However, it encourages alternative means of resolving disputes. Consequently, when the parties have not used a dispute resolution process established by contract, the Commission is likely to ask them why not and whether that process would help resolve the dispute.

The Commission would not want such mechanisms to be used to draw out and delay resolution of a dispute. However, if the contractual dispute resolution process is more expeditious the Commission can direct a party under s. 152CT to attend a conciliation or mediation conference in accordance with the process set out in the contract. It is also open to the Commission to terminate the arbitration under s. 152CS (see section 7.6.2.)

Chapter 3. Structure of an arbitration

When 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, by telephone or video conference) are referred to as 'conferences'.

3.1. Notification of parties

On 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 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)**.[7]

There is no automatic right for persons not party to an arbitration to make submissions. However, sometimes 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.[8] However, 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.[9]

---

[7] The concept of 'sufficient interest' is addressed in chapter 5.

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

[9] 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.

To identify other people to whom the Commission must provide written notice of a dispute, the Commission has often issued a media release about the dispute. The Commission also asks the access provider and access seeker whether there are others who may have an interest in the dispute, with a view to notifying them in writing of the dispute.

The Commission is currently establishing a new process for notifying people who may wish to become parties to an arbitration. The Commission will maintain an electronic register of people who wish to be notified of disputes. When the Commission receives notice of a dispute, it will send an email to each of those people identifying the access provider, access seeker and service, as well as providing a brief description of the nature of the dispute. It will be the responsibility of the people registered to ensure that their details are properly maintained. Persons wanting to be informed when disputes are notified to the Commission should send an email requesting this to the telecommunications group (telecommunications.group@accc.gov.au) providing their name, position, email address and a contact phone number.

Generally, applications to become a party should be made to the Commission within five working days. The Commission is conscious of the need to balance allowing sufficient time for parties to consider and, if necessary, obtain advice on whether they should be applying to become a party, against the desirability of commencing the arbitration in a timely manner.

The Commission will consider applications to become a party received after the indicative timeframe of five working days but encourages people to indicate their intentions within the timeframe.

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 members[10] nominated in writing by the Chairperson **(s. 152CV)**. If the Chairperson is one of those members, the Chairperson must preside at the arbitration. If not, the Chairperson must nominate a member to preside at the arbitration **(s. 152CW)**.

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

When 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 arbitration, it informs all parties.

3.2.2. Decisions of the Commission

When 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 arbitration, then the Chairperson must either:

- direct that the Commission be constituted to finish 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 **(ss. 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 one related to the arbitration dispute **(s. 152CV(2))**.

However, the Commissioners arbitrating a dispute try to disclose to the parties any relevant interests and their involvement in related matters to assess whether the parties have any objections to a particular Commissioner constituting the Commission for an arbitration.

3.2.5. Commission staff

While Commissioners are responsible for making decisions in the arbitration, they are supported by staff drawn from the Commission's Telecommunications and Legal groups. Staff will generally perform three roles in an arbitration.

First, some will perform a case management role as part of a team (see section 3.4.). 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 them in considering the substantive issues in dispute. This may involve providing oral or written advice to Commissioners and drafting correspondence, directions, determinations and reasons for decision. However, Commissioners 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 facilitate or encourage conciliation or mediation for particular issues that are the subject of the arbitration. However, the participation of Commission staff in conciliation or mediation (or other alternative dispute resolution) processes can be problematic because while they often have knowledge and expertise that can help the process, they also perform other roles in relation to the telecommunications industry. This may result in parties being less willing to participate in a full and frank exchange of views in the presence of Commission staff. This situation can, of course, be overcome by seeking the consent of the parties. Accordingly, the Commission will consider the role of staff in alternative dispute resolution processes on a case by case basis, in consultation with the parties.

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

3.3. Phases of an arbitration

There are three main phases to arbitrations—the preliminary, substantive and determination phases. While these phases can sometimes 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; that is, 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. Also during the preliminary phase, the Commission will want to resolve any jurisdictional issues so that they do not interfere with the subsequent consideration of the substantive issues.

In the **substantive phase** the Commission deliberates on the issues in dispute (except for those which have been deferred pending mediation or expert determination). 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, therefore, is the **determination phase** of the arbitration.

Each phase is discussed below. Where relevant, the discussion reflects modifications that the Commission has 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 2.3. and 2.5.). If this is in doubt, the Commission will seek further information from the person notifying the dispute (see section 2.5.).

If it appears that the pre-conditions have been satisfied, the Commission will set up a **case management team** for the dispute. While the constitution of the team will be determined case-by-case, it is likely to include two Commission staff (one of whom leads the team, and the other from the Commission's Legal Group). It may also include a person external to the Commission with relevant experience (for example, mediation experience). The team would manage the dispute resolution process (as distinct from providing advice on substantive issues). The use of a case management team is a new Commission process. To an extent, it formalises the Commission's approach previously used in arbitrations but more clearly delineates the role of Commission staff in dealing with process issues as distinct from the substantive issues.

Using a case management team is also intended to improve the strategic focus of both the Commission and the parties in choosing the most appropriate method for resolving the dispute (or parts thereof)—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. However, this will not be possible in all situations, particularly when new issues arise during the arbitration. Therefore, the case management approach provides 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 leader of the case management team must first notify certain persons of the dispute. This will include the access provider/access seeker (as the case may be) and everyone 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.

3.4.2. The initial case management meeting

The next step is for the case management team to hold a meeting with the access provider and access seeker jointly. At the meeting, the case management team ensures that all parties understand the nature of the dispute, and facilitates consensus between the access provider and access seeker on the dispute resolution process.

At the meeting, the case management team will seek 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 the arbitration;
- discuss the approaches that could be used to resolve the dispute—such as 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 people who wish to become parties to the arbitration, and the views of the access provider and access seeker;
- 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; and
- identify any potential barriers and delays to resolution of the dispute, as well as the skills that are likely to be necessary to resolve the dispute.

The meeting will usually be held within two to three weeks of receiving the notification. Before the meeting, the leader 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.

People who have applied to become a party to the arbitration usually will be invited to participate in that part of the meeting when their applications are discussed. Normally they will not attend discussions of other items on the agenda. Given that discussion of their applications may take only 15-30 minutes, they may participate 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—the Commissioner(s) hearing the dispute make this decision . 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 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 dealing with joinder applications will also be copied to the applicants seeking to be joined as parties.

The report will also reflect the access provider and access seeker's agreement on referring particular issues to mediation or expert determination. If they can't agree, the report will set out their views on particular dispute resolution approaches as well as 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 report will be the main input for this conference enabling the Commissioner(s) to focus on the issues in dispute, especially the strategy to be used to resolve the dispute.

The Commissioner(s) will 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 initial case management meeting and the conference with the Commissioner(s). This ensures 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.

- If 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, especially alternative dispute resolution methods such as mediation and expert determination if they are likely to lead to more timely resolution.

- The Commissioner(s) will also want all parties to the arbitration to have been identified. Usually, people who have requested to become a party will be invited to attend the conference to discuss their request. If the Commission is unable to make a decision on particular requests at the time of the conference, then those people will usually 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))**. The Commission is also 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 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, within a week of receiving the transcript, to the Commission (copy to the other party or parties) setting out the areas of inaccuracy, along with suggested changes. The Commission can then check areas of concern against the tape recording of the conference.

Following the conference, the Commissioner(s) may issue directions to the parties. These 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 used 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 that the Commission has determined rather than one for which they have 'ownership'. Therefore, where possible the Commission will facilitate alternative methods of dispute resolution—including commercial negotiation.

Section 152CLA(1) 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:

- referring particular issues to mediation by a third party or determination by an expert, as agreed between the parties;
- issuing an advisory opinion to facilitate commercial negotiations;
- issuing a direction to facilitate negotiations—a direction may require one party to provide information to the other, or to attend a conciliation or mediation conference **(ss. 152BBA and s. 152CT)**;
- statutory mediation by the Commission **(s. 152BBC)**;
- taking legal action when the dispute appears to involve a contravention of Part IV or Part XIB of the Act, or of the prohibition on hindering the fulfilment of a standard access obligation **(s. 152EF)**; and
- taking legal action when the dispute appears to contravene the standard access obligations **(s. 152BB)**.

Of course, alternative methods of dispute resolution may be used before a dispute has been notified to the Commission. 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, and the Commission remains committed to participating in the SPAN process and assisting in the development of an industry driven dispute resolution process.

