



Australian
Competition &
Consumer
Commission

Guide to inquiries into disputes about bulk interconnection services

Part 3 of the *Australian Postal Corporation Regulations 1996*

December 2012



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Important notice:

This guide is designed to give you basic information; it does not cover the whole of Part 3 of the *Australian Postal Corporation Regulations 1996* (APCR) and it is not a substitute for professional advice. Moreover, because it avoids legal language wherever possible there may be generalisation about the application of the APCR. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the dispute need to be taken into account when determining how the APCR apply to that dispute.

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Glossary of terms

ACCC	Australian Competition and Consumer Commission
APCA	<i>Australian Postal Corporation Act 1989</i>
APCR	<i>Australian Postal Corporation Regulations 1996</i>
Australia Post	Australian Postal Corporation
CCA	<i>Competition and Consumer Act 2010</i>
Commission	Refers to those members of the ACCC who are constituted to conduct the inquiry
Conference	A meeting between the parties and one or more Commissioner
Minister	Within the Australian Government, the Minister for Broadband, Communications and the Digital Economy has portfolio responsibility for Australia Post
Party	A person who is formally recognised as a party to an inquiry under Part 3 of the Australian Postal Corporation Regulations 1996

Preface

The Australian Postal Corporation (Australia Post) provides a bulk interconnection service under which bulk quantities of letters are delivered within Australia at reduced rates.

The *Australian Postal Corporation Regulations 1996* (APCR) were made under the *Australian Postal Corporation Act 1989* (APCA). The object of Part 3 of the APCR is that persons who use a bulk interconnection service receive fair and reasonable rate reductions for use of the service by making provision for the Australian Competition and Consumer Commission (ACCC) to:

- inquire into a dispute about the terms and conditions on which a rate reduction in relation to the bulk interconnection service is or will be provided to a person (including the amount of the rate reduction and the period for which it should apply); and
- make a recommendation to the Minister about the terms and conditions on which a rate reduction is or will be provided to a person.

A ‘bulk interconnection service’ for the purpose of the APCR has the same meaning as in section 32A of the APCA.

The purpose of the guide is to inform the public and stakeholders about how the ACCC will conduct an inquiry under Part 3 of the APCR. The ACCC considers that having a guide will help an inquiry to proceed in a timely and efficient manner.

1 Introduction

The ACCC has a role under Part 3 of the *Australian Postal Corporation Regulations 1996* (APCR) to inquire into disputes about the terms and conditions on which Australia Post provides or will provide a rate reduction for bulk interconnection services. The intention of these provisions is to ensure that Australia Post does not set unreasonable terms and conditions for its bulk letter service.¹ If the ACCC undertakes an inquiry into a bulk interconnection service dispute, it is required to report to the Minister with recommendations about the terms and conditions on which a service is or will be provided to that person.

The purpose of the guide is to inform the public and stakeholders about how the ACCC will conduct an inquiry under Part 3 of the APCR in order to help inquiries to proceed in a timely and efficient manner.

1.1 Australia Post's bulk interconnection service

Part 3 of the APCR allows the ACCC to inquire into disputes about the bulk interconnection service. The bulk interconnection service referred to in the APCR has the same meaning as in section 32A of the *Australian Postal Corporation Act 1989* (APCA).² Section 32A of the APCA defines a 'bulk interconnection service' as a service provided by Australia Post under which bulk quantities of letters are delivered within Australia at reduced rates provided that:

- the letters have been lodged at specified Australia Post offices, and
- the letters have been sorted in accordance with the terms and conditions of the service as specified by Australia Post.

At the time of writing this document, the ACCC considers Australia Post's PreSort Letters service, Charity Mail service and Acquisition Mail service meet the definition of a 'bulk interconnection service' under section 32A.³ In terms of volume, the majority of bulk interconnection services offered by Australia Post are its PreSort letter services.⁴

¹ Explanatory Memorandum *Postal Services Legislation Amendment Bill 2003*

² Regulation 3(1) of the APCR.

³ Australia Post's PreSort Letters service offers discounted postage rates for customers lodging more than 300 machine-addressed articles that are barcoded and sorted. The PreSort letter service also includes Charity mail which provides for delivery of small PreSort letters at lower prices for approved charitable organisations. Acquisition mail provides for delivery of non-personalised addressed mail pieces to households in specific postcodes, suburbs or Census Collection Districts. Further information on these Australia Post mail services is available on the Australia Post's website <http://auspost.com.au>.

⁴ For example in 2010-11 Australia Post advised the ACCC that small and large PreSort letters accounted for 2.1 billion letters or 57 per cent of total letters sent.

PreSort has a minimum lodgement requirement of 300 letters. Prices for PreSort letter services depend on the size and weight of the article, whether it is barcoded and the choice of delivery standard (surface or regular delivery) required. PreSort letters comprise around 57 percent of Australia Post's total letter volumes. In contrast, Acquisition mail has a minimum lodgement of 30,000 letters with prices dependent on the size and weight of the article.

The users of bulk interconnection services include mail houses that produce and deliver letters in very large quantities on behalf of firms that produce large amounts of letters, such as banks, utility companies and marketing firms, and such firms themselves.

1.2 ACCC role in the regulation of postal services

The ACCC has three key roles in the regulation of postal services under the *Competition and Consumer Act 2010* (CCA) and the APCA.

This guide deals only with one of these roles: inquiries into disputes about bulk interconnection services. Part 3 of the APCR allows the ACCC to inquire into disputes about the terms and conditions on which a rate reduction is or would be provided to a person for a bulk interconnection service, including the amount of the rate reduction and the period for which it will apply.

The ACCC also has two other roles under the CCA and the APCA:

- assessing proposed price increases of Australia Post's declared⁵ services under Part VIIA of the CCA
- monitoring Australia Post's regulatory accounts for the presence of cross-subsidy under Part 4A of the APCA

1.3 Structure of this document

Chapter 2 – Overview: this chapter provides an overview of the structure and process of an inquiry the ACCC may undertake to resolve a bulk interconnection dispute under the APCR.

