



Part XICB arbitration guideline

**A guideline for resolving cash equity clearing and
settlement access disputes**

October 2023

Acknowledgment of country

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

Australian Competition and Consumer Commission
Land of the Ngunnawal people
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Purpose of these guidelines

The purpose of this document is to provide guidance on negotiation and arbitration processes in relation to declared cash equity clearing and settlement (CS) services under Part XICB of the *Competition and Consumer Act 2010* (Cth) (CCA).

It is intended to promote workable and effective dispute resolution processes, and to enable parties to an access dispute to be adequately prepared for the Australian Competition and Consumer Commission's (ACCC) dispute resolution processes.

This guideline:

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

The ACCC may, from time to time, revise this guideline at its discretion. The legislative provisions extracted within this guideline are current as at October 2023. It is important for any party seeking to rely on Part XICB to obtain their own legal advice.

1. The ACCC and its role under Part XICB

1.1 Introduction to the ACCC

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

1.2 Overview of Part XICB of the CCA

In September 2023, Part XICB—Access to CS services was inserted into the CCA. Part XICB provides the ACCC with powers to arbitrate disputes related to third party access to declared CS services, including on issues such as pricing and access to data. The ACCC's arbitration power will provide third party access seekers with recourse to binding arbitration, if a dispute arises with the CS service provider about the terms of access to certain CS services that have been declared by the Minister.

The amendments to the CCA were part of a package of reforms aimed at introducing competition in the clearing and settlement (CICS) of cash equities. These reforms also included changes to the *Corporations Act 2001* (Cth) (Corporations Act), that contains definitions for key concepts that are also used in the CCA (Chapter 2 discusses these key concepts).

Box 1 below briefly describes the background and rationale of the CICS legislative reforms.

Box 1: Brief background and rationale of the CICS legislative reforms

Background

The Council of Financial Regulators (CFR)¹, along with the ACCC, recommended a policy of openness to competition in clearing and settlement of cash equities as result of the following reviews:

- Review of Competition in Clearing Australian Cash Equities (2015)
- Safe and Effective Competition in Cash Equity Settlement in Australia (2017).

¹ The Council of Financial Regulators comprises the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC), the Australian Department of Treasury and the Reserve Bank of Australia (RBA).

The CFR's recommendations received Government endorsement in 2016 and 2022.² As part of the recommendations from the reviews, the Government endorsed legislative changes to grant:

- ASIC rule-making powers to regulate CS services
- the ACCC an arbitration power to resolve disputes between parties unable to agree on terms of access to declared CS services.

As a result, Part XICB of the CCA was introduced to implement the ACCC's arbitration powers. At the same time, the Corporations Act was updated to implement ASIC's rule-making powers.

According to the Government, it is intended that together, these powers will set minimum, enforceable conditions to facilitate a competitive environment for clearing and settlement services.³

Rationale of reforms

The purpose of the CICS reforms, including the ACCC's new arbitration power, is to facilitate competitive outcomes in the provision of CS services for Australia's financial markets. To date, there has been only one provider of cash equity CS services in Australia.⁴

Various reviews and regulatory documents recommending the CICS reforms have identified barriers to entry in the market for CS services in Australia. These barriers include:

- Customer familiarity with the use of existing CS infrastructure, as market participants have used the incumbent provider's existing systems for many years.⁵
- The small scale of the Australian cash equities market and the significant costs of developing competing CS infrastructure.⁶
- A lack of incentive for the incumbent monopolist to allow access to its data or CS infrastructure for the purpose of allowing competitors to develop systems and infrastructure that will allow the competitor to enter the market.⁷

Competition is likely to lead to more efficient outcomes in the areas of pricing, innovation and user responsiveness in this market, and would support access and competition at the trading level.

2 The Hon Scott Morrison, [Turnbull Government to open competition in share clearance](#) [media release], Department of the Treasury, 30 March 2016, accessed 5 October 2023; The Hon Dr Jim Chalmers and The Hon Stephen Jones, [Modernising Australia's financial system](#) [media release], Department of the Treasury, 14 December 2022, accessed 5 October 2023.

3 The Hon Dr Jim Chalmers and The Hon Stephen Jones, [Modernising Australia's financial system](#) [media release], Department of the Treasury, 14 December 2022, accessed 5 October 2023.

4 The incumbent provider is the Australian Securities Exchange (ASX Limited).

5 Department of the Prime Minister and Cabinet, [Competition in Clearing and Settlement in Cash Equities – Regulatory Impact Statement](#), 23 January 2023, accessed 5 October 2023.

6 Council of Financial Regulators, [Safe and Effective Competition in Cash Equity Settlement in Australia: Response to Consultation](#), September 2017, p 3.

7 Council of Financial Regulators, [Review of Competition in Clearing Australian Cash Equities: Conclusions](#), June 2015, p 32.

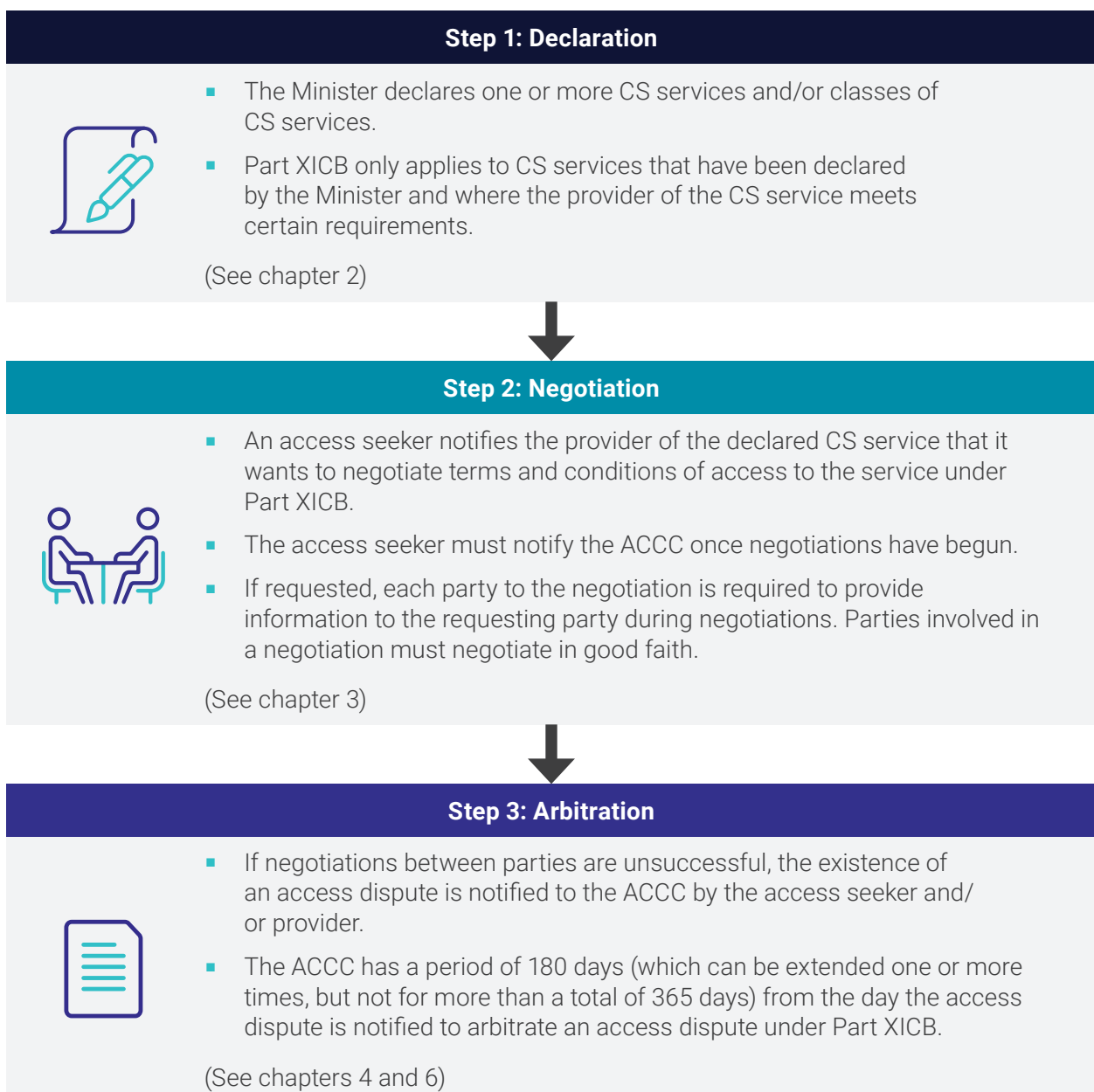
1.3 The ACCC's role in arbitrating disputes under Part XICB

The approach under Part XICB of the CCA applies a 'negotiate-arbitrate' model. Under a negotiate-arbitrate model, the parties are free to negotiate the terms of their access to the relevant CS services. If the parties successfully agree the terms of access, the ACCC will have little, if any, interaction with the parties or involvement in the negotiation process. The ACCC can only be called upon to arbitrate a dispute and make a determination where commercial negotiation has failed, and the parties are unable to agree on the terms of access to a particular CS service.

Arbitration under Part XICB is a process whereby the parties submit their dispute to the ACCC, who will consider the issues in dispute according to the criteria set out in Part XICB of the CCA and will make a determination that is binding upon the parties.

Figure 1 provides an overview of the negotiate-arbitrate framework under Part XICB.

Figure 1: Overview of negotiate-arbitrate framework under Part XICB (a guide only)



2. Key concepts in Part XICB

This chapter discusses key concepts in Part XICB that govern the ACCC's powers to arbitrate disputes, including:

- what is a CS service, and the CS services that Part XICB applies to (section 2.1)
- which parties Part XICB applies to – the access seeker and the provider of the service (sections 2.2 and 2.3)
- what is a CS facility (section 2.4)
- what is an access dispute (section 2.5).

2.1 Part XICB applies to declared CS services

The access regime under Part XICB facilitates third party access to particular services provided by a CS facility. Specifically, Part XICB applies to CS services that are declared by the Minister (discussed in this section), and where the provider of the CS service meets certain requirements (discussed in the section 2.3 below). To be a declared CS service, each of the elements set out under section 153ZEB of the CCA must be met (see Box 2).

Box 2: The definition of the declared CS service

Competition and Consumer Act 2010 (Cth) – Section 153ZEB

declared CS service: a CS service is **a declared CS service** if:

- (a) the provider of the CS service is a CS facility licensee or a person that is related to a CS facility licensee; and
- (b) the CS facility licensee holds an Australian CS facility licence that authorises the CS facility licensee to operate a CS facility; and
- (c) the CS service can only be provided because it has access to, or to data used in the operation of, the CS facility; and
- (d) the CS service is covered by a declaration under section 153ZEF.

2.1.1 What is a CS service

Under Part XICB, a CS service has the same meaning as that under the Corporations Act.⁸ The full definition from the Corporations Act extracted in Box 3 below.