Just because a dispute has been notified to the Commission does not 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 subsequently throughout the arbitration process, as particular issues are raised. Two

---

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

dispute resolution approaches that the parties will be encouraged to consider are mediation and expert determination, 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, such as mediation, without the consent of the parties, it will usually prefer to do this with their consent. This is because genuine commitment is usually necessary for the success of particular dispute resolution processes.

3.4.5. Sequencing of dispute resolution processes

The parties will be given every opportunity to conclude commercial negotiations, or engage in alternative dispute resolution processes for particular issues when they are more likely to efficiently resolve the dispute.

If an issue is referred to mediation or expert determination the Commission must decide whether it should arbitrate that issue before the outcome of the alternative dispute resolution process or whether it should defer consideration pending the outcome.

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 them.

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 believes that the alternative dispute resolution process has a reasonable chance of success, it is likely to await the outcome of those processes, particularly when it can arbitrate other issues in dispute in the meantime. Where possible, it will facilitate the alternative dispute resolution processes and make any necessary directions to improve the chances of success, as well as minimise the scope for delay should the process not succeed.

However, the fact that the Commission is arbitrating particular issues should not prevent the parties from trying 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—these processes are not mutually exclusive.

3.4.6. Mediation

Mediation is a consensual approach, where the mediator seeks to facilitate agreement between the parties. It 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. The Commission can also 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 during 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. If mediation is not successful within the time limit the Commission will usually make a determination.

The Commission understands that SPAN is developing a list of mediators that the parties may wish to use. However, parties are not required 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 where the parties 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 (for example, technical issues). Additionally, the use of a less formal mode of gathering information, without the need to observe strictly the requirements of procedural fairness, may help the expert complete the task more quickly.

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 would 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 arbitrating particular issues, then consideration of those issues progresses to the substantive phase of the arbitration.

In this phase, the Commission is not merely choosing between competing points of view expressed by the parties but must form its own view about the appropriate outcome in light of the statutory criteria in the Act **(s. 152CR)**. To do this, the Commission undertakes its own analysis and may seek material in addition to that provided by the parties (for example, expert opinions on particular issues). Consequently, this phase of the arbitration involves active deliberation by the Commission.

3.5.1. Information

To consider the issues that are subject to arbitration, the Commission will need information, such as service costs and prices. It will sometimes be possible to identify the type of information required at the outset, but in other cases it may be necessary to resolve particular issues before it is clear what information will be required.

For example, 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 apply the 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 in applying the model. Moreover, the information required for a subsequent step may depend on the approach adopted in 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 that it needs from the parties. When information is likely to be required over the course of the arbitration then the Commission may issue several directions for it, or, if appropriate, would consider issuing an order requiring continuous disclosure. 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.).

Before issuing these directions, the Commission will often (but not always) ask the parties what information they think is required. This may be done in the context of a case management meeting, a conference with the Commissioner(s), or by written submission. However it is ultimately the Commission that must determine what information the parties must provide.

3.5.2. Submissions

The Commission will also 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 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:

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

However, providing written submissions tends to delay the arbitration process especially when the submissions are voluminous or 'tit-for-tat' replies to each other's submissions. Sometimes the Commission may direct the parties that submissions should be provided in summary 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, in a dispute about both service and price, if the Commission provides its views on one issue (such as the service description) the parties may then be able to focus on the material areas of dispute in determining price.
- Similarly, in resolving price issues, the parties may be in dispute about the pricing model that should be used to determine access prices. If the Commission provides its views on the appropriate pricing model, the parties can then focus their submissions on the issues relevant to the data that should be used to apply the model.

In this case, the Commission will generally give its views before making the final determination, thus providing a basis for progressing the arbitration. The statements made by the Commission during the substantive phase represent the decision that the Commission is likely to reach when making its determination.

3.5.4. Case management meetings

During the substantive phase, 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 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 (for example, 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 should ensure that the arbitration process is kept on track. When 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 arbitration.

These conferences may be called, for example, so that the parties can discuss their views on particular issues with the Commissioner(s) rather than setting them 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.

The Commission may also find it useful to hold a conference with the parties when significant process issues emerge during the substantive phase. For instance, in building a pricing model, issues might include who should develop the model, and what its basic features should be. It may be more productive to discuss these issues in a conference rather than through written submissions.

In deciding whether to hold a case management meeting or conference, the Commission will consider, among 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 consider requests for interim determinations, particularly when the deliberation process is likely to take considerable time. Assessing requests for an interim determination does, however, divert resources from considering 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

The Commission generally tries to ensure that all relevant factual material is available to the parties before making its determination (subject to confidentiality issues—see section 6.3.). Once the Commission has considered this material as well as 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 give the parties a copy of the determination and reasons for the decision in draft form so that they can comment on any factual matters 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 it 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 hear and determine disputes with as little formality as possible. The process of hearing the dispute is usually conducted by written submissions, supplemented by response submissions as appropriate. There may also be conferences with Commissioners to address particular issues.

The powers in 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 **(ss. 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 investigate the dispute and all matters affecting its merits and fair settlement; and
- may inform itself of any matter relevant to the dispute in any way it thinks appropriate **(s. 152DB(1))**.

The Commission may obtain evidence or inform itself of matters relevant to the dispute in several ways.

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, usually in documentary form.

Third, the presiding member of the Commission may summon a person to appear before it 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 about matters before it in an arbitration.

A person issued with a summons or a notice under s. 155 to appear before the Commission is 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. The Commission would generally 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))**, that is, 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))**.
- The Commission can decide to jointly hear two or more access disputes involving common issues.[12] This is addressed in section 5.2.

In a private hearing, the presiding member of the Commission may give written directions about who may be present **(s. 152CZ(3))**. In doing so, the member must consider 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 to maintain the commercial confidentiality of information being presented by another party.

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

4.2. Use of experts

To better understand particular issues or analyse factual material, the Commission or the parties can engage an expert. Such experts could include engineers, economists, accountants, lawyers, or persons experienced in an industry or trade.

If the Commission agrees to the use of experts, the parties and experts should note the following requirements, which 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 as soon as possible the expert witnesses they propose to use. In the interests of an expeditious resolution of the dispute, the Commission will generally ask the parties to limit themselves to 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] It may, therefore, be appropriate to update the requirements in this section in light of any changes by the Federal Court guidelines.

4.2.2. Expert appointed by the Commission

To arbitrate an access dispute, the Commission may refer any matter to an expert and receive the expert's report as evidence **(s. 152DC(1)(e))**. Before making the referral, the Commission will generally seek comments from the parties.

4.2.3. The expert's report

The evidence of an expert should be set out as a report comprising 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 (such as, did it involve industry consultations, and if so with whom?);
- the expert's conclusions about those issues, along with full reasons;
- when the expert is aware that other people (including other experts) have expressed conflicting views on those issues, the reasons should explain why the expert believes the other views to be incorrect;
- additional information 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 their field of expertise.

At the end of the report, the expert should declare that they have:

> …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.

Any calculations (including those set out in spreadsheets), photographs, plans or other reports referred to in the report must be provided along with the report.

In general, when a party provides the expert's report to the Commission, it should also give a copy to all other parties. If, after providing the report, the expert changes their view on a material matter (for example, 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, when the Commission engages an expert the report will usually 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 consider and comment on the views expressed by the parties. Comments should be provided in writing.

The expert may also 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 why it disputes the expert's qualifications. If the party does not object at that time but waits until later, the party's objections may be given less weight.

If a party wants to withhold a copy of the expert's report, or particular parts of the report, from other parties because it contains confidential commercial information, it should make a request under s. 152DK of the Act (see section 6.3.).

4.2.4. Experts' conference

If there are several experts' reports expressing conflicting conclusions, it may be useful to convene a forum[14] to discuss relevant issues. In such cases, 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 specify the reasons for their differences.[15] This then helps to further refine the areas of difference between the parties.

4.2.5. Experts' costs

Each party must meet the costs of engaging its own experts. The Commission does not have the power to award costs incurred by a party to an arbitration. If the Commission incurs costs in engaging an expert, it may recover them only as part of its general costs charged within the limits specified in the Trade Practices Regulations.

When the parties cannot reach agreement on a technical issue, the Commission may, with the consent of the parties, allocate the cost of engaging an expert between the parties.

---

[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.

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.

