



# Part IIIA arbitration guide

**A guide to the arbitration process for resolving access  
disputes**

December 2024

## **Acknowledgement of country**

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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# Contents

Part IIIA arbitration guide .....	0
Purpose of this guide .....	4
1. The ACCC and Part IIIA .....	5
1.1. The ACCC .....	5
1.2. Part IIIA of the CCA .....	5
1.3. Declared services .....	5
2. Arbitration process.....	6
2.1. Notification of dispute .....	6
2.2. Parties to the arbitration .....	6
2.3. Determination .....	7
2.3.1. Time limits .....	7
2.3.2. Scope .....	7
2.3.3. Restrictions.....	8
2.3.4. Matters to be taken into account.....	8
2.3.5. Interim determinations .....	9
2.4. Termination of arbitration.....	9
2.5. Arbitration procedure .....	9
2.5.1. Constitution of Commission .....	9
2.5.2. Right to representation .....	9
2.5.3. Commission arbitration powers.....	9
2.5.4. Confidentiality.....	10
2.5.5. Costs .....	10
2.5.6. Joint arbitration hearings .....	10
3. Report of final arbitration.....	11
3.1. Matters to be included .....	11
3.2. Confidentiality.....	11
4. Effect of determinations.....	11
4.1. Operation of final determination .....	11

4.2. Payment of interest on backdated provisions .....	12
4.3. Operation of interim determinations.....	12
5. Review of final determination.....	12
5.1. Review by Tribunal .....	12
5.1.1. Time limit for Competition Tribunal decisions.....	13
5.1.2. Competition Tribunal decision .....	13
5.2. Appeal to Federal Court .....	13
5.2.1. Operation and implementation of a determination subject to appeal .....	14
Glossary of terms .....	15

# Purpose of this guide

The purpose of this short guide is to provide stakeholders with an overview of the core elements of the arbitration process as contained in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA). The process applies to parties seeking access to an essential infrastructure service where agreement cannot be reached with the service provider.

This guide includes details on the arbitration procedure, the costs of arbitration, the effects of the arbitration determination and rights to review of the determination.

This guide:

- is non-binding
- provides only a summary of key concepts from Part IIIA, and does not cover all aspects of the arbitration process
- should not be considered a substitute for professional advice
- should be read in conjunction with Part IIIA of the CCA.

The ACCC may, from time to time, revise this guide at its discretion. The legislative provisions referred to within this guideline are current as of November 2024. It is important for any party seeking to rely on Part IIIA to obtain their own legal advice.

# 1. The ACCC and Part IIIA

## 1.1. The ACCC

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The ACCC's primary responsibilities are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the CCA, to regulate national infrastructure and to undertake market studies.

## 1.2. Part IIIA of the CCA

[s44AA]

The object of Part IIIA of the CCA is to promote effective competition in upstream and downstream markets by promoting the economically efficient operation of, use of, and investment in infrastructure.

Part IIIA includes provisions setting out the legal right for third parties to gain access, on reasonable terms and conditions, to certain nationally significant infrastructure services. Under Part IIIA, the ACCC has certain responsibilities including arbitrating disputes about access to declared services.

## 1.3. Declared services

[s44CA, s44F-s44L]

Access to services provided by essential facilities may be obtained by having the facility "declared".<sup>1</sup> Once a service has been declared, a third party who seeks access but is unable to reach agreement with the service provider may apply to the ACCC to have the access dispute determined by arbitration.

The National Competition Council (NCC) considers applications to declare a service. It then makes recommendations to the responsible Minister who can decide to declare the service. The declaration criteria for a service are that:

- access or increased access to the service, on reasonable terms, would promote a material increase in competition in at least one market, other than the market for the service; and
- the facility could meet the total foreseeable demand in the market over the access period at the least cost; and
- the facility is of national significance, having regard to its size and the importance of the facility to constitutional trade or commerce or to the national economy; and
- access, or increased access, on reasonable terms would promote the public interest.