⁸ Section 153ZEB of the CCA provides that: **CS service** has the same meaning as in section 828 of the *Corporations Act 2001*.

Box 3: The definition of the CS service

Corporations Act 2001 (Cth) – Section 828

Meaning of CS service:

- (1) A **CS service** is a service that can only be provided if it has access to a clearing and settlement facility, or to data used in the operation of a clearing and settlement facility.
- (2) The operation of a clearing and settlement facility is taken to be the provision of **a CS service**.

2.1.2 How are CS services declared by the Minister

Part XICB only applies to CS services that have been declared by the Minister (the Commonwealth Treasurer). These declarations are made by legislative instrument. The CS services that have been declared can be found in the Federal Register of Legislative Instruments.⁹

The Minister can declare CS services by taking into regard certain factors under the CCA, such as the declaration's likely effect on the Australian economy and on the efficiency, integrity and stability of the Australian financial system, the likely regulatory impact of the declaration, and the extent to which a provider of the CS service has a monopoly or significant market power over the provision of the CS service.¹⁰

The Minister must consult the ACCC in making a declaration, and the ACCC can at its own initiative consider and advise the Minister on whether a declaration should be made.

The rest of this chapter will provide further guidance on each of the elements of a declared CS service.

2.2 The access seeker

An access seeker for a CS service is a person who wants access to the CS service or wants a change to some aspect of the person's existing access to the CS service.¹¹

As discussed in the explanatory memorandum for Part XICB, access seekers are any third parties that are direct users of CS services.¹² This may include intermediaries, agents and other stakeholders that are accessing a CS service on behalf of another person. An example of other stakeholders may be share registries who access CS services to maintain records for shareholders and shareholdings on behalf of their clients. Access seekers also include parties who may already have some degree of access, but who want to change some aspects of their existing access.

Access seekers can obtain access in exchange for a price (pricing terms) and non-pricing terms. Non-pricing terms may include, for example, the speed of access to the infrastructure.

This structured process by which access seekers can request and be given access under Part XICB is known as an 'access regime'.

⁹ The Federal Register of Legislative Instruments is available from [here](#).

¹⁰ For the matters the Minister must consider in making a declaration, see section 153ZEF(4) of the CCA.

¹¹ The term 'access seeker' is defined in section 153ZEB of the CCA.

¹² Explanatory Memorandum, [Treasury Laws Amendment \(2023 Measures No. 3\) Bill 2023 \(Cth\)](#), para 3.103.

2.3 The provider of the CS service

Under Part XICB of the CCA, a CS service is a 'declared CS service' if, among other things¹³, the provider is:

- a CS facility licensee or a person that is related to a CS facility licensee, and
- the CS facility licensee holds an Australian CS facility licence that authorises the CS facility licensee to operate a CS facility.

A CS facility licensee is a person who holds an Australian CS facility licence. This is a licence issued under the Corporations Act that authorises a person to operate a clearing and settlement facility.

The concept of a related entity (that is, a person that is *related* to a CS facility licensee) is defined in section 4A of the CCA, and involves concepts such as being:

- the holding company of another body corporate
- the subsidiary of another body corporate
- a subsidiary of the holding company of another body corporate.

2.4 The CS facility

The access regime under Part XICB facilitates third party access to particular *services* provided by the clearing and settlement infrastructure, rather than providing general access to the infrastructure itself.

The infrastructure that is covered by Part XICB is known as the 'CS facility'. Under Part XICB, the CS facility means a clearing and settlement facility within the meaning of the Corporations Act.¹⁴ The full definition from the Corporations Act is extracted in Box 4 below.¹⁵

13 See section 2.1 above for the definition of declared CS service.

14 Section 153ZEB of the CCA provides that: **CS facility** means a clearing and settlement facility (within the meaning of section 761A of the *Corporations Act 2001* (Cth)).

15 CS facility is defined in section 153ZEB of the CCA, and sections 761A and 768A of the *Corporations Act 2001* (Cth).

Box 4: The definition of the CS facility

Corporations Act 2001 (Cth) – Section 768A

What is a clearing and settlement facility?

(1) For the purposes of this Chapter [of the Corporations Act], a clearing and settlement facility is a facility that provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other that:

- (a) arise from entering into the transactions; and
- (b) are of a kind prescribed by regulations made for the purposes of this paragraph.

Example 1: A facility that provides a regular mechanism for stockbrokers to pay for the shares they buy and to be paid for the shares they sell, and for records of those transactions to be processed to facilitate registration of the new ownership of the shares, would be a clearing and settlement facility (assuming that the relevant obligations are of a kind prescribed by regulations made for the purposes of this section).

Example 2: A facility that provides a regular mechanism for registering trade in derivatives on a futures market and that enables the calculation of payments that market participants owe by way of margins would also be a clearing and settlement facility (assuming that the relevant obligations are of a kind prescribed by regulations made for the purposes of this section).

(2) However, the following conduct does not constitute operating a clearing and settlement facility for the purposes of this Chapter [of the Corporations Act]:

- (a) an ADI (within the meaning of the Banking Act 1959) acting in the ordinary course of its banking business;
- (b) a person acting on their own behalf, or on behalf of one party to a transaction only;
- (c) A person who provides financial services to another person dealing with the other person's accounts in the ordinary course of the first person's business activities;
- (d) the actions of a participant in a clearing and settlement facility who has taken on the delivery or payment obligations, in relation to a particular financial product, of another person who is a party to a transaction relating to a financial product;
- (e) conducting treasury operations between related bodies corporate;

[subsections (f) and (g) have been repealed]

- (h) operating a facility for the exchange and settlement of non-cash payments (see section 763D) between providers of non-cash payment facilities;
- (i) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Note: An ADI is an authorised deposit-taking institution. See the *Banking Act 1959* (Cth).

2.5 An access dispute

As discussed in Chapter 1, the access regime under Part XICB is described as a ‘negotiate-arbitrate’ regime. An ‘access dispute’ arises where the parties are unable to agree on the terms (whether price or non-price) through negotiations. The issues on which they cannot agree become the basis of the dispute in the ensuing arbitration.¹⁶

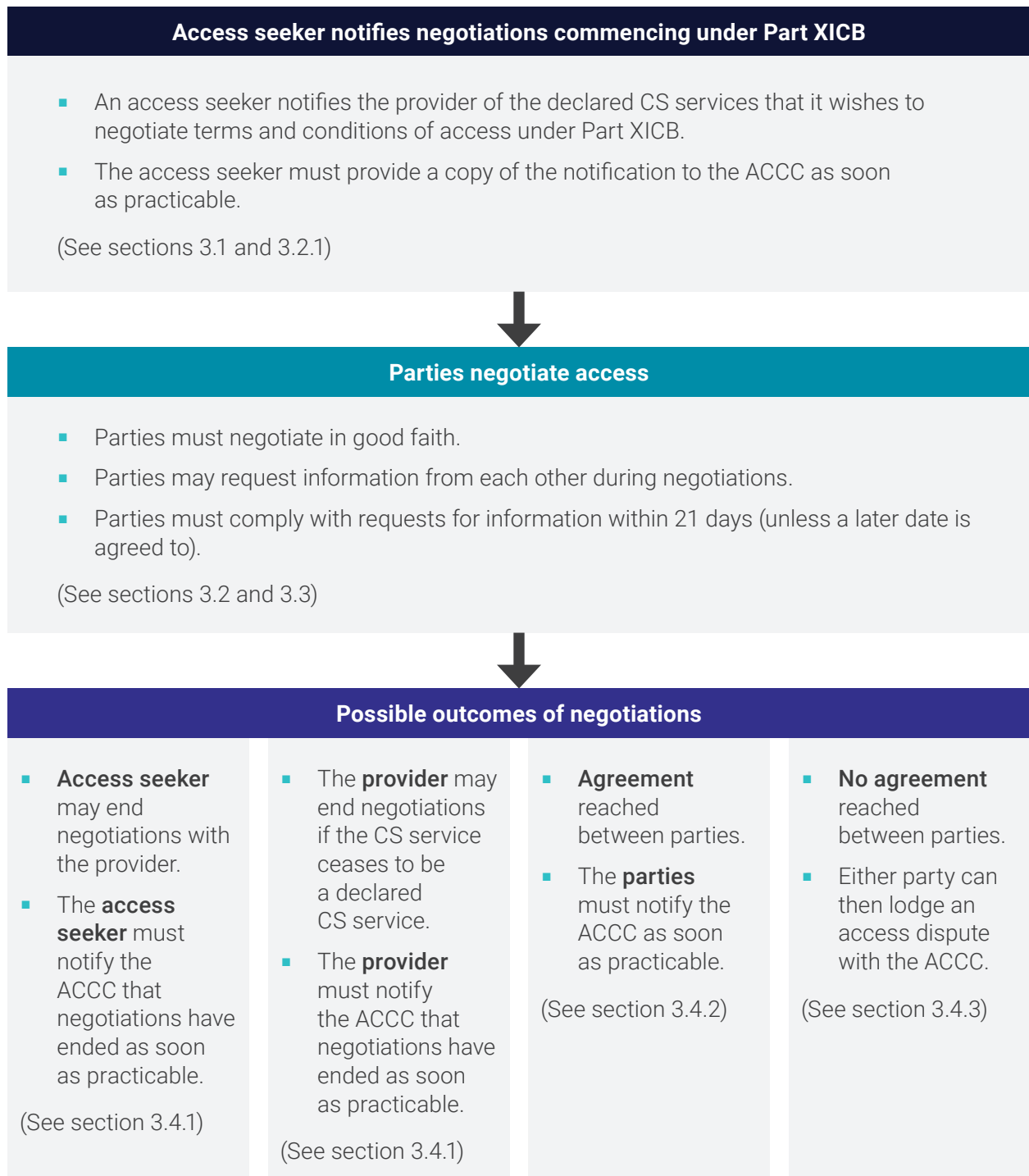
The process that parties should follow in negotiations is discussed in Chapter 3. Should the parties not reach agreement through negotiations, the process that parties should follow to submit an access dispute, and in the ensuing arbitration, is discussed in Chapter 4.

¹⁶ In addition to dealing with the disputed issues identified by the parties, the ACCC’s determination (of the arbitration) may also deal with any matter relating to access to the CS service, including matters that were not the basis for the notification of the access dispute – see section 153ZEP(2) of the CCA. More discussion on the outcomes of arbitrations (including the determination and enforcement issues) is in Chapter 6.

3. The negotiation process

Figure 2 outlines the negotiation process under Part XICB that will be discussed in further detail in this chapter.

Figure 2: Negotiation process under Part XICB (a guide only)



3.1 Beginning negotiations

3.1.1 When do negotiations start?

[s153ZEH]

Negotiations under Part XICB start when an access seeker notifies a provider of a declared CS service of its intention to gain access to that service, or to change some aspect of their existing terms of access. This notification must set out certain matters – see section 3.2 below.

3.1.2 Parties to the negotiations

[s153ZEJ(1)]

Negotiations are between the access seeker and the provider of a declared CS service. However, other interested parties may be included in the negotiations if agreed by both the access seeker and the provider.