Also, 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;
- 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 them or expose them to a penalty. This definition does not limit what constitutes a reasonable excuse **(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. 152DH)**. 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 **(ss. 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;
- interrupt an arbitration hearing;
- 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**, inclusive of GST, payable by the person notifying the dispute at the time of notification **(regs. 28T(2) and (3))**;
- a pre-conference fee of **$10 850**, inclusive of GST, payable by the party notifying the dispute (to be paid before the start of the conference); and
- a daily conference fee of **$4 340**, inclusive of GST, payable by the parties in proportions determined by the Commission **(reg. 28W)**. At the conference, it likely that the Commission will discuss apportioning the conference fee between the parties. The conference fee is usually split equally among the parties and submissions should address whether this practice is appropriate in the case at hand.

The Commission sometimes jointly hears issues set out in two dispute notifications. For instance, when the parties are disputing both an originating and a terminating service, two separate notifications are required. 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

Sometimes the parties to a dispute raise issues that are common to one or more other arbitrations, or which are likely to arise in other arbitrations. While the Commission is not required to adopt a consistent approach to an issue across all arbitrations, some issues are of such significance that it is preferable.

Pricing is such an example. The price paid for a particular declared service is likely to have a substantial effect on how 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 could potentially create significant distortions in the competitive process.

Given the private nature of arbitration hearings (see chapter 4), there are several 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 on the issue.
- When 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.
- When 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, to develop a consistent approach to a particular issue, it may be preferable to use a single process that provides all interested people 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 people who are not ordinarily party to an arbitration (such as consumer groups) to provide submissions to the Commission. To do this a process outside the arbitration may be necessary.

To involve other people in matters common to two or more arbitrations, there are three basic approaches that the Commission could use. 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 3.1.1.

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 arbitration[16], and can 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 a Part XIC arbitration, the Commission interprets '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 people (namely, a particular access provider and access seeker) regarding 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.

'Sufficient interest' is not defined in the Act. However, the Australian Competition Tribunal was asked to consider its meaning 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 that 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, 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

[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.

> 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 that 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 help from Optus in the cost modelling work, which was a central issue in dispute, provided a basis for accepting that Optus had a sufficient interest in the matter.[19]

Also, 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 it may provide a basis for holding a joint hearing instead—see section 5.2. This means the Commission can 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

When the Commission is conducting two or more arbitrations involving common issues, it can decide to hold a joint hearing **(s. 152DMA)**. This means the common issues can be considered in 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:

> 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

---

[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 arbitation 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]).

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 (for example, issues concerning interconnection and co-location of equipment, or access to subscriber equipment); or
- 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 determines 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 can make a request under s. 152DK (see section 6.3.).

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

---

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

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 a process separate to the arbitration. For instance, when the Commission has previously assessed pricing of a declared service in the context of an access undertaking which it subsequently rejected the Commission has drawn on that assessment process in its determination of pricing for the relevant arbitration(s).

Also, the Commission may establish a process to specifically consider a matter common to several arbitrations. For instance, when the Commission is conducting several arbitrations about the price of a particular declared service, the Commission has established a process separate to each arbitration so that 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 in 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 the particular issues that the Commission wishes to explore.
- Submissions are invited from interested persons, including the parties to each arbitration. Submissions will usually be available to anyone on request, fostering a more robust and open deliberative process. However, 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 people.
- The Commission releases a final report setting out its views on the matter and supporting reasoning.

The Commission will then seek submissions from parties in each individual arbitration about 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) vary and depend on the circumstances of the access dispute and the requirements in Part XIC. There are, however two key requirements that 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 does not give other parties an opportunity to comment on information it has received from one party, this may impair the ability of the other parties to present their case and it 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 given to all other parties to the dispute. While the Commission is empowered to withhold confidential information from a party, it is likely to use this power sparingly, and only after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information (see section 6.3.).

The Commission believes the requirements of procedural fairness apply not only to consideration of the substantive issues in dispute, but also to certain process issues. For example, when the Commission is establishing or modifying a process concerning how the parties present their cases, it will usually seek the views of the parties if practical and appropriate.

In resolving procedural issues, the Commission must balance several competing considerations including the detriment to the party raising the issue and the desirability

---

[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.

of resolving disputes in a timely manner **(s. 152CLA(1))**. Accordingly, parties should bear these issues in mind, particularly s. 152CLA(1), when making submissions on procedural issues.

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 objects 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.).

A perception of bias can also arise when public comments are made about the issues in dispute. To avoid this perception, the Commission will usually not publicly comment on specific issues in an arbitration until it has been completed, and after the determination for that arbitration has been published, if it is published (see section 6.4.5.). However, parties must also be aware that the Commission has other roles in the regulation of the telecommunications industry. The Commission must continue to undertake, and where appropriate, comment on those roles despite arbitrating disputes.

6.2. Confidentiality between the parties

Arbitration hearings are 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]

However courts have 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 an arbitration hearing and to do anything necessary or expedient for the speedy hearing and determination of the dispute **(ss. 152DC(1)(a) and (f))**. The Commission can also 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))**.

---

[23] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

[24] ibid.

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 during the arbitration (other than information in the public domain) unless 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 or the provider of the information.

The confidentiality arrangements will ordinarily enable the parties to disclose that they are restricted in disclosing information and explain the effect of any restrictions.

The Commission believes issuing this type of direction and order at the start of an access dispute contributes to a more open environment in which the parties can discuss issues with each other and the Commission.

The Commission may need to review the form of any confidentiality direction and order when it makes a final determination about 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.

Similarly, the confidentiality arrangements after an arbitration is finalised generally provide for limited exceptions to enable disclosure of information:

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

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. Subsection 152DK(4) gives the Commission a discretion to withhold a document, or part of a document, from another party to the dispute.

There are several circumstances in which the Commission may receive confidential commercial information during an access dispute.

- The Commission may direct a party to provide certain information about a particular access dispute. In response, a party may indicate that the request relates to confidential commercial information, which it does not want to provide to the other party.

- A party's written submission to the Commission on 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. To clarify these issues, a party may need to refer to other information considered to be confidential.

When a request is made for information that is initially provided to the Commission orally, the following process generally applies:

- Before 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 given 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 for 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 doing so, 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 consider 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 non-disclosure will be likely to hinder the ability of the Commission to perform its functions (that is, 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 provides guidance.

First, to establish that disclosure would be likely to cause harm, it is not enough 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 is appropriate to draw a distinction between current (or contemporaneous) information and past (or out of date) information. The Commission believes it is less likely that disclosure of past information would cause harm. Also, in general, it is appropriate to distinguish 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 (for example, those set out in the standard confidentiality direction made at the start of the arbitration) are not enough to prevent or minimise the likelihood of harm. If existing restrictions are insufficient, it may be possible to strengthen them by limiting disclosure to certain internal staff of the party and external advisers, prohibiting those people communicating contents of the documents to other staff. In rare situations it may be appropriate to limit disclosure to external advisers only, to minimise the likelihood of harm. 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 is 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.

Fourth, in assessing the extent to which non-disclosure may hinder the Commission's ability to perform its functions, the Commission may also consider the impact on the objective of Part XIC to promote the long-term interests of end-users, and the requirement in s. 152CLA(1) that the Commission consider the desirability of access disputes being resolved in a timely manner.

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 about that request. 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 request confidentiality should inform the Commission in writing that a specified part of a document contains confidential commercial information and ask 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, when the party making the request has not described the information in enough detail, the Commission will supplement the description so that the other parties can adequately consider the request. The Commission will ask these parties whether they have any objection to the Commission complying with the request. The Commission will try 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 according to 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 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.

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

If the Commission is 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; and
- 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.

To meet the requirements of procedural fairness, the Commission will generally require that all confidential commercial information be disclosed to (at least) identified external representatives (subject to satisfactory confidentiality undertakings).

When 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. A 'standard form' confidentiality undertaking is provided in appendix 5. The Commission will consider modifying this undertaking to suit particular circumstances.

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

6.4. Disclosure of information by the Commission

6.4.1. The existence of an access dispute

Once 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).

The Commission will also email all people registered with the Commission for dispute notification (see section 3.1.2.). The email 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 website 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 (for example, other arbitrations concerning the same service); or
- in the performance of other responsibilities (for example, the assessment of an undertaking for the same services or other declared services).

Recent amendments to the Act allow the Commission 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 more efficiently and timely manner **(s. 152DBA(2))**.

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 **more** efficiently and timely manner, the Commission will generally consider the alternative scenario. This could involve the Commission issuing a direction or summons to the person who originally provided the information and documents.