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<sup>1</sup> A list of declared services can be found on the ACCC website at <https://www.accc.gov.au/public-registers/access-to-services-registers/s44qb-register>

Decisions to declare, or not declare a service, are reviewable by the Australian Competition Tribunal (Competition Tribunal).

## 2. Arbitration process

### 2.1. Notification of dispute

[s44S –s44T]

If a third party access seeker is unable to agree with the service provider on one or more aspects of access to a declared service (aspects that are not already subject to an access undertaking), either the provider or the third party may notify the Commission that an access dispute exists.

The notification must contain certain information including:

- a description of the access dispute
- a description of efforts to resolve the dispute
- details of any existing users of the service, or persons with a right to use the service
- whether access would involve extending the facility
- an estimate of the direct costs of providing access to the service to the third party
- whether access will involve the third party becoming the owner of any part of the facility, including extensions to the facility
- if the notifier is the third party, a short description of the benefits from allowing access, or increased access, to the service.<sup>2</sup>

After receiving the notification, the Commission must give notice of the access dispute to the provider (if the third party notified the access dispute) or the third party (if the provider notified the access dispute). The Commission must also notify any other person that the Commission believes may want to be a party to the arbitration.

A \$2,750 notification fee is payable to the ACCC.<sup>3</sup>

### 2.2. Parties to the arbitration

[s44U]

The parties to the arbitration are the provider, the third party, and any other person who applies to be made a party and is accepted by the Commission as having a sufficient interest.

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<sup>2</sup> The full list of information requirements for a notification is at Reg 6C(1), Competition and Consumer Regulations 2010.

<sup>3</sup> Reg 6C(2), Competition and Consumer Regulations 2010

## 2.3. Determination

[s44V, s44ZZCB]

The Commission must make a final determination (and may make an interim determination) in relation to the arbitration of the access dispute. The Commission must provide a draft determination to the parties before making the final determination. The final determination must contain reasons for the decision.

The arbitration may be deferred if the Commission is simultaneously considering whether to accept an access undertaking for the same declared services.

### 2.3.1. Time limits

[s44XA]

The Commission must make a final determination within 180 days of receipt of the arbitration application. However, the clock is stopped for certain reasons, including when:

- the Commission gives a direction for the giving of information or the making of a submission within a specified period
- consideration of the dispute is deferred whilst the Commission considers an access undertaking
- the Commission and the parties agree to stop the clock for a specified period.

If the Commission does not publish a written report about a final determination within 180 days then the Commission is taken, immediately after the end of this period, to have:

- made a final determination that does not impose any obligations on the parties or alter any obligations (if any) that exist at that time between the parties; and
- published a written report about the final determination.<sup>4</sup>

### 2.3.2. Scope

[s44V(2)-s44V(2A)]

The determination may deal with any matter relating to access by the third party to the service. This includes matters that were not the basis for notification of the dispute. For example, the determination may:

- require the provider to provide access to the service by the third party
- specify the terms and conditions, including payment, of the third party's access to the service
- require the provider to extend the facility
- require the provider to permit interconnection to the facility by the third party.

The Commission does not have to require the provider to provide third party access to the service.

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<sup>4</sup> s44ZNB set out the matters that must be included in a written report.



### 2.3.3. Restrictions

[s44W]

The Commission must not make a determination that would:

- prevent an existing user of the service from obtaining their reasonably anticipated requirements<sup>5</sup>
- prevent a person with a contractual right, or a right under a determination, from obtaining a sufficient amount of the service
- result in the third party becoming the owner (or one of the owners) of any part of the service facility without the consent of the provider
- require the provider to bear some or all of the costs of either extending the service facility and/or maintaining extensions of the facility
- require the provider to bear some or all of the costs of creating or maintaining interconnections to the service facility.

