255 Elizabeth Street
Sydney NSW 2000
Australia
DX 107 Sydney
Tel +61 2 9286 8000
Fax +61 2 9283 4144
www.phillipsfox.com

Adelaide
Brisbane
Canberra
Melbourne
Perth
Sydney
Auckland
Wellington
Hanoi
Ho Chi Minh City

# Review of Telecommunications Arbitration Processes

18 April 2002

## Table of Contents

# PART I

## 1 Retainer

1.1 By letter dated 17 August 2001, the Australian Competition and Consumer Commission (the ACCC) engaged Phillips Fox to provide the consultancy services detailed in the Consultancy Brief, a copy of which is Appendix A to this report. In broad terms, the consultancy required consideration of two distinct but related matters:

1.1.1 The ACCC's internal structure and process for managing telecommunication arbitrations (the ACCC arbitration process) under the *Trade Practices Act 1974* (the Act) and the *Telecommunications Act 1997* (the Telecommunications Act), and possibilities for improvement of that process; and

1.1.2 The viability of the ACCC implementing a dispute management system whereby different dispute resolution mechanisms are used for different disputes, and the nature of such a system (the system design).

1.2 The major focus of this review and report is the ACCC's arbitration process. To the extent that the consultants have considered the system design other than in outline, this is anticipated to be the subject of a separate and concurrent program that requires industry input and 'buy-in'. This project is currently being implemented in association with the Service Providers Industry Association (SPAN).

## 2 Methodology

2.1 The consultants' approach to this project involved the following:

2.1.1 Project management and administration.

2.1.2 Research and benchmarking.

2.1.3 Review and analysis of files.

2.1.4 Interviews with stakeholders and ACCC personnel.

2.1.5 Drafting recommendations and report.

2.2 The report includes an evaluation of current processes generally against the benchmarks relied on by the consultants, as well as file summaries containing comment in more detail on the ACCC's specific processes.

2.3 Given the difference between the legislative frameworks in Australia and other countries, the report also relies substantially on subjective feedback on the processes from participants and their representatives. These stakeholders were encouraged to comment on the efficiency and effectiveness of the ACCC's arbitration processes. They inevitably focussed upon areas of dissatisfaction with the ACCC's performance. This report therefore also focuses upon these issues and considers whether the criticisms have any valid basis and, if so, how to address these issues. While market participants were critical of some of the ACCC's processes, the persons interviewed generally acknowledged both the difficulty of the ACCC's task and the complexity of the process the ACCC had to undertake.

2.4 The focus of the report is therefore not an indication that the ACCC has not effectively performed its telecommunications access role. Instead, it seeks to identify on areas in which the existing processes of the ACCC can be augmented or improved.

## Project management and administration

2.5 The consultancy has been undertaken by a small project team (the consultants) consisting of Paul Holm, Geoff Masel, Paul Fenton-Menzies and Tom Pincus of Phillips Fox and Shirli Kirschner of Resolve Advisors. Resolve Advisors was engaged as a sub-contractor by Phillips Fox to assist in the consultancy. In particular, Ms Kirschner's role involved a focus on issues concerning appropriate Alternative Dispute Resolution (ADR) processes – both in relation to their integration into the ACCC's arbitration processes and to the separate design of a dispute management system.

2.6 The project was managed by Paul Holm, assisted by Tom Pincus. The consultants held weekly meetings throughout the project in order to review progress and refine the project plan. The majority of interviews and case file reviews were undertaken by Geoff Masel and Shirli Kirschner, both of whom were assisted by Tom Pincus.

## Research and benchmarking

2.7 The consultants undertook a broad review of material relating to regulatory and arbitration experience with telecommunications access in comparable jurisdictions. These included: the United States, the European Union, Germany, France, Japan, New Zealand and Finland. We also considered other industry experience, including in relation to electricity under Chapter 8 of the National Electricity Code and rail access issues – in particular the proposed dispute resolution regime proposed in the Australian Rail Track Corporation (ARTC) undertaking. We considered literature regarding benchmarks for commercial arbitrations and external industry ADR schemes generally.

2.8 The consultants also took into consideration proposals for amendments to the telecommunications access regime including:

2.8.1 The Productivity Commission's report on *Telecommunications Competition Regulation*, as it pertains to the ACCC's arbitration role;

2.8.2 Selected submissions to the Productivity Commission by more than ten industry stakeholders and the ACCC;

2.8.3 The *Trade Practices Amendment (Telecommunications) Bill 2001* and Explanatory Memorandum;

2.8.4 Submissions provided to the Senate *Environment, Communications, Information Technology and the Arts* Legislation Committee, again by more than ten industry stakeholders and the ACCC;

2.8.5 The Report of the Senate Committee; and

2.8.6 The *Trade Practices Amendment (Telecommunications) Act 2001*, which commenced when it received Royal Assent on 27 September 2001.

## Review and analysis of files

2.9 The consultancy agreement specified that three case studies would be carried out. The consultants reviewed ACCC files for arbitrations focussing on price disputes, in relation to both LCS and PSTN services; and for an arbitration focussing on disputes concerning technical issues, in relation to DDAS.

2.10 The consultants also selected additional files for review, based on industry feedback and consultation with the ACCC. The files reviewed may be divided into three groups:

2.10.1 Set out in Appendix B are summary case study reports for PSTN – disputes with Telstra, notified by AAPT and Primus; LCS – dispute with Telstra, notified by Optus; and GSM – disputes with Vodafone and Optus, notified by Primus. These files were reviewed soon after the commencement of the consultancy, with a view to identifying issues on which to focus during interviews with stakeholders and further review and analysis.

2.10.2 Set out in Appendix C is a summary case study report regarding the DDAS dispute with Telstra, notified by MCT (3 notices). The consultants undertook a detailed review and analysis of this file, which is reflected in the chronology table also included in Appendix C. This provided an overview of the strengths and weaknesses of the ACCC's process in dealing with this dispute.

2.10.3 A review was also undertaken of the Foxtel Pay TV dispute, on the basis of feedback received from key participants or their representatives. Due to the scope of the project this review, while informing the report, was not documented as a separate memo.

## Interviews and other feedback

2.11 In addition to ongoing consultation and communication throughout the drafting of the report, the consultants undertook interviews of the case officers at the ACCC with responsibility for the files reviewed, as well as with other ACCC staff and Commissioners. Individual interviews were conducted with:

- Rod Shogren and John Martin – Commissioners;
- Michael Cosgrave – General Manager, Telecommunications;
- Julia Peterburgsky – Legal Officer, Legal Unit;
- Bruce Cooper – Assistant General Counsel (Regulatory Affairs);
- Stephen Farago – Assistant Director, Telecommunications;
- Ken Walliss – Director, Telecommunications;
- John Bahtsevanoglou – Assistant Director, Telecommunications; and
- Chris Pattas – Senior Director Access, Telecommunications Unit.

2.12 After an initial consultation with the ACCC, a list was agreed of 16 stakeholder organisations that should be approached by the consultants. The consultants then sent 'stakeholder packs' (Appendix D) to each of the 16 organisations, and in some cases also to their identified legal advisers. The organisations are:

- Telstra;
- Cable and Wireless Optus (Optus)[1];
- AAPT Limited (AAPT);
- Primus Telecom (Primus);
- Vodafone;
- Macquarie Corporate Telecommunications (MCT);
- Chime Communications (Chime);
- FlowCom;
- The Internet Group;
- PowerTel;

[1] Prior to its acquisition by Singapore Telecom.

- Dingo Blue;
- people Telecom;
- RSL Com;
- C7;
- FoxTel; and
- TARBS.

2.13 The stakeholder packs included questionnaires for completion and return by nominated individuals (including external advisers) for each organisation. Completed questionnaires were received from 12 out of the 16 organisations.

2.14 Interviews were then conducted with individual stakeholders as necessary to gain feedback about the specific arbitrations in which file reviews were undertaken and about issues arising in the arbitration process more generally. The questionnaires provided data which, in combination with the file reviews, formed a basis for the interviews – both with ACCC and industry personnel.

2.15 In order to maintain confidentiality the consultants do not propose to reveal the names of all individuals or stakeholder organisations who returned completed questionnaires or participated in interviews. The consultants interviewed or conferred by telephone (or both) with the following:

2.15.1 For Telstra – 3 regulatory personnel.

2.15.2 For Optus – 2 members of regulatory personnel and an external legal adviser.

2.15.3 For AAPT, Primus, Vodafone and MCT – a combined total of seven nominated regulatory personnel and/or external advisers.

2.15.4 For the remaining 10 industry stakeholders – a combined total of five nominated regulatory personnel and/or external advisers.

2.16 An additional 13 interviews were also arranged at the consultants' initiative, where particular persons were seen as being likely to have useful comments to offer. These interviewees included independent legal advisers and technical experts with relevant experience in resolving telecommunications disputes, both in Australia and overseas.

2.17 Overall, interviews were utilised both to gather data and opinions about the current arbitration process and to test the consultants' preliminary conclusions and recommendations for reform as the project progressed.

### Drafting recommendations and report

2.18 The report was drafted jointly by the consultants as the project progressed. The consultants' preliminary conclusions and analysis were subject to evaluation, and revision where necessary, in light of ongoing file reviews and feedback received from stakeholders.

2.19 The consultants also received regular and useful feedback from ACCC staff – in particular, Ken Walliss and John Laughlin. The consultants gave a presentation on 19 October 2001 to a number of Commissioners and ACCC staff to summarise the conclusions reached in the first complete draft report. A further draft was provided to Ken Walliss and circulated by him amongst Commissioners and staff for comment. All such comment and other feedback received has been carefully considered. The final version of the report incorporates the results of such consideration.

## 3 Alternative Dispute Resolution (ADR)

3.1 The consultants have adopted the definition of ADR processes put forward by the National Alternative Dispute Resolution Advisory Council's (NADRAC) March 1997 ADR definitions paper. At its broadest ADR is any dispute resolution process other than litigation and therefore includes an arbitral process such as that under Part XIC of the Act.

3.2 NADRAC defines ADR as including the following types of processes:

- Facilitative (or consensual), which includes mediation and conciliation;
- Advisory, which includes non-binding expert determination; and
- Determinative (or adjudicative), which includes binding expert determination and arbitration.

3.3 In this evaluation we have distinguished between the existing arbitration process (being a determinative process) and the complementary use of facilitative and advisory processes. Our recommendations are therefore directed at both the refinement of the existing arbitration process and towards the more structured and comprehensive use of facilitative and advisory processes.

## 4 Nature of telecommunications arbitrations

4.1 It is clear that telecommunications access disputes are commonly more complex than standard commercial arbitrations. The consultants consider that this arises due to four key distinguishing characteristics:

4.1.1 the parties commonly lack a mutual commercial incentive to reach a settlement, particularly where the service to which access is being sought is provided by infrastructure which has natural monopoly

characteristics and where the infrastructure owner competes in a downstream service market;

4.1.2 telecommunications access arbitrations can involve the creation of rights, as well as the adjudication of rights;

4.1.3 the existence of the public benefit requirements under the Act; and

4.1.4 the complexity associated with access pricing.

## The lack of mutual incentive to commercially agree

4.2 The consultants note that the current dispute resolution process is based on a negotiate/arbitrate model. This model can be effective in commercial disputes as a result of an alignment of the underlying interests of the parties. Usually, both have an interest in maintaining a commercial relationship due to the mutual benefit that can be achieved by doing so. The difference in access disputes is that, typically, in the absence of regulation the access-provider has no inherent commercial incentive to provide access to an access-seeker – indeed, there may be a disincentive to do so.

4.3 Where an access seeker is unable to negotiate access commercially, the only way for it to obtain access is through 'declaration' of the service. In the absence of a recommendation from the Telecommunications Access Forum, the ACCC will only declare an eligible service where it considers that the declaration will promote the long term interests of end users (with reference to promoting competition, achieving any to any connectivity and encouraging economically efficient use of, or investment in, the relevant infrastructure). It follows that the service over which declaration is most likely to be sought (due to an access seeker being unable to negotiate access) and/or made (due to it being in the long term interest of end users) are those services provided by infrastructure that demonstrates natural monopoly characteristics. Part XIC of the Act therefore provides a process that will tend to highlight matters where the provider has a degree of market power and a reduced commercial incentive to provide third party access on competitive terms.

4.4 The framework of the telecommunications access regime seeks to provide an incentive to negotiate, by requiring the parties to negotiate access terms. It therefore effectively mandates a commercial relationship between the parties. This artificial incentive is reinforced by the 'sanction' that, if negotiations are not successful, the ACCC can impose its own terms and conditions of access. As a result, an artificial relationship is created. When things go wrong and a dispute arises, the parties have no underlying interest in their relationship which could motivate them to negotiate or use other processes to resolve the dispute themselves.

## Creation of rights and adjudication of rights

4.5 In ACCC arbitrations, a distinction needs to be made between processes which interpret whether a specific action infringes a right or obligation and those which

create rights or clarify existing rights. The general scope and role of a commercial arbitration is the adjudication, not the creation, of rights.

4.6 Rights can be created either through a legislative or regulatory process. Creation of rights is not a process of finding 'the correct answer' in the context of the application of known rights, but rather one of the legislature or regulator deciding what rights should be conferred.

4.7 This distinction between the creation of rights and adjudication of rights can be illustrated by comparing a common commercial arbitration with a telecommunications access arbitration. In a commercial dispute the 'right' is commonly contained in a contractual provision and the dispute revolves around the interpretation/application of that right to a particular fact situation. Typically, this will also involve the consideration of relevant precedents and the application of such precedents to the current fact circumstances. By way of contrast, a telecommunications access dispute presupposes a declared service and a failure to agree on terms and conditions of access as between a provider and access-seeker. Subject only to such a dispute being notified, the ACCC has broad powers to:

- require the provision of access;
- require the access seeker to pay for access;
- specify the terms and conditions to which the carrier must comply;
- specify any other terms and conditions; and
- require a party to extend or enhance the capability of the facility used to provide the service.