Chapter 3 — Commencement of an inquiry: this chapter provides guidance about how the ACCC would commence an inquiry into a bulk interconnection dispute.

Chapter 4 — Stages of an inquiry: this chapter outlines the main steps of an inquiry.

⁵ In 2011, the Australian Government undertook a regulatory impact analysis, as a result of which it has decided to limit the prices surveillance of Australia Post letter services from all reserved services to certain letter services reserved to Australia Post. For example, the 60 cent basic postage rate (BPR) and other Ordinary letter services remain 'declared' and thus subject to price notification requirements. The other services currently reserved to Australia Post are no longer declared. Refer *Price Notification Declaration (Australia Post Letter Services) (No. 2) 2011*.

Chapter 5 — Ministerial consideration: this chapter provides information related to ministerial consideration of the ACCC's report.

Chapter 6 — Termination of an inquiry: this chapter outlines the circumstances under which an inquiry into a dispute may be terminated by the ACCC or withdrawn by the complainant before a report is made to the Minister.

Chapter 7 — Procedural matters: this chapter identifies the major administrative procedures associated with conducting an inquiry into a bulk interconnection service dispute.

Chapter 8 — Confidentiality: this chapter sets out the ACCC's approach to confidential information.

2 Overview of an ACCC inquiry into a bulk interconnection service dispute

This chapter provides an overview of the structure and process of an inquiry that the ACCC may undertake to resolve a bulk interconnection service dispute under the APCR. Subsequent chapters discuss the inquiry process in detail.

ACCC assessment process

Under the APCR only a complainant (that is, a user or a person intending to use a bulk interconnection service) can lodge a dispute notification with the ACCC. The APCR also requires the ACCC to make a recommendation in relation to an inquiry into a dispute within a specified timeframe commencing on the date the ACCC receives a dispute notification.

Inquiry time periods

The ACCC is required within 21 days of receiving a valid notification of a dispute to commence an inquiry into the dispute and notify the Minister of the commencement of the inquiry (r. 14 (1)).

The ACCC is generally required to complete an inquiry within 60 days of its commencement (r. 14 (2)). However, it is able to extend the period of the inquiry by up to 30 days (r. 14 (3)). The period of the inquiry may also be extended if a party is required to provide information to the ACCC for the purposes of the inquiry (r. 14 (5)).

The ACCC considers that some disputes may involve consideration of complex issues within these confined timeframes. In these circumstances and also given that under the APCR only a complainant can lodge a dispute notification with the ACCC, it may be beneficial for the complainant to raise their concerns with the ACCC prior to submitting a formal dispute notification to the ACCC. If the complainant considers that these discussions should be treated as private and confidential, it should indicate this to the ACCC prior to the discussion.

Preferred ACCC process

To assist the ACCC to inquire into a bulk interconnection service dispute and to assist the complainant to provide sufficient information, the ACCC suggests the following process:

- Pre-lodgement—particularly in relation to novel, difficult or complex matters, it may be appropriate for the complainant to meet informally with ACCC staff to discuss the prospective dispute inquiry process and timetable before lodgement. This provides the complainant and the ACCC with sufficient opportunity to consider relevant issues involved in the dispute at a preliminary stage and to ensure the information required to be provided as part of a dispute notice will be addressed. This process may involve provision of a draft notification for discussion.

However, under the APCR, a complainant is also able to lodge a dispute notice without prior consultation with the ACCC.

- Formal notification is lodged—the complainant lodges a formal dispute notice with the ACCC. The ACCC then assesses the lodgement application to ensure there is sufficient information provided to consider it a valid dispute under the APCR. This may also involve the ACCC requesting further information where necessary.
- The ACCC is required to commence an inquiry and notify the Minister of the commencement of an inquiry within 21 days of lodgement of a valid notification (r. 14 (1)).
- ACCC consultation with parties—the ACCC may seek submissions from parties on issues relevant to its consideration of the dispute. The ACCC may conduct other consultation processes with organisations or individuals on relevant issues where appropriate, such as holding roundtable discussions.
- ACCC recommendation—the ACCC issues a report regarding the bulk interconnection service dispute to the Minister within 60 days of commencing the inquiry (subject to potential extensions to this time period outlined in the APCR (r. 14)).
- Ministerial consideration—the Minister considers the ACCC’s report and may direct Australia Post to act in accordance with recommendations in the report.