If the declaration of a service is under review by the Competition Tribunal the Commission must not make a determination in relation to the service until the Competition Tribunal has decided its review.

### 2.3.4. Matters to be taken into account

[s44X, s44ZZCA]

When making a final determination, the Commission must take the following matters into account:

- the objects of Part IIIA
- the legitimate business interests of the provider, including its investment in the facility
- the public interest, including in having competition in markets
- the interests of all persons who have rights to use the service
- the direct costs of providing access to the service
- the value to the provider of extensions to the facility whose cost is borne by someone else
- the value to the provider of interconnections to the facility whose cost is borne by someone else
- the operational and technical requirements necessary for the safe and reliable operation of the facility
- the economically efficient operation of the facility
- the specified pricing principles.

The Commission may also take into account any other matters that it believes are relevant.

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<sup>5</sup> s44W(5) An existing user means a person, including the provider, who was using the service at the time when the dispute was notified.

### **2.3.5. Interim determinations**

[s44X(3)-s44X(4)]

When making an interim determination the Commission *may* consider any of the matters that *must* be taken into account when making a final determination. However, it does not have to consider these matters.

## **2.4. Termination of arbitration**

[s44Y - s44YA]

The Commission may terminate the arbitration at any time if it believes that:

- the application is vexatious, trivial, misconceived or lacking in substance, or
- the party who notified the dispute has not taken part in negotiations in good faith, or
- access to the service should continue to be governed by an existing contract between the provider and third party, or
- if the dispute is about varying an existing determination, there is no sufficient reason why the previous determination should not continue in its present form.

The Commission must terminate the arbitration if the declaration to which the service relates is set aside or varied by the Competition Tribunal.

## **2.5. Arbitration procedure**

### **2.5.1. Constitution of Commission**

[s44Z-s44ZD]

For the purposes of an arbitration, the Commission will be made up of 2 or more members of the Commission. Any question before the Commission will be decided according to the majority, or if the members are evenly divided, according to the presiding Commissioner. The arbitration will normally be held in private.

### **2.5.2. Right to representation**

[s44ZE]

A party may appear in person at an arbitration or be represented by someone else.

### **2.5.3. Commission arbitration powers**

[s44ZF – s44ZK]

When conducting an arbitration the Commission is not bound by legal forms or rules of evidence, must act as speedily as appropriate, and may seek information relevant to the dispute in any way it deems appropriate. The Commission may require that the parties present their respective cases within specified time periods and may decide whether it wishes to receive particular evidence and/or argument orally or in writing.

The Commission's powers when arbitrating an access dispute include:

- giving directions in the course of, or for the purposes of, an arbitration hearing and also more generally to ensure the timely hearing and determination of the access dispute
- hearing and determining the arbitration in the absence of a person who has been summoned or served with a notice to appear
- referring any matter to an expert and accepting the expert's report as evidence
- giving an order to a person not to 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
- taking evidence on oath or affirmation.

Criminal penalties including imprisonment apply to certain failures to comply with the arbitration process.

### **2.5.4. Confidentiality**

[s44ZL]

A party to an arbitration may inform the Commission that a specified part of a document is commercially confidential and request the Commission not to give a copy of that part to another party.

On receiving the request, the Commission must inform the other parties of the general nature of the request and ask if they have any objection to it. After considering the request and any objections, the Commission may decide not to give the other parties a copy of so much of the document as contains commercially confidential information.

### **2.5.5. Costs**

[s44ZN]

The Commission may charge the following fees for its costs in conducting an arbitration of an access dispute:

- A pre-hearing fee of \$2,170 if the access dispute relates to a variation of an existing access determination or, in any other case, \$10,850. The fee is payable by the person who notified the access dispute.
- A hearing fee of \$4,340 per day (apportioned between parties by the Commission).<sup>6</sup>

### **2.5.6. Joint arbitration hearings**

[s44ZNA]

If the Commission is arbitrating two or more access disputes at a particular time and these disputes have one or more matters in common, the Chairperson may decide to hold a joint arbitration if this is likely to lead to a more efficient and timely resolution. Each party must be given notice of the proposal and the Chairperson must consider any submissions made by the parties in deciding whether to hold a joint arbitration.