4.8 Section 152CP(2) of the Act also specifically empowers the ACCC to deal in its access determination with matters that were not the basis of the notification of the dispute.

4.9 Deciding whether access should be provided is an interpretative issue and may require adjudication of the rights provided under the standard access obligations applying to declared services. The specification of particular terms and conditions of access, or the imposition of requirements to enhance an existing facility, is however likely to involve the ACCC in a mixture of both the adjudication and creation of rights.

4.10 This distinction is important in terms of understanding the role of the arbitrator and the skills required in an access arbitration. Lawyers are particularly skilled in adjudicative processes. By way of contrast, the creation of rights will not necessarily require legal skills, but will commonly require industry/economic skills or other specialist knowledge.

4.11 A further issue that arises from this distinction is that, where the ACCC is performing an adjudicative function, it will need to strictly adhere to procedural

fairness requirements. Natural justice requirements differ where the issue is the creation of rights, as a decision is being reached not only on the basis of arguments put by the parties, but also on the basis of the proper application of public policy.

4.12 The consultants recognise that the ACCC's existing approach to the creation of rights, such as setting access prices, has not been to treat it as a purely legal process.

4.13 **[R1:]** *There has been no clear recognition of the distinction between adjudication and creation of rights. Recognition of the dual function is likely to assist in the case management of the arbitration process. In particular this type of analysis will assist in deciding the type of skills required for a particular process and in deciding the appropriate procedural requirements.*[2]

## Public benefit requirement

4.14 The imposition of a public benefit requirement under the Act arises from the need to balance the promotion of long-term interests of end users with the legitimate business interests of the provider and other criteria in s. 152CR(1) of the Act. The concept of the long-term interests of end users can be seen to embody the need to maintain the viability of the telecommunications industry, and to price access at a level which provides an incentive to maintain and build infrastructure. Equally the end users' interests are served by having multiple competitive service providers, which requires access to be priced at a level which encourages efficient decisions about whether to buy the declared service or build a parallel network. The balancing of these interests in the context of a bilateral or multilateral dispute will inevitably provide a challenge to any arbitrator.

## Access pricing

4.15 The complexity of access pricing and the need to complete pricing principles as a precursor to finalising terms and conditions of access are obvious factors which are well known to the ACCC and do not need to be addressed in any more detail for the purposes of this report.

## Case Management

4.16 One thing which is manifestly clear from both the file reviews and interviews is that telecommunications access disputes do not fit into a standard mould and that therefore there can be no 'one size fits all' approach to the resolution of such disputes. The ACCC has implicitly recognised this fact and adjusted its processes over time with reference to the particular disputes at hand. It has not, however,

[2] The consultants note that the distinction made between adjudication of and creation of rights is akin to the distinction between the ACCC's roles as regulator and arbitrator. It is intended only to be an analytical tool and should not be construed as reflecting a constitutional legal analysis of the ACCC's powers or processes.

systemised the process to be used in considering the steps to be taken in any particular case.

*4.17* **[R2:]** *One of the consultants' major recommendations is that a case management protocol (in our view implemented by a team of people) should be established to review each dispute at its outset and decide which process or processes will provide the best outcome in the particular dispute. The protocol would require case management to monitor the progress of the dispute and adapt the process as required by changing circumstances. The case management could also be designed to assist in addressing concerns of stakeholders with regard to the transparency and fairness of the process. The bases of these recommendations are discussed further below under the relevant benchmark headings. A protocol model is set out in Part II of this report.*

# 5 Benchmark analysis

5.1 The benchmarks against which the consultants measured the ACCC's arbitration processes are that they should provide fair, effective, efficient and fast dispute resolution. These benchmarks are used in evaluating complaints and dispute resolution systems. Other areas of industry dispute resolution have a number of detailed and comprehensive sub-categories in each benchmark, particularly in relation to consumer concerns. Our analysis of other regimes indicated that such detailed benchmarks were unlikely to be helpful for telecommunications access disputes. Instead we concluded that telecommunications access disputes lend themselves to benchmarks at a relatively high level of abstraction.

5.2 The following analysis reviews the ACCC's current arbitration process against each of the benchmarks. This analysis is based on comments provided by industry stakeholders, including ACCC personnel, as well as the consultants' file reviews.

# 6 Benchmark - fair

6.1 This benchmark is designed to ensure that the process results in decisions which are objectively fair and that the process is seen to be fair, particularly by the participants. It therefore includes consideration of natural justice, or what the High Court prefers to call procedural fairness. There are 3 components to procedural fairness:

6.1.1 The arbitrator should be free of bias, or the appearance of bias.

6.1.2 The process should be transparent to the parties and the role of the arbitrator clearly defined.

6.1.3 Each party should have the right to a fair hearing: to make its case known, to know the case of the other parties and to have an opportunity to respond.

## The arbitrator should be free of bias or the appearance of bias

6.2 The question of bias is whether the arbitrator is seen to be impartial and to make an objective assessment of the case based solely on the issues before him/her.

6.3 There have been some concerns expressed about neutrality. This perception appears to have been fostered by a number of matters, some process driven and some structural.

## Structural issues

6.4 The ACCC's traditional role is as an enforcement agency, and this role continues in relation to both Parts XIB, IV and V of the Act. Telecommunications companies have often been subject to ACCC investigation and action and therefore may be predisposed to see the ACCC as an adversary or prejudiced against them.

6.5 In the early days, without established pricing principles, the ACCC's role of arbitrating disputes and its role in establishing pricing principles were closely intertwined. Notably, the consultants' inquiries with the State regulator in New York State suggest that price based disputes diminish once pricing principles are published (see Appendix E – notes from an interview with Daniel Martin). With the recent amendments to the Australian legislation requiring the publication of pricing principles, we consider that a similar trend may occur here. This is not to say that price will not remain a potential source of dispute, but that the focus of such disputes may shift to other terms and conditions including implementation issues.

6.6 The close connection in the past between the ACCC's roles in setting access pricing principles and in the arbitration of particular disputes is one reason that a perception of bias may have arisen. Strictly speaking, the setting of pricing principles is the exercise of the regulatory rather than the arbitration function. It is an example of where the ACCC's views in one area, its regulatory role, may cause a perception of bias in dispute resolution. However, without altering the entire system, this cannot be changed; rather, the focus should be on minimising the risk of any actual bias occurring.

## Procedural issues

6.7 The perception of bias has arisen where the ACCC gives one party to the dispute greater access, either through separate meetings with ACCC staff or through correspondence not shared with the other party. This is a transparency issue, dealt with in more detail under the 'fair hearing' component of this benchmark (below).

6.8 The other area of concern is the making of public statements by the ACCC which may be seen as suggesting that it supports or does not support a particular party to a dispute. Any such comments are likely to cause at least the suspicion of pre–judgment.

6.9 **[R3:]** *The risk of any perception of pre-judgement can be minimised by ensuring that the ACCC does not make public comments in relation to issues which are in*

*dispute, or if it does, that the comments are clearly distinguished as the views of an individual and not the Commissioners involved in arbitrating a dispute.*

## The process should be transparent to the parties and the role of and influences on the arbitrator should be clearly defined

6.10 To meet this benchmark:

6.10.1 the process to be followed needs to be understood by the parties at the outset, and any changes in process need to be made clear; and

6.10.2 the roles of the Commissioners and the staff need to be clear.

## Process to be followed

6.11 A common theme arising from the comments of participants and advisers was that the ACCC's process was not clearly identified at the start of a dispute, other than in general terms in the opening of a preliminary conference and in an indirect way through a series of specific directions.

6.12 The consultants reviewed files to assess the level of disclosure of the process to be followed. An explanation of the process does generally take place by way of a scripted outline from the Commissioner at the opening of the preliminary conference. This description of the process is, however, in fairly general terms and does not indicate any tailoring of approach to the dispute.

6.13 The consultants note that the ACCC handled disputes differently. However, these differences were substantially in the level of detail of the directions, rather than demonstrating the analysis of the process needed or the responsiveness to those needs which the consultants consider is warranted. We also did not find material on the files reviewed which indicated a consistent approach to keeping parties informed of the process to be followed and any changes to the process.

6.14 The consultants' observations from the files were supplemented by stakeholder feedback. Some stakeholders also indicated a perception that the ACCC is often reluctant to be flexible in its process. A number of parties suggest this is due to the ACCC being fearful of legal challenge. Others suggested that it may be as a result of the Commissioners having had no special training as arbitrators and finding it difficult to devote the time that is necessary to effectively address the details of the arbitration process. Our review suggests that this second reason is a large contributor to perceptions of inflexibility. We note that both Commissioners and staff largely learn by experience, rather than having access to specialist training or expert coaching and mentoring in running dispute processes.

6.15 The structure of the ACCC means that different staff members may act in successive disputes and, similarly, different Commissioners may act as arbitrators. This can make consistency of process and incorporation of lessons learnt into the process more difficult to achieve. We consider that these factors are likely to have contributed to stakeholders' perceptions of a lack of clarity

around the process. The interaction of staff and Commissioners is analysed in more detail under the effectiveness benchmark (below).

6.16 The best defensive strategy against legal challenge for breach of natural justice, to the extent that this is a concern to the ACCC, is to state clearly at the outset what arbitral processes are being used and then keep the parties fully informed of any variation in the process.

6.17 **[R4:]** *In the interests of transparency the ACCC needs to more clearly consider, identify and articulate the process it will adopt for arbitrations. Having done so, it needs to put in place procedures designed to ensure that parties remain properly informed of any changes throughout the process.*

6.18 **[R5:]** *Transparency of process will require a model for assessing the process, guidelines and monitoring of those guidelines*. *It may also be useful for the ACCC to consider training for Commissioners and staff handling arbitrations to supplement the current learning by experience*. *(This will be especially important when Rod Shogren leaves the ACCC, as he has the most depth of experience in this area.)*

6.19 Appropriate training can be achieved in a number of ways: through a mentoring program with external consultants, or through the adoption of the case management approach suggested later in this report. The suggested approach provides for the development of a specialist case management team with the skills to supplement those of the Commissioner and additionally to assist in institutionalising lessons learned through ongoing arbitrations. The ACCC will also need to consider the recruitment or development of staff with specialist skills to assist Commissioners with this role.

## The role of Commissioners and staff needs to be clear

6.20 Comments were also made to the consultants by a number of stakeholders regarding their lack of clarity around the involvement and role of ACCC staff in the arbitration process.

6.21 We understand from our file reviews and interviews that for each arbitration there are two members of the ACCC's Telecommunications Group appointed, one of whom acts as the main point of contact. In addition, one or more members of the ACCC legal group may be involved in each arbitration. Discussions1 with the stakeholders, Commissioners and staff indicate that the level and type of involvement of staff will vary depending on the experience of staff and the nature of the dispute. The delegation of duties in an arbitration follows the way that the ACCC delegates generally. Staff will be involved in a number of capacities including making recommendations on procedure (meetings, directions etc), and assisting with research on substantive issues.

6.22 One of the fundamental tenets of procedural fairness in arbitration is that it must be clear to the parties what information the arbitrator has taken into account in making a determination. Another is that the arbitrator must be the decision-maker. It has been suggested to the consultants that the majority of research and

recommendations on both process and substantive issues are made at staff level, with the Commissioners as arbitrators then clarifying and improving on staff suggestions. While this is completely appropriate for most functions undertaken by the ACCC, it raises some difficulties in relation to the management of arbitrations.

6.23 In commercial arbitrations, one of the key roles of the arbitrator is to get a 'feel' for the parties and issues in dispute and use this in his/her assessment and design of the procedure s/he invokes. As Commissioners delegate much of the contact with parties to staff, this opportunity is to an extent missed in telecommunications arbitrations. While ACCC staff have shown themselves to be skilled and conscientious in their grasp of the substantive issues, they do not generally have extensive dispute resolution experience. The consultants consider that the ACCC's system of delegation has been in part responsible for the less than optimal strategic procedural management of some disputes.

6.24 **[R6:]** *A structure needs to be developed by the ACCC which ensures that the arbitration process can be and is managed strategically. This structure needs to be mindful of and take into account the delegation protocol within the ACCC. Further, this structure should be transparent to participants in arbitrations.*

## The role of staff as experts

6.25 ACCC staff have a significant degree of economic, regulatory and technical expertise. In many cases, staff have been used to brief and liaise with experts, to provide analytical input into the process and to critique expert evidence. The resulting material has formed part of the briefing documents sent to the Commissioners.

6.26 In our view this role is akin to that of the independent experts who advise the ACCC. Staff have suggested that it is useful to draw an analogy between ACCC staff and judge's associates, who often do research and assist in the writing of judgments.

6.27 In the main, however, the two processes are different. The court process is based mostly on oral evidence and cross-examination. The judge is privy to all of that evidence first-hand and both directs the process and determines the issues. The associate merely assists in researching and drafting the judgement under the direction of the judge. The ACCC's arbitration process however relies predominantly on written submissions. From our observations, staff are involved in analysing the submissions, clarifying matters with parties and briefing experts. This can mean that the Commissioner as arbitrator is not as directly involved with the detail of the case, effectively delegating some of his/her primary role as a decision-maker in a way which is not always transparent to the parties.