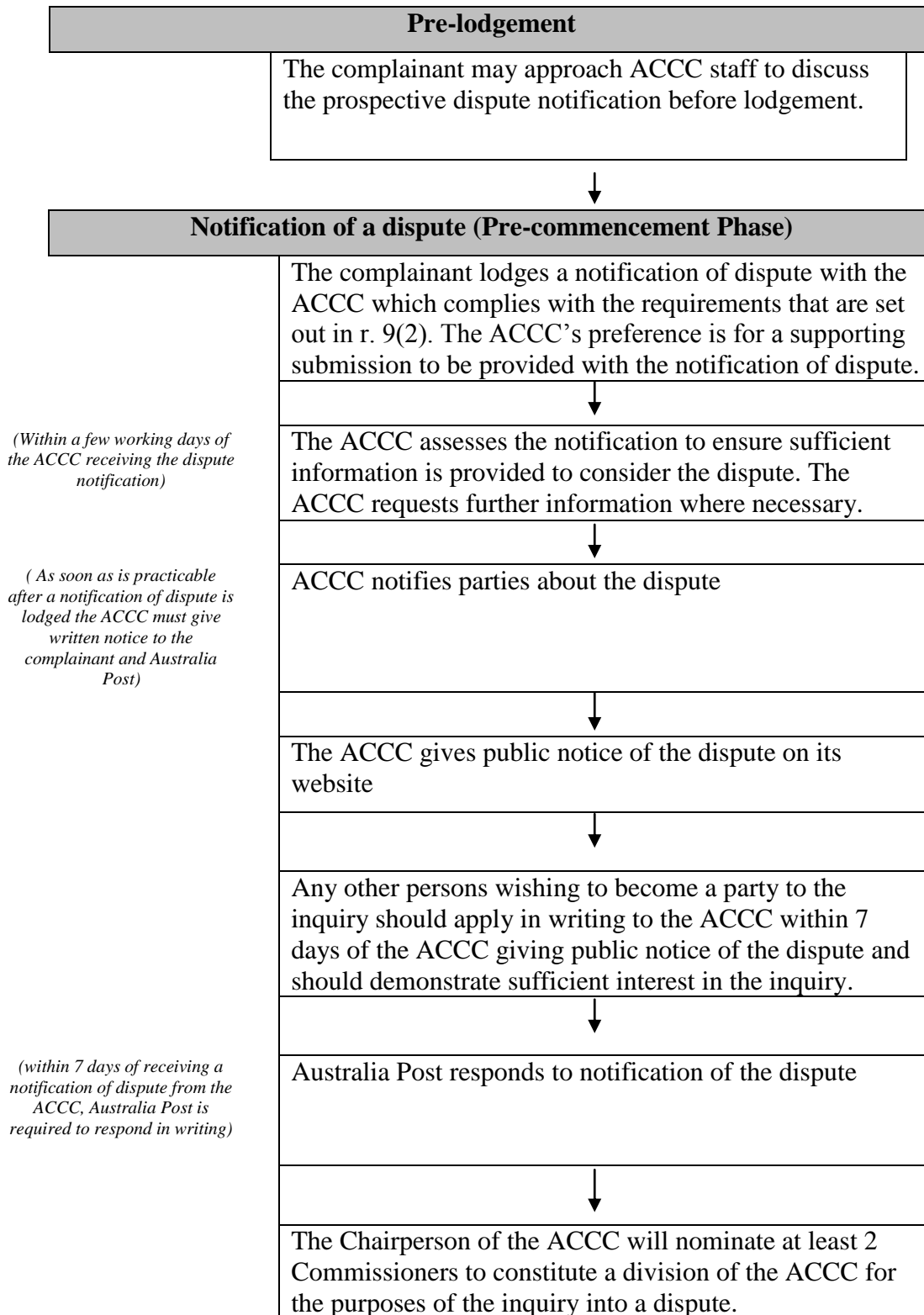
A flowchart (‘Chart A’) is presented on the following page and outlines the ACCC’s preferred assessment process. This provides a general guide to the ACCC’s likely approach to a notified bulk interconnection service dispute. However, the specific process adopted by the ACCC is likely to vary depending on the circumstances of the dispute.

While the ACCC will publicly give notice (on its website) that it is undertaking an inquiry into a dispute, the actual proceedings of an inquiry into a dispute will be conducted in private with parties to the inquiry.

The process should assist the complainant to submit a dispute notice that provides the ACCC with sufficient time and information to conduct a proper and accurate inquiry into the dispute. The timeframe for each stage of the inquiry process is likely to depend on the nature and complexity of the dispute. However, these timeframes are subject to the statutory periods that are specified in the APCR. For example, the ACCC must commence an inquiry within 21 days of lodgement of formal notice, and must complete an inquiry within another 60 days of commencement (subject to some specific extension provisions).

Chart A outlines the specific procedures that the ACCC would expect to be undertaken as part of an inquiry into a bulk interconnection service dispute. The estimated timeframes for completing them are noted in the margin comments.

Chart A: Suggested procedure for an inquiry into a bulk interconnection service dispute



Inquiry Assessment Phase

(The ACCC is required to commence an inquiry into a dispute within 21 days after receiving a formal dispute notification)

The ACCC commences an inquiry into the dispute



The ACCC may hold a case management meeting with the parties and potential other parties.



The ACCC may request submissions from specific organisations or individuals on issues relevant to its consideration of the dispute.



(The ACCC will usually allow parties between 2– 4 weeks to respond to a request for a submission)

The ACCC receives submissions from organisations or individuals in response to a request from the ACCC.



The ACCC may issue information requests to parties to obtain additional information to assist its assessment of the notified dispute (r. 19(1)).



ACCC Recommendation Phase

(The ACCC is required, subject to potential extensions of this time period, to report to the Minister its recommendations in relation to an inquiry into a dispute within 60 days of the commencement of the inquiry)

The ACCC provides a report to the Minister with recommendations on its inquiries into the bulk interconnection service dispute.

Ministerial consideration

The Minister considers the ACCC's report.

The Minister may direct Australia Post to act in accordance with recommendations in the report.

The Minister must consult with the Board of Australia Post before giving a direction.

The Minister provides notification of the decision to the complainant and the ACCC.

(The Minister is required, to issue any notice of direction to Australia Post within 28 days of receiving the ACCC Report)

3 Commencement of an inquiry

This chapter provides guidance about how the ACCC would commence an inquiry into a bulk interconnection service dispute.

3.1 Parties

The parties to an inquiry are (r. 8):

- the complainant who notified the dispute (who is a user or person intending to use a bulk interconnection service)
- Australia Post
- any other person who applies in writing to be made a party and is accepted by the ACCC as having a sufficient interest.

3.2 Other persons that may wish to become a party to the inquiry

The parties to a bulk interconnection service dispute are the complainant who notified the dispute and Australia Post. If another person has demonstrated a ‘sufficient interest’ to the ACCC, then that person will also be made a party to the inquiry (r. 8(c)).

Any other persons wishing to be made a party to the inquiry should apply in writing to the ACCC within 7 days of the ACCC giving public notice of the dispute, and should outline the reasons why they have a sufficient interest to be made a party to the inquiry.