3.1.3 Notifying the ACCC

[s153ZEH(4)]

The access seeker must notify the ACCC that negotiations have begun and provide a copy of the notification to the ACCC as soon as practicable after notifying the provider.

3.2 Information to provide during negotiations

3.2.1 What to provide in the access request notification

[s153ZEH(2)–(4)]

Part XICB specifies certain matters that must be set out in an access seeker's notification to commence negotiations. These matters are:

- The issues that the access seeker wishes to negotiate with the provider. There is no limit to the number of CS service issues that an access seeker may wish to negotiate over. The issues may be relating to any aspect of access to the CS service, including:
 - whether access can be granted
 - the price and other terms and conditions of the access.
- The access seeker's contact person and that person's contact details.
- Any other matters that may be specified in a regulation.

The ACCC expects that the notification should be made in writing.

3.2.2 Information requests by negotiating parties

[s153ZEK(1)–(2)]

Each party to the negotiations may request specific information from the other party. Such an information request may be made if the information is held by the responding party (or a related body corporate of the responding party), and the request is reasonable for the purposes of negotiating access. What is reasonable depends on the specific circumstances of each negotiation. The ACCC considers that generally, a request is likely to be reasonable if the information sought relates directly to the issues specified in the notification of negotiations.

Practically, a requesting party may not know if relevant information is held by the responding party (or a related body corporate). In such cases, the ACCC considers that the requesting party may make a request, and the responding party may respond by stating that it (or a related body corporate) does not hold the requested information. Circumstances where a party (or a related body corporate) does in fact hold information, but fails to provide it, is discussed in section 3.2.6 below.

Information requests must be made in writing and provide the reason why it is reasonable to make the request, such as how the information relates to the issues under negotiation. The requirement of reasonableness in making information requests is part of the broader requirement to negotiate in good faith, and to ensure that information requests are not overly burdensome. Good faith is discussed below in section 3.3.

Information requests must also comply with any other requirements specified in a regulation.

3.2.3 Response time and method

[s153ZEK(3)–(4)]

Requested information must be provided no later than 21 days after receiving the request, or at a later date agreed by the party requesting the information.

Information should be supplied in a readily readable form. For example if the information is requested to be supplied electronically, all associated files and inputs should be provided and saved in commonly accessible file formats.

Each party to the negotiations must request or provide information in a time and manner that is consistent with the broader requirement to negotiate in good faith (discussed below in section 3.3).

3.2.4 Limitations to use of information provided in negotiations

[s153ZEL]

Negotiating parties responding to information requests are not required to provide personal information, as defined in the *Privacy Act 1988* (Cth). The definition of personal information is extracted in Box 5 below.

Box 5: The definition of personal information in the *Privacy Act 1988* (Cth)

***Privacy Act 1988* (Cth) – Section 6**

personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.

Information exchanged during negotiations must only be used for the purposes of Part XICB, that is, to seek access to a declared CS service through negotiations or arbitrations. If negotiations do not proceed to arbitration, information obtained during negotiations cannot be used once negotiations end. However, if negotiations end because the parties are proceeding to arbitration, the information exchanged during negotiations may be used in the arbitration.

3.2.5 Penalties for misusing information

[s153ZEL and s76(1A), table item 13A, of the CCA]

Fines apply for parties that use information provided to them during negotiations for a purpose not related to Part XICB. For example, a misuse of information can include disclosing the information to another access seeker or third party not involved in the negotiations. Individuals may be fined up to \$500,000, while body corporates may be fined 600 penalty units. The value of a penalty unit for Part XICB is defined in section 4AA of the *Crimes Act 1914* (Cth) and is subject to change through indexation from time to time. For example, in 2023, the value of a penalty unit was \$275.

3.2.6 Failing to provide requested information

[s153ZEJ(2), s153ZEM, s153ZEW]

Each party must participate in the negotiations in good faith (see section 3.3.1 below). If a responding party fails to comply with a reasonable request for information, this may result in the negotiating parties being unable to agree on an issue. In this case, either party may wish to notify the ACCC that an access dispute exists and proceed to arbitration.

The ACCC considers that failure to provide requested information may include circumstances where:

- the responding party (or a related body corporate) in fact holds the information at the time of the request, but states it does not hold the information
- the responding party fails to meet the 21 day timeframe (or a later date agreed to by the parties) to respond
- the information requested is not given in a readily readable form
- the information provided is not relevant to the information request.

If a responding party fails to provide reasonably requested information during the negotiations, it will be limited in its ability to use that information in subsequent arbitrations that arise from those negotiations. This issue is discussed in detail in section 4.3.

The ACCC encourages parties to work co-operatively in relation to information provision under the Part XICB framework. The ACCC considers that open sharing of information between the negotiating parties is likely to lead to the parties reaching a negotiated outcome that is mutually agreeable.

Arbitration should be considered as a back-up only when negotiations in good faith have failed, and parties are encouraged to reach negotiated outcomes wherever possible.

3.3 Conducting negotiations

3.3.1 Expected conduct during negotiations

[s153ZEJ(2)–(3)]

Parties involved in negotiating access to a declared CS service must negotiate in good faith. This includes each party accommodating all reasonable requirements of the other party and exchanging information within the requested timeframes. Additionally, the legislation requires that all reasonable requests from the parties regarding timeframes for negotiations must be accommodated by the other parties.

Examples of conduct that may breach the good faith obligation may include:

- avoiding or refusing to engage in discussions with the other party
- unreasonably delaying the negotiation process
- failing to provide reasonable information when requested
- making clearly unreasonable offers
- failing to consider or accept reasonable offers made by the other party.

Examples of acceptable actions by a party that are unlikely to breach the good faith obligations include:

- a party putting its own commercial interests ahead of the other party's
- a party rejecting unreasonable offers or demands from the other party.

3.3.2 Scope of negotiations

[s153ZEJ(4)]

The negotiations must be about the specific issues detailed in the access request notification. Other issues may be negotiated if all parties agree in writing. The ACCC expects the parties to notify the ACCC of any other issues that the parties have agreed to negotiate over, that were not originally notified to the ACCC at the commencement of the negotiations (see section 3.1 and 3.2).

3.4 Ending negotiations

3.4.1 How to end negotiations

[s153ZEI]

An *access seeker* may end a negotiation at any time by providing notice to the provider. This applies whether or not an access seeker intends to refer or has referred an issue for arbitration. An access seeker can choose to continue to negotiate with a provider on a specific issue even if that issue has been referred to an arbitration.

A *provider* may give notice to an access seeker that negotiations have ended if the CS service over which access is being negotiated ceases to be a declared CS service (see Chapter 2 for discussion of a declared CS service).

The negotiation is taken to have ended when the notice to end negotiations is given by one party to the other parties.

The parties are also required to notify the ACCC as soon as practicable that negotiations have ended. The party who ended the negotiations is the party responsible for notifying the ACCC. For example, if the access seeker ends the negotiations, they are responsible for notifying the ACCC.

3.4.2 If negotiations end because agreement is reached

[s153ZEJ(5)]

Parties may negotiate over the issues specified in the original notification of negotiations, and over any other issues that the parties have agreed. If negotiations end because the parties have reached agreement on each issue that they are negotiating over, then the parties must ensure that they provide written notification of the agreement to the ACCC as soon as practicable.

For example, if the parties are negotiating over 4 issues and have reached agreement on 2, the ACCC considers the parties should notify the ACCC that they have reached agreement on the 2 issues. The parties should notify the ACCC as soon as practicable after an agreement is reached on each issue. In the case where agreement is reached simultaneously on several issues, the notifications can be combined in one document.

In summary, the ACCC considers that a notification should provide:

- a written description of the issue under negotiation
- a statement that agreement was reached on the issue.

The ACCC considers that the notification does not need to disclose the terms of what was agreed.

3.4.3 If negotiations end because agreement cannot be reached

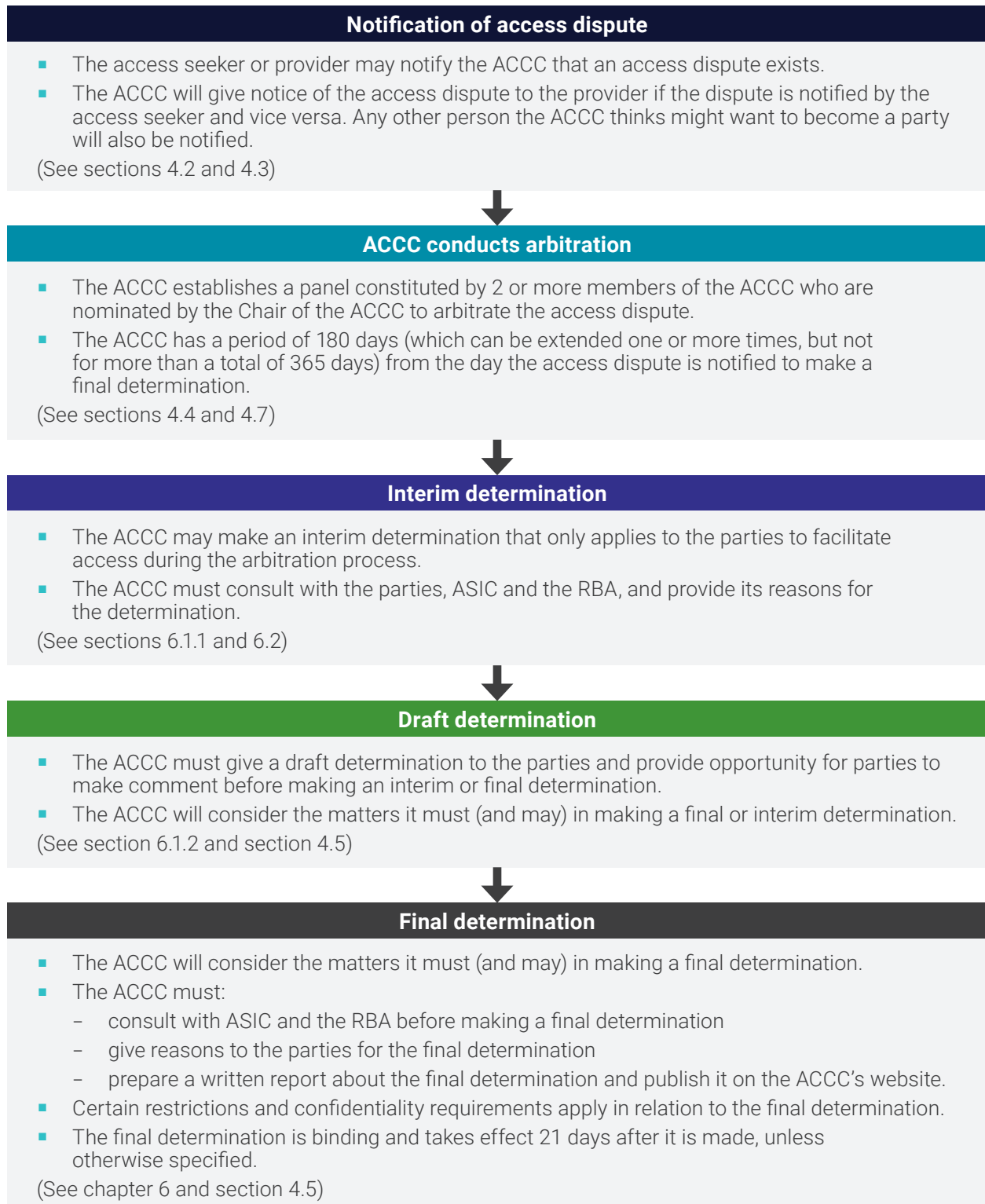
[s153ZEM(2)]

Where negotiating parties have been unable to reach a commercial agreement, either party can lodge an access dispute in writing with the ACCC. The notification of the access dispute will commence the arbitration process under Part XICB. The arbitration process is discussed in detail in the following chapter (Chapter 4).