6.28 **[R7:]** *It is important that the demarcation of roles between staff and arbitrators to be defined more clearly and that it be made transparent to all parties. The role of staff using their industry knowledge should be no less transparent than that of an independent expert. This will mean ensuring that the parties have a right to*

*submit any concerns or objections they may have about the factual or theoretical basis for expert input by staff. This transparency can be ensured either by providing that staff report to parties for comment, or alternatively by incorporating fully any staff reasoning in the draft determination.*

6.29 **[R8:]** *If the latter process is adopted, it is necessary to ensure that the opportunity for parties to comment on the draft and have changes made is real and not merely a procedural formality. Feedback from a number of the stakeholders and the consultants' experience in other regulated industries, such as electricity and gas, suggests that it is difficult to convince parties that an arbitrator is open to changing a draft report. This makes the second option a more difficult one to implement in practice.*

## Each party should have the right to a fair hearing: to make its case known, to know the case of the other parties and to have an opportunity to respond

6.30 Section 152CZ of the Act provides that, unless the parties otherwise agree, an arbitration hearing for an access dispute is to be in private. Section 152DB provides that, in an arbitration hearing of an access dispute, the ACCC is not bound by technicalities, legal forms or rules of evidence and may inform itself of any matter relevant to the dispute in any way it thinks appropriate.

6.31 These provisions do not otherwise discharge the ACCC's obligation to give each party the right to procedural fairness. This means that, subject to the parties consenting to a different process, the Commissioners must hear both sides and make sure all parties have a chance to deal with matters impacting on their case and to test any adverse evidence. This has practical implications for the arrangements for the exchange of confidential information and the treatment of independent experts by the ACCC.

## The exchange of confidential information

6.32 The consultants' file reviews and interviews suggest that the treatment and exchange of information is a key issue in the ACCC's arbitration process. It traverses a number of the benchmarks – particularly effectiveness and efficiency.

6.33 In relation to fairness, the issues are more narrowly defined. They include ensuring that parties receive an adequate description of what information is claimed to be confidential (to allow them to make submissions on the merits of such a claim) and the briefing of experts to ensure procedural fairness is achieved. Each of these are considered below.

## Description of confidential information

6.34 Section 152DK of the Act sets out the procedure for when a party claims that a part of a document contains confidential commercial information. A party need only request the ACCC not to give a copy of that part of the document to another party. The ACCC must then inform the other party (the 'receiving party') of the request and only of the general nature of the matters to which the relevant part of the document relates. On that information the receiving party then has to

determine whether it wants to make an objection. If so, it has then to give its reasons for the objection, based only on the general description provided. The ACCC can then ask for further submissions, before it makes a decision as to whether the receiving party should obtain the part of the document which is claimed to include the confidential information.

6.35 One difficulty with this procedure is that, in the absence of a comprehensive description of the part of the document in question, a receiving party is not in a position to make a fully informed submission about its confidentiality or otherwise.

6.36 **[R9:]** *The ACCC needs to put in place a process which ensures that parties provide a sufficiently detailed description of the document, information or part of the document for which a claim of confidentiality is made.*

6.37 **[R10:]** *In identifying whether information is properly classed as confidential, the Commissioners should continue to ask for submissions from the receiving party on the other party's claims. This should be done as part of a more comprehensive process which deals with confidentiality issues. Guidelines for this are considered under the effectiveness benchmark, below.*

## The use of experts

6.38 In commercial arbitrations, the arbitrator has the power to engage an expert. The ACCC also has powers to engage an expert to assist in the establishment of pricing principles – an issue which has up to now been inextricably linked with the determination of disputes.

6.39 It appears from the files and was suggested by a number of the stakeholders that the ACCC, when engaging its own experts, has not always let the parties see the briefing material (or all of the material) given to the experts. We understand that the current approach is to consider it sufficient to show an expert's report to the parties.

6.40 While this is a matter for the ACCC's discretion in a regulatory environment, in the arbitration context a failure to provide parties with access to experts' briefing material is likely to be seen as not procedurally fair. The consultants recognise that this issue is made more complex by the fact that some of the information that typically forms part of an expert's brief is also subject to restrictions for preserving confidentiality.

6.41 **[R11:]** *An expert's opinion will be directly effected by the material with which he/she is briefed, and accordingly each party is entitled to ensure that the expert has all the information that the party thinks is relevant. The guidelines dealing with confidentiality will need to be drafted to recognise and provide for access to briefs prepared for independent experts.*

6.42 **[R12:]** *A guideline will also need to be developed to address the use of experts and expert reports more generally. We recognise that in developing such a guideline it would be important for the ACCC to consider its use of experts in performing its other roles, to try and ensure a consistency of approach.*

# 7 Benchmark – effective

7.1 This benchmark sets out to ensure that the arbitration process is effective in dealing with impediments and barriers that arise as a result of the structure of the telecommunications industry. The two issues that fall into this category for access disputes are:

7.1.1 the ability to deal with information effectively; and

7.1.2 the ability to get expert assistance to deal with complex and technical matters.

## The ability to deal with information

7.2 There is no lack of power in the ACCC to require production of information. Section 152CT(2) of the Act gives the ACCC the power to make procedural directions requiring parties to give relevant information. This is in addition to the general powers in s.152DC and the power to issue a summons given by s.152DD.

7.3 The existence of these powers does not provide guidance on how they should be used. It is not clear from the files reviewed where the ACCC sees the onus lying in deciding what information should be provided by parties to a dispute. A Commissioner expressed a preference to allow the parties to determine between them the scope of information to be provided, the terms of access to the confidential information and the appropriate undertakings.

7.4 The consultants consider that the ACCC's generally consensual approach to dealing with information has led to delay. The interviews undertaken also indicated that the parties to disputes have an expectation that the ACCC will perform a more traditional adjudicative role, which is seen as involving definition of the issues in dispute and the pro-active control of the process for resolving those issues. One of the interviewees in the Pay TV dispute encapsulated this in a comment that can be summarised as follows:

> '*A trained litigator realises that it is essential to try and define issues and set procedural rules to resolve the issues as soon as possible. The arbitrator needs to take a more active role in the process. They need to work out what they as arbitrator need to know and make directions accordingly, not work on what the parties say they need to know*.'

7.5 Another lawyer interviewed suggested that, in his view, the ACCC did not understand the process of using information to the same extent as courts or other decisional bodies.

7.6 We consider that the ACCC's reluctance to take a more pro-active stance on such issues is a significant cause of the dissatisfaction expressed by stakeholders with the current process. The Act, on its face, provides the ACCC with the powers to take a more pro-active approach in the process**.**

7.7 **[R13:]** *The consultants recommend that the ACCC utilises a more pro-active approach to defining the matters in dispute and the appropriate processes for dealing with the dispute, including the information that is required.*

7.8 **[R14:]** *The information required by the ACCC in any particular matter is to an extent dependant upon the issues in contention. Properly defining the matters in dispute will therefore be a prerequisite to requiring the parties to produce information.*

7.9 **[R15:]** *The key test of relevance should be to ask 'what information is needed by the ACCC for it to perform its arbitration function? 'Once this test has been applied the issue then becomes the level of protection to be afforded any information disclosed. In answering the question it is important for the ACCC to consider not only the case at hand but also the general approach to regulated information disclosure to the market.*

7.10 **[R16:]** *The consultants recommend that guidelines be developed which set out the matters for the arbitrator to consider in directing the production and exchange of information. These guidelines should include consideration of the following:*

*7.10.1 the relevant issues in dispute;*

*7.10.2 whether the information sought is relevant;*

*7.10.3 what material, if any, is confidential;*

*(a) if confidential, who should have access; and*

*(b) the form of confidentiality undertaking, where required.*

## Information disclosure in the market

7.11 The extent to which information on pricing and other access conditions is not generally available will increase the incentive on companies to restrict access to their information. The consultants understand that in other jurisdictions, such as the United States and the United Kingdom, the publication of more extensive categories of information on pricing has reduced both information asymmetry and the number of disputes in relation to access to that information. We understand that the ACCC is currently looking at the issue of levels of transparency in pricing in the industry generally.

7.12 It is important that there is a consistency in how information is treated. Having information available more easily in a dispute (than commercially) would encourage parties to utilise the arbitration process to obtain information.

7.13 **[R17:]** *The issue of access to information in a dispute should be dealt with in a way that is consistent with ACCC policy on the level of information that is to be available to industry. This is especially important in relation to bottleneck services. Not doing so provides an incentive for participants to 'game' the arbitration*

*process to get access to commercially sensitive information that they would not otherwise be able to access. This can lead to inequities and delays.*

### Parties' access to confidential information

7.14 Once the question of the scope of information is decided, the next issue that has caused delays is the need to define the terms on which access to the information will be provided. The question can arise in two ways: either as a result of the parties to a dispute wanting access to each other's information; or the ACCC wanting to rely on information from a non-party – most typically, information from another similar dispute or information the ACCC has received while acting in a different capacity. At present, there are 3 levels of access provided:

7.14.1 Access to nominated persons within a party.

7.14.2 Access to independent (to the party) consultants only.

7.14.3 Access to the ACCC only. (We note there was some discussion with the Commissioners and staff during the report drafting process about whether this category exists and, if so, how extensively it is used.)

### Information required by parties and provided by parties

7.15 **[R18:]** *For information that is provided by the parties we recommend that there be only 2 categories of information, those being access to nominated persons within a party and access to independent consultants to the party (see 7.14.1 and 7.14.2). For the reasons set out under the fairness benchmark, we do not consider it appropriate that any information be provided to the ACCC without access being provided to at least the nominated external lawyers and consultants of the other parties, subject to their giving an appropriate confidentiality undertaking.*

### Information from non-parties

7.16 During an arbitration the ACCC will often have access to information gained while exercising a function other than arbitration, or in arbitrating another dispute, which may be useful for the arbitration. To the extent that this information is from another related arbitration, the issue is one that has been dealt with by recent legislative amendment and is discussed in the context of joinder under the efficiency benchmark. Information in the ACCC's possession as a result of a different role or process, is not covered by the joinder procedures.

7.17 It is not uncommon for an arbitrator to have knowledge, expertise or access to information which is acquired outside a particular arbitration. Commercial arbitrators, for instance, are often chosen due to their expertise in the area of dispute as well as their expertise in conducting arbitrations. To the extent that an arbitrator relies on information or knowledge which does not form part of the information in the arbitration, he/she has an obligation to make this transparent to the parties. It is important that the ACCC process has safeguards that ensure similar protections.

7.18 **[R19:]** *The ACCC should ensure it has guidelines for the proper disclosure of information upon which arbitrators rely. This can be achieved in a number of ways, the most common of which would be to provide parties with the information and allow them an opportunity to make submissions. (see Recommendations 7 and 8).*

7.19 **[R20:]** *Where information has been provided to the ACCC in a context other than the dispute, or by a person who is not a party to the dispute, procedures will be required to obtain the person's consent prior to any disclosure. In the absence of consent, steps need to be taken to ensure that the provision of information to the parties is done in such a way that it is supported by the ACCC's powers. To the extent that information is confidential, the guidelines dealing with the handling of confidential information will apply*.

## General guidelines

7.20 It was widely agreed by interviewees that considerable time could be saved if general guidelines for handling confidential information were issued by the ACCC.

7.21 **[R21:]** *Guidelines for access to confidential information should be drafted with industry input and giving consideration to other processes in courts and specialist tribunals. Obviously the **use** of any guidelines may need to be negotiated and fine-tuned by parties on a case by case basis, depending on the nature of the information to which access is granted. However, such guidelines would at least provide a common base for discussion.*

7.22 **[R22:]** *Given the limited number of players in the industry, it would also be useful to develop a standard form of confidentiality agreement for any third party neutrals who may be used as mediators or expert evaluators and who may be involved in the resolution process.*

## Access to information – publishing determinations

## Desirability of publication

7.23 The new s.152CRA of the Act will give the ACCC power to publish the whole or part of a determination and the reasons for it, provided that each party first has the opportunity to make written submissions on their views about publication. In deciding whether and what to publish the ACCC is asked to take into account a number of factors, including whether the publication will be likely to promote competition in markets for listed carriage services.

7.24 Without publication Telstra and Optus, which are involved in many arbitrations, have the advantage of being able to ascertain trends in ACCC processes and determinations, whereas less frequent disputants do not have this benefit.

7.25 The publication of determinations can act as incentive for settlement of pending disputes by negotiation in a number of ways. It may act as an indicator to parties of the ACCC's views on a variety of issues. In this way, it may be used by parties as an input in commercial negotiations, increasing their chance of resolving issues effectively.

7.26 Having arbitrations published also makes a clearer delineation between ADR/consensual processes, which can remain confidential, and the ACCC arbitration which will not. This can act as an incentive for parties to use consensus-based processes.

7.27 **[R23:]** *We consider that publication of determinations is generally desirable and in the public interest. It will assist in ensuring that the information that is available by being a party to a dispute is not confined to the larger players who have the financial ability to pursue disputes through to final arbitration. It may also act as an early indicator of the ACCC's views, thereby assisting parties in their commercial negotiations.*

### Confidential information and publication

7.28 In the event that the determination is published, an issue arises as to the extent of the publication and the protection that should be given to confidential information. Some stakeholders contend that the entire determination should be published, as it will be an incentive to the commercial settlement of disputes. There are other views that call for only a summary of the key features of the determination. The difficulty with a summary is ensuring its accuracy, that it conveys the right emphasis and the fact that producing such a summary is itself time consuming.

7.29 In some other jurisdictions, for example Finland, determinations are published after removing confidential information. This will also be the practice with the Dispute Resolution Panel (DRP), a specialist adjudicative body constituted under Chapter 8 of the National Electricity Code.