The ACCC’s assessment of whether a person has sufficient interest to become a party to an inquiry into a dispute will be made on a case by case basis. The ACCC is likely to consider whether a person has a direct and immediate interest in the inquiry or whether that interest is indirect. In general a person with an indirect interest is not likely to be accepted by the ACCC as having a sufficient interest to become a party to an inquiry.

3.3 Involvement of persons who are not a party to an inquiry

The ACCC may consult more widely than the parties to the inquiry into a dispute, including inviting a person who is not a party to make a submission (r. 17(2)(b)). The ACCC can take issues covered in those submissions into consideration when determining a dispute.

3.4 Pre-notification

The APCR provides limited time (60 days plus a possible extension of up to 30 days) for the ACCC to conduct its inquiry into a bulk interconnection service dispute. Where disputes involve complex, protracted or novel matters, it may be appropriate for a potential complainant to consider a pre-notification dispute consultation process. This would assist in ensuring that:

- the issues in dispute, and the respective positions of Australia Post and the potential complainant on those issues, can be identified
- there is sufficient information for the ACCC to inquire into the dispute

During these discussions, the potential complainant may wish to provide a draft notification to assist the discussions with the ACCC.

As part of the pre-notification stage, the parties may provide the ACCC with confidential commercial information. The ACCC recognises that the disclosure of this information may have a substantial adverse effect on the parties. The ACCC will assess any claim for confidentiality having regard to the ACCC/AER Information policy, which can be accessed at www.accc.gov.au.

3.5 Formal notification requirements

In order to commence the processes under the APCR, the complainant needs to lodge a notification with the ACCC in relation to the dispute.⁶

The notification will need to comply with the requirements in sub regulation 9(2). These requirements are outlined in Box 3.1 below.

⁶ As noted above, a complainant is able to lodge a dispute notice without prior consultation with the ACCC, as per sub regulation 9(1) of the APCR.

Box 3.1: Requirements for lodging a dispute notification

The notice lodged with the ACCC must be clear and legible (r. 9(2)(a)) and must state (r. 9(2)(b)):

- if the rate reduction is in dispute — the amount that the complainant proposes should apply
- if the period during which the service will be supplied is in dispute — the period during which the complainant proposes that the service should be supplied at the reduced rate
- if any other terms and conditions on which the rate reduction is or would be provided are in dispute — the terms and conditions that the complainant proposes should apply

A notice must also state (r. 9(2)(c)):

- the rate reduction (if any) that Australia Post has offered for supply of the service to the complainant
- the period (if any) during which Australia Post has offered to supply the service to the complainant at the reduced rate
- any other terms and conditions to which Australia Post's offer is subject

The notice should include a copy of any document that may be relevant to this dispute (r. 9(2)(d)).

A notice must state the name and address of the complainant and be signed and dated by or for the complainant (r. 9(2)(e) and (f)).

A complainant may claim the protection of regulation 21 (which relates to confidentiality) in respect of any document supplied to the ACCC (r. 9(3)).

A notice may relate to more than one dispute (r. 9(4)).

A notice is taken to be given when the ACCC receives the notice (r. 9(5)).

The templates at the **Appendix** provide further information on the requirements for lodging a dispute notification with the ACCC.

A dispute notification can be lodged with the ACCC by email to:

postalservices@accc.gov.au

or by post to:

General Manager

Fuel, Transport and Prices Oversight Branch

Australian Competition and Consumer Commission

GPO Box 520

MELBOURNE VIC 3001

3.6 Unable to agree

One of the preconditions for notifying a dispute is that the complainant and Australia Post are unable to agree on the terms and conditions of access to the bulk interconnection service.

By way of guidance, the ACCC sets out the following ‘rule of thumb’ which it proposes to use in considering whether the complainant and Australia Post are unable to agree:

- The complainant must have made a request of Australia Post or put a proposal to Australia Post; and
- Australia Post must have refused the request or rejected the proposal. The refusal may be an explicit refusal or a constructive refusal (e.g. where Australia Post has not responded to the request or proposal within a reasonable time).

Where there is insufficient information in the notification for the ACCC to be satisfied that the complainant and Australia Post have been unable to agree, the ACCC will contact the relevant party, seeking additional information, and will generally advise the other party that it has done so. In some instances, it may seek the views of both parties before reaching a conclusion on the issue.

If the ACCC decides not to undertake an inquiry into a dispute, it must give written notice to the Minister and to the parties of the reasons for the decision (r. 13(2)).

3.7 Exercise of powers by the ACCC

The powers of the ACCC under Part 3 of the APCR can be exercised either by the ACCC, or by a Division of the ACCC constituted by at least two Commissioners.

3.7.1 Constitution of the ACCC for the purpose of an inquiry

The Chairperson of the ACCC may direct in writing for two or more Commissioners to constitute a ‘Division of the ACCC’ to exercise the powers of the ACCC under Part 3 of the APCR (r. 15(1)).

If the Chairperson is included in the ‘Division of the ACCC’ they must preside over the inquiry into a dispute (r. 15(3)). If the Chairperson is not included in the ‘Division of the ACCC’ and a Deputy Chairperson of the ACCC is included then a Deputy Chairperson must preside over the inquiry (r. 15(4)). If neither the Chairperson nor a Deputy Chairperson is included in the ‘Division of the ACCC’ the Chairperson must nominate in writing the member who is to preside over the inquiry (r. 15(5)).

3.7.2 Reconstitution of the ACCC for the purpose of an inquiry

If a Commissioner sitting on an inquiry ceases to be a member of the ACCC or is otherwise unavailable for the purposes of the inquiry into a dispute, the Chairperson must either (r. 16(2)(a) and (b)):

- direct that the ACCC be constituted to finish the inquiry by the Commissioner(s) in the ‘Division of the ACCC’; or
- direct that the ACCC be constituted for that purpose by the Commissioner(s) together with one or more other Commissioner(s) remaining in the ‘Division of the ACCC’.