4. The arbitration process

Figure 3 outlines the arbitration process under Part XICB that will be discussed in further detail in this chapter.

Figure 3: Arbitration process under Part XICB (a guide only)



4.1 What is arbitration and when to seek it?

Arbitration is a process whereby parties submit their dispute to an arbitrator, who then makes a determination (i.e. decision) that is binding upon the parties. For Part XICB, the arbitrator is the ACCC. A determination may cover issues including price, terms and conditions of access, or whether a previous determination by the ACCC should be varied.

Parties to a negotiation can seek arbitration on matters that they cannot agree on during commercial negotiations. As discussed in Chapter 3, the ACCC expects the parties to participate in commercial negotiations in good faith, and to use arbitration only when the parties have failed to reach agreement on the terms of access through negotiations.

Parties must have attempted to negotiate under Part XICB (see Chapter 3) before they are able to commence an arbitration under this Part.

4.2 How to start an arbitration

4.2.1 Notification of the access dispute

[s153ZEM(1), (2), (4)]

Under Part XICB, the ACCC can only arbitrate access disputes in relation to declared CS services. The concept of a declared CS service is discussed in Chapter 2.

Where an access seeker and a provider of a declared CS service are unable to reach agreement on the terms of access through negotiations, either party may notify the ACCC in writing that an access dispute exists. On receiving the notification, the ACCC will provide written notice of the access dispute to the other party involved as soon as practicable. For example, if the access seeker notified the ACCC of the dispute, the ACCC would notify the provider of the access dispute. The ACCC will also provide written notice of the access dispute to any other person it thinks might want to become a party to the arbitration.

Once a party provides the ACCC with a notification of an access dispute, the dispute will continue until one of the following occurs:

- the ACCC makes a final determination (see Chapter 6), or is taken to have made a determination because the time period for making a determination has expired (see section 4.7)
- the ACCC terminates the arbitration (see section 4.8)
- one or both of the parties withdraws the notification (see section 4.8).

4.2.2 Parties to an arbitration

[s153ZE0]

The parties to the arbitration are:

- the access seeker mentioned in the notification of access dispute
- the provider of a declared CS service mentioned in the notification of access dispute
- any other person that applies in writing to the ACCC to be made a party, and is accepted by the ACCC as having a sufficient interest.

Examples of third parties who may wish to apply to be joined as a party to the arbitration may include:

- the operator of a declared CS service, where that operator is a separate legal entity to the provider of the CS service
- an existing user of the declared CS service whose access may be affected by the new access seeker
- if the dispute is about whether a previous determination made under Part XICB should be varied, the parties to the previous determination.

4.2.3 The application of the arbitration regime under Part XICB

[s153ZED, s153ZEB]

The arbitration regime under Part XICB only applies where:

- the provider of the CS service is a corporation, or a partnership or joint venture consisting wholly of corporations, or
- the access seeker is a corporation, or
- the access is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

A corporation is defined in section 4 of the CCA, and this definition is extracted in Box 6 below. As the explanatory memorandum for Part XICB explains, it is expected that the majority of CS service providers would be CS facility licensees, who are required to be a body corporate under section 824A of the *Corporations Act 2001* (Cth).

Box 6: The definition of a corporation

Competition and Consumer Act 2010 (Cth) – Section 4

“corporation”: means a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

The term constitutional trade and commerce is defined in section 153ZEB and section 53B of the CCA, and is extracted in Box 7 below.

Box 7: The definition of constitutional trade or commerce

Competition and Consumer Act 2010 (Cth) – Section 53B

“constitutional trade or commerce” means any of the following:

- (a) trade or commerce among the States;
- (b) trade or commerce between Australia and places outside Australia;
- (c) trade or commerce within a Territory, between a State and a Territory, or between 2 Territories.

4.2.4 Scope of the arbitration

[s153ZEM(1), (2), s153ZEP(2)]

The parties can only seek arbitration over issues that they have previously negotiated over under Division 3 of Part XICB (see Chapter 3). Generally, the scope of the arbitration will be the issues that remain in dispute between the parties after the negotiation, as specified in the notification of an access dispute (see section 4.3).

The parties may continue to negotiate over disputed issues during the course of the arbitration and may reach agreement on issues that were previously in dispute. The ACCC expects to be notified, in the course of an arbitration, of any issues that were included in the original access dispute notification, but that are no longer in dispute. If the parties reach agreement on all disputed matters, they may withdraw the original notification of a dispute (see section 4.8).

In making a determination on the access dispute, the ACCC may deal with any matter relating to access to the CS service by the access seeker, including matters that were not the basis for the notification of the access dispute. For more discussion on the making of determinations, see Chapter 6.

4.3 Information to be provided to the ACCC for an arbitration

4.3.1 Information to include in the access dispute notification

[s153ZEM(3)]

The notifying party must provide the ACCC with certain information in the access dispute notification. This includes information about:

- the issues (if any) on which agreement has been reached during negotiations
- the issues that are in dispute
- any other matters that may be specified in regulations made for Part XICB.

After receiving the access dispute notification, the ACCC will generally write to parties seeking submissions on the issues identified as being in dispute.

4.3.2 How information from the negotiations is used in the arbitration

[s153ZEW(1), (2)]

Failure to provide requested information during negotiations may result in that information being excluded from the ACCC's consideration in forming its determination. If information was requested during negotiations but was not provided by the responding party, and that responding party then wishes to include that information in the arbitration process, it must seek the ACCC's permission in writing to include that information in its case.

When determining whether to grant permission to include the information in the arbitration process, the ACCC must consider:

- the desirability of the negotiating parties complying with the requirement to exchange information during the negotiation process (see section 153ZEK)
- whether the responding party had a reasonable opportunity, before the access dispute was notified, to comply with said requirements. These requirements include ensuring the information provided is relevant to the request, and that it is provided within 21 days after the request is given and in a readily readable form.

Whether the ACCC decides to grant permission in any case will depend on the particular facts of the case. The following factors will likely be relevant to the ACCC's decision:

- the reasons a party did not comply with the request
- the nature of the information
- the conduct of the parties during the negotiations, such as whether each party negotiated in good faith (see section 153ZEK(4) and section 3.3 of this guideline).

For example, in having regard to the matters under section 153ZEW(2), the ACCC may consider:

- whether the responding party was attempting to avoid providing the information to gain a possible advantage at a later stage
- whether the failure to disclose the information at the negotiating stage was inadvertent, and if so, whether the responding party took steps to provide the information to the requesting party as soon as the error was discovered
- the value of the undisclosed information, for example, if it relates to new information that could not have been inferred from other information provided during the negotiations, or would have provided critical context to other information provided.

4.3.3 The ACCC's powers where information was not provided in negotiations

[s153ZEW(3)]

If the ACCC is satisfied that during negotiations the responding party failed to provide the requesting party with requested information (see section 3.2 of this guideline and section 153ZEK), the ACCC may do any of the following in the arbitration:

- direct that a party cannot rely on specified information or materials
- draw such adverse inferences from the failure to provide the requested information as the circumstances justify

- for the purposes of making a determination, not have regard to the information that the party failed to provide in the negotiations.

4.4 How will the ACCC conduct an arbitration?

4.4.1 Arbitration panel

[s153ZEV and Part IIIA Division 3 Subdivision D s44Z, s44ZA, s44ZB, s44ZC]

For an arbitration under Part XICB, the ACCC will establish a panel that will be constituted by 2 or more members of the ACCC who are nominated in writing by the Chair of the ACCC. This panel is referred to:

- in these guidelines as the ‘arbitration panel’
- in the explanatory memorandum to Part XICB as the ‘arbitration commission’
- in the legislation as ‘the Commission constituted for the purposes of a particular arbitration’.

The ACCC Chair will preside at an arbitration, unless the Chair is not a member of the arbitration panel, in which case the Chair will nominate a member of the panel to preside at the arbitration. If a member of the arbitration panel becomes unavailable for the purpose of the arbitration, the Chair will direct that either the arbitration should be finished by the remaining member(s), or that the arbitration panel should be reconstituted for the purposes of finishing the arbitration. The ACCC will notify all parties to the arbitration in writing that an arbitration panel has been formed.

Questions before the arbitration panel will be decided according to the opinion of the majority of members, or if the members are evenly divided on a question, according to the opinion of the presiding member.

4.4.2 Commission procedure

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZF]

Part XICB requires the ACCC to act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly investigate and inquire into the dispute. The ACCC is permitted to inform itself of any matter relevant to the access dispute in any way it thinks appropriate, and is not bound by technicalities, legal forms or the rules of evidence.

The ACCC has discretion to:

- set timeframes that are reasonably necessary for the parties to fairly and adequately present their case, and to require that the cases be presented within these time periods
- determine which evidence or arguments are to be presented in writing or orally
- decide the form of communication the hearing will take, for example, in person, by a video conference call, telephone or another method.

4.4.3 Commission powers and penalties for contravening directions

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZG, s44ZH, s44ZI, s44ZJ, s44ZK]

The arbitration panel’s powers for arbitrating an access dispute include:

- giving a direction in the course of an arbitration hearing

- summoning a person to appear to provide evidence or to produce documents, and taking evidence on oath (or affirmation)
- hearing and determining the arbitration even if a person who is summoned is absent
- conducting the hearing at any place, and adjourning at any time
- referring any matter to an expert and deciding whether to accept the expert's report as evidence
- doing all things as are necessary or expedient for the speedy hearing and determination of the dispute.

A penalty of up to 6 months imprisonment applies if a party involved in an arbitration contravenes a summons, direction or order of the arbitration panel. Examples of when such a penalty would apply include:

- where the arbitration panel gives an oral or written order for specified information that was given in the course of an arbitration to remain confidential, and the order is not complied with
- where a party does not comply with orders or directions of the arbitration panel
- if a witness is summoned to appear before the arbitration panel and fails to attend, refuses to be sworn in, or does not answer questions by the arbitration panel (unless the person has a reasonable excuse).

A penalty of up to 12 months' imprisonment applies to a person that intimidates, threatens, coerces or causes damage, loss or disadvantage to another person because that other person is a witness before, or produces documents for, the arbitration panel.