When the Commission believes 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. The Commission must consider:

- any objections from the person who provided the information or documents to the Commission;
- confidentiality requirements currently applying to the information or document (for example, pursuant to an order or direction under s. 152DC or a decision under s. 152DK); and
- 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.

---

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

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, when assessing an undertaking.

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

If the information provider objects, the Commission would need to consider whether there are any restrictions on disclosure without the provider's consent. If the Commission is restricted in its use of the information, then it would need to consider whether to use its information gathering powers (for example, the summons power—s. 152DD) to acquire the information for the arbitration at hand.

6.4.4. Commission conducting joint arbitration hearings

When the Commission conducts a joint hearing pursuant to s. 152DMA (see chapter 5), it can consider 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 people wanting certified true copies of documents on the register can make a request in person or in writing **(reg. 28Z(2))**.[26]

The Commission can also 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 establishing 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

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

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 to show those parts which the Commission intends to publish. Each party will then have 14 days to provide a written submission identifying any parts that should not be published along with reasons for that view.

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

- any objections from the parties;
- whether publication would be likely to promote competition in markets for listed carriage services[28];
- 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 succeed when 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 arbitration. Given that Part XIC is concerned with enabling access to declared services, measures that enable access arrangements to be settled in 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, when there are difficulties in concluding access arrangements because of 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 help establish conditions for improved competition in those markets.

These matters will generally indicate that the determination and the accompanying reasons should be published. However, when the objections of the parties establish grounds for not publishing the determination and reasons (or particular parts of those

---

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

[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.

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 the use of information:

- Commission staff cannot make improper use of information.[30]
- When 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 to maintain the confidence of all parties to an access dispute. However, it 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 given to it during the conduct of an access dispute:

- in response to a request under the *Freedom of Information Act 1982*;
- 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 or its obligations as a government body.

Before complying with such requirements, the Commission will usually first seek to advise a party who has produced confidential information. However the Commission will not seek to consult with parties about the release of non-confidential information. 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

---

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

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

information, ensure that the disclosure of information is subject to a court-imposed confidentiality regime.

Chapter 7. Determinations and termination of an arbitration

7.1. Interim determinations

At any time before issuing the final determination, the Commission has the power to issue an interim determination. This 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 while it conducts an arbitration.

The Commission sees interim determinations as being important for the smooth operation of the access regime, as they help ensure access seekers get timely access to declared services. This is because access providers may see arbitration disputes as a way of delaying access—arbitration processes can be lengthy because of 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 it 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 to have reached a view on all outstanding issues between the parties. To set the information threshold at that level would seem to restrict unnecessarily 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. Model terms and conditions for access made pursuant to s.152AQB (see Section 7.3 of the Guidelines) are likely to provide, in particular, sufficient information to make an interim determination.

Appropriate in all the circumstances

In considering whether an interim determination is appropriate in all the circumstances, the Commission considers a range of matters, depending on the circumstances of the arbitration. They include:

- 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);
- the timing of the final determination; and
- international treaty obligations.

When the parties have entered into a contractual arrangement for the declared service, making an interim determination may over-ride that arrangement. The Commission believes its arbitration powers, including its power to make an interim determination, are not limited (expressly or by implication) when 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 no longer agree about 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, when 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. However, there may be a case for making an interim determination varying that arrangement when it can be shown 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. However, when 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 help improve the conditions for competition. If these price changes flow through to end-users, the benefits can be realised more quickly than otherwise. 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 outcomes in the long-term interests of end-users during that period.

The timing of an interim determination is relevant in two ways. First, if the period of time between notification of the dispute and making the final determination is likely to be substantial, then an interim determination may be appropriate. Second, the period of time between the interim and final determination should be considered. If a final determination is to be made within a relatively short period of time (say two to three months), then the case for making an interim determination is likely to be weaker. Also, making an interim determination uses resources that could otherwise be used to finalise the arbitration, potentially delaying finalisation of the arbitration.

International treaties may impose obligations on Australia with respect to the treatment of particular carriers and carriage service providers. While these treaties are not binding on the Commission in the absence of legislative direction, they are relevant matters to which the Commission may have regard. For instance, article 9.8(b) of chapter 10 of the Singapore-Australia Free Trade Agreement, executed on 17 February 2003, provides that where the Commission is unable to resolve disputes concerning the 'terms, conditions and rates' of interconnection within 180 days:

> …Each Party [i.e. Australia and Singapore] shall ensure that the regulator endeavours to provide interim determinations on the disputes where necessary to ensure that facilities-based suppliers of the other Party are able to interconnect with a major supplier.[33]

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, enabling 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.

---

[33] Available at http://www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html, accessed 10 March 2003.

7.1.3. Duration of an interim determination

An interim determination has effect from the date specified in the determination **(s. 152CPA(4))**. An expiry date is specified in the interim determination, and this must not be more than 12 months after it takes effect **(s. 152CPA(5))**.

The determination remains in force for this period 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 asked to do so by the parties to the determination **(s. 152CPA(7))**. This allows the parties to a dispute to negotiate their own alternative interim commercial agreements pending a final determination. This is particularly important because 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.

7.2. Final determinations

The arbitration continues until a final determination is made, unless terminated or the notification is withdrawn before 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; and
- 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))**.

Where the Commission has made a determination under s. 152AQA setting out pricing principles for the declared service, or a determination under s. 152AQB setting out model terms and conditions, it must take these determinations into account during the arbitration **(s. 152AQA(6) and s. 152AQB(9))**. Generally, the Commission's consideration of these matters would be reflected in the final arbitration determination. The role of pricing principles is addressed in appendix 3 and the interaction between an arbitration determination and model terms and conditions is addressed in section 7.3.

The Commission may also 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, 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.[34] A similar interpretation would seem to be appropriate in the context of making a determination.

---

[34] 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.

The Commission believes particular terms and conditions promote the interests of end-users if they are likely to contribute towards providing goods and services at lower prices, higher quality, or towards providing greater diversity of goods and services.[35]

To consider the likely impact of particular terms and conditions in a determination, the Commission must consider 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'.[36]

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, infrastructure' refers to the concept of economic efficiency. This concept consists of three components:

- productive efficiency—the efficient use of resources within each firm so that all goods and services are produced using the least cost combination of inputs;
- allocative efficiency—the efficient allocation of resources across the economy so 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 so 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.

---

[35] ibid, at pp. 32—33.

[36] *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.[37]

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

People who have rights to use a declared service will generally, use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users. The Commission believes these people 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 access seekers who already have rights to use the declared service in question, the Commission can also consider the interests of access seekers who may wish to use that service. Where appropriate, the interests of such access seekers may be considered to be 'any other relevant consideration'.

Economically efficient operation of a carriage service, etc

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 (for example, service providers using the declared service).

---

[37] Explanatory Memorandum for the Trade Practices Amendment (Telecommunications) Bill 1996, p. 44.

In the context of a determination, the Commission may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently. 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.[38]

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 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 access seeker requested access pursuant to s. 152AR;
- 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 access seeker requested access pursuant to s. 152AR;
- 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;[39]
- 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;

---

[38] 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.

[39] 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 a party (other than the access seeker) to bear an unreasonable amount of the costs of extending or enhancing the capability of the facility, or maintaining extensions or enhancements to the facility;

- 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; or

- 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 arbitrating 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))**. This will set out the Commission's proposed decision. In addition, the Commission also 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 the Commission makes a final determination and gives it to the parties, the process of arbitration ends.

7.3. Interaction between arbitration determination and model terms and conditions of access

Section 152AQB of the Act provides that the Commission must make a written determination setting out model terms and conditions of access for the following services (referred to as 'core services'):

- Domestic PSTN Originating Access Service;
- Domestic PSTN Terminating Access Service;
- Unconditioned Local Loop Service;
- Local Carriage Service; and
- any declared service specified in regulations made under the Act.

The determination setting out model terms and conditions is separate from the arbitration determination and, as explained in the Explanatory Memorandum, serves a broader role.