The ACCC, as reconstituted, must complete the inquiry and may have regard to any record of the proceedings of the inquiry made by the ACCC as previously constituted.

3.7.3 Decisions of the ACCC

When the ACCC is constituted for an inquiry into a dispute by two or more Commissioners, any question, including both procedural and substantive issues, will normally be decided by consensus. If consensus cannot be reached, the question is to be decided by a majority of those members. If there is not a majority in favour of a recommendation, the recommendation of the presiding member will prevail.

In the case of disagreement between members about a recommendation in the report to the Minister, the report must also set out the other recommendation (r. 27(4)).

3.7.4 ACCC staff and experts

Once the ACCC has been notified of a dispute which satisfies the pre-conditions for notification, the ACCC will inform the parties of the appropriate ACCC staff contacts for the dispute. Parties should note that ACCC staff do not have decision making responsibilities as this is the role of Commissioners.

The ACCC, when inquiring into the dispute, may also engage an expert to advise on any matter relevant to the dispute. However, the role of the expert is to assist the ACCC with analysis of the dispute and not to resolve the dispute through expert determination.

4 Stages of an inquiry after notification of a dispute

There are three phases to an inquiry after the ACCC receives a valid notification of dispute – the pre-commencement, inquiry assessment and recommendation, which may overlap in some situations.

In communicating during the inquiry, the ACCC will establish appropriate procedures to ensure any correspondence issued by it as part of its consideration of the bulk interconnection service dispute is received in a timely way by all parties.

4.1 The Pre-commencement stage

This part of the guide discusses the period from the notification of the dispute until the ACCC commences the inquiry.

4.1.1 Notifying Australia Post and other persons of the dispute

As soon as practicable after the ACCC receives notice of a dispute the ACCC must:

- give written notice to both the complainant and to Australia Post identifying the date (r. 10(a)):
 - on which the ACCC received the notification
 - on which the ACCC must commence an inquiry into the dispute
 - by which the ACCC must complete the inquiry
 - the substance of regulations 13(1) and 23(1) and (2)
- give Australia Post a copy of (r. 10(b)):
 - the notice of dispute
 - any document that accompanies the formal notification of dispute (subject to confidentiality provisions in r. 21)
- inform in writing any other person the ACCC thinks might want to become a party to the inquiry (r. 10(c))
- give the notice of the dispute to the public in such manner as it thinks fit (r. 10(d)).
The ACCC will generally notify the public by an entry on its website.

Members of the public who consider that they have a sufficient interest in the dispute may apply in writing to the ACCC, with reasons, to be made a party to the inquiry.

4.1.2 Australia Post response to notification of a dispute

Within 7 days of receiving a notification of a dispute from the ACCC, Australia Post is required to respond in writing to the ACCC stating:

- whether Australia Post has made an offer that is more advantageous to the complainant than the standard terms and conditions for the bulk interconnection service (r. 11(1)(a))
- if an offer has been made, the details of the offer and of the method by which any rate reduction is to be applied and the period during which the rate reduction is to be applied and has been calculated (r. 11(1)(b))
- if an offer has not been made, Australia Post is required to state the reasons why the standard terms and conditions for the bulk interconnection service are appropriate (r. 11(1)(c))

Any rate reduction method used by Australia Post must show the component that is Australia Post's estimate of the average transport costs per letter avoided in relation to letters lodged with Australia Post for delivery in accordance with the offer (r. 11(2)).

4.1.3 Circumstances where an inquiry should not be undertaken

The ACCC must not undertake an inquiry if the complainant has withdrawn notification of the dispute (r. 13(1)(a)).

The APCR also requires that where the ACCC reasonably believes the dispute is trivial, misconceived or lacking in substance, or that the dispute arises from negotiations between Australia Post and the complainant that were not conducted by the complainant in good faith, it must not undertake an inquiry (r. 13(1)(b)).

The ACCC must not undertake an inquiry if the complainant does not, within 7 days of being requested by the ACCC to do so, give the ACCC sufficient information to enable the ACCC to satisfy itself that r. 13(1)(b) does not apply (r. 13(1)(c)).

If the ACCC decides not to undertake an inquiry into a dispute, it must give written notice to the Minister and to the parties of the reasons for the decision (r. 13(2)).

4.2 The Inquiry Assessment Stage

This part of the guide discusses the period from the commencement of the inquiry into a dispute to the ACCC's report to the Minister.

4.2.1 Commencement of inquiry

The ACCC must commence an inquiry into the dispute within 21 days after it receives notification of the dispute (unless the ACCC considers there are circumstances in which an inquiry is not to be undertaken as discussed in sections 3.6 and 4.1.3 above). The ACCC must give the Minister written notice of the commencement of the inquiry (r. 14 (1)).

4.2.2 The case management meeting

ACCC staff may hold an initial meeting with Australia Post and the complainant shortly after the commencement of an inquiry. At such a meeting, the relevant ACCC staff would

ensure that all parties understand the nature of the dispute and the dispute resolution process.

It should be noted that ACCC staff do not have decision making responsibilities and Commissioners will not usually be present at a case management meeting.

At the case management meeting, ACCC staff will seek to:

- identify the issues in dispute and the respective positions of Australia Post and the complainant on those issues
- discuss whether Australia Post or the complainant have any concerns with the ACCC's jurisdiction
- discuss whether Australia Post or the complainant have any concerns with the Commissioner(s) or staff involved in the inquiry
- consider requests received from people who wish to become parties to the inquiry, and the views of Australia Post and the complainant on such requests
- discuss whether the ACCC is conducting any other inquiries involving similar issues where it may be useful to hold joint meetings and seek the view of Australia Post and the complainant
- identify any potential barriers and delays to resolution of the dispute.

Before the case management meeting, the ACCC will usually send an agenda to Australia Post and the complainant.