4.4.4 Representation at an arbitration hearing

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZE]

Parties to an arbitration may choose to appear in person or be represented by someone else, such as a legal adviser, at an arbitration hearing. The ACCC encourages each party to attend the hearing with a representative authorised to make binding decisions.

4.4.5 Private or public hearing

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZD]

Arbitration hearings will be private, unless the parties agree to a public hearing. This means that all information arising out of an arbitration, for example, the parties' written submissions, are not disclosed to anyone outside of the arbitration process. The rationale for private hearings is to allow for the free flow of information.

The arbitration panel may provide written direction about who is permitted to attend a private hearing, having regard to the wishes of the parties and the need for commercial confidentiality.

4.4.6 Confidentiality and information handling

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZL]

Parties to the arbitration may request the arbitration panel to treat material provided to the commission as confidential. Issues of confidentiality and information handling are discussed further in Chapter 5.

4.4.7 Joint hearing

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZNA]

The Chair of the ACCC may decide it is suitable to hold a joint arbitration hearing if the ACCC is arbitrating 2 or more access disputes at a particular time, and there are matters common to those disputes. A joint arbitration may only be held if the Chair considers it would be likely to result in the disputes being resolved in a more efficient and timely manner.

In such an instance, the Chair of the ACCC will provide a written notice to the affected parties proposing a joint hearing. Affected parties will have 14 days after the notification is given to respond with a written submission. The Chair will then consider the submissions as well as any other matter they consider relevant in deciding whether to hold a joint arbitration hearing.

If a joint arbitration is held, the same procedures as discussed in this section (section 4.4) apply. The arbitration panel may have regard to the proceedings that have already occurred in the previous disputes before they were joined. The arbitration panel may make a single determination that covers all of the disputes. Issues of making determinations (decisions) and enforcement of determinations are discussed in Chapter 6.

4.5 What will the ACCC consider as part of an arbitration?

4.5.1 Matters the ACCC must consider

[s153ZER]

Under Part XICB, the ACCC must take certain matters into account when making a final determination for an arbitration. These matters are shown in Box 8 below. The ACCC may also take any other matters that it thinks are relevant into account in making a final determination.

Box 8: Matters the ACCC must consider when making a final determination

Competition and Consumer Act 2010 (Cth) – Section 153ZER

- (1) The Commission must take the following matters into account in making a final determination:
 - (a) the objects of this Part; [see Box 9 below]
 - (b) the operational and technical requirements (including those relating to interoperability and financial stability) necessary for the safe and reliable operation of a current or proposed CS facility that is or may be linked to the CS service;
 - (c) the pricing principles specified in subsection (3); [see Box 10 below]
 - (d) if an obligation of the provider under an Australian law in relation to the CS service is mentioned in a party's case—that obligation;
 - (e) if the provider is not the holder of the Australian CS facility licence that authorises the operation of the CS facility, and an obligation of the holder under an Australian law in relation to the CS service is mentioned in a party's case—that obligation;
 - (f) any advice provided by ASIC or the Reserve Bank of Australia in response to consultations undertaken under paragraph 153ZEP(3)(b);
 - (g) any advice provided by ASIC or the Reserve Bank of Australia under subsection 153ZEX(3) in relation to the arbitration;
 - (h) any guidance or policies relating to CS services made by the Commission, ASIC or the Reserve Bank of Australia;
 - (i) the legitimate business interests of the provider, and the provider's investment in the CS facility;
 - (j) if the provider is not the holder of the Australian CS facility licence that authorises the operation of the CS facility—the legitimate business interests of the holder, and the holder's investment in the CS facility;
 - (k) the interests of all persons who have rights to access the CS service;
 - (l) the public interest, including the public interest in having competition in markets (whether or not in Australia).

4.5.2 The objectives of Part XICB

[s153ZER(1)(a), s153ZEA]

In making a final determination, one of the factors the ACCC must consider is the objectives of Part XICB. These objectives are shown in Box 9 below.

Box 9: Objectives of Part XICB

Competition and Consumer Act 2010 (Cth) – Section 153ZEA

The objects of this Part are to:

- (a) facilitate access to CS services on terms and conditions, including pricing, that are transparent, non-discriminatory, fair and reasonable; and
- (b) support the long-term interests of the Australian market by delivering outcomes that are consistent with those that might be expected in a competitive market for CS services; and
- (c) address the imbalance in bargaining power between providers of CS services and access seekers in Australia; and
- (d) provide incentives for providers of CS services to negotiate commercial and non-discriminatory terms of access with access seekers of the CS services in Australia; and
- (e) provide for the timely resolution of access disputes between providers of CS services and access seekers, if they arise; and
- (f) discourage providers of CS services from exerting market power to the detriment of competition in upstream and downstream markets.

4.5.3 The pricing principles

[s153ZER(1)(a), (3)]

In making a final determination, another one of the factors the ACCC must consider is the pricing principles. These principles are shown in Box 10 below.

Box 10: Pricing principles

Competition and Consumer Act 2010 (Cth) – Section 153ZER

(3) For the purposes of paragraph (1)(c), the pricing principles are as follows:

- (a) access prices should generate expected revenue for a CS service that reflects the costs of providing access to the CS service;
- (b) access prices should include a return on investment commensurate with the regulatory and commercial risks involved;
- (c) access price structures should not allow a vertically integrated provider to set terms and conditions that discriminate in favour of its related entities, except to the extent that the cost of providing access to other access seekers is higher;
- (d) access pricing should provide incentives to reduce costs or otherwise improve productivity.

4.6 Cost of arbitration

[Part IIIA Division 3 Subdivision D s44ZN, *Competition and Consumer Regulations 2010 (Cth)*, s6F]

The ACCC may charge the parties to the arbitration for the ACCC's costs in conducting the arbitration, and apportion the charges between the parties. The costs of an arbitration are set out in section 6F of the *Competition and Consumer Regulations 2010 (Cth)* – see Box 11 below.

At the time of writing, the ACCC may charge a pre-hearing fee of \$10,850, which is payable by the person who notified the access dispute. A lower pre-hearing fee of \$2,170 applies only if the access dispute is in relation to the variation of an existing determination. These fees are GST inclusive.

At the time of writing, the ACCC may charge a hearing fee of \$4,340 for each day, or part of a day, of the arbitration hearing. This hearing fee will be apportioned by the ACCC between the parties appearing at the hearing on that day. These fees are GST inclusive.

Box 11: Costs of conducting an arbitration

Competition and Consumer Regulations 2010 – Section 6F

- (1) This regulation is made for the purposes of section 44ZN of the Act.
- (1A) The amount of a fee mentioned in subregulation (2) is the GST inclusive market value of the consideration for the supply of the service of conducting an arbitration of an access dispute.
- (2) The Commission may charge, for its costs in conducting an arbitration of an access dispute:
 - (a) a pre-hearing fee of:
 - (i) if the access dispute is in respect of a variation of an existing determination relating to access by the third party—\$2 170; or
 - (ii) in any other case—\$10 850; and
 - (b) a hearing fee of \$4 340 for each day, or part of a day, of the arbitration hearing.
- (3) A pre-hearing fee charged under paragraph (2)(a) is payable by the person who notified the access dispute on or before the commencement of the arbitration hearing.
- (4) A hearing fee charged under paragraph (2)(b) for a day, or part of a day, of the arbitration hearing:
 - (a) must be apportioned by the Commission between the parties appearing at the hearing on that day; and
 - (b) is payable by those parties accordingly.
- (5) Nothing in this regulation enables the Tribunal to charge for its costs in conducting a review of a determination.

4.7 How long does arbitration take?

[s153ZES]

The ACCC must make a final determination within 180 days, starting from the day the access dispute is notified. This is called the expected period.

The ACCC may extend the expected period if it is satisfied that it is appropriate to do so. If the expected period is extended, the ACCC must notify the parties to the arbitration before the extension takes effect and provide the reasons for the extension.

The expected period may be extended one or more times, however, the ACCC must not take longer than 365 days in total to make its final determination.

If the ACCC is unable to make a final determination within the expected period, the arbitration is deemed to have concluded immediately after the end of the expected period. In this case, the ACCC will be deemed to have made a final determination that:

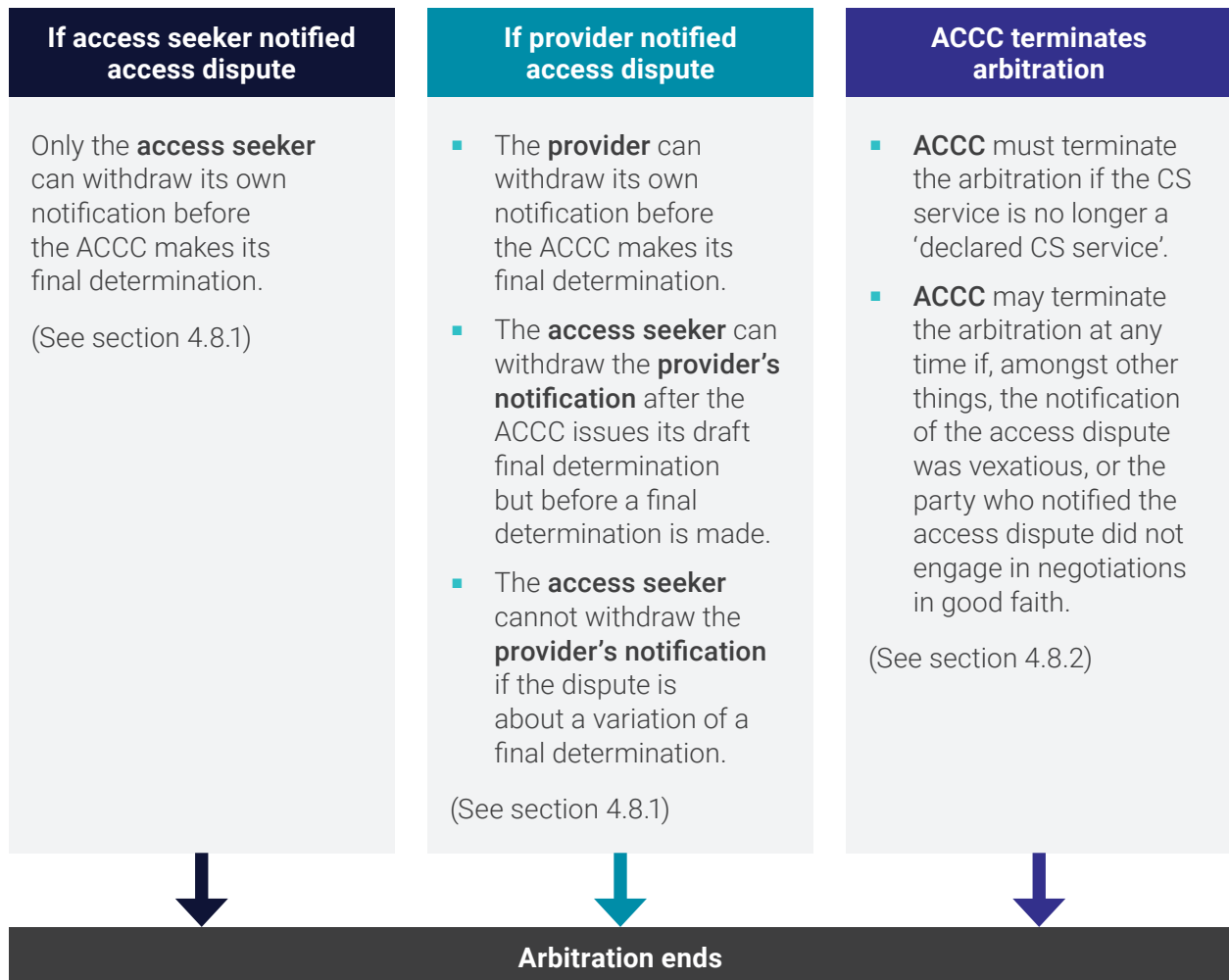
- does not impose any obligations on the parties
- does not alter any existing obligations (if relevant) between the parties that exist at that time.