> The aim of releasing model terms and conditions is to assist parties to reach commercial agreement on terms and conditions for access, or to submit access undertakings, thus providing more timely access for access seekers to "core" fixed line network services. This is in line with the underlying philosophy of the telecommunications access regime in Part XIC that is focussed on the terms and conditions of access being established through commercial agreement or being set out in access undertakings.
>
> While these model terms and conditions will not be binding, they will provide clear guidance about the regulator's views as to what fair terms and conditions for access would be, including price. The model terms and conditions would be based on an assessment of the current market conditions and would be in a form that could be easily incorporated into an access undertaking. If a dispute about terms and conditions then arose between parties, any subsequent ACCC arbitration decision (determination) would be expected to reflect the model terms and conditions.
>
> The availability of model terms and conditions is designed to overcome the uncertainty that currently exists prior to regulatory arbitrations as to what the regulator's likely views may be concerning the eventual terms and conditions of access. Up-front provision of this information is likely to assist the commercial negotiation process by giving parties a view of what the likely outcome of an ACCC determination on the issue would be. This is intended to bring the parties' negotiating position closer together, thus expediting and simplifying the commercial negotiation process.[40]

Where the Commission has made a determination setting out model terms and conditions for a particular declared service, the Commission is required to have regard to those terms and conditions in arbitrations concerning that service **(s. 152AQB(9))**. This is of particular significance in the context of making a final determination concerning that service.

---

[40] Explanatory Memorandum for the Telecommunications Competition Bill 2002, p. 40.

As a general rule, the Commission will look to apply the model terms and conditions in its arbitration determinations subject to the particular circumstances of the particular dispute. However, in order to foster regulatory certainty, it is desirable that the terms and conditions of access set out in a final arbitration determination are, to the greatest extent possible, consistent with the model terms and conditions. For this reason, the Commission proposes to adopt the following approach when determining model terms and conditions for a declared service:

- The model terms and conditions should not be inconsistent with any of the standard access obligations applying to access providers supplying the service.

- In making the determination, the matters specified in s. 152CR(1) should be taken into account. The Commission also proposes to take into account the matters specified in s. 152AH(1); these matters are, generally speaking, the same as those in s. 152CR(1).[41]

- The model terms and conditions must not be inconsistent with any Ministerial pricing determination or with any determination by the Commission under s. 152AQA establishing pricing principles for the service **(s. 152AQB(10))**.

That said, in particular circumstances it may be appropriate to depart from the model terms and conditions when making an arbitration determination. For instance, s. 152CQ(1) establishes certain restrictions on arbitration determinations. Some of these restrictions operate by reference to matters which will be unknown at the time of determining the model terms and conditions[42] and, consequently, it may not be possible to take these restrictions into account for the model terms and conditions.

Before making a determination setting out model terms and conditions the Commission must publish a consultation draft of the determination and consider submissions which it receives during the consultation period **(s. 152AQB(5))**. In addition, the Commission must consult with the Australian Communications Authority **(s. 152AQB(6))**.

The Commission is required to take all reasonable steps to ensure that it has made determinations setting out model terms and conditions for the services listed above (i.e. the core services) by 18 June 2003. This means that where the Commission is conducting arbitrations or assessing undertakings concerning those services, these processes will, necessarily, occur simultaneously.

---

[41] The matters specified in s. 152AH(1) are those which the Commission must take into account in assessing an access undertaking. Given that the model terms and conditions are intended to inform access providers regarding the terms and conditions to incorporate in an access undertaking, it is appropriate that the Commission also consider the criteria by which it will assess any access undertaking given by the access provider.

[42] In this regard, certain restrictions operate by reference to the date on which the access seeker requested access (ss.152CQ(1)(a) and (b)), the date on which the dispute was notified (s. 152CQ(1)(c)), or by reference to particular characteristics of the access seeker (s. 152CQ(1)(g)).

7.4. Backdating

Under s. 152DNA the provisions of a final determination may be expressed to take effect 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))**.

Section 152DNA(8) requires the Commission to formulate guidelines about its approach to backdating and to have regard to those guidelines. These guidelines are set sections 7.4.2.-7.4.6.

7.4.1. 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, its incentives to progress the arbitration may be weak. 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.[43]

7.4.2. Approach to backdating

Given that the backdating provision is intended to improve incentives, the Commission will, in general, 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 before and during the arbitration provides grounds for not backdating the determination.

For instance, if before notification of the dispute, the access provider offered the access seeker price and non-price terms and conditions that are substantially similar to those determined by the Commission and the access seeker refused, then it may not be appropriate to backdate. Considering the parties' conduct in this way improves incentives for the access provider to offer reasonable price and non-price terms and conditions, and reduces incentives for the access seeker to notify a dispute in the hope that the final price will be lower and backdated.

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

To minimise incentives for delay during the arbitration, the Commission may indicate at the outset whether it is likely to backdate the final determination. However, the

---

[43] Supplementary Explanatory Memorandum for the Telecommunications Legislation Amendment Bill 1998, p. 33.

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 about the 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 better to have separate retrospective and prospective charges. For instance, if a price is cost-based, it may be appropriate to determine retrospective charges based on costs for the relevant year rather than current costs. These are matters on which the Commission is likely to seek submissions from the parties.

7.4.3. From when?

Backdating is limited to the date on which negotiations began.

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

Section 152DNA(2) establishes a maximum period of retrospectivity. However, this does not 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 (for example, immediately after expiry of a previous contract).

7.4.4. Interest

For backdating to effectively remove the incentive for delay, the Commission believes the backdated payment should include an interest component. This is expressly permitted by s. 152DNA(6).[44]

For example, suppose that the Commission were to determine that a particular declared service should have been supplied during the 12 months prior to commencement of the final determination 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 amount subject to backdating were calculated by multiplying 1 billion minutes by 1 cent per minute, then this amount would be $10 million. However, $10 million is worth less now than it was 12 months ago both because of any inflationary effect, but more importantly because the $10 million could have been

---

[44] Section 152DNA(6) was inserted into the Act by the *Telecommunications Competition Act 2002*. Prior to the amendments which inserted s. 152DNA(6), the Commission was of the view that it had power to award interest. The amendment clarifies the Commission's powers in this regard.

invested over that period and be worth more than $10 million today (i.e. not awarding interest would effectively constitute a free loan). In other words, the access seeker could have put the $10 million to alternative uses over that time.

Therefore, when 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 this regard, the Commission proposes to adopt the following methodology to the calculation of interest:[45]

- Interest will be calculated on the amounts of money that have been overpaid.
- These amounts usually will be calculated by reference to the volume of services supplied by the access provider to the access seeker over the backdating period, and the charges that the Commission considers should have applied in respect of those services.
- The backdating period is the period between the date on which backdating commences (see section 7.4.3.) and the date on which the determination takes effect.
- The rate of interest will be applied to those amounts from the date on which the overpayments were made.

This methodology can be illustrated using the above example. In that example, the amount subject to backdating was $10 million; however, the access seeker would not have been deprived of this amount for the entire twelve months. For instance, suppose that invoices were rendered each month, and that the same volume of services was supplied each month. Consequently, there is an overpayment of $0.83 million each month (i.e. $10 million/12months).

If the invoices were rendered at the end of each month and provided 30 day payment terms, then the first overpayment would have occurred 10 months ago, the second overpayment would have occurred nine months ago, the third overpayment would have occurred eight months ago, and so on. Thus, immediately before the final determination, the access seeker would have made 10 overpayments. The access seeker would have been deprived of $0.83 million for 10 months, $1.67 million for nine months, $2.5 million for eight months, and so on. The rate of interest, therefore, is applied to each of these amounts for the period during which the access seeker was deprived of that amount.

The rate of interest should reflect the opportunity cost of the under or over payment; i.e. the opportunities a person making the payment, or entitled to an additional payment, has foregone by reason of being deprived of that amount. As a general rule of thumb, this will be the rate that the person would have paid to raise the amount by means of debt financing.

---

[45] The Explanatory Memorandum for the Telecommunications Competition Bill 2002 states: 'It is proposed that the guidelines will also include a method that the ACCC will use for calculating interest under the express power provided by the proposed amendments' (p. 52).

However, the Commission also recognises that some consideration may be required to individual circumstances. For example, the interest rate calculation may be influenced by:

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

7.4.5. Impact of interim determination on backdating

Where backdating is a satisfactory alternative to an interim determination, the Commission will consider not granting an interim determination. However, the fact that an interim determination has been made does not mean that backdating is ineffective and therefore unnecessary. The interim determination helps to ensure that outcomes in the long-term interests of end-users 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.

7.4.6. 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 (and payment of interest). However, it is conceivable that the reverse situation may occur, where the determination sets a charge higher than that currently being paid by the access seeker. In such a situation, backdating is still likely to be appropriate to reduce any incentives that an access seeker has to delay progression of the arbitration.

7.5. Effect of determination

7.5.1. When does it come into effect?

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

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(2))**.

7.5.2. Duration of determination

Although not currently 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))**.