7.30 **[R24:]** *We recommend that the determination be published in full, subject to the deletion of any confidential information. To facilitate this the draft determination for publication should be prepared by the arbitrator, excluding the confidential information. The parties should have the right to review the publication draft and make submissions where they have a concern that any information that the arbitrator intends to publish is commercially confidential.*

## The ability to get expert assistance to deal with complex and technical matters

7.31 Experts are used by parties to the arbitration to support their cases (in a traditional adversarial fashion) and by the ACCC, in a number of ways. For example, to assist the parties to independently evaluate the application of pricing models or to provide the ACCC with an independent assessment of technical data. To be effective, the arbitration process needs to deal with experts in each of their various roles.

### Use of independent experts as witnesses

7.32 A number of interviewees expressed concern that repeat players in disputes were relying on the same witnesses each time. This, they say, has created a situation where experts are aligned with a particular party's view and cease to be

independent. One of the interviewees in the Pay TV dispute encapsulated the view on experts as follows (summary):

> *'It is important to acknowledge that an expert report is only as good as the assumptions that underpin it. Procedures need to be in place to prevent experts losing their independence. This can be achieved by the ACCC having a code of conduct for expert reports and enforcing it strictly.'*

7.33 The issue of the independence of experts and quality of their advice has arisen in other jurisdictions. The Federal Court has a code of conduct that requires experts to set out the assumptions with which they were briefed and which underpin their report. This is seen as removing potential bias in the instructions of the expert and, while not ensuring their independence, goes some way to providing transparency in relation to the objectivity and independence of the opinion provided. Failure to comply with the code of conduct results in the Court giving little or no weight to the report.

7.34 We note that the Federal Court guidelines provide that the expert has an overriding duty to the Court and is not an advocate for the party retaining them. While we consider that this a useful enjoiner for the ACCC to make to a expert appearing before it, it must be done while recognising that some expert witnesses may fail to recognise the full implications of such a requirement. For this reason the other methods of dealing with expert evidence raised in this section also need to be employed.

7.35 Many interviewees acknowledged the potential value in using independent experts to assist in narrowing down the issues and clearly defining the areas in dispute. A number of interviewees expressed concern that the adversarial approach to dealing with experts potentially reduced their effectiveness and that more could be done to close the gap between different experts' interpretations of relevant matters.

7.36 Where the parties are engaging their own experts, the ACCC's (working) draft Dispute Resolution Guidelines suggests the useful approach of limiting each party to no more than two expert witnesses, with only one expert witness in any one area of expertise of issue in the dispute. There is also often an advantage to be obtained by having conferences of experts ('facilitated hot tubs'), which could include an expert appointed by the ACCC itself. We understand that this approach has been utilised by the ACCC to a limited extent, but consider that it could usefully be given further attention. This model has been used and proved to be effective in a variety of trade practices cases involving expert economic evidence before the Federal Court.

7.37 **[R25:]** *More needs to be done to use experts in a way that is problem solving rather than adversarial. One tool which could be used to achieve the more effective use of experts is 'facilitated hot tubs', whereby an attempt is made to mediate a consensus between experts on the key technical issues.*

7.38 **[R26:]** *We also suggest that the ACCC review the Federal Court's guidelines on the rules for experts. It would be useful to consult with industry on the guidelines*

*and for the ACCC to adopt them to the extent that they are applicable to telecommunications arbitrations. This would include an enjoiner that the expert has a duty to the process and the basis on which expert evidence can be weighted by the arbitrator. The Federal Court guidelines are currently under review and therefore the ACCC should also consider any resulting amendments to them.*

### Use of experts – independent evaluation

7.39 Section 152DC(1)(e) of the Act gives the ACCC power to refer any matter to an expert and accept the expert's report as evidence. The consultants have (under the fairness benchmark) earlier in this report discussed the need to ensure that parties have the opportunity to test the expert's evidence.

7.40 The expert process is flexible and there are many uses that assist the arbitration process. The ACCC has endorsed the use of an expert to break a deadlock on access to confidential information in more than one matter and with some success.

7.41 **[R27:]** *The ACCC should use, and encourage the parties to use, experts in an innovative way to order to break deadlocks. This can be done by way of directions under section 152DC. A thorough understanding of what processes are available and an ability to identify the expert required and how it will interface with the rest of the arbitration process should be an essential part of the ACCC's case management strategy.*

## 8 Benchmark - efficient

8.1 The efficiency benchmark is designed to assess whether the process operates in the manner that is likely to achieve the best outcomes. An efficient process will provide optimal outcomes at each stage of the process. Efficiency needs to be measured in 3 ways:

- Does the overall process meet the objectives set?
- Are the individual aspects of the processes effectively applied?
- Does the system capture lessons learnt?

### Does the overall process meet the objectives set?

### Overview analysis

8.2 The consultants have noted previously that the negotiate/arbitrate model is not optimal in access disputes where there is a lack of mutual commercial incentive to settle a dispute. The ACCC as arbitrator needs to be conscious of this issue.

8.3 Clearly the parties remain free to negotiate their own terms and this is a preferable outcome. However, to the extent that they come to the ACCC by way of a notice of dispute, the consultant's view is that ACCC can validly assume that

the negotiations have broken down. The focus for the ACCC should then be to case manage the arbitration to expeditiously decide the matter, rather than to facilitate the parties' agreement to a resolution of the matter. This approach still provides scope for the ACCC to use facilitative problem-solving processes where appropriate, but outside the formal arbitration process.

8.4 There can be no hard and fast rule as to when facilitative processes are appropriate; this must be a decision made in the context of each particular dispute. A case management process such as the draft model outlined in Part II of this report is designed to facilitate such a referral where appropriate.

## The supporting provisions of the legislative scheme

8.5 The Act provides that one should not create an incentive for people to lodge disputes before they have exhausted commercial negotiations. For this reason, s.152CM(1)(c) provides that one of the preconditions for notification of a dispute is that: 'an access seeker is unable to agree with the carrier or provider about the terms and conditions on which the carrier or provider is to comply with those [standard access] obligations'. Admittedly the ACCC has treated this as a light test, but in fact it is arguable that it should not be a test at all.

8.6 Under s.152CM(6), the ACCC must give written notice of the access dispute to the other party on receipt and it is not required to examine whether or not an access seeker is unable to agree with the carrier. In any event, it may well be that the mere giving of notification of a dispute will speed up the negotiation process.

8.7 Section 152CT gives the ACCC power to give directions in relation to negotiations to persons who are, or were, party to an access dispute. This includes the power to require a party to give relevant information, to carry out research or investigations to obtain relevant information, to not impose unreasonable procedural conditions on the other party or parties' participation in negotiation and also to attend either a mediation conference or a conciliation conference. We understand that the ACCC has not often used these powers. We understand that prior to 5 July 1999, the ACCC needed to find that a party was not negotiating in good faith (whatever that means) before using this power, which restricted its usefulness.

8.8 The new s.152CLA now also provides that the ACCC must have regard to the desirability of access disputes being resolved in a timely manner, including through the use of consensual dispute resolution methods such as mediation and conciliation. To date there appears not to have been any systematic consideration of these processes in the context of access disputes by either industry or the ACCC. While decisions about the application of mediation and expert determination in an arbitration have always rested with the arbitrator, this alone will not facilitate the meaningful use of these processes. The use of facilitative ADR, such as mediation, particularly where the parties do not all consent, is a difficult issue, and one that courts and tribunals have grappled with for some time.

8.9 **[R28:]***The mere fact that a dispute has been notified should be treated by the ACCC as indicative that any commercial discussions between the parties have failed.*

8.10 **[R29:]** *The consultants believe that, unless there is consent by all parties, the ACCC should be cautious about referring issues in dispute to facilitative or advisory dispute resolution processes (such as mediation, conciliation and non-binding expert determination).*

8.11 **[R30:]** *It is important that there is an opportunity for facilitative and advisory based dispute resolution processes to be used when appropriate, but in a way that is tailored to the particular issues in dispute. As this has not occurred to any significant degree to date, it will be necessary to develop a consistent method for such matching to occur. This requires the ACCC to have a clear policy statement about its role and obligations in resolving a dispute and a case management model to back up this policy.*

8.12 **[R31:]** *The power to give directions to negotiate under section 152CT should be used to underpin this use of ADR as part of the case management process.*

8.13 Effective case management means ensuring that each of the individual aspects of the ACCC process are well understood and applied effectively. This includes:

- the notice of dispute;
- processes for dealing with multi-lateral disputes (including joinder); and
- processes for dealing with evidence (including conferences and hearings).

We have examined and made recommendations on each below. In Part II of this report we have provided a model process which seeks to systematically apply the tools in a comprehensive and strategic way.

## Are the individual aspects of the processes effectively applied?

### Notice of dispute

8.14 Section 152CM(6) of the Act states that the ACCC must give written notice of the access dispute to either the carrier or access seeker (depending upon who notified the dispute). Section 152CM(6)(c) provides that the ACCC must give written notice of an access dispute to 'another person', if the ACCC is of the opinion that the resolution of the access dispute may involve requiring that other person to do something. We consider that this is unlikely to arise in practice.

8.15 Section 152CM(6)(d) requires that the ACCC give written notice of an access dispute to any other person who the 'Commission thinks might want to become a party to the arbitration'. Such other persons are currently informed of disputes by the ACCC issuing a media release advising that an access dispute has been notified. The ACCC also asks the parties whether they think any other party or parties should be notified. We also note that there appears to be no specific

notification of persons who might be seen to represent the interests of end users, as specifically referred to in sections 152AB and 152CR. We assume this is because the ACCC is seen as fulfilling this role.

8.16 **[R32:]** *While the consultants consider that the current notification process for interested parties is probably adequate to meet the requirements of s. 152CM(6), we recommend that the ACCC consider implementing a process under which notification of interested parties will occur by direct means, rather than through general publicity. We see this as more clearly meeting the requirements of s. 152CM, as well as being more efficient and more likely to ensure that the right parties are at the table.*

8.17 **[R33:]** *Direct notification of interested parties would involve establishing a list of the e-mail addresses of contact persons at each telecommunications company and at other associated industry bodies. Each such person could then be notified electronically upon the lodgment of a dispute.*

8.18 **[R34:]** *We suggest that the nomination of contact persons within stakeholder companies be made the responsibility of stakeholders and that they be responsible for updating such information with the ACCC. A similar process is currently being utilised by the National Electricity Code Administrator (NECA) in relation to notification of National Electricity Market disputes.*

## Multilateral disputes

8.19 A distinguishing feature of the telecommunications access arbitration process is that there are many issues the subject of a dispute which are common across the industry (eg termination of data calls). At present these issues are being dealt with through a series of bilateral disputes. While the issues are the same, they impact on parties differently. The bilateral arbitration process means parties are often not aware of the other disputes. This may give a strategic advantage to the access provider, who sees the submissions of the various access seekers, while the access seekers, even if aware of each other, cannot see each other's submissions.

8.20 There needs to be a process for dealing with industry issues in a way that is efficient and fair. These disputes require particular procedures for facilitating the joining of parties, issues and arbitrations. They also require powers to deal with information which may need to be shared between disputes. Some of those powers have been vested in the ACCC for some time, while others have been more recently acquired.

## Joinder of parties

8.21 One way of resolving multilateral issues is by joining parties who are relevantly affected by the outcome of the dispute.

8.22 Section 152CO(d) provides that a party to the arbitration of an access dispute can include a person who applies in writing to be made a party and is accepted by the

ACCC as having a 'sufficient interest'. We are not aware of any successful applications to the ACCC under this section.

8.23 In the PSTN appeal to the Australian Competition Tribunal, the Tribunal had to consider the question of 'sufficient interest'. It allowed Optus' application to join the proceedings, but rejected a similar application by MCT. Optus succeeded on the basis that it had a direct interest, as it was the largest provider of the declared services after Telstra. MCT failed on the basis that it was only indirectly affected: *Telstra Corporation Ltd (2001) A Comp T1*.

8.24 **[R35:]** *The question of what constitutes a sufficient interest to allow a party to be joined in a dispute, needs to be clarified. The consultants suggest that it would be useful for the ACCC to consider the PSTN case and review whether the Tribunal's decision satisfactorily defines the way it can apply the sufficient interest test in the future.*

## Joinder of issues and arbitrations

8.25 The amendment to s. 152DMA provides for joint arbitration hearings where disputes are contemporaneous and involve at least one common matter. This is a new power. In the absence of experience and data, it is difficult to determine when and how this may best be used.

8.26 In some circumstances, the solution may be the joinder of common issues across existing disputes, rather than the joinder of parties in the one dispute.

8.27 The new s. 152DBA gives the ACCC power to order that information from one arbitration be used in another, provided the ACCC considers that this would be likely to result in the arbitrations being conducted in a more efficient and timely manner.

8.28 The issue of joinder is complex and is probably worthy of a report in its own right. In general, joinder will make case management and tracking protocols both more difficult and more essential. Undoubtedly, matters will be complicated by the hearing of multilateral disputes, but the extent of the logistical challenge should not of itself be a basis for refusing to join parties to proceedings. The best way of proceeding with guidelines for when and how to use the ACCC's various powers is through an analysis based on experience. This will require a feedback process to evaluate all attempts to use the process.

8.29 **[R36:]** *The ACCC would perhaps be best placed to make some conclusions based on its experience with joinder of issues to date, include them in the draft Dispute Resolution Guidelines for comment from interested parties and indicate that it is willing to modify its approach as its experience grows.*

8.30 **[R37:]** *It may be useful in the short term for the ACCC to run a matter that requires joinder of parties or arbitrations as a pilot. In our view, this would involve it obtaining professional assistance from an experienced arbitrator and providing resources to properly monitor feedback from the parties, to finetune the process and to test the parameters of its powers.*

## Number of arbitrators

8.31 Section 152CV of the Act required that the ACCC appoint two or more of its members as arbitrators. This has now been amended so that a single Commissioner can be the arbitrator. A deadlock-breaking mechanism is needed when two arbitrators are used and this is now provided by s. 152CY. The amendment allows greater flexibility. One aim of this is to reduce the time pressure on Commissioners.