The ACCC will also be deemed to have published a written report about the final determination as required by section 153ZET. The requirement to publish a written report on the final determination is discussed in section 6.4.

4.8 How to withdraw or terminate an access dispute

Figure 4 outlines how arbitrations can end under Part XICB in addition to the ACCC making a final determination and is discussed in further detail in this section.

Figure 4: How arbitrations can end in addition to the ACCC making a final determination (a guide only)



4.8.1 How a provider or access seeker may withdraw a notification

[s153ZEN]

Part XICB specifies certain circumstances under which an access dispute notification (see section 4.2 above) may be withdrawn. The circumstances differ depending on whether the ACCC was notified of the access dispute by the provider or access seeker.

If a *provider* notified the access dispute:

- it may withdraw its notification at any time before the ACCC makes its final determination
- the access seeker may also withdraw the provider's notification, at any time after the ACCC issues a draft final determination, but before it makes its final determination.

However, if the provider has notified a dispute about a variation of a final determination, the access seeker cannot withdraw the provider's notification.

If an access seeker notified the access dispute:

- the access seeker may withdraw its notification at any time before the ACCC's final determination is made
- the provider may not withdraw an access seeker's notification.

If an access dispute notification is withdrawn, it is taken to have never been given.

4.8.2 The ACCC's termination of an access dispute

[s153ZEU]

The ACCC must terminate an arbitration (without making a final determination) if the CS service is no longer a declared CS service. For example, if the provider of the CS service ceases to be a CS facility licensee or no longer holds an Australian CS facility license. The concept of a declared CS service is discussed in Chapter 2.

The ACCC may terminate an arbitration at any time, without making a final determination, if it thinks that:

- the notification of the access dispute was vexatious
- the subject matter of the access dispute is trivial, misconceived or lacking in substance
- the party who notified the access dispute did not engage in negotiations in good faith
- the negotiations that lead to the access dispute notification are insufficiently relevant to the matters the final determination is likely to deal with
- access to the CS service should continue to be governed by an existing contract between some or all of the arbitration parties.

The ACCC may also terminate an arbitration if a dispute is about varying an existing determination, and the ACCC considers there are no sufficient reasons why the previous determination should not continue.

5. The treatment of information and confidentiality

5.1 Confidentiality

The ACCC will handle confidential commercial information in accordance with Part XICB. This chapter discusses the ACCC's processes for handling confidential commercial information.

5.1.1 What is confidential commercial information?

The term 'confidential commercial information', as used in Part XICB, is not defined in the CCA. However, the term may be informed by its use in the legislation.

The ACCC considers it is likely to refer to information of a confidential nature that is not in the public domain and which would affect a party's commercial interests and/or position if disclosed to the other party or parties in an arbitration.

5.2 Information provided in negotiations

[s153ZEL]

Part XICB provides for the use of information exchanged between parties to a negotiation. Information provided during a negotiation may only be used for the purpose of:

- negotiating access to a declared CS service in good faith
- arbitration of an access dispute over a declared CS service (where negotiations have failed and the matter has proceeded to arbitration).

Additionally, negotiating parties responding to information requests are not required to provide personal information within the meaning of the *Privacy Act 1998* (Cth).

Limitations on the use of information provided in negotiations are discussed in further detail in section 3.2.

5.3 Information provided in arbitrations

5.3.1 Confidentiality direction and order

The ACCC will typically give a general confidentiality direction and order to parties (including their employees, contractors and agents) at an early stage of the arbitration. This confidentiality direction generally provides that the recipient must not use or disclose any information obtained from the other party or the ACCC in the course of the arbitration (other than information in the public domain) except to the extent that the use or disclosure is:

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

Issuing a general confidentiality direction at the commencement of an access dispute aims to establish an environment where parties openly discuss issues with each other and the ACCC.

The ACCC may need to review the form of any confidentiality direction and order at the time of making a determination. The form of any variation will depend on the circumstances of the particular access dispute.

5.3.2 Confidentiality arrangements between the parties

Although there is a specific regime under Part XICB for dealing with confidentiality requests, the ACCC generally prefers that matters of confidentiality be dealt with at an early stage of arbitration and in a manner that does not require the ACCC to make decisions about disclosure or non-disclosure of information on a document-by-document basis.

Accordingly, when it is anticipated that there will be confidential information used in an arbitration, it is usually appropriate for the parties to provide and exchange confidentiality undertakings. These undertakings may only allow identified persons from each party (usually consisting of limited internal regulatory personnel and external lawyers) to have access to all the confidential information of the other party.

If the parties are not able to agree on a satisfactory regime for the exchange of information, the CCA provides a process for dealing with specific confidentiality requests and the ACCC can give directions in relation to such matters.

On limited occasions, there may be a need for the complete non-disclosure of confidential information. The party seeking such form of protection can make a request under s 44ZL of the CCA as discussed below.

5.3.3 Consultation with other parties

In an arbitration hearing about an access dispute, the ACCC is entitled to inform itself of any matter relevant to the dispute in any way it thinks appropriate. The ACCC may decide to consult with people other than the parties. This course of action may raise the need for the disclosure of confidential information.

As a matter of practice, the ACCC will alert parties of its decision to conduct wider consultation at the earliest opportunity. It may be that the information necessary to enable meaningful consultation in a wider forum is in the public domain.

However, where the consultation would require the disclosure of confidential information, as a general rule the ACCC will seek to first advise any party who has provided confidential information and explain the need for and extent of the proposed disclosure. In this regard, the ACCC has a broad duty to consider whether to consult with the provider of that information before deciding to disclose it. In making any decision to disclose confidential information, the ACCC will always try to balance the need for informed decision-making with the need to respect the confidentiality of information and therefore the overall confidence of providers of information to the ACCC.

5.3.4 A party may request the ACCC to treat material as confidential

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZL]

A party to an arbitration hearing may inform the ACCC that, in its opinion, a specified part of a document contains confidential commercial information and request the ACCC not to give a copy of that part to another party.

The party making the request should provide the ACCC with a written submission describing the information over which confidentiality is claimed as comprehensively as possible, setting out the grounds for its request and outlining the form of the proposed decision sought from the ACCC.

If the information is to be provided orally, for example, in an arbitration hearing:

- the ACCC may arrange for the information to be provided during a private transcribed meeting with one or more Commissioners and/or staff
- the party will be provided with a full transcript after the meeting and can identify parts of the transcript that it believes contain confidential commercial information
- the party can then make a request for confidentiality in relation to identified terms in the transcript.

On receiving such a request, the ACCC must inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates. The ACCC must ask the other party or parties whether there is any objection to the ACCC complying with the request.

In general, this will involve providing those parties with a copy of the requesting party's submission setting out the grounds for the request. Where the party making the request has not described the information in sufficient detail, the ACCC may supplement the description or ask the requesting party to supplement the description so that the other parties are able to adequately consider the request.

The other party may object to the request for confidentiality. If there is an objection, the party objecting may inform the ACCC of its objection and the reasons for it, which should be done in writing. The party should also provide the form of any proposed decision sought from the ACCC. The party objecting to confidentiality should also provide a copy of their submission to all the other parties.

If there is an objection to the request for confidentiality, the ACCC may ask the party making the request to reply to the issues raised by the objection.

After considering the request, any objection and any further submissions made by any party in relation to the request, the ACCC may decide not to give the other party or parties a copy of so much of the document as the ACCC considers contains confidential commercial information and should not be given.

In making a decision on a confidentiality request, the ACCC will consider the factors in Box 12 below.

Box 12: Factors considered by the ACCC in assessing confidential commercial information

Where a party has demonstrated that information is confidential commercial information, the ACCC will have regard to the following 3 factors when assessing a party's confidentiality request under section 44ZL of the CCA:

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

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

5.3.5 The ACCC may make orders regarding confidentiality

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZG(4)–(5)]

The arbitration panel established by the ACCC to arbitrate a dispute may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration without the ACCC's permission.

A person who contravenes such an order is guilty of an offence, punishable on conviction by a maximum term of 6 months' imprisonment.

[s153ZEV and Part IIIA Division 3 Subdivision D s44ZD]

Arbitration hearings will be in private unless the parties agree to the hearing, or part of the hearing, being conducted in public. This aims to allow for the free flow of information during arbitration proceedings.

The member of the ACCC presiding at an arbitration hearing that is conducted in private may give written directions as to the persons who may be present. In giving these directions, the presiding member must have regard to the wishes of the parties and the need for commercial confidentiality.

Further discussion on the ACCC's arbitration procedures can be found in section 4.4.

5.3.6 How the ACCC shares information with other regulators

[s153ZEX]

Part XICB permits the ACCC to share information in relation to an access dispute under Part XICB with ASIC and the RBA. This includes sharing confidential commercial information claimed under section 44ZL (see above). The ACCC may notify ASIC or the RBA that the access dispute exists, request advice, and give information relating to the dispute to ASIC or the RBA.

5.4 Use and disclosure of information after an arbitration

5.4.1 Use of information in arbitration report

[s153ZET(5)–(7) and s153ZEV and Part IIIA Division 3 Subdivision D s44ZL]

The ACCC must not include in an arbitration report any information that the ACCC has accepted as confidential commercial information (and decided not to give to the other party or parties) under section 44ZL (see section 5.3 above).

Before the ACCC publishes its arbitration report, it must:

- specify in writing to the arbitration parties, the information it intends to publish
- invite the arbitration parties to make a written submission to the ACCC, to identify any information that it considers to be confidential commercial information and that it does not want published – parties have 14 days to respond.

The ACCC must have regard to any submissions it receives in deciding what it publishes in the report. The ACCC may also consider any other matter it considers relevant.

Further discussion about information the ACCC may publish in an arbitration report can be found in section 6.4.

5.4.2 Specific retention and disclosure obligations

As a Commonwealth agency, the ACCC must preserve and maintain records for as long as required to meet its operational, legal, financial and archival obligations.