7.5.3. 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))**.

7.5.4. Variation of determination

Any party to a determination may apply to the Commission for a variation of the determination. On receiving an application for a variation, the Commission must notify and seek the consent of all other parties to the arbitration. If any party objects to the variation, it 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))**.

7.6. Termination without a determination

7.6.1. Termination by a party

Subject to the consent of the other party, or the Commission, the party who has notified an access dispute can 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; and
- 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 withdrawn.

7.6.2. 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 considering whether an arbitration should be terminated, the Commission will consider each notification case by case. In instances where the dispute is in relation to varying an existing contract, the Commission will generally be reluctant to continue the arbitration unless there is evidence of significant competition concerns or other significant concerns relevant to the long-term interests of end-users. In such cases, the onus will generally be on the party notifying the dispute to present sufficient grounds for continuing the arbitration.

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 about whether the Commission ought to continue with the arbitration.

Chapter 8. Review

8.1. Review by the Australian Competition Tribunal

Recent amendments to the Act, effected by the *Telecommunications Competition Act 2002*, removed the ability of the parties to apply to the Tribunal for review of the determination.

In the Explanatory Memorandum, the Government explained the purpose of the amendments:

> Removing merits review of ACCC determinations recognises the significant delays that have resulted from the review process in the past and that new entrants seeking access to telecommunications infrastructure have difficulty raising or committing capital during the review process due to the contingent liability of an unfavourable outcome via, for example, a backdated determination or review decision. Removing merits review is also intended to promote certainty for access seekers by streamlining the decision-making process. It will provide for consistency in decision-making and, in combination with the publication of model terms and conditions under proposed section 152AQB, it will further promote the likelihood that parties will reach commercial agreement on the terms and conditions for access.[46]

These amendments did not, however, affect determinations made before 19 December 2002 or determinations made after that date in respect of disputes notified before 26 September 2002.[47] For these determinations, the former provisions of the Act apply.[48]

Pursuant to these provisions, a party may apply in writing to the Australian Competition Tribunal for review of the determination within 21 days of the final determination **(former ss. 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 **(former ss. 152DO(3) and (4))**.

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 a decision being made or a statement of reasons for the decision being furnished, or within such period as the Federal Court allows.

---

[46] Explanatory Memorandum for the Telecommunications Competition Bill 2002, p. 42.

[47] The cut-off date (26 September 2002) corresponds to the date on which the Telecommunications Competition Bill 2002 was introduced to Parliament. This Bill was subsequently enacted, with effect from 19 December 2002.

[48] *Telcommunications Competition Act 2002*, Schedule 2, item 9.

Chapter 9. Undertakings and arbitrations

Under the Act, the access provider can give the Commission an access undertaking setting out terms and conditions in relation to the supply of particular services, including declared services. Access undertakings are an alternative to arbitration for establishing the terms and conditions of access (though not a mutually exclusive means).[49] Consequently, the Commission can be in the position of having to simultaneously consider an access undertaking and conducting an arbitration in relation to the same subject matter. This raises issues as to the interaction and sequencing of Commission decision making for each of them.

9.1. Legislative provisions

9.1.1. What is an access undertaking?

There are two types of access undertaking — ordinary access undertakings and special access undertakings **(s. 152AC)**.

- Ordinary access undertakings concern declared services and set out the terms and conditions with which the access provider will comply with the applicable standard access obligations **(s. 152BS(1))**.
- Special access undertakings, on the other hand, concern services that are not declared and may not even exist when the undertaking is made. The undertaking provides that in the event that the carrier or carriage service provider supplies the service, it agrees to be bound by the standard access obligations and (in relation to those obligations) will comply with the terms and conditions set out in the undertaking **(ss. 152CBA(2) and (3))**.[50]

The interaction and possible tension between arbitrations and undertakings, however, only arises in respect of ordinary access undertakings since arbitrations can only concern disputes in respect of existing declared services whereas special undertakings involve obligations in respect of future services or future declared services. Accordingly, a special undertaking cannot be in respect of the same matter as an arbitration.

---

[49] Where an access undertaking specifies the terms and conditions about a particular matter, then access is to be in accordance with those terms and conditions – see s. 152AY(2)(b)(i).

[50] The purpose of special access undertakings is to enable a carrier or carriage service provider (or a person who expects to become a carrier or carriage service provider) to establish the access arrangements prior to investing in infrastructure, and thereby obtain regulatory certainty. See Explanatory Memorandum for the Telecommunications Competition Bill 2002, p. 81.

9.1.2. Criteria for acceptance of access undertakings

Access undertakings are voluntary — they become operative once accepted by the Commission. Before accepting the undertaking, the Commission must satisfy itself that the terms and conditions in the access undertaking are:

- consistent with the standard access obligations;
- reasonable; and
- consistent with any Ministerial pricing determination **(ss. 152BV(2) and 152CBD(2))**.

To assess reasonableness, the Commission must take into account criteria which are, generally speaking, the same as those considered in making a final arbitration determination (compare **ss. 152AH(1) and 152CR(1))**.

The Act establishes a timeframe for considering access undertakings. If the Commission has not made its decision (to accept or reject the access undertaking) upon the expiration of the timeframe, then it is deemed to have accepted the access undertaking. Relevantly, the timeframe is six months from the date on which the Commission received the access undertaking (but excluding the period of public consultation or period during which the Commission has sought information from the person giving the undertaking). It can be extended where necessary, although the Commission must issue a statement (published on the Internet) explaining the reasons for the extension **(s. 152BU(5)-(8) and s. 152CBC(5)-(8))**.

9.1.3. Consistency of arbitration determination with undertaking

The terms and conditions of an arbitration determination must not be inconsistent with those of an access undertaking that is in operation **(s. 152CQ(5))**. Where there is inconsistency, the terms and conditions in the access undertaking prevail over those in the arbitration determination **(s. 152CGB)**.

9.1.4. Deferral of arbitrations when considering access undertakings

Section 152CLA deals with the situation of the Commission simultaneously considering an access undertaking and conducting an arbitration in relation to the same matter. It provides that the Commission may defer consideration of the arbitration "in whole or part" while it is considering the access undertaking **(s. 152CLA(2))**.

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

- the fact that the access undertaking, if accepted, will apply generally to all access seekers, not just those involved in the arbitration;
- any guidelines that it has made, and which are in force, in relation to the deferral of arbitrations (see section 9.2.2., below); and
- such other matters which the Commission considers relevant **(s. 152CLA(4))**.

The purpose of these provisions was explained in the Explanatory Memorandum:

> …The criteria in paragraph 152CLA(4)(a) recognise that the ACCC should generally give priority to the consideration of undertakings in preference to arbitrations. The remaining criteria in subsection 152CLA(4) recognise that there may be circumstances where it is appropriate for the ACCC to complete arbitration of an access dispute.[51]

9.1.5. Rights of review

The Commission's decision to accept or reject an access undertaking can be reviewed by the Australian Competition Tribunal, upon the application of a person 'whose interests are affected' by the decision **(s. 152CE)**. The 2002 amendments to the Act removed the right of merits review (i.e. review by the Tribunal) in respect of arbitration determinations[52] although the parties to an arbitration retain rights of judicial review (i.e. review by the Federal Court). Rights of review in respect of arbitration determinations are addressed in Chapter 8.

9.2. Deferral of arbitrations - relevant considerations

In deciding whether to defer an arbitration while considering an access undertaking that relates to the same matter, the Commission must have regard to a number of matters.

Primarily, the Commission must consider the fact that the undertaking, if accepted, will apply generally to all access seekers. The Commission interprets this as a requirement to consider the benefits of giving priority to the access undertaking. These benefits, described in section 9.2.1., will usually lead the Commission to defer the arbitration in whole or part.

Nevertheless, there may exist particular circumstances or other relevant matters which justify continuing with the arbitration while simultaneously considering the access undertaking. These circumstances are addressed in the guidelines at section 9.2.2.

9.2.1. Undertakings are generally applicable

Like most organisations, the Commission must make decisions about how to allocate its resources. Naturally, it seeks to do so in a way that maximises its ability to meet the objectives of the Act. In the context of Part XIC, this involves promoting the long-term interests of end-users.

Access undertakings have the potential to promote the interests of end-users to a greater extent than arbitration determinations. This is because the pro-competitive outcomes of the access undertaking (e.g. lower, more efficient access prices) will be available to all access seekers, rather than being confined to a few. This maximises the spread of benefits and, by making these benefits available to all access seekers, it can be expected that there will be greater pressure to pass them on to end-users.