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<sup>6</sup> Reg 6F, Competition and Consumer Regulations, 2010

## 3. Report of final arbitration

### 3.1. Matters to be included

[s44ZNB]

The Commission must prepare and publish a written report of its final determination. The report must include, amongst other things:

- the reasons for the determination
- the principles and methodologies applied by the Commission, in particular the reasons for the choice of the asset value methodology
- any information provided by the parties that was relevant to those principles or methodologies
- how the Commission took into account the mandated arbitration matters and how and why the Commission considered any additional matters
- any implications the Commission considers the determination has for people seeking access to the service, or similar services, in the future.

### 3.2. Confidentiality

[s44ZNB(5)-s44ZNB(7)]

The Commission must not include in the final determination report any information that, due to confidentiality claims, it decided not to give to a party to the arbitration.

Before publishing the report, the Commission must inform each party to the arbitration what it proposes to publish. Each party must be given the opportunity to make a written submission (within 14 days of notification) identifying any information that the party considers should not be published due to confidentiality.

In deciding what to publish, the Commission must consider any submission made and may consider any other matter it considers relevant.

## 4. Effect of determinations

### 4.1. Operation of final determination

[s44ZO(1)-s44ZO(4)]

The determination has effect 21 days after it is made unless one of the parties to the arbitration applies to the Competition Tribunal for a review. If a party does apply for a review, the determination has no effect until the Competition Tribunal makes its decision.

Any or all of the findings of a final determination may be backdated to apply from a specified day that is earlier than either the date the determination takes effect, or, if the determination

is subject to review by the Competition Tribunal, the date the Tribunal makes its decision. However, the specified day must not be earlier than the day following:

- the day on which negotiations commenced if the parties commenced negotiations on access to the service *after* the service was declared; or
- the day on which the declaration began to operate if the parties commenced negotiations on access to the service *before* the service was declared.

The specified day cannot be a day on which the third party did not have access to the service.

## 4.2. Payment of interest on backdated provisions

[s44ZO(6)]

If a backdated provision of a final determination requires a party to the determination to pay money to another party, the determination may require interest to be paid on the whole or a part of that money, at a rate specified in the determination.

The Commission has determined legislative guidelines relating to the deferral of arbitrations and the backdating of final determinations.<sup>7</sup>

## 4.3. Operation of interim determinations

[s44ZOA(5)]

Where the Commission makes an interim determination this will take effect on the day specified in the interim determination until the earliest of the following:

- notification of the access dispute is withdrawn
- a final determination relating to the access dispute takes effect
- an interim determination made by the Tribunal (while reviewing a final determination relating to the access dispute) takes effect.

# 5. Review of final determination

## 5.1. Review by Tribunal

[s44ZP, s44ZZOAA]

A party may apply to the Tribunal for a review of a final determination. The application must be made within 21 days after the Commission made the final determination. The Tribunal has the same powers as the Commission for the purposes of the review.

The Tribunal will re-arbitrate the access dispute, based on:

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<sup>7</sup> ACCC [Guidelines relating to deferral of arbitrations and backdating of determinations under Part IIIA of the Competition and Consumer Act 2010](#)

- the information, reports, and materials taken into account by the Commission in the making of its final determination
- information provided to the Tribunal which the Tribunal reasonable and appropriately requests for the purpose of making its decision on the review.<sup>8</sup>

The Tribunal may require the Commission to give assistance to the review, provide specified information and make reports.<sup>9</sup>

### **5.1.1. Time limit for Competition Tribunal decisions**

[s44ZZOA]

The Competition Tribunal must make a decision on the review within 180 days of receipt of the review application. However, the clock is stopped for certain reasons, including when:

- the Competition Tribunal, the Commission and the parties to the review agree to stop the clock for a specified period
- the Competition Tribunal requests information which it considers reasonable and appropriate for the purposes of making its decision on the review<sup>10</sup>
- the Competition Tribunal gives a notice requiring the Commission to give specified information and make reports for the purposes of the review.<sup>11</sup>

If the Competition Tribunal is unable to make a decision on the review within the consideration period, the Competition Tribunal must, by notice in writing to the Treasurer, extend the consideration period by a specified period.