The ACCC and its staff must comply with a number of laws prohibiting the unauthorised disclosure of information including the CCA, the *Criminal Code Act 1995* (Cth), the *Public Service Act 1999* (Cth), *Public Service Regulations 2023* (Cth) and the *Privacy Act 1988* (Cth).

The ACCC may be compelled to disclose information in certain circumstances. For example in response to a:

- Freedom of information (FOI) request
- subpoena or summons issued in court proceedings
- government minister, house of parliament or another government agency's power to obtain information.

Where the ACCC is legally required to disclose confidential commercial information, it will endeavour to notify and consult with the party who provided the information about the proposed release of that information.

For more information on the circumstances in which the ACCC may be compelled to disclose confidential information, refer to the [ACCC/AER Information Policy](#) on the ACCC's website. For more information on FOI requests, visit the ACCC's website on [Freedom of information](#).

6. Outcomes of arbitration – determinations & enforcement

6.1 Types of determinations

[s153ZEP(1), (3)]

For arbitrations under Part XICB, the ACCC must make a written final determination setting out its decision on the outcome of the access dispute, unless that arbitration has been terminated (see section 153ZEU and section 4.8 of this guideline).

The ACCC may also make an interim determination in an arbitration if it is appropriate.

Prior to making either an interim or a final determination, the ACCC is required to provide a draft of that determination to the parties and consult ASIC and the RBA about the determination.

When the ACCC makes a determination, it must give the parties its reasons for making the determination.

The purpose and differences of each determination is explained below.

6.1.1 Interim determinations

[s153ZEP(1)(b), (2), s153ZER(4)–(5), s153ZEY(5), s153ZEEZ]

The ACCC may make an interim determination to facilitate appropriate access during the arbitration process and prevent a provider of a declared CS service from using the arbitration process as a strategy to delay providing access. An interim determination only applies to the parties to the arbitration.

An interim determination has a limited duration. It will specify the day the interim determination takes effect, and will continue to have effect until either it is revoked or one of the following occurs before this:

- the notification of the access dispute is withdrawn (see section 4.8.1 of these guidelines)
- the arbitration is terminated (see section 4.8.2 of these guidelines)
- a final determination relating to the access dispute takes effect (see section 6.5.1 of these guidelines).

For example, an interim determination may be made to enable an access seeker to maintain access to a CS service that it has under an existing access agreement during the course of the arbitration of a dispute about that access agreement.

The matters that the ACCC must (and may) consider in making a final determination are discussed in section 4.5 of these guidelines. In making an interim determination, the ACCC may take any of these matters into account but is not bound to do so.

The operation of an interim determination may be affected by the effective date of a final determination. This issue is discussed in section 6.5.1 of these guidelines.

6.1.2 Draft determinations

[s153ZEP(3)(a)]

The ACCC must give a draft determination to the parties to the arbitration before making either an interim or a final determination. The ACCC's draft determination will be provided in writing. A draft determination is issued after the ACCC has considered the matters in dispute. However, it is designed to give the parties an opportunity to provide comment and for the ACCC to further consider its analysis and position before making its final determination.

6.1.3 Final determinations

[s153ZER(1)–(3), s153ZEY]

A final determination represents the ACCC's final decision on the access dispute. The final determination is binding on the parties to the arbitration and will dictate terms of access to the CS service. Specific processes apply for the making of final determinations, and their operation once made.

Further detail on the processes for making determinations and their operation is set out below in section 6.5. The matters that the ACCC must (and may) consider in making a final determination are discussed in section 4.5 of these guidelines.

6.2 How does the ACCC make a determination?

6.2.1 Matters a determination may deal with

[s153ZEP(2)]

An interim or final determination may deal with any matter relating to access to the CS service by the access seeker, including matters that were not the basis for the notification of the dispute.

Examples of matters that a determination may deal with include:

- requiring the provider to provide an access seeker with access to the CS service
- requiring the access seeker to accept, and pay for, access to the CS service
- specifying the terms and conditions of the access seeker's access to the CS service
- varying or revoking a prior determination relating to access to the CS service by the access seeker.

6.2.2 The ACCC must consult before making a determination

[s153ZEP(3)(a), (b)]

Before making an interim or final determination, the ACCC is required to:

- give a draft determination to the parties to the arbitration
- consult ASIC and the RBA.

Any advice that is provided by either ASIC or the RBA must be considered by the ACCC in making an interim or final determination.

6.2.3 The ACCC must give the parties its reasons for the determination

[s153ZEP(4), (5)]

When the ACCC makes either an interim or final determination, it must provide the determination, and the reasons for the determination, to the parties. The ACCC must also publish a written report about a final determination it makes (see section 6.4.1). This would be subject to confidentiality considerations, discussed in section 6.4.2 and chapter 5 of these guidelines.

A determination (either interim or final) is not a legislative instrument and only apply to the parties to the arbitration.

The ACCC may also publish an interim determination if it considers it is appropriate (see section 6.1.1).

6.2.4 Miscellaneous determination considerations

Part XICB incorporates various miscellaneous provisions from the CCA in relation to the making of an arbitration determination. These provisions are discussed below.

Compensation for property acquisitions

[s153ZFE(1)(a) and Part IIIA Division 8 s44ZZN]

Section 44ZZN protects a determination made for CS services from being invalid where there is unjust acquisition of property. The Commonwealth is liable to pay a reasonable amount of compensation if the determination results in an acquisition of property and the person has not been sufficiently compensated. The provision gives rise to complex legal questions. If a party considers its matter may invoke the operation of section 44ZZN it should seek legal advice.

Part XICB does not affect operation of Part IV and VII of the CCA

[s153ZFE(1)(b) and Part IIIA Division 8 s44ZZNA]

The operation of Part XICB does not affect the operation of [Part IV of the CCA](#) (in relation to restrictive trade practices), or the operation of [Part VII of the CCA](#) (in relation to authorisations and notifications).

If an access arrangement in a code or undertaking contains anti-competitive terms, it will continue to be subject to the operation of Part IV and Part VII of the CCA. Similarly, the operations of industry bodies in formulating access codes will be subject to the competitive conduct rules unless authorised or otherwise excluded from the competitive conduct rules.

Conduct by directors, servants or agents

[s153ZFE(1)(c) and Part IIIA Division 8 s44ZZO]

It may be necessary during proceedings for offences under the arbitration regime to establish the state of mind of an individual or of a body corporate in relation to particular conduct. The purpose of incorporating this provision in Part IIIA of the CCA is to provide for attribution of state of mind (for example, knowledge, intention, opinion, belief of purpose) to directors, servants or agents of a body corporate, or to the body corporate.

6.3 Restrictions on determinations

6.3.1 The ACCC must not make certain determinations

[s153ZEQ(1)–(3), (5)–(6)]

Part XICB places specific limits on the ACCC's power to make certain determinations. The ACCC must not make a determination that would have the following effects:

- (a) prevent an existing user that is not related to the provider¹⁷ of a CS service from being able to obtain sufficient access to the CS service to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified
- (b) prevent a person that is not related to the provider from obtaining, by the exercise of a pre-notification right¹⁸, sufficient access to the CS service to be able to meet the person's actual requirements
- (c) result in the access seeker becoming an owner (or one of the owners) of any part of the CS facility, or of extensions of the CS facility, that is used for the purposes of providing the CS service, without the provider's consent
- (d) require the provider to bear some, or all of the costs, of extending or maintaining extensions to the CS facility used to provide the service (including expanding the capacity of the facility to provide the service).

The purpose of these restrictions is to ensure that appropriate access is granted and no unrelated third party is disadvantaged from doing so.

An exception to the restrictions in (a) and (b) above applies when the ACCC is making a decision that relates to an earlier determination of an access dispute between a particular access seeker and CS service provider. Paragraphs (a) and (b) above do not apply in relation to the requirements and rights of the access seeker and provider if:

- the ACCC has previously made a determination of an earlier access dispute between the access seeker and CS service provider
- the ACCC is now making a determination that relates to that earlier determination.

In other words, the ACCC is not restricted from making a determination that would have the effect of preventing:

- an existing user (who is not related to the service provider) from obtaining sufficient access to the service to meet the user's reasonably anticipated requirements, or

¹⁷ An existing user is a person (including the provider) who was using the CS service when the dispute was notified. The concept of a 'related' entity is discussed further in section 2.3 of these guidelines.

¹⁸ A pre-notification right is a right under a contract, or a determination, that was in force at the time the access dispute was notified.

- a person (who is not related to the service provider) from obtaining sufficient access to the service to be able to meet the person's actual requirements, by the exercise of a pre-notification right, where it is making a decision that relates to an earlier determination between the access seeker and service provider.

This exception is to ensure that a previous determination made under the arbitration framework can be replaced by a new determination as the ACCC will not be limited by the restrictions in paragraphs (a) and (b) in making the new determination.

In the case where the provider is not a CS facility licensee (the provider may be a related entity of the relevant CS facility licensee), the ACCC must apply the restrictions and implications as if the relevant CS facility licensee was the provider of the CS service. The concept of a CS facility licensee is discussed in chapter 2.

A final determination that contravenes any of the restricted matters discussed in this section is invalid only for the part that is contravened.

6.3.2 Compensation for depriving a person of pre-notification rights

[s153ZEQ(4)]

If a person other than the access seeker has a right under a contract, or under a determination, that was in force when the access dispute was notified, that person will have a pre-notification right.

Any determination made by the ACCC that has the effect of depriving such a person of a pre-notification right to require the provider to supply the CS service to that person, must require the access seeker to pay to that person an amount (if any), as the ACCC considers is fair compensation for the deprivation.

The determination must also require the access seeker to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth agrees, or is required by a court order, to pay to the holder of the pre-notification right as compensation for the deprivation.

6.4 Publication of determinations

6.4.1 Arbitration reports

[s153ZET(1)–(4)]

The ACCC must prepare a written report about its final determination. The report must be published by electronic or other means – the report will usually be published on the ACCC's website. The arbitration report may include the whole or part of a final determination and the reasons.

Under Part XICB, the arbitration report must address the following matters:

- the issues the arbitration parties agreed to
- the issues in dispute between the arbitration parties
- the principles and methodologies that the ACCC applied in making the determination
- any information provided by the arbitration parties that was relevant to the principles and methodologies applied by the ACCC
- how the ACCC took into account the matters that it must consider in making the determination (under section 153ZER(1), see section 4.5 of these guidelines)

- any other matters the ACCC may have considered relevant and taken into account in making its determination, and the reasons it took those matters into account (under section 153ZER(2), see section 4.5 of this guideline).

The requirements of what must be included in the report does not preclude the ACCC from reporting on any other matters relevant to the arbitration, subject to the exclusion of confidential commercial information. An arbitration report is not a legislative instrument.

6.4.2 Confidentiality

[s153ZET(5)–(7) and s153ZEV and Part IIIA Division 3 Subdivision D s44ZL]

Section 44ZL of the CCA applies to arbitrations under Part XICB. Under s 44ZL, a party to an arbitration may request that the ACCC does not give to another party a document or part of a document that it claims contains confidential commercial information. The ACCC must consider a request and decide whether or not to give the other party or parties any part of a document that it considers contains confidential commercial information.