---

[51] ibid., pp. 89-90.

[52] *Telecommunications Competition Act 2002*, s. 3 and Schedule 2, item 8. Arbitrations commenced prior to the amendments retain the right to merits review.

Where the Commission is considering an access undertaking and conducting an arbitration that relate to the same matter, deferral of the arbitration will typically free up resources that can be used to assess the access undertaking. This should enable the undertaking to be assessed more quickly and, if the access undertaking is subsequently accepted, the benefits to end-users would be realised more quickly.

Additionally, the access undertakings process enables the Commission to deal with issues that are (or potentially will be) common to multiple arbitrations (e.g. price). From an administrative perspective, it may be more efficient and less cumbersome to deal with these issues as part of a single industry-wide process. Also, assessment of an undertaking is a public process, thereby facilitating input from all interested persons and a greater degree of transparency. While it may be possible to address industry-wide issues in the arbitration context[53], where an access undertaking has been given to the Commission this provides an alternative mechanism for doing so in an efficient manner.

9.2.2. Guidelines

Section 152CLA(5) provides that the Commission must formulate guidelines that it will take into account when deciding whether to defer consideration of an arbitration. As noted in the Explanatory Memorandum, it is intended that the guidelines address circumstances where it may be appropriate to continue with an arbitration.[54]

For the purposes of these guidelines, the Commission envisages several circumstances where it may be appropriate to continue with an arbitration namely, where:

- matters covered by the undertaking have already been substantively considered in the arbitration;
- the arbitration concerns issues additional to those covered in the undertaking; and/or
- consideration of the undertaking is likely to involve a long time-frame.

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

In identifying these circumstances, the Commission has endeavoured to envisage situations that may arise, based on its experience with both access undertakings and arbitrations. That said, they are not the only circumstances in which it may be appropriate to continue with an arbitration and others can be considered pursuant to s. 152CLA(4)(c) where relevant.

---

[53] For a discussion of how industry-wide issues can be accommodated within the context of an arbitration, see Chapter 5.

[54] Explanatory Memorandum for the Telecommunications Competition Bill 2002, pp. 89-90.

Matter already substantively considered in the arbitration

If the Commission were to rigidly apply the principle of deferring arbitrations while considering an access undertaking relating to the same matter, then this could lead to adverse consequences. Particularly, it could have the effect of creating an incentive for access providers to offer access undertakings only once an arbitration has progressed through its substantive phase, with a view to delaying further progress, or completion, of the arbitration.

In the Commission's view, it is preferable for access undertakings to be given to it as early as possible and, in any event, before commencement of the substantive phase of an arbitration. This ensures that the Commission, access seekers and other interested persons focus on the establishment of industry-wide access arrangements through a public and transparent process in a timely manner.

Where, however, matters in the access undertaking have already been substantively addressed in an arbitration at the time the undertaking is given, then deferring the arbitration is likely to delay its completion. In this circumstance, it may be appropriate to continue with the arbitration in order to make a final determination, or at least put in place an interim determination reflecting the work undertaken to date.[55]

For a matter to have been substantively addressed in an arbitration, it is not necessary for the Commission to have made a decision on the matter. Rather, a matter has been substantively addressed once the parties have put their respective views to the Commission and it is in a position to make a decision for the purposes of either an interim or a final determination.

Where the Commission decides to continue with the arbitration in this circumstance, it could make an interim or final determination based on model terms and conditions of access **(s. 152AQB)**, the draft report on the Commission's assessment of the access undertaking, or on any other suitable basis. Once the Commission has considered and made its decision in respect of the access undertaking, the determination could be varied (or a final determination made) to reflect the findings in respect of the access undertaking and ensure consistency with any access undertaking accepted by the Commission (see section 9.3.4.).

Therefore, where an access provider chooses to wait until after the Commission has commenced the substantive phase of an arbitration before giving an access undertaking, the access provider risks the Commission continuing with the arbitration even if only to make an interim determination.

That said, there might be circumstances which suggest that such an approach is not appropriate for the particular situation at hand. One example is where the market environment has changed in a material way since an issue was considered in the arbitration, necessitating reconsideration of that issue. In such a situation the access undertaking process may provide a more appropriate forum for reconsidering the issue. Another example might be where, notwithstanding the advanced state of the arbitration,

---

[55] Interim determinations are addressed in section 7.1.

the access undertaking may provide a more efficient and timely means of handling certain issues (particularly those issues with industry-wide dimensions). In this situation, it may be appropriate to await the outcome of the access undertaking process before completing the arbitration. The Commission would expect, however, that such circumstances would be relatively rare.

Additional issues

There is no requirement for an access undertaking to be exhaustive in setting out the terms and conditions on which the access provider will comply with applicable standard access obligations. Consequently, where the arbitration deals with issues additional to those covered in the undertaking then it may be appropriate to continue the arbitral process in respect of those issues, even where the arbitration and access undertaking processes are begun at a similar time. This approach is reflected in the provisions of section 152CCA(2), which provide that an arbitration can be deferred in whole or in part.

For instance, where the Commission is conducting an arbitration in respect of both price and non-price issues, it may be given an undertaking dealing only with price. The Commission could therefore, defer consideration of the price issues in the context of the arbitration (leaving this to be assessed as part of the access undertaking process), but proceed with consideration of the non-price issues. This then enables the Commission to finalise the arbitration once the pricing issues covered by the access undertaking have been addressed.

Undertaking likely to take a long time

While the Act establishes a six-month timeframe for consideration of an access undertaking, this can be extended, and more than one extension is possible. Thus, while the Commission endeavours to consider access undertakings in an expeditious manner, it is possible that access undertakings involving complex issues could take up to nine months to assess (or longer where necessary).

In such circumstances, it may be appropriate to continue the conduct of an arbitration in order to make an interim determination, particularly where this would enable the benefits from improved access conditions to be realised by end-users in a timely manner.

This may also be appropriate where an interim determination is necessary in order to meet international treaty obligations. For instance, article 9.8(b) of chapter 10 of the Singapore-Australia Free Trade Agreement requires the Commission to make an interim determination where it is unable to finalise arbitrations concerning the terms, conditions and rates of interconnection between Singaporean ‘facilities-based suppliers’ and a ‘major supplier’ within 180 days.

9.2.3. Other relevant considerations

The guidelines set out in section 9.2.2. explain the Commission’s approach to those circumstances which it envisages may arise. That said, it is not possible to exhaustively describe all circumstances in which it will be appropriate to continue with

an arbitration. Thus, the Act specifically enables the Commission to take account of other matters where relevant.

9.3. Procedural issues

9.3.1. Process for considering undertakings

The process for consideration of an access undertaking generally involves the following steps:

- receipt of the access undertaking;
- publication of the access undertaking, along with a discussion paper (and other relevant material relevant to consideration of the undertaking) inviting submissions on relevant issues by a specified time;
- publication of submissions received in response to the discussion paper;
- consideration of the access undertaking and submissions received in response to discussion paper;
- publication of a draft report setting out the Commission's proposed decision to accept or reject the access undertaking, along with its reasons, and inviting submissions on the draft report;
- publication of submissions received in response to the draft report;
- consideration of submissions on the draft report;
- decision to accept or reject the access undertaking;
- notice to the carrier or carriage service provider of the Commission's decision; and
- publication of a final report setting out the Commission's reasons for accepting or rejecting the access undertaking.

9.3.2. Procedural fairness and confidentiality

The Commission considers that the requirements of procedural fairness (or natural justice) apply in relation to its decision to accept or reject an access undertaking. As a starting point, the Commission is of the view that all information and submissions that it proposes to take into account in assessing the access undertaking should be publicly disclosed and as early as possible in the process. This enables persons with an interest in the access undertaking to comment on matters affecting their interests. Also, it enables the Commission to test the veracity of the information, thereby improving the accuracy of information used by the Commission and promoting transparency of its decision making.

Where, however, the Commission receives confidential information or submissions, public disclosure may harm the legitimate commercial interests of the information provider. In such a case, it is necessary to balance this harm against both the benefits from public disclosure and the harm that interested persons may suffer if they are

unable to comment on matters affecting their interests. After balancing these matters, the Commission may decide that public disclosure is not appropriate, but that a more limited form of disclosure should apply.