8.32 This amendment also provides increased flexibility for the strategic management of disputes. For example, when appointing one Commissioner to arbitrate a dispute the ACCC may wish to consider utilising another Commissioner in case management (see Part II – draft model). This may assist in more complex disputes by giving greater weight to the management of the process in the eyes of participants and also in the co-ordination of the process and arbitration aspects of the dispute, without overburdening the sitting arbitrator.

## Skills required in arbitration

8.33 The skills which the arbitrators of a particular dispute will require should be evident from the issues identified by the case management process.

8.34 We note that the legal teams representing parties in these types of arbitrations have typically combined lawyers with regulatory knowledge with those with litigation experience. For example, we noted that Allens, Gibert & Tobin and Freehills had all (apparently independently) adopted this approach.

8.35 **[R38:]** *To be effective and to ensure that the process affords procedural fairness to the parties, the arbitrators should utilise a combination of litigation experience and industry understanding. The ACCC could engage two arbitrators who together have the necessary skills. Alternatively, the arbitrators could supplement their skills by using external resources (see also the draft model process in Part II).*

## Evidence

8.36 Section 152DB of the Act gives the ACCC the power to require evidence in writing. The ACCC has developed a process that relies predominantly on the exchange of written information as a means of gathering evidence. The view amongst industry participants and ACCC staff is that this process is efficient in arranging for the exchange of information. It is seen as effective as it provides a mechanism that is both time-efficient and facilitates communication in a way that is geographically neutral.

8.37 However, a broad observation from stakeholders and their advisers is that the length and volume of written material is too great. Further, the format and quantity of material makes it difficult to clearly identify what is really important to the parties. The main focus of the comments from interviewees is on modifying the current process, not replacing it.

8.38 There was consensus amongst interviewees that there is scope for the increased use of processes other than exchanging written information, including: round table conferences (**conferences**), oral submissions and oral evidence (**hearings**) to supplement the existing paper process – particularly on contentious issues and where there is deadlock.

8.39 Some ACCC staff have expressed the concern that the inclusion of other processes will just be an addition to the workload and would not decrease the paperwork. This concern is valid, particularly in the period in which people will need to adjust to a new protocol. This reflects the need to have clearly defined processes with clear views on when processes are going to be used and their purpose. None of the processes should invite an open-ended use of submissions.

8.40 At present, the major use of conferences by the arbitrator occurs at the commencement of the process (**the preliminary conference**). For this reason we have made general recommendations on the use of conferences and hearings, dealt with the preliminary conference separately and then provided some more specific suggestions on conferences and hearings.

8.41 **[R39*:]*** *The consultants consider that the present reliance on written submissions should be reduced by the greater use of conferences and hearings where appropriate. In general the role of conferences should be to clarify and prioritise issues. The consultants consider that there is scope for the ACCC to do this by making directions under s. 152DC and implementing its procedural discretion under s. 152DB (in particular by reference to s. 152DB(2)&(3)). In general the role of hearings would be for a dispute on factual issues, where there is a need to determine the facts either by taking evidence on oath and/or by limited cross examination. A hearing may also be useful to deal with expert evidence.*

8.42 **[R40:]** *The consultants also consider that there is merit in the ACCC using its powers of direction to limit the volume of written material in some circumstances. In private ADR processes it is not unusual for an arbitrator or mediator to provide guidance to parties in relation to written submissions. Examples include requiring parties at the outset of a dispute to provide an issues paper, or in some cases requiring parties to respond to questions on a standard form. The form could include requirements such as to 'list the key issues in dispute' and 'list what documents are required by reference to the key issues in dispute.' The ACCC should consider adopting a similar approach.*

## The use of preliminary conferences

8.43 The ACCC regularly uses a preliminary conference in its arbitrations. The agenda for preliminary conferences is designed to ensure that necessary steps for an arbitration are addressed. This includes discussion of the likely future conduct of the arbitration. We see this as a valuable and efficient part of the arbitral process.

8.44 The recent extension of the ACCC's powers means that in the future there are a potentially wider range of issues which may need to be addressed during the

preliminary conference. These issues include: joinder of parties, issues or arbitrations and directions for production of documents and other information.

8.45 **[R41:]** *The consultants suggest that the preliminary conference be retained. To ensure that the conference's effectiveness is maximised there should be an agenda set for the conference. Parties should be encouraged to exchange and provide short written submissions prior to the preliminary conference addressing issues such as:*

8.45.1 *what they see as the key issues in dispute;*

8.45.2 *what processes if any have been used to date to resolve the issues;*

8.45.3 *whether they see any room for expedition of any issues;*

8.45.4 *what documents they would like to provide to the ACCC and the other side;*

8.45.5 *what documents they would like to request;*

8.45.6 *any parties they think should be joined; and*

8.45.7 *any type of expertise that may be useful in the resolution.*

This should be provided on a pre-prepared form which sets a maximum word length for each submission.

8.46 **[R42:]** *At the preliminary conference, the ACCC should continue its practice of making directions for the continuation of the matter, but the directions should only extend to the next logical point in the management of the matter and not further.*

## The use of conferences

8.47 While we note that the ACCC has the power to enforce a direction under s.152CU of the Act, as a matter of practice it is difficult to enforce such time limits. The consultants consider, however, that a date set for a conference to finalise the matters which are the subject of directions is unlikely to be disregarded. It would also provide a useful opportunity for the ACCC to focus on the details of the matter in dispute and its progress. This opportunity may not otherwise arise.

8.48 **[R43:]** *Given the many benefits of regular conferences, the consultants recommend that they be used as a case management tool to monitor the progress of directions and keep the arbitration moving forward. The ACCC has wide powers under s 152DB to have such meetings either face-to-face or by telephone or video, as appropriate*.

8.49 The conferences should to the extent possible be run as round table meetings, to clarify information, set directions and deal with the compliance with such directions. Obviously to be of maximum effect it is necessary to ensure that an agenda is set, circulated and the meetings are controlled. How this is done is a cornerstone of effective case-management. The New York State experience

suggests that this requires skills borne of experience. There are a number of options available to ensure this occurs skilfully. One model protocol is to have a specialist case management team and this model has been outlined by the consultants.

## The use of hearings

8.50 There will also be circumstances where oral submissions are useful to add clarity to written submissions and provide focus and emphasis for both the arbitrator and the parties. This should be encouraged. Once again it requires the arbitrator to have the experience and skill to recognise when this is appropriate. Where this needs to be supplemented with evidence or cross-examination, a hearing rather than a conference can be used. This involves an increase in formality; the taking of a transcript and often the need to take evidence on oath and allow cross-examination. It also requires specialist skills and experience to set up and run.

8.51 **[R44:]** *There will also be circumstances where oral submissions are useful to add clarity to written submissions and provide focus and emphasis for both the arbitrator and the parties. In such instances the consultants recommend the greater use of formal hearings.*

8.52 **[R45:]** *The ACCC will need to increase the number of Commissioners with experience in arbitration and other dispute resolution processes. Alternatively, it will need to consider a case management process which gives the arbitrator access to the specialist skills required to facilitate these processes.*

## Appeals

8.53 Section 152DO of the Act gives a party the right to have an arbitration award reviewed by the Tribunal as a re-arbitration. Section 152DQ gives a party the right to appeal to the Federal Court on a question of law from the decision of the Tribunal.

8.54 The new s.152DOA gives the Tribunal the power to have regard **only** to:

8.54.1 any information given;

8.54.2 documents produced or evidence given to the ACCC in connection with the making of the final determination; and

8.54.3 any other information referred to in the ACCC's reasons for making the determination.

8.55 If the right to re-arbitration is to be retained, we are concerned by the effect of s.152DOA. It is difficult to limit the information before the arbitrator in the initial hearing as long as this section is in place. If the ACCC fails to order disclosure of relevant information provided to it or referred to in its reasons and the information is then disclosed by order of the Tribunal, natural justice requires that the parties have the right to produce such further information, documents or evidence as is necessary to respond.

8.56 In various submissions to the Productivity Commission and Senate Committee, there was support for the retention of merits review on the ground that it increases the ACCC's accountability. The alternative argument is that the benefits of such review do not justify their cost or the delay involved, or the negative impact upon the finality and certainty of the process. There is also an argument that this right of review is not consistent with commercial arbitrations, where there is typically only a right to review if there has been an error of law. The ACCC's submission to the Senate Committee also listed a range of monopoly or former monopoly utility industries in Australia which allow appeals only on matters of law.

8.57 The arguments for further legislative amendment to limit the right of appeal would be strengthened if the ACCC's arbitration processes were improved and the parties' satisfaction with the process was increased.

8.58 **[R46:]** *Section 152DOA should be repealed unless the right of appeal is limited to a question of law.*

8.59 **[R47:]** *The consultants consider that once arbitration processes are improved, appeal rights should be limited to allow an appeal to the Federal Court only on a matter of law, or subject to leave where a party can establish a material error as to fact or law.*

## Keeping track of the dispute

8.60 Tracking of a dispute is essential to ensure that benchmarks are met and that the process follows an efficient plan. The consultants have seen case summaries on the ACCC's files that provide an update of the substantive elements of a dispute in some detail. We have not however seen evidence of any process tracking mechanisms that provide an overview of the progress of a matter.

8.61 Tracking mechanisms require case management tools similar to those found in courts, tribunals, and other organisations which have complaint handling roles. These organisations generally utilise electronic project management systems that are created and maintained by a case manager and independently reviewed.

8.62 Once the process is being properly tracked, it will be easier for the ACCC and parties to react when the process breaks down. Further, it will assist in developing a system whereby any party (typically an access-seeker) can quickly invoke the intervention of the ACCC where the process has somehow been delayed or has stalled. This type of approach can also provide a 'failsafe' mechanism where such a slippage is not otherwise immediately noted. In order for this to be achieved, a flexible and integrated case management process needs to be developed.

8.63 **[R48:]** *A uniform file tracking system should be implemented. This should monitor the relevant events within an arbitration including the directions made, any consent orders or ADR processes used, the extent of compliance with directions and other events which may affect the progress of the arbitration.*

8.64 **[R49:]** *The case management records should be used as one measure of the efficiency of the process.*

### Does the system capture lessons learnt?

8.65 The consultants' experience from the files reviewed and interviews conducted suggests that the ACCC has improved markedly in its ability to manage arbitrations since the inception of this function. However, the lessons learnt often seem only to inure to the benefit of the person or team who has had the relevant experience. While this is common in start-up processes, a systematic approach is required to ensure that experience is captured by the 'corporate memory' of the ACCC. This would also prevent improvements to the process being lost as a result of staff changes.

8.66 Organisations performing dispute resolution functions generally have regular internal training sessions to ensure that lessons are captured and incorporated in the process employed. They also commonly release guidelines and practice notes for external stakeholders, so that this knowledge is distributed. Such organisations include, for example: the Telecommunications Industry Ombudsman, the Financial Service Complaints Resolution Scheme (now called the Financial Industry Complaints Service), LawCover claims management, and the National Electricity Market Management Company.

8.67 An integrated and centralised case management system may help to capture data for distribution and educational purposes. Case management innovations should find their way into and be integrated in case management notes.

8.68 As well as tracking compliance, a system that captures lessons learnt needs to track user satisfaction. Until the interviews in this review, we are not aware of feedback being sought from participants. It would be useful for the ACCC to have standardised feedback from participants to track perceptions of the process over time. This is common in many complaint handling and dispute resolution systems.

8.69 **[R50:]** *The ACCC should routinely seek feedback from participants, staff and Commissioners in a standard format to track their satisfaction with the process and capture any suggestions over time.*

8.70 **[R51:]** *The ACCC may wish to consider reviewing the feedback processes used by other dispute resolution and complaint handling organisations and tailoring one of these for its own use.*

## 9 Benchmark - fast

9.1 This benchmark is designed to reflect the desirability of the time-efficient resolution of arbitrations. Issues should be dealt with in an expeditious way, timetables laid down should be followed and the overall process should be completed in a timely manner.

### Assessing appropriate time periods

9.2 Section 152DB(1)(b) of the Act provides that the ACCC must act as speedily as proper consideration of a dispute allows, having regard to the need to carefully

and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute. Subsection (2) provides that the ACCC may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute, and may require that the cases be presented within those periods. Section 152 DC(1)(f) also gives the ACCC power to give all such directions and do all such things as are necessary and expedient for the speedy hearing and determination of an access dispute.

9.3 It is a truism to say that the duration of an arbitration will be significantly affected by its subject matter. In this regard, we are aware of arbitrations where a three month time frame would be considered too long, while for other more complex disputes arbitration periods of 18 to 24 months would be acceptable. It is important that sufficient time be allowed for a matter to be fully and fairly resolved, as too great a focus on expedition can lead to unnecessary error. This makes it difficult to usefully set indicative time frames for ACCC arbitrations.

9.4 It is also true that there can be a trade off between cost and speed. One interviewee noted that in recent hearings before the Tribunal the legal costs had exceeded the costs incurred in all arbitrations to date. More intensive processes will escalate costs for the parties.

9.5 The best objective measures when estimating appropriate time frames are those arising from commercial arbitrations and those of other expert arbitral bodies, such as those determining rail access, and electricity disputes under Chapter 8 of the National Electricity Code. However, many of the time provisions in those contexts, although set out in legislation, are not strictly adhered to. Also, the reality of the resolution does not always meet the written standards.