The ACCC must not include in an arbitration report any information it decided not to give to a party under s 44ZL.

Before publishing the report, the ACCC must provide parties notice of its contents and allow parties 14 days to make written submissions. In this written submission, parties can identify any information that they do not want published because of its confidential commercial nature. The ACCC must have regard to the submissions in deciding what to publish and may have regard to any other matter it considers relevant.

Confidentiality requirements and the ACCC's processes for handling confidential information are discussed further in chapter 5 of this guideline.

6.4.3 Register of determinations

[s153ZFD]

The ACCC must maintain a public register of determinations made under Part XICB that specifies the following for each determination:

- the names of the parties to the determination
- the CS service that the determination relates
- the date the determination was made.

The regulations may make a provision about the inspection of the public register, including provision about fees.

6.5 When does a determination take effect?

6.5.1 Operation of final determinations

[s153ZEY]

The ACCC's final determination of an access dispute will take effect 21 days after the determination is made, unless otherwise specified.

Backdating

Any or all of the provisions of the final determination may be backdated – that is, expressed to apply from a specific day that is earlier than the usual 21 days after the determination is made. For example, if the ACCC makes a final determination on 1 August, it would usually take effect on 22 August (i.e. 21 days after it's made). However, the ACCC can backdate the determination to apply from 1 July.

A specified effective date cannot:

- be any earlier than the date provided on the access seeker's notification of negotiations (see section 153ZEH and section 3.2 of these guidelines)
- be a date on which the access seeker did not have access to the CS service.

If the effective date of a final determination overlaps with the period that an interim determination was in effect, the provisions in the final determination will prevail.

Interest

If a final determination is backdated and requires one party to pay another party a sum of money, interest may apply at the rate specified in the determination. The determination may require that the interest is payable:

- on a part of the money, or the whole amount
- for a part of the period between the backdated day and the day the determination would usually take effect, or for that whole period.

6.6 Revocation or variation of determinations

6.6.1 How determinations may be varied or revoked

[s153ZFA]

The ACCC may vary or revoke an interim or final determination by written instrument if the ACCC is satisfied that it is appropriate to do so.

The ACCC may vary or revoke a determination on its own initiative or if the ACCC receives an application from a party to the arbitration determination.

What the ACCC considers before varying or revoking a determination

When deciding whether to vary a final determination, the ACCC must consider the same matters and restrictions that it considered when making the original final determination. It must consider:

- all of the matters the ACCC is required to consider under section 153ZER (see section 4.5 of these guidelines)
- all of the restrictions on access determinations (see section 153ZEQ and section 6.3 of these guidelines).

The ACCC must consider the above matters as if the access dispute was notified when the variation application was made and the variation was the making of a final determination.

Notifying parties of the variation or revocation

Before making a variation, the ACCC may provide the parties to the arbitration determination with a draft variation.

If the ACCC varies or revokes a determination, it must provide the arbitration parties with its reasons for doing so in writing.

A varied or revoked determination is not a legislative instrument and will only apply to the parties to the arbitration.

6.7 How an ACCC arbitration determination is enforced

6.7.1 Prohibition on hindering access

[s153ZFB]

A provider or user of the CS service (or a related body corporate to the provider or user) must not engage in conduct for the purpose of preventing or hindering an access seeker's access to the CS service under a determination. A user of a CS service includes a person who has a right to use the CS service.

A person may be taken to have engaged in conduct for the purpose of preventing or hindering an access seeker's access to the CS service under a determination, even if it is only possible to establish the person's 'purpose' by inference from their conduct or relevant circumstances (as opposed to having direct evidence of the person's purpose). This is explained in more detail below.

Enforcement and Remedies – applying Division 7 of Part IIIA

[s153ZFC and Part IIIA Division 7 as applied to Part XICB by s153ZFC(1) and amended by s153ZFC(2)]

Enforcement and remedies from the national access regime in the CCA (Division 7 of Part IIIA of the CCA) also apply to Part XICB. The principal remedies for contravention of arbitration determinations are injunctions and orders for compensation, which can be sought through proceedings in the Federal Court of Australia. The court is also empowered to make any other orders that it considers appropriate.

Federal Court proceedings may be pursued by the parties if:

- (a) a party to a determination has engaged, or is proposing to engage, in conduct that constitutes a contravention of a determination
- (b) a person has engaged, or is proposing to engage in conduct that prevents, hinders or obstructs an access seeker's access to a declared CS service granted under a final determination.

Where the Federal Court is satisfied either of the above conduct has occurred, the Court may:

- grant an injunction order that restrains the relevant parties from engaging in the conduct
- order the party that is refusing or failing to do something, to do that thing. For example if the provider is preventing or refusing the access seeker's access to the CS service, the Federal Court can order the provider to grant the access seeker with the access they are entitled to according to the final determination
- order the party preventing or hindering the access seeker's access to compensate the access seeker for loss or damage suffered
- make any other order it thinks is appropriate.

An injunction is an order of the court that requires or prohibits a person from taking certain actions. A mandatory injunction requires a person to do certain things as set out in the injunction, while a restraining injunction prohibits a person from doing certain things as set out in the injunction.

The Federal Court may issue an interim injunction for the above while an outcome is determined. The Court may also make injunctions by consent of all the parties to the proceedings, whether the Court is satisfied that the relevant party has engaged in the relevant conduct. The factors that may be relevant to the Federal Court exercising its powers to grant a restraining or mandatory injunction are set out in the legislation (s44ZZH and s44ZZI of the CCA).

The Federal Court has the power to discharge or vary an injunction or order that it has granted under these provisions.

Glossary of terms

Term	Meaning
Access dispute	<p>Arises where the parties are unable to agree on the terms (whether price or non-price) through negotiation.</p> <p>Refer to section 2.5 of this guideline and section 153ZEB of CCA.</p>
Access seeker	<p>For a CS Service, means a person who wants access to the CS service or wants a change to some aspect of the person's existing access to the CS service.</p> <p>Refer to section 2.2 of this guideline and section 153ZEB of CCA.</p>
ACCC	Australian Competition and Consumer Commission
Arbitration	<p>A process whereby parties submit their dispute to the ACCC, who will consider the issues in dispute according to the criteria set out in Part XICB of the CCA and will make a determination that is binding upon the parties.</p> <p>Refer to section 4.1 of this guideline.</p>
Arbitration panel	<p>A panel, established by the ACCC, constituted by 2 or more members of the ACCC who are nominated in writing by the Chair of the ACCC.</p> <p>Refer to section 4.4 of this guideline.</p>
ASIC	Australian Securities & Investments Commission
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CICS	Competition in the clearing and settlement
Commission	In the context of this guideline, refers to the ACCC.
CS	Clearing and settlement
CS service	<p>(1) A CS service is a service that can only be provided if it has access to a clearing and settlement facility, or to data used in the operation of a clearing and settlement facility.</p> <p>(2) The operation of a clearing and settlement facility is taken to be the provision of a CS service.</p> <p>Refer to section 2.1.1 of this guideline, section 153ZEB of the CCA and section 828 of the <i>Corporations Act 2001 (Cth)</i>.</p>
CS facility	<p>A facility that provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other that:</p> <p>(a) arise from entering into the transactions; and</p> <p>(b) are of a kind prescribed by regulations made for the purposes of this paragraph.</p> <p>Refer to section 2.4 of this guideline, section 153ZEB of the CCA and sections 761A and 768A of the <i>Corporations Act 2001 (Cth)</i>.</p>

Term	Meaning
Declared CS service	<p>A CS service is a <i>declared CS service</i> if:</p> <ol style="list-style-type: none"> (1) the provider of the CS service is a CS facility licensee or a person that is related to a CS facility licensee; and (2) the CS facility licensee holds an Australian CS facility licence that authorises the CS facility licensee to operate a CS facility; and (3) the CS service can only be provided because it has access to, or to data used in the operation of, the CS facility; and (4) the CS service is covered by a declaration under section 153ZEF of the CCA. <p>Refer to section 2.1 of this guideline and section 153ZEB of CCA.</p>
Determination	<p>Refer to sections 4.1 and 6.1 of this guideline and section 153ZEB and section 153ZEP of the CCA.</p>
RBA	<p>Reserve Bank of Australia</p>

Appendix 1: Dispute lodgement checklist

Please provide the following information to notify the ACCC of an access dispute under section 153ZEM of Part XICB of the *Competition and Consumer Act 2010* (Cth).

The purpose of this Appendix is to reduce the likelihood of necessary information being omitted from a notification and to minimise delays associated with correspondence between the ACCC and the notifying party about the provision of information.

This is not intended to be an exhaustive statement of the information that should be provided to the ACCC in a notification of an access dispute. The notifying party should have regard to the requirements of Part XICB in determining the information that is required or would otherwise be useful to the ACCC at this stage of the dispute.

Parties are also required to engage in negotiations under Division 3 of Part XICB before they can submit an arbitration to the ACCC under Division 4 of Part XICB (see chapter 3 of these guidelines).

Notifying party

1. Name of notifying company.
2. Address of notifying company.
3. Contact person: name and position of contact person.
4. Email address and telephone number of contact person.

Responding party

5. Name of responding company.
6. Address of responding company.
7. Contact person: name and position of contact person (if known).
8. Email address and telephone number of contact person (if known).

Access seeker and service provider

9. Specify which party is the access seeker and which party is the provider of the declared CS service.

Details of the declared CS service to which the dispute relates

10. Provide a description of the CS facility used to provide the declared CS service.
11. Specify the name of the owner(s) of the CS facility used to provide the declared CS service (if known).
12. Specify the declared CS service to which the dispute relates.
13. Provide a description of the notifying party's existing and anticipated business.

Details of the dispute

14. The issues (if any) on which agreement has been reached in negotiations between the parties.
15. The issues that are in dispute between the parties to the negotiations.

Some examples of the details that the parties should provide about the dispute include:

- (a) whether the dispute is about varying existing access arrangements or about future access arrangements
- (b) whether the access provider is currently supplying the declared CS service to the access seeker, and if so, a description of the supply arrangements (for example, contract date and term, key terms and conditions)
- (c) the terms and conditions of supply, or aspects of access, on which the access seeker and access provider have agreed
- (d) the terms and conditions, or aspects of access, on which the access seeker and access provider are unable to agree
- (e) a history of the negotiations, including details of the offers and counter-offers put forward by each of them during negotiations. A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful
- (f) particulars of existing users and those with rights to use the declared CS service, and a brief description of how access may affect these other users
- (g) whether access would involve extending the relevant CS facility
- (h) an estimate or description of the direct costs of providing access to the declared CS service and who will bear those costs
- (i) whether access will involve the access seeker becoming the owner of any part or extension of the CS facility
- (j) the operational and technical requirements necessary for the requested level of access to the CS facility
- (k) the outcome sought by the notifying party (e.g. the price for supply of the declared CS service).