In cases where more limited forms of disclosure are appropriate, the Commission would expect that disclosure to a limited number of persons (e.g. particular persons employed by an access seeker, or external advisers) would be made. This would be on condition that those persons give confidentiality undertakings restricting use and disclosure of the information. This is intended to minimise the likelihood of harm to the legitimate commercial interests of the person providing the information or submission as a consequence of disclosure but still allow third party access to test the veracity of the information.

This approach is similar to that adopted in the arbitration context (see section 6.3.) and thus ensures that when an arbitration is deferred, the parties to the arbitration are not compromised in terms of their ability to comment on information and submissions considered by the Commission. Accordingly, persons providing confidential information and submissions to the Commission in the context of an undertaking should be aware that the information or submission may be disclosed to other persons, albeit on a limited basis.

There may also be situations where information that is provided to the Commission may be considered so sensitive that the party providing it does not consent to even a limited form of disclosure as noted above. In such situations, the Commission will assess the reasonableness of such a request, having regard to the sensitivity of the information and the risks associated with even a limited form of disclosure to a party's commercial interests. The Commission may then determine that the information should not be disclosed beyond the Commission. It needs to be noted, however, that where the veracity of the information cannot be tested by the Commission to its satisfaction, it may decide to give lesser weight to such information.

9.3.3. Use of arbitration information in assessment of the access undertaking

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

Before doing so, however, generally it will be necessary for the Commission to grant its consent to such use or disclosure. This is because confidential information in an arbitration is usually subject to a confidentiality order made by the Commission, which limits use or disclosure of this information outside the arbitration context— see section 6.2.

In order for the Commission to grant its consent, the party wishing to use or disclose the confidential information should make a written request to the Commission seeking consent for the proposed use or disclosure. The request should describe the information that the party wishes to use, and the persons to whom the information would be disclosed.

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

9.3.4. Co-ordination of decision making

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

- If the Commission decides to accept the undertaking, this may dispense with the need to continue with the arbitration. However, where the arbitration dispute is not withdrawn (s. 152CN) or terminated (s. 152CS), the Commission will be required to proceed with the arbitration and make an interim or final determination that is not inconsistent with the undertaking.

- If the Commission decides to reject the undertaking, the work that the Commission has performed in respect of the undertaking may, as appropriate, be used for the purposes of making an interim or final determination in the arbitration.

In the event that the Commission has made a final determination in respect of the arbitration prior to making its decision on the access undertaking, one of the parties can seek a variation to the determination. If the other party refuses, then this can form the basis of a dispute notification[56] and the Commission can resolve the matter by way of arbitration.

9.3.5. Review of the undertaking by the Tribunal

Where a person whose interests are affected by the Commission's decision in respect of the access undertaking seeks review by the Australian Competition Tribunal, the Tribunal's consideration of the matter will add to the time involved in considering the access undertaking. In such a situation, it may be appropriate for the Commission to make an interim determination in any arbitration previously deferred pending consideration of the access undertaking. Once the Tribunal has completed its review, the Commission can proceed towards finalising the arbitration in the manner described in section 9.3.4. in order to achieve consistency between the Tribunal decision and any arbitration determination.

---

[56] Section 152CM(1) and (5)(b).

Appendix 1. List of declared services

Declared services	Date decision made	Process for decision making
Domestic PSTN originating and terminating access	June 1997	Deeming
Domestic GSM originating and terminating access[a]	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
Domestic AMPS originating and terminating access[d]	June 1997	Deeming
AMPS to GSM diversion service[d]	June 1997	Deeming
Broadcasting access service	June 1997	Deeming
ISDN originating and terminating service	November 1998	TAF[57] referred to ACCC
Unconditioned local loop service	August 1999	TAF referred to ACCC
Local carriage service[e]	August 1999	TAF referred to ACCC
Local PSTN originating and terminating service	August 1999	ACCC initiated inquiry
Analogue subscription television (pay TV) broadcast carriage service	September 1999	ACCC initiated inquiry
Line Sharing	August 2002	ACCC initiated inquiry

[a] Service varied in April 2002.
[b] Service varied in May 2001.
[c] Service varied in November 1998.
[d] Declarations revoked in February 2001.
[e] Partial exemption granted in July 2002.

[57] The TAF was the Telecommunications Access Forum. One of its roles was to recommend services to the Commission for declaration. It has now been disbanded, and recent amendments to the Act have removed references to the TAF — see Telecommunications Competition Act 2002, Schedule 2, Part 10.

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>; Email: <email 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 >; Email: <email 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 (for example, 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 a history of negotiations (particularly details, and evidence, of when negotiations commenced) and indicate whether the parties have used dispute resolution mechanisms (for example, conciliation, mediation). A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful;

— details of any options or proposed solutions put forward during negotiations, or in the context of dispute resolution mechanisms, and the parties' responses;

— the terms and conditions of supply, or aspects of access, on which the access seeker and access provider have agreed; and

— the outcome sought by the notifying party (e.g. the price for supply of the declared service), and the justification for that outcome.

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; that is, the pricing principles;
- use of the pricing principles to derive the formulae which can be used to calculate the price; and
- populating the formula with data (inputs) in order to derive the price.

Each of these steps involves 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 (for example, 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 formulae 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 formulae.

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 about 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

As noted above, the determination of pricing principles is to occur at the same time, or as soon as possible 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 as the Commission considers appropriate. In general, this will involve making the document available on the Commission's website and advising people 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 assessing 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 people 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 **(see s. 152CR(1) and s. 152AH(1)).**

See chapter 7 for a discussion of particular criteria.

The Commission may also have regard to any other matters that it considers relevant as is the case with respect to arbitrations and access undertakings **(s. 152CR(2) and 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	
GSM and CDMA terminating services	September 2002
Line sharing service	August 2002
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 these services are available from the Commission's website: 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:

- subsection 335(5) relating to supply of carriage services for defence purposes;
- subsection 351(3) relating to provision of pre-selection;
- subsection 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.

When 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 if 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 give the Commission 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, upon notification of a dispute the Commission will send an email to all persons registered with the Commission for the purposes of dispute notification. The email 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 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 (see 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 (see 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 Part XIC, 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, there is no provision 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 multilateral dimensions, it is likely that it would adopt the process set out in 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, 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, 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, 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, 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.

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, as described in section 7.6. of this guide.

Termination by the Commission

As for arbitration under Part XIC (which is described in section 7.6.2. 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

As for arbitration under Part XIC (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. Draft confidentiality undertaking

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974

IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

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

NOTIFIED UNDER: *Trade Practices Act 1974* (Cwth) s 152CM(1) [or s 152CM(2)]

CONFIDENTIALITY UNDERTAKING

I, of undertake to

[INFORMATION PROVIDER] and to the Australian Competition and Consumer Commission ("**the ACCC**") that:

1. Subject to the terms of this Undertaking and any order of the ACCC, I will keep confidential at all times the information provided by [INFORMATION PROVIDER] listed at Attachment 1 to this Undertaking ("**the** [INFORMATION PROVIDER] **confidential information**").

2. I will only use the [INFORMATION PROVIDER] confidential information for the purposes of this arbitration.

3. Subject to paragraph 4 below, I will not disclose any of the [INFORMATION PROVIDER] confidential information to any other person without the prior written consent of [INFORMATION PROVIDER] or without first obtaining an order authorising such disclosure from the ACCC.

4. I acknowledge that I may disclose the [INFORMATION PROVIDER] confidential information to which I have access to:

   (a) the ACCC; and

   (b) any employee, internal legal advisor, external legal advisor or independent expert currently employed or retained by [PARTY] for the purposes of the conduct of the arbitration provided that:

      (i) the person to whom disclosure is proposed to be made ("the person") is named in Attachment 2 or has otherwise been approved of by [INFORMATION PROVIDER] in writing, or by order of the ACCC;

      (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [INFORMATION PROVIDER]; and

      (iii) a signed undertaking of the person has already been served on [INFORMATION PROVIDER]; and

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

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

   (a) the finalisation of this arbitration; or

   (b) my ceasing to be employed or retained by a party to this arbitration;

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

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

   (a) the notification is withdrawn under s 152CN of the Trade Practices Act 1974 (Cwth) ("**the Act**");

   (b) the ACCC terminates this arbitration under s 152CS of the Act; or

   (c) the ACCC makes a final determination under s 152CP of the Act.

6. Nothing in this Undertaking shall impose an obligation upon me in respect of information:

   (a) which is in the public domain; or

   (b) which has been obtained by me otherwise than from [INFORMATION PROVIDER] in the course of this arbitration;

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

Signed:_____ Dated:_____