When the ACCC is considering requests from people to become a party to the inquiry and deciding whether they should be accepted by the ACCC as having a sufficient interest (r. 8(c)), the ACCC will usually invite the applicant to participate in the part of the meeting where their application is discussed with the complainant and Australia Post.

ACCC staff will prepare a report on the meeting setting out the substance of the discussions. The report will be provided to Commissioners and to the parties to the inquiry into the dispute. An extract of the report dealing with any applications to become a party to the inquiry will also be copied to the parties and to the other interested persons.

Typically the ACCC expects that there will only be one case management meeting during the inquiry into a dispute, given the timeframes involved. While the matters addressed at a case management meeting are likely to depend on the case at hand, an additional case management meeting may be called to:

- identify the information that is relevant to matters on which the ACCC is deliberating, including claims for confidentiality

- identify and discuss issues which have subsequently emerged as being in dispute between the parties.

4.2.3 Information gathering – submissions, information notices, and information provided under Part VIIA of the CCA

The ACCC has the power to inform itself of any matter relevant to a dispute in any manner that it reasonably believes to be appropriate (r. 17(2)). The ACCC may undertake its own analysis and may seek material in addition to that provided by the parties (for example, expert opinions on particular issues).

To consider the relevant issues that are subject to its inquiry, the ACCC may need to gather specific information, such as information on service costs and prices. Typically, the ACCC will gather relevant information in one of three ways:

- submissions from parties
- issuing notices to parties to provide information
- using information provided under Part VIIA, such as during a price notification.

Types of information sought

The ACCC will seek information from parties relating to the different matters in dispute between the complainant and Australia Post. Accordingly, the information sought will depend on the nature of the dispute.

Submissions

The first way that the ACCC would be likely to obtain information is through submissions made by parties.

The ACCC will seek submissions from parties on the issues relevant to a dispute. If necessary the ACCC may seek additional submissions from parties as required.

The ACCC may also invite a person who is not party to the dispute to make a submission in relation to the inquiry (r. 17(2)(b)).

A submission to the ACCC should set out the view or conclusion that the party believes the ACCC should adopt on particular issues, along with supporting reasons.

Generally, written submissions will provide the primary means by which the ACCC receives argument from the parties. Detailed written submissions are particularly useful in disputes involving:

- complex questions of law
- methodology of calculating costs/charges

- analysis of detailed or extensive information that has been presented in evidence
- resolution of apparent conflicts in the evidence on which an argument is based.

Notices

The second way that the ACCC would be likely to obtain information is through issuing notices requiring a party to provide information or documents.

If the ACCC reasonably believes that a party is capable of providing information or producing a document that is relevant to a dispute or to an inquiry, the Chairman or the presiding Commissioner⁷ may give written notice to the party to provide the information or produce the document (r. 19(1)). The notice will set out the place, date and time in which the information or the production of the document is to be provided.

The party must then provide the information requested at the time and place described in the notice (r. 19(2)). The ACCC may, at its discretion, extend the time at or before which information must be given, or a document must be produced, to the ACCC (r. 17(2)(a)).

If a party fails to comply with a notice, the ACCC may draw an inference from the failure that is adverse to the party (r. 19(3)). Additionally, if the party is capable of providing the information and fails to comply with the notice, it commits an offence (r. 19(5)).

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

If the ACCC issues a notice requiring a party to provide information (including further and better information) to it for the purposes of an inquiry into a dispute, the period of the inquiry is extended by the amount of time the party takes to supply that information (r. 14(5)).

Documents provided to ACCC

If a document is provided to the ACCC in the context of an inquiry into a dispute, either as a submission or a response to a notice, the ACCC may (r. 20):

- make a copy of, and take an extract from, the document
- keep the document for as long as is necessary for the purposes of the inquiry.

⁷ Or another Commissioner who is nominated in writing by the Chairperson.

Use of information obtained under Part VIIA of the CCA

The third way that the ACCC would be likely to obtain information is that, if the ACCC thinks that any information obtained by the ACCC as part of its consideration of a price notification from Australia Post under Part VIIA of the CCA may be relevant to an inquiry into a dispute, the ACCC may use the information in the inquiry (r. 18A).

4.2.4 Alternative access pricing methodologies

In assessing what rate reduction should apply to a bulk interconnection service, the ACCC may make use of a number of alternative access pricing methodologies such as a ‘top down’ ‘retail minus avoidable cost’ methodology or a ‘bottom up’ ‘building block’ approach .

These approaches involve the ACCC making an assessment of the efficiency of costs incurred by Australia Post in processing and sorting letters. The ACCC would expect that bulk interconnection service prices would be sufficient for Australia Post to recover efficient costs of the service.

The ACCC will also consider the limited timeframe (60 days plus a possible extension of up to 30 days) available for it to conduct an inquiry into a bulk interconnection service dispute when deciding on an appropriate pricing methodology to apply.

Avoidable cost methodology

Under an avoidable cost methodology the access price for a particular bulk interconnection service should be no higher than the retail price or the equivalent ordinary letter service less Australia Post’s avoidable cost in providing that service.

For example, the bulk interconnection service access price for small letters could be calculated as the basic postage rate less Australia Post’s avoidable cost in providing that service (in this case, Australia Post’s costs of sorting, processing and transporting letters).

However, some small letter bulk interconnection services such as Charity mail are currently provided to customers at a discount to the small PreSort rate without any additional savings in sorting, processing and transporting costs to Australia Post. This would be a consideration for the ACCC in relation to any dispute notification for such a service.

Building-block approach

Under a ‘bottom up’ approach an access price could be calculated using a ‘building-block’ methodology. In calculating an access price of a bulk interconnection service the ACCC would consider the various ‘blocks’ of costs associated with providing that service. These cost blocks would include capital costs (including a return on capital) and a return of operating costs and indirect costs. Together these would represent the cost of providing the service and prices would be forecast to recover those costs.