9.6 Another objective measure is the timeframes applicable in overseas jurisdictions on similar telecommunications access disputes. Australia is a signatory to a World Trade Organisation agreement which requires interconnect disputes to be resolved within a 'reasonable time'. In New York State, the total time allowed for expedited telecommunications disputes is about nine months. However, all of these are benchmarks that relate to a particular regulatory regime and industry circumstance and none provide a directly applicable objective benchmark for the ACCC’s processes.

9.7 Another possible course is to use a subjective benchmark: assessing the satisfaction levels of the stakeholders with the actual timeframes. Unfortunately data on this cannot be effectively sourced retrospectively. Recommendation number 51 suggests that a system be developed that will allow tracking of this for the future.

9.8 The majority of stakeholders interviewed by the consultants expressed dissatisfaction with the time taken for the resolution of disputes. Additionally a number of participants who have entered into commercial settlements indicated that they believe they would have done better if the ACCC had determined the dispute, but that the time delays involved made waiting for this impractical. The

risk or threat of appeal of decisions was, in some instances, seen as a further incentive to accept an unsatisfactory, but certain, commercial agreement.

9.9 Chapter 7 of the Productivity Commission's report states that between the inception of Part XIC of the Act in 1997 and the initial release of the report in September 2001, there had been 43 access disputes notified to the ACCC. The ACCC had made 17 interim and five final determinations in relation to these disputes. Three of the five final determinations were made more than 18 months after the relevant dispute had been notified to the ACCC and another dispute took 11 months to finalise. The ACCC had terminated two disputes, and 18 had been withdrawn by parties. The 18 disputes which had not been finalised at that time had been active for between two months and two years.

9.10 The period for finalisation of disputes is longer when one considers the total process from the time of declaration of a service to that of the final disposal of appeals; as at the date of release of the Productivity Commission's report, two of the five final determinations were under appeal. For example, Telstra's first PSTN undertaking was received by the ACCC in November 1997 and, at the date of the report, had effectively been on foot for four years. The uncertainty caused by such delay has serious commercial consequences for industry participants. It is hard for them to plan when pricing is not known and balance sheets have to allow for costs as contingent liabilities until these are finalised.

## Contribution to delays

9.11 The length of time taken is at least partly attributable to the fact that the ACCC has had to consider difficult issues such as the development of pricing principles and cost modelling for the first time. It was therefore submitted by various stakeholders to the Productivity Commission and Senate Committee that pricing principles should be prepared at the same time as a service is declared, or shortly thereafter.

9.12 The new s.152AQA of the Act, which addresses these matters, looks on its face to be useful. It requires the ACCC to determine principles relating to the price of access to a declared service and price-related terms and conditions either at the same time as the declaration of a service, or as soon as practicable thereafter. Before making a determination of pricing principles, the ACCC is required to publish draft principles and invite 'people' to make submissions on it. The determination must be published. The ACCC then must have regard to these pricing principles in any arbitration of an access dispute. The purpose of this provision is to seek to prevent the time taken to develop pricing principles from contributing to delays in access disputes.

9.13 The development of pricing principles at an early stage will particularly assist where there are a number of arbitrations relating to the same service. There is likely to be a great commonality between the arbitrations and little differentiation with respect to cost, so that uniform pricing principles can quickly advance the arbitrations.

9.14 The publication of pricing principles as close as possible to the time of declaration of a service is also essential to narrow the area of dispute to concern only the application of the pricing principles and not which pricing principles to employ.

9.15 As noted previously, the consultants made contact with Daniel Martin of the Office of Communications at the New York State Department of Public Service (see Appendix E). The information he provided indicates that in that jurisdiction, once pricing principles were developed, pricing disputes diminished in favour of disputes over non-price issues. Given the differences in the regulatory system, however, the consultants saw this only as a trend which could be used as a basis for raising the issue with local stakeholders. Australian stakeholders were divided in their views on whether the determination of pricing principles, together with the new provisions requiring the ACCC to determine pricing principles at the time of declaration or soon thereafter, will see a similar shift of emphasis in Australia in the future.

9.16 **[R52:]** *Given the analysis conducted the consultants do not think that it is helpful to prescribe time periods for the resolution of disputes. Rather, the focus should be on removing any of the barriers to efficient and effective resolution and, as far as possible, implementing matter-specific time frames.*

9.17 **[R53:]** *It is possible for the arbitrator to set indicative time periods for the resolution of specific individual disputes. This should occur soon after preliminary conference. Deviations from the estimates should be monitored to assess whether the process should be fine-tuned, or whether other intervention would be useful and appropriate*.

# 10 Closing observations and conclusions

10.1 The ACCC has a role under Part XIC of the Act that is both challenging and distinctly different from its role as an enforcer of competition and consumer protection laws. With respect to most of the Act, excluding Part IIIA, the ACCC uses the courts to adjudicate matters brought to it. Under Part XIC it is required to adopt the role of adjudicator itself.

10.2 An additional complication is the negotiate/arbitrate resolution model underlying the telecommunications arbitration process. Part XIC is structured so that it effectively identifies telecommunications services that are provided by infrastructure which has at least some elements of natural monopoly. If the infrastructure were easily bypassed then it is unlikely that, in the absence of system constraints, a significant long-term dispute would arise over access issues. The facts that, first, a service has been declared and, second, a dispute has been notified, are strong indicators that negotiation alone is unlikely to result in expeditious resolution, or that where an agreement is reached it would not necessarily provide an efficient outcome. Similarly, in the absence of some additional incentives or sanctions, notification of a dispute under Part XIC is a good indicator that the dispute may not be susceptible to efficient resolution through negotiation alone.

10.3 The consultant's principal recommendation is therefore that the ACCC's emphasis should be on the 'arbitrate' part of the negotiate/arbitrate model. It is only by creating strong incentives through the arbitration process that either negotiation or facilitative ADR processes will be effective in resolving telecommunications access disputes. We consider that this change of emphasis remains consistent with the negotiate/arbitrate model, as the greater is the ACCC's emphasis on producing an expeditious arbitrated result, the greater will be the incentive for parties to negotiate and use facilitative processes to avoid the imposition of a regulated solution.

10.4 We see fair, effective, efficient and fast decisions best being implemented through a system that will allow ongoing monitoring of the progress of matters and the implementation of appropriate responses to blockages throughout the dispute. This design proposes that for each matter the ACCC obtain objective data and participant feedback to monitor its progress against set objectives.

10.5 Part II of this report describes a model process for facilitating this. It includes the formulation of a case management team. The case management team is likely to include some members who may be external advisers with particular expertise in arbitration, case management and ADR. These advisers should be selected on the basis that they possess skills which are complementary to the skills of ACCC staff and appropriate for the dispute at hand.

10.6 In addition, coming out of our benchmark review of the ACCC's existing arbitration processes, we have made a number of principally process-related recommendations. These are directed at refining aspects of the existing processes and are dealt with under the benchmark headings of 'fair', 'effective', 'efficient' and 'fast' in this report. These recommendations are replicated in Section 12, commencing at page 53.

10.7 We suggest that if the ACCC wishes to adopt these recommendations, they be implemented through the development, or finalisation, of the appropriate guidelines. We suggest that the transparency of the ACCC's processes would be aided by making such guidelines public, but the ACCC may also want to consider internal guidelines in some areas. Before finalising a case management model it would be appropriate for the ACCC to employ and refine the draft model process outlined by using pilot disputes and getting direct feedback from the neutrals, ACCC staff and participants involved in disputes.

# PART II

## 11 Proposed model process

11.1 The consultants have developed a model process, which addresses a number of the opportunities for improvement identified by application of the benchmarks. In designing this model, we have sought to identify initiatives which have been successful in resolution of other access disputes, including by the New York Commission (referred to above). We have also considered the National Electricity Market dispute resolution process under Chapter 8 of the National Electricity Code and, more recently, the recommendations made to the ACCC in respect of the dispute resolution process under the ARTC access undertaking.

11.2 We are mindful, to the extent that the ACCC will be undertaking arbitrations in other areas (such as rail), that consistency of process between utilities is desirable in so far as it allows the consolidation of learning and the streamlining of processes, educational opportunities and the development of panels of experts who can assist where required.

11.3 As well as meeting 'best practice' in terms of the benchmarks, we have also assumed that there will often be a financial imperative on the access-seeker to resolve a dispute quickly, while the access-provider will often lack that motivation. We note that on occasion this situation may be reversed, in which case the model will apply correspondingly. Based on this assumption, the model seeks to provide an incentive for facilitative processes, while at the same time ensuring that these do not delay the overriding right of an access-seeker to obtain fair, effective, efficient and fast access to a determination by the ACCC – ie through arbitration.

11.4 To the extent possible, the model seeks to rely on existing powers in the legislation (as amended). The ACCC may find in testing the model that it is constrained by the current legislative provisions, and that the model process would work better with legislative amendment.

### Overview of process

11.5 The overall framework has a number of key features:

11.5.1 Parties have an option of choosing to use private facilitative processes (mediation, conciliation) or advisory processes (expert evaluation) to resolve the dispute. Failing resolution they can use a binding process to decide the dispute.

11.5.2 Parties can use these processes independently of the ACCC, through private agreement. To the extent that they use the process after a notice of dispute has been filed, the use of the processes will not postpone or delay the progress of the ACCC arbitration, unless all parties and the ACCC agree that this should occur.

11.5.3 There is a distinction made between facilitative processes which seek to resolve a dispute by agreement of the parties and the ACCC's arbitration process, which makes a decision on the issues in dispute.

11.5.4 A case management team (**CMT**) is set up by the ACCC once a dispute is filed. It is responsible for considering the issues in the dispute and deciding how best to manage it to avoid a deadlock or delay. It may recommend:

*(a)* which issues may be suitable for a facilitative process; and

*(b)* an appropriate timetable for dealing with the issues taking into account the process to be followed.

11.5.5 If the parties do not agree on the recommendations then the CMT will make a direction to that effect. The parties may appeal to the arbitrator on the direction but Appendix E suggests that, as a matter of practice, once the CMT process becomes familiar this is unlikely to occur.

11.5.6 Once a process and timetable is agreed the CMT will monitor it to ensure that it is run in a way that is fair, effective, efficient and fast.

11.5.7 A pro forma flowchart showing the preliminary steps to be followed upon notification of a dispute is set out on page 46, while the pro forma of the overall model process for the case management meeting and beyond is set out on page 47.

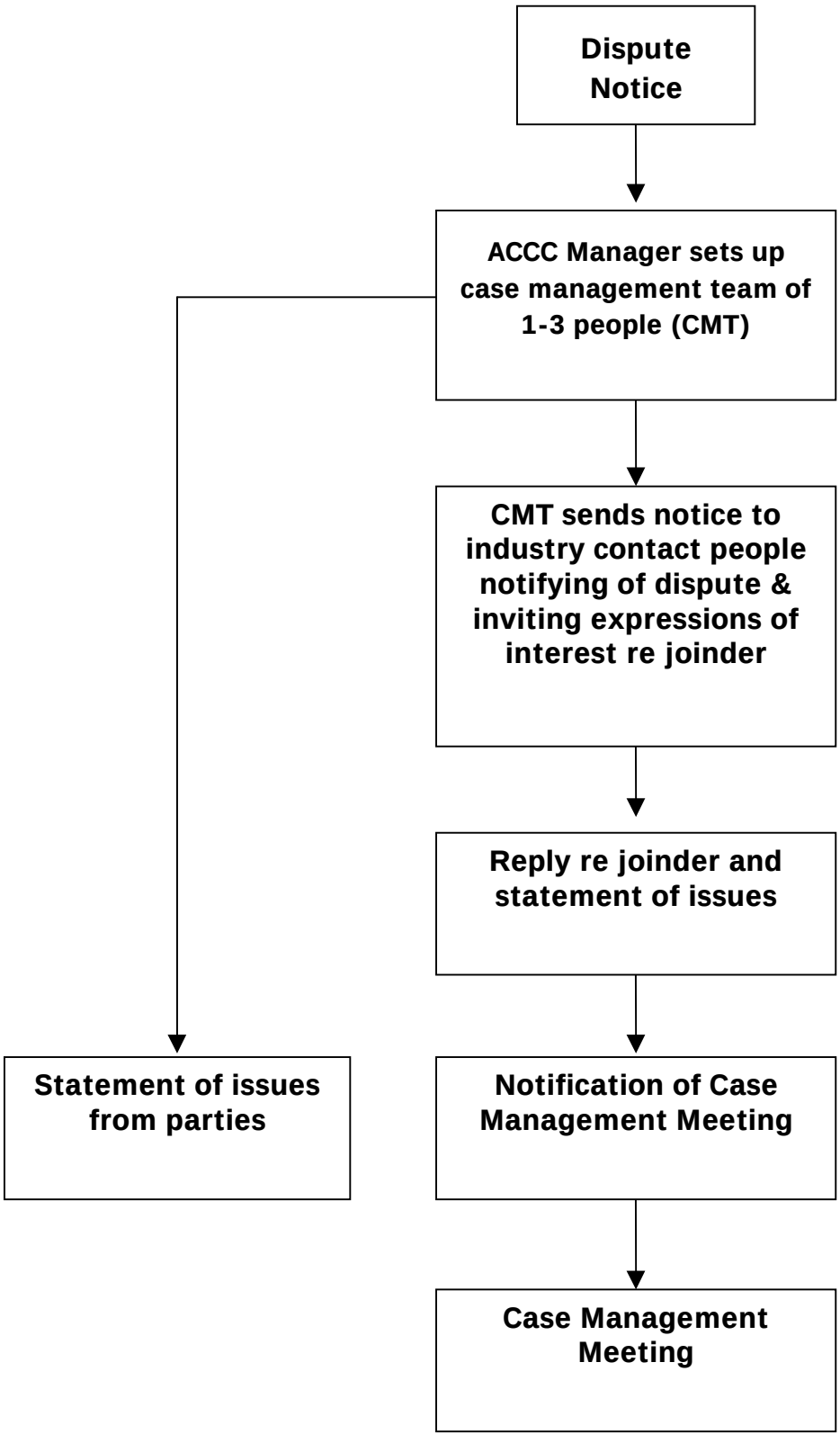
11.5.8 If the ACCC adopts the recommendation to establish a CMT, this pro forma model process will need to be further refined. Once finalised, it will act as a guide to the steps for the CMT to consider at each stage. Questions of the composition of the CMT and its interface with the arbitrator will need to be closely defined.