### **5.1.2. Competition Tribunal decision**

[s44ZP(6)-(8)]

The Competition Tribunal may either affirm or vary the Commission's determination. The Competition Tribunal's decision is to be taken as a determination of the Commission and takes effect immediately.

## **5.2. Appeal to Federal Court**

[s44ZR]

A party to an arbitration may appeal a Competition Tribunal decision on a question of law to the Federal Court. The appeal must be filed no later than 28 days after the day on which the decision was made.

The Federal Court must hear and determine the appeal and may make any order it thinks appropriate. These orders may include (but are not limited to):

- affirming or setting aside the Competition Tribunal's decision
- sending the matter back to the Competition Tribunal to be decided again in accordance with the Federal Court's directions.

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<sup>8</sup> s44ZZOAAA(4)

<sup>9</sup> s44ZP(5)-(5A)

<sup>10</sup> s44ZZOAAA(5)

<sup>11</sup> s44ZP(5A)

### **5.2.1. Operation and implementation of a determination subject to appeal**

[s44ZS]

The institution of an appeal in the Federal Court against a Competition Tribunal's decision does not affect the decision's operation or prevent its implementation. However, the Federal Court may make orders to stay or otherwise affect the operation or implementation of the decision in order to ensure the effectiveness of the appeal hearing and determination.

If such an order is in effect, the Court may later vary or revoke it.

# Glossary of terms

Term	Meaning
ACCC	Australian Competition and Consumer Commission
Access dispute	Arises where a third party access seeker is unable to agree with the service provider on one or more aspects of access to a declared service (aspects that are not already subject to an access undertaking).
Access seeker	A third party who makes a request for access to a service declared under Part IIIA of the CCA.
Access undertaking	Access providers may give an access undertaking to the ACCC. An undertaking may specify the terms and conditions on which access will be made available to third parties. An undertaking may provide for the ACCC to resolve disputes that arise under that undertaking. An access undertaking is able to be enforced in the Federal Court.
Arbitration	Refers to the process of arbitration of an access dispute by the Commission under Part IIIA of the CCA.
Arbitration hearing (or hearing)	The process of conducting the arbitration.
Commission	Refers to those members of the ACCC who are constituted to conduct the arbitration.
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Competition Tribunal	Refers to the Australian Competition Tribunal, and includes a member of that Tribunal or a Division of that Tribunal performing functions of that Tribunal - see s. 4 of the CCA.
Declared service	A service (see definition of service) for which a declaration is in operation - see s. 44B of the CCA.
Final determination	A determination of the ACCC made pursuant to s. 44V of the CCA that is not an interim determination.
Interim determination	A determination that is expressed to be an interim determination.
Party	A person who is formally recognised as a party to an arbitration under Part IIIA of the CCA - see ss. 44B and 44U of the CCA.
Provider	The entity that is the owner or operator of the facility that is used (or is to be used) to provide the service (see definition of service) - see s. 44B of the CCA.
Service	As defined in s. 44B, the term service refers to 'a service provided by means of a facility' and includes the (a) use of an infrastructure facility such as a road or railway line; (b) handling or transporting things such as goods or people; and (c) a communications service or similar service, but excludes matters specified in the CCA.
Third party	In relation to a service (see definition of service), a person who wants access to the service or wants a change to some aspect of their existing access to the service - see s. 44B.