4.2.5 Possible Conference with the Commissioner(s)

Given the timeframes involved, the ACCC generally anticipates conducting its inquiries based on information supplied to it in submissions and other documents.

However, the ACCC may hold a conference between the parties and Commissioner(s) either before or after seeking submissions from interested parties. This conference may be held to expedite the progress of the inquiry into the dispute or to clarify matters that have arisen during the course of the inquiry from a document or information provided to the ACCC, or on any other matter relevant to the inquiry (r. 24(1)).

The specific requirements under the APCR associated with holding a conference are outlined in Box 4.1 below.

Box 4.1: Requirements of a conference with Commissioner(s)

If the ACCC decides to hold a conference, the ACCC (r. 25(1)) :

- must determine the date, time and place for holding the conference; and
- may give written notice to a party, a member of the staff of the ACCC or another person of the conference

An individual who is given notice of a conference must attend the conference in person (r. 25(2)).

A corporation must be represented at a conference by a director, officer or employee of the corporation (r. 25(3)).

If a person who is given notice of a conference does not attend, the ACCC may hold the conference in the absence of that person (r. 25(4)).

Conferences are to be held in private, or if the parties agree, may be held wholly or partly in public (r. 26(1) and (2)).

The ACCC may decide (r.17 (2) (e)):

- to limit the duration of time which a person may give evidence or make a submission at a conference
- who may be present at a conference
- whether a conference may be conducted wholly or partly in person or by telephone, closed circuit television or another means of communication

A minute of the conference will be provided to the parties as soon as practicable afterwards. If a party believes the minute is inaccurate in any way, it should provide a submission, within a week of receiving the transcript to the ACCC (copy to the other party or parties) setting out the areas of inaccuracy, along with suggested changes. The ACCC can then check areas of concern against the recording of the conference.

4.3 ACCC recommendation

Once the ACCC has considered all of the relevant material available to it, it will proceed to form its view on particular issues. The ACCC will then provide a report to Minister with its recommendations in relation to the dispute.

The ACCC must report to the Minister within the time prescribed for completing the inquiry into the dispute (r. 27(1)).

The ACCC's report must recommend if appropriate:

- the rate reduction that should apply to bulk interconnection service supplied to the complainant (r. 27(2)(a)(i))
- the period during which the bulk interconnection service should be supplied to the complainant at the reduced rate (r. 27(2)(a)(ii))
- the other terms and conditions on which the bulk interconnection service should be supplied to the complainant at the reduced rate (r. 27(2)(a)(iii))

The manner in which the recommendations on these matters are specified will be determined on a case by case basis.

Any such recommendations by the ACCC to the Minister:

- would relate only to the terms and conditions under which Australia Post supplied bulk interconnection services to the complainant
- could include a recommended date from which a rate reduction or other terms and conditions of the relevant service should be supplied to the complainant, provided that the recommended date does not precede the date of notification of the dispute

In making a recommendation, the ACCC must have regard to (r. 27(3)):

- all the known information relevant to the dispute including information provided to the inquiry
- the obligations of Australia Post under section 26, 27 and 28 of the APCA which relate respectively to Australia Post's commercial, community service and general governmental obligations.
- Australia Post's estimate of the average transport costs avoided for letters lodged for delivery under the service

The role of the Minister under the APCR, in regards to the ACCC's recommendation and the dispute, is discussed in Chapter 5.

5 Ministerial consideration of reports and recommendations

In addition to the ACCC procedures discussed elsewhere in this guide, this chapter briefly outlines processes specified in the APCR for ministerial consideration of an ACCC report of an inquiry into a bulk interconnection service dispute.

5.1 Ministerial consideration of ACCC report

The Minister may either, by notice in writing and after consultation with the Board of Australia Post, direct Australia Post to act in accordance with a recommendation made in a report by the ACCC, or use his/her discretion not to give such a direction. That is, the Minister may either accept or reject an ACCC recommendation.

In deciding whether to give a direction to Australia Post, the Minister must take into account (r. 31):

- the reasons given by the ACCC for making the recommendation
- the obligations of Australia Post under the APCA
- any response from the Board of Australia Post based on the earlier consultation in relation to the issuing of a direction
- any other relevant matter.

5.2 Ministerial Notification

The Minister must give written notice of a direction to Australia Post within 28 days of receipt of the ACCC report (r. 32(1)).

Under section 32B(1A) of the APCA, the Minister must not issue a direction to Australia Post that is inconsistent with section 32A(2) of the APCA (relating to the terms and conditions of a bulk interconnection service).

Australia Post must act in accordance with a direction from the Minister (r. 32(2)).

The Minister must also give a written notice to the parties and to the ACCC stating the Minister's decision whether to give a direction in relation to each recommendation made in the report by the ACCC (r. 33(1)). If the Minister:

- gives a direction to act in accordance with a recommendation in the ACCC report, the Minister must give the notice when the direction is issued (r. 33(2)(a))
- does not give such a direction, the Minister must give notice as soon as practicable after receiving the report (r. 33(2)(b)) and set out reasons for not accepting the recommendation (r. 33(3)(b)).

6 Termination of an inquiry

In certain circumstances, an inquiry into a dispute may be terminated by the ACCC or withdrawn by the complainant before a report is made to the Minister.

6.1 Withdrawal of notification of a dispute

A complainant may withdraw notification of a dispute by giving notice in writing to the ACCC and giving a copy of the notice to Australia Post (r. 12). Should a notice of withdrawal of notification occur, the inquiry is finalised for all participants.

6.2 Compromise of disputes

After an inquiry into a dispute commences, if Australia Post offers a complainant a rate reduction or any other variation in the terms and conditions on which the bulk interconnection service is to be provided and the complainant accepts the offer, the complainant must give written notice of acceptance of the offer to the ACCC (r. 22(1)).