11.5.9 The proposed increased use of conference/hearings will clearly require additional time from all parties, but we see substantial benefits accruing through:

- the effective and timely identification of key issues;
- the ability to direct parties to provide shorter submissions and, where appropriate, reduce those submissions to an oral presentation;
- the setting of hearing dates imposing greater time constraints upon the parties and allowing less opportunity for timetable slippage;
- the creation of a useful opportunity for the arbitrator to focus on the detail of the matter in dispute and its progress; and

- provision of an opportunity for the parties to talk directly with each other, rather than doing so only through the ACCC or the parties' legal representatives.

## Step 1: Establishment of processes and identification of parties



## Step 2: Case management meeting and beyond

**Agenda:**

1. Identity of the parties
2. Joinder of similar disputes & issues
3. Applications for expedition
4. Use of ADR processes
5. Processes for information exchange
6. Timetables for agreed processes
7. Identification of potential barriers and delays
8. Skills required in arbitration

**Case Management Meeting**

The primary purpose is to discuss the agenda items (see 11.9) and ascertain the issues in dispute and potential blockers

| Mediation | Experts | Arbitration |
|---|---|---|
| By agreement in a resolution contract, **appointment of a mediator** for all or part of the issues in dispute | By agreement in a resolution contract, **the use of an expert** by someone other than the ACCC, binding or non-binding | The CMT send out and get comment on a draft document setting out the issues in dispute and process suggestions for managing the arbitration |
| | | CMT meets with parties re information in dispute, any blockers and suggestions on processes |
| **Mediation** | **appointment of expert** | Parties' Conference with arbitrator(s) for the arbitrator(s) to make directions on dispute or recommend actions |
| | **submission to expert** | |
| **non-binding** | **decision from expert** | **Binding** |

## Overview of key steps in the model

### The case management team

11.6 A dispute notice is issued and the authorised nominees from the parties meet with a CMT within a specified time. In the New York Commission there are guidelines about the level within the parties' organisations which needs to be involved in negotiation of disputes. This is obviously helpful in ensuring that issues receive the direct attention of senior management. The ACCC may want to consider requiring that the initial case management meeting be attended by nominees of each party organisation who are of a specified level of seniority or authority within the organisation.

11.7 The CMT is to be appointed by the ACCC and is made up of a team of between one and three people, depending on the nature of the issues in dispute. In selecting the CMT, consideration needs to be given to the size, complexity and nature of the dispute and whether it is or may become a multi-party dispute.

11.8 The primary role of the CMT is to make recommendations and seek consensus on how to best manage the dispute. To the extent possible, this will involve facilitating an agreement between the parties on how best to use appropriate facilitative and advisory processes. The case management meeting is likely to involve both joint sessions and private sessions with some or all of the parties. This will then form the basis of an agreement between the parties, or a 'dispute resolution contract'.

### The first meeting

11.9 The matters on the agenda for the first case management meeting should include:

- the identity of the parties;
- joinder of similar arbitrations or issues;
- applications for expedition;
- use of facilitative and advisory ADR processes;
- processes for information exchange;
- timetables for agreed processes;
- identification of potential barriers and delays; and
- skills required in the arbitration.

### Identity of the parties

11.10 Once a CMT is appointed by the ACCC, it provides notification of the dispute to the nominated contact people of all industry participants and invites an application from participants who wish to join the dispute. These applications need to set out

the basis on which the participant seeks to join and what they see to be the relevant issues in the arbitration.

11.11 If participants cannot agree on the identity of the parties or a process for that issue to be resolved, the CMT will refer the issue to the arbitrator with the other issues forming the substance of the dispute.

### Joinder of similar disputes, arbitrations and issues

11.12 To the extent that industry participants identify similar disputes or issues, an application may be made by the parties to those disputes to have the matters dealt with together at the same time as the original dispute.

11.13 Again, if parties cannot agree, they may agree to refer the issue to one or more ADR processes. If no agreement can thus be reached, the CMT may refer the issue to the arbitrator with recommendations. This may then also form one of the preliminary questions to be addressed in the arbitration itself.

### Applications for expedition

11.14 If all parties agree that the dispute is appropriate for expedition then it may be referred directly to an expedited process, which is the same basic process as outlined in the model but with shortened time frames. Again, a failure to agree on expedition will require the CMT to refer the issue to the arbitrator with its recommendation.

### Use of facilitative processes, processes for information exchange, timetables

11.15 Parties will, with the assistance of the CMT, identify the issues in dispute and the processes that are best matched to those issues. Parties may by agreement refer all or part of the dispute to facilitative or advisory processes. If parties can agree on the referral at the case management meeting the referral and timetable will form part of the dispute resolution contract between the parties. Where further issues become relevant during the conduct of the dispute these issues can be fed back through the case management process and appropriate processes adopted.

11.16 The timetable for the ACCC arbitration itself and the nature of the process to be used by the ACCC will be discussed in light of any facilitative or advisory processes agreed by the parties. This can be done through both joint sessions and in private sessions as part of the case management process.

### Identification of potential barriers and delays

11.17 A major role of the CMT is settling timetables and deciding on the process that should be used to define issues and obtain information. As part of setting timetables, the role of the CMT is to work with the parties to identify potential delays and barriers to resolution of the issues. Having done this, the CMT will assimilate all the information and draft recommendations for the parties on the directions in the arbitration itself. A copy of the recommendations will be sent to the parties. These will include:

- whether it sees merit in the parties referring some or all issues to facilitative or advisory processes, and if so which issues;
- whether the arbitration will be conducted by way of conferences, formal hearings, written submissions or a combination of these means;
- whether external expert opinion or determination will be required; and
- whether the ACCC can be seen from a practical perspective to be adjudicating on existing rights or creating new rights.

11.18 The choice of recommendations will necessarily depend on the qualities and complexities of the particular issues in dispute. This will be discussed with the parties at the case management meeting and the recommendations then documented and sent to the parties.

### Profile of the case management team

11.19 Support for the role of the CMT comes from the new s. 152CLA of the Act, which provides that the ACCC *'must 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)*'. In effect, the CMT is the utilisation of facilitative skills and experience in matching process to achieving an end.

11.20 The CMT should comprise a mix of skills including litigation expertise in competition regulation, case management expertise (which includes an understanding of the full range of ADR processes and ACCC arbitration) and technical expertise. It is crucial that the CMT:

- understands the telecommunications industry and the needs of industry participants;
- is familiar with ADR processes and their strengths and weaknesses;
- is purpose-appointed;
- is capable of either conducting any mediation process themselves or assisting the parties in the selection of a suitable mediator;
- has the skill and knowledge to combine and coordinate all ADR processes where appropriate and is able to disseminate information on the processes available to the telecommunications industry, either through ACCC guidelines or such other process as is convenient; and
- has knowledge of, and access to, appropriately qualified persons to appoint as experts or mediators if the parties agree to a facilitative or advisory process.

11.21 It is important to ensure that there are sufficient resources available so that the CMT is effective in its monitoring of a dispute. At the same time, it is desirable to

ensure that the pool from which the CMT is selected is kept small. This will ensure:

- consistency of approach; and
- the ability to identify any issues that are causing repeat problems and recommend a systematic approach to those issues (ie for review of the system).

11.22 The potential difficulty with a person being both a facilitator and an arbitrator is that matters disclosed in ADR processes should not influence a determination where they are disclosed without parties having an opportunity to test the evidence. This extends to staff assisting the arbitrator. We also understand that, despite these risks, the background of the ACCC staff may make them ideal in the dual role. It is a matter of balancing the benchmarks of efficiency and fairness. We suggest that the best way of achieving this is to allow the CMT maximum flexibility in its role and the role of its members and also to allow parties to object to a particular ACCC staff member being on a CMT, or a staff member themselves to decline a role, on the basis that there is a real or perceived conflict.

## Optional steps

## Mediation (by agreement)

11.23 Where the parties think that some or all of the matters in dispute can be resolved through a facilitative process, a mediation can be agreed.

11.24 The generally accepted elements of mediation include:

11.24.1 the opportunity for each party to address the comprehensive range of issues that, in that party's mind, have given rise to the dispute;

11.24.2 commitment by parties to participate with each other and the mediator in good faith;

11.24.3 agreement that the contents of the mediation remain confidential;

11.24.4 the ability for private conferencing between the mediator and any party;

11.24.5 the capacity for any agreement reached to be in the form of a signed agreement which is enforceable;

11.24.6 the capacity for the parties to agree, having distilled various issues in dispute, about the manner in which those issues may be resolved (including by way of expert determination where appropriate); and

11.24.7 the opportunity for an integrated approach to be applied to resolving the dispute, using a range of dispute resolution mechanisms.

11.25 The ACCC, or other appropriate industry body, may maintain a list from which mediators can be selected so that the list can include mediators with relevant broad-based qualifications.

11.26 It may be that the fact the arbitration is proceeding in parallel with mediation could lessen the likelihood of the parties reaching agreement. This may support the need for the ACCC to be more directive about the mediation/expert determination process. This is something that the ACCC can consider once it has feedback on the CMT system and its operation.

## Expert determination (by agreement)

11.27 Expert determination is a process for resolution under which an appropriately qualified expert selected by the parties gives a determination (to which the parties agree to be bound) on specific questions agreed by the parties. The process will be confined to determining issues identified by the parties, rather than making orders generally affecting the parties (as in the case of arbitration). The parties would select and pay for the expert. By participating in the process and agreeing that any determination is binding, the desired result is achieved.

11.28 The benefits of this process are that:

11.28.1 the process is capable of completion within a short period of time; and

11.28.2 the parties can agree for it to be final.

11.29 Binding expert determination is a process that could only operate if both parties agreed that it was the appropriate mechanism to resolve their dispute. It would need the parties to agree:

11.29.1 on the formulation of the issues requiring expert determination;

11.29.2 on the appointment of the expert;

11.29.3 to the provision of submissions and other material for consideration in writing only;

11.29.4 whether the determination will include reasons; and

11.29.5 that there will be no appeal from any determination.

11.30 The parties may also agree that the determination of the expert on particular questions is to be non-binding, and the expert's opinion may then by agreement be fed back into a mediation process for discussion by the parties. The parties may also by agreement put the expert opinion before the arbitrator to aid determination of the issues in dispute.

## ACCC arbitration

11.31 Following the initial case management meeting, all issues are put to arbitration. As mentioned above, issues that are resolved are then withdrawn. The model

allows for the CMT to draft recommendations on all of the process issues and make suggestions on the process of the arbitration itself. The CMT then arranges a preliminary conference with the selected arbitrators.

11.32 While there is an argument for proceeding with the arbitration, irrespective of any parallel processes, this will need to be considered on a case-by-case basis. Some of the parallel processes may be prerequisites for further progress of the arbitration. For example, confidentiality issues may need to be resolved. Such processes should have clear parameters and time constraints for resolution under s.152CT and s.152DC, and be monitored by the CMT.

# 12 Consolidated list of recommendations

*12.1* **[R1:]** *There has been no clear recognition of the distinction between adjudication and creation of rights. Recognition of the dual function is likely to assist in the case management of the arbitration process. In particular this type of analysis will assist in deciding the type of skills required for a particular process and in deciding the appropriate procedural requirements.*

*12.2* **[R2:]** *One of the consultants' major recommendations is that a case management protocol (in our view implemented by a team of people) should be established to review each dispute at its outset and decide which process or processes will provide the best outcome in the particular dispute. The protocol would require case management to monitor the progress of the dispute and adapt the process as required by changing circumstances. The case management could also be designed to assist in addressing concerns of stakeholders with regard to the transparency and fairness of the process. The bases of these recommendations are discussed further below under the relevant benchmark headings. A protocol model is set out in Part II of this report.*

*12.3* **[R3:]** *The risk of any perception of pre-judgement can be minimised by ensuring that the ACCC does not make public comments in relation to issues which are in dispute, or if it does, that the comments are clearly distinguished as the views of an individual and not the Commissioners involved in arbitrating a dispute.*

*12.4* **[R4:]** *In the interests of transparency the ACCC needs to more clearly consider, identify and articulate the process it will adopt for arbitrations. Having done so, it needs to put in place procedures designed to ensure that parties remain properly informed of any changes throughout the process.*

*12.5* **[R5:]** *Transparency of process will require a model for assessing the process, guidelines and monitoring of those guidelines. It may also be useful for the ACCC to consider training for Commissioners and staff handling arbitrations to supplement the current learning by experience. (This will be especially important when Rod Shogren leaves the ACCC, as he has the most depth of experience in this area.)*

12.6 **[R6:]** *A structure needs to be developed by the ACCC which ensures that the arbitration process can be and is managed strategically. This structure needs to be mindful of and take into account the delegation protocol within the ACCC. Further, this structure should be transparent to participants in arbitrations.*

12.7 **[R7:]** *It is important that the demarcation of roles between staff and arbitrators to be defined more clearly and that it be made transparent to all parties. The role of staff using their industry knowledge should be no less transparent than that of an independent expert. This will mean ensuring that the parties have a right to submit any concerns or objections they may have about the factual or theoretical basis for expert input by staff. This transparency can be ensured either by providing that staff report to parties for comment, or alternatively by incorporating fully any staff reasoning in the draft determination.*

12.8 **[R8:]** *If the latter process is adopted, it is necessary to ensure that the opportunity for parties to comment on the draft and have changes made is real and not merely a procedural formality. Feedback from a number of the stakeholders and the consultants' experience in other regulated industries, such as electricity and gas, suggests that it is difficult to convince parties that an arbitrator is open to changing a draft report. This makes the second option a more difficult one to implement in practice.*

12.9 **[R9:]** *The ACCC needs to put in place a process which ensures that parties provide a sufficiently detailed description of the document, information or part of the document for which a claim of confidentiality is made.*

12.10 **[R10:]** *In identifying whether information is properly classed as confidential, the Commissioners should continue to ask for submissions from the receiving party on the other party's claims. This should be done as part of a more comprehensive process which deals with confidentiality issues. Guidelines for this are considered under the effectiveness benchmark.*

12.11 **[R11:]** *An expert's opinion will be directly effected by the material with which he/she is briefed, and accordingly each party is entitled to ensure that the expert has all the information that the party thinks is relevant. The guidelines dealing with confidentiality will need to be drafted to recognise and provide for access to briefs prepared for independent experts.*

12.12 **[R12:]** *A guideline will also need to be developed to address the use of experts and expert reports more generally. We recognise that in developing such a guideline it would be important for the ACCC to consider its use of experts in performing its other roles, to try and ensure a consistency of approach.*

12.13 **[R13:]** *The consultants recommend that the ACCC utilises a more pro-active approach to defining the matters in dispute and the appropriate processes for dealing with the dispute, including the information that is required.*

12.14 **[R14:]** *The information required by the ACCC in any particular matter is to an extent dependant upon the issues in contention. Properly defining the matters in*

*dispute will therefore be a prerequisite to requiring the parties to produce information.*

12.15 **[R15:]** *The key test of relevance should be to ask 'what information is needed by the ACCC for it to perform its arbitration function.' Once this test has been applied the issue then becomes the level of protection to be afforded any information disclosed. In answering the question it is important for the ACCC to consider not only the case at hand but also the general approach to regulated information disclosure to the market.*

12.16 **[R16:]** *The consultants recommend that guidelines be developed which set out the matters for the arbitrator to consider in directing the production and exchange of information. These guidelines should include consideration of the following:*

*12.16.1 the relevant issues in dispute;*

*12.16.2 whether the information sought is relevant;*

*12.16.3 what material, if any, is confidential;*

*(a) if confidential, who should have access; and*

*(b) the form of confidentiality undertaking, where required.*

12.17 **[R17:]** *The issue of access to information in a dispute should be dealt with in a way that is consistent with ACCC policy on the level of information that is to be available to industry. This is especially important in relation to bottleneck services. Not doing so provides an incentive for participants to 'game' the arbitration process to get access to commercially sensitive information that they would not otherwise be able to access. This can lead to inequities and delays.*

12.18 **[R18:]** *For information that is provided by the parties we recommend that there be only 2 categories of information, those being access to nominated persons within a party and access to independent consultants to the party (see 7.14.1 and 7.14.2). For the reasons set out under the fairness benchmark, we do not consider it appropriate that any information be provided to the ACCC without access being provided to at least the nominated external lawyers and consultants of the other parties, subject to their giving an appropriate confidentiality undertaking.*

12.19 **[R19:]** *The ACCC should ensure it has guidelines for the proper disclosure of information upon which arbitrators rely. This can be achieved in a number of ways, the most common of which would be to provide parties with the information and allow them an opportunity to make submissions (see Recommendations 7 and 8).*

12.20 **[R20:]** *Where information has been provided to the ACCC in a context other than the dispute, or by a person who is not a party to the dispute, procedures will be required to obtain the person's consent prior to any disclosure. In the absence of consent, steps need to be taken to ensure that the provision of information to the*

*parties is done in such a way that it is supported by the ACCC's powers. To the extent that information is confidential, the guidelines dealing with the handling of confidential information will apply.*

*12.21* **[R21:]** *Guidelines for access to confidential information should be drafted with industry input and giving consideration to other processes in courts and specialist tribunals. Obviously the* ***use*** *of any guidelines may need to be negotiated and fine-tuned by parties on a case by case basis, depending on the nature of the information to which access is granted. However, such guidelines would at least provide a common base for discussion.*

*12.22* **[R22:]** *Given the limited number of players in the industry, it would also be useful to develop a standard form of confidentiality agreement for any third party neutrals who may be used as mediators or expert evaluators and who may be involved in the resolution process.*

*12.23* **[R23:]** *We consider that publication of determinations is generally desirable and in the public interest. It will assist in ensuring that the information that is available by being a party to a dispute is not confined to the larger players who have the financial ability to pursue disputes through to final arbitration. It may also act as an early indicator of the ACCC's views, thereby assisting parties in their commercial negotiations.*

*12.24* **[R24:]** *We recommend that the determination be published in full, subject to the deletion of any confidential information. To facilitate this the draft determination for publication should be prepared by the arbitrator, excluding the confidential information. The parties should have the right to review the publication draft and make submissions where they have a concern that any information that the arbitrator intends to publish is commercially confidential.*

*12.25* **[R25:]** *More needs to be done to use experts in a way that is problem solving rather than adversarial. One tool which could be used to achieve the more effective use of experts is 'facilitated hot tubs', whereby an attempt is made to mediate a consensus between experts on the key technical issues.*

*12.26* **[R26:]** *We also suggest that the ACCC review the Federal Court's guidelines on the rules for experts. It would be useful to consult with industry on the guidelines and for the ACCC to adopt them to the extent that they are applicable to telecommunications arbitrations. This would include an enjoiner that the expert has a duty to the process and the basis on which expert evidence can be weighted by the arbitrator. The Federal Court guidelines are currently under review and therefore the ACCC should also consider any resulting amendments to them.*

*12.27* **[R27:]** *The ACCC should use, and encourage the parties to use, experts in an innovative way to order to break deadlocks. This can be done by way of directions under section 152DC. A thorough understanding of what processes are available and an ability to identify the expert required and how it will interface with the rest*

*of the arbitration process should be an essential part of the ACCC's case management strategy.*

*12.28* **[R28:]** *The mere fact that a dispute has been notified should be treated by the ACCC as indicative that any commercial discussions between the parties have failed.*

*12.29* **[R29:]** *The consultants believe that, unless there is consent by all parties, the ACCC should be cautious about referring issues in dispute to facilitative or advisory dispute resolution processes (such as mediation, conciliation and non-binding expert determination).*

*12.30* **[R30:]** *It is important that there is an opportunity for facilitative and advisory based dispute resolution processes to be used when appropriate, but in a way that is tailored to the particular issues in dispute. As this has not occurred to any significant degree to date, it will be necessary to develop a consistent method for such matching to occur. This requires the ACCC to have a clear policy statement about its role and obligations in resolving a dispute and a case management model to back up this policy.*

*12.31* **[R31:]** *The power to give directions to negotiate under section 152CT should be used to underpin this use of ADR as part of the case management process.*

*12.32* **[R32:]** *While the consultants consider that the current notification process for interested parties is probably adequate to meet the requirements of s. 152CM(6), we recommend that the ACCC consider implementing a process under which notification of interested parties will occur by direct means, rather than through general publicity. We see this as more clearly meeting the requirements of s. 152CM, as well as being more efficient and more likely to ensure that the right parties are at the table.*

*12.33* **[R33:]** *Direct notification of interested parties would involve establishing a list of the e-mail addresses of contact persons at each telecommunications company and at other associated industry bodies. Each such person could then be notified electronically upon the lodgment of a dispute.*

*12.34* **[R34:]** *We suggest that the nomination of contact persons within stakeholder companies be made the responsibility of stakeholders and that they be responsible for updating such information with the ACCC. A similar process is currently being utilised by the National Electricity Code Administrator (NECA) in relation to notification of National Electricity Market disputes.*

*12.35* **[R35:]** *The question of what constitutes a sufficient interest to allow a party to be joined in a dispute, needs to be clarified. The consultants suggest that it would be useful for the ACCC to consider the PSTN case and review whether the Tribunal's decision satisfactorily defines the way it can apply the sufficient interest test in the future.*

*12.36* **[R36:]** *The ACCC would perhaps be best placed to make some conclusions based on its experience with joinder of issues to date, include them in the draft Dispute Resolution Guidelines for comment from interested parties and indicate that it is willing to modify its approach as its experience grows.*

*12.37* **[R37:]** *It may be useful in the short term for the ACCC to run a matter that requires joinder of parties or arbitrations as a pilot. In our view, this would involve it obtaining professional assistance from an experienced arbitrator and providing resources to properly monitor feedback from the parties, to finetune the process and to test the parameters of its powers.*

*12.38* **[R38:]** *To be effective and to ensure that the process affords procedural fairness to the parties, the arbitrators should utilise a combination of litigation experience and industry understanding. The ACCC could engage two arbitrators who together have the necessary skills. Alternatively, the arbitrator(s) could supplement their skills by using external resources (see also the draft model process in Part II).*

*12.39* **[R39:]** *The consultants consider that the present reliance on written submissions should be reduced by the greater use of conferences and hearings where appropriate. In general the role of conferences should be to clarify and prioritise issues. The consultants consider that there is scope for the ACCC to do this by making directions under s. 152DC and implementing its procedural discretion under s. 152DB (in particular by reference to s. 152DB(2)&(3)). In general the role of hearings would be for a dispute on factual issues, where there is a need to determine the facts either by taking evidence on oath and/or by limited cross examination. A hearing may also be useful to deal with expert evidence.*

*12.40* **[R40:]** *The consultants also consider that there is merit in the ACCC using its powers of direction to limit the volume of written material in some circumstances. In private ADR processes it is not unusual for an arbitrator or mediator to provide guidance to parties in relation to written submissions. Examples include requiring parties at the outset of a dispute to provide an issues paper, or in some cases requiring parties to respond to questions on a standard form. The form could include requirements such as to: 'list the key issues in dispute' and 'list what documents are required by reference to the key issues in dispute.' The ACCC should consider adopting a similar approach.*

*12.41* **[R41:]** *The consultants suggest that the preliminary conference be retained. To ensure that the conference's effectiveness is maximised there should be an agenda set for the conference. Parties should be encouraged to exchange and provide short written submissions prior to the preliminary conference addressing issues such as:*

*12.41.1 what they see as the key issues in dispute;*

*12.41.2 what processes if any have been used to date to resolve the issues;*

*12.41.3 whether they see any room for expedition of any issues;*

*12.41.4 what documents they would like to provide to the ACCC and the other side;*

*12.41.5 what documents they would like to request;*

*12.41.6 any parties they think should be joined; and*

*12.41.7 any type of expertise that may be useful in the resolution.*

*This should be provided on a pre-prepared form which sets a maximum word length for each submission.*

*12.42* **[R42:]** *At the preliminary conference, the ACCC should continue its practice of making directions for the continuation of the matter, but the directions should only extend to the next logical point in the management of the matter and not further.*

*12.43* **[R43:]** *Given the many benefits of regular conferences, the consultants recommend that they be used as a case management tool to monitor the progress of directions and keep the arbitration moving forward. The ACCC has wide powers under s 152DB to have such meetings either face-to-face or by telephone or video, as appropriate.*

*12.44* **[R44:]** *There will also be circumstances where oral submissions are useful to add clarity to written submissions and provide focus and emphasis for both the arbitrator and the parties. In such instances the consultants recommend the greater use of formal hearings.*

*12.45* **[R45:]** *The ACCC will need to increase the number of Commissioners with experience in arbitration and other dispute resolution processes. Alternatively, it will need to consider a case management process which gives the arbitrator access to the specialist skills required to facilitate these processes.*

*12.46* **[R46:]** *Section 152DOA should be repealed unless the right of appeal is limited to a question of law.*

*12.47* **[R47:]** *The consultants consider that once arbitration processes are improved, appeal rights should be limited to allow an appeal to the Federal Court only on a matter of law, or subject to leave where a party can establish a material error as to fact or law.*

*12.48* **[R48:]** *A uniform file tracking system should be implemented. This should monitor the relevant events within an arbitration including the directions made, any consent orders or ADR processes used, the extent of compliance with directions and other events which may affect the progress of the arbitration.*

*12.49* **[R49:]** *The case management records should be used as one measure of the efficiency of the process.*

*12.50* **[R50:]** *The ACCC should routinely seek feedback from participants, staff and Commissioners in a standard format to track their satisfaction with the process and capture any suggestions over time.*

*12.51* **[R51:]** *The ACCC may wish to consider reviewing the feedback processes used by other dispute resolution and complaints handling organisations and tailoring one of these for its own use.*

*12.52* **[R52:]** *Given the analysis conducted the consultants do not think that it is helpful to prescribe time periods for the resolution of disputes. Rather, the focus should be on removing any of the barriers to efficient and effective resolution and, as far as possible, implementing matter-specific time frames.*

*12.53* **[R53:]** *It is possible for the arbitrator to set indicative time periods for the resolution of specific individual disputes. This should occur soon after preliminary conference. Deviations from the estimates should be monitored to assess whether the process should be fine-tuned, or whether other intervention would be useful and appropriate.*