6.3 Discontinuing an inquiry

The ACCC must discontinue an inquiry into a dispute before making a recommendation to the Minister if the ACCC (r. 23(1)):

- receives a notice from the complainant withdrawing the notification of dispute
- receives a notice from the complainant, accepting an offer from Australia Post and the ACCC is satisfied that the offer is fair and reasonable
- reasonably believes the dispute is trivial, misconceived or lacking in substance.

The ACCC may discontinue an inquiry before making a recommendation to the Minister if the complainant does not, within 7 days of being requested by the ACCC, provide the ACCC (r. 23(2)):

- with information known to the complainant
- a document in the possession, or under the control of the complainant and necessary for the inquiry.

If the ACCC discontinues an inquiry, it must inform the Minister and the parties in writing of the reasons for the discontinuance (r. 23(3)).

7 Procedural matters

This chapter identifies the major administrative procedures associated with conducting an inquiry into a bulk interconnection service dispute.

7.1 General

The ACCC will generally conduct dispute inquiries with as little formality as possible. The process of hearing the dispute usually involves provision of written submissions, supplemented by response submissions as appropriate. Conferences with Commissioner(s) may also be required to address particular issues.

The procedural powers of the ACCC in conducting an inquiry are relatively broad and are outlined in Box 7.1 below.

Box 7.1 Procedural powers of the ACCC

For the purpose of hearing an inquiry into a dispute, the APCR (r. 17 (2) & (3)) provide that the ACCC may:

- extend the time at or before which information must be given, or a document must be produced, to the ACCC
- invite a person who is not a party to make a submission to the ACCC in relation to an inquiry
- permit a person to amend or withdraw information or evidence given to, or a document produced to, the ACCC
- decide to limit the duration of time that a person may give evidence or make a submission at a conference
- decide who may be present at a conference
- adjourn an inquiry to any time or place
- give an oral or written order to a person not to divulge or communicate to another person, without the permission of the ACCC, information specified in the order that was given to the person for the purposes of an inquiry.

7.2 Evidence

The ACCC (r. 17(5)):

- is not bound by technicalities, legal forms, or rules of evidence
- must act as quickly as the proper conduct of the inquiry allows

- must have regard to the objects set out in regulation 6, which are that:
 - users of Australia Post’s bulk interconnection services receive fair and reasonable rate reductions
 - the ACCC’s inquiry into a dispute is conducted in a manner that is fair, efficient and timely

As outlined in section 4.2.3 the ACCC may obtain evidence or inform itself of matters relevant to the dispute in several ways. This can include obtaining evidence or information voluntarily from the parties or from other persons. In addition, the ACCC may direct parties in writing to provide information or produce documents.

7.3 Representation

In keeping with the objective that the ACCC inquiry process should be fair, efficient and timely, it is not considered necessary that parties at a conference should be represented by lawyers. A corporation must be represented at a conference by a director, officer or employee of the corporation (r. 25(3)).

7.4 Use of experts

In order to better understand particular issues or analyse factual material in an inquiry, the ACCC, or a party to the inquiry, can engage an expert. Such experts could include economists, accountants, lawyers, or person experienced in the mail industry.

Although the usage of experts is likely to be limited, the ACCC will be reasonable in assessing the need for a party to engage an expert. If the ACCC agrees to the use of experts, the parties and experts should note the following requirements, which are based on the Guidelines for Expert Witness Statements in proceedings in the Federal Court of Australia.⁸

7.4.1 Expert appointed by a party

Parties should indicate as soon as possible the expert witnesses they propose to use. In the interests of an expeditious resolution of the dispute, the ACCC will generally ask the parties to limit themselves to two expert witnesses, with only one expert witness in any one field of expertise.

7.4.2 Expert appointed by the ACCC

During the inquiry into a dispute, the ACCC may refer any matter to an expert and receive the expert’s report as evidence. Before making the referral, the ACCC will generally seek comments from the parties.

⁸ This can be accessed at www.fedcourt.gov.au

7.4.3 Expert's report

The specification of how an expert's report should be set out for the purposes of an inquiry is outlined in Box 7.2 below.

In general, when a party provides an expert's report to the ACCC, it should also give a copy to all other parties. If, after providing the report, the expert changes their view on a material matter (for example, because the expert has read another expert's report, or because the expert receives further information), the change of mind should be communicated without delay to the ACCC.

Similarly, when the ACCC engages an expert, the final report will usually be provided to all parties. Where appropriate, the ACCC will also consider making the expert's draft report available to the parties so that the expert can consider and comment on the views expressed by the parties. Comments should be provided in writing.

The expert may also be required to attend an inquiry conference or similar forum to answer questions by parties and/or the ACCC.

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

If a party wants to withhold a copy of the expert's report, or particular parts of the report, from other parties because it contains confidential commercial information it should make a request to the ACCC (r. 21(1)).

Box 7.2: The expert's report

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

- the qualifications and experience in support of the expert's expertise
- the questions or issues that the expert has been asked to address
- the factual material considered by the expert
- the assumptions made by the expert
- the process used by the expert to consider those issues (such as, did it involve industry consultations, and if so with whom)
- the expert's conclusions about those issues, along with full reasons
- when the expert is aware that other people (including other experts) have expressed conflicting views on those issues, the reasons should explain why the expert believes the other views to be incorrect
- additional information necessary to resolve particular issues or to provide a firm conclusion, what that information is and how it is relevant to the issues or conclusion
- whether any question or issue falls outside their field of expertise.

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

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

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

- all oral and written instructions (original and supplementary) given to the expert that define the scope of the report
- the documents and other materials that the expert has been asked to consider.
- any calculations (including those set out in spreadsheets), photographs, plans or other reports referred to in the report must be provided along with the report.

7.5 Joint inquiries

Sometimes the parties to a dispute raise issues that are common to one or more other inquiries, or which are likely to arise in other inquiries.

If the ACCC is conducting two or more inquiries involving common issues, it can with the consent of the parties decide to hold a joint inquiry into two or more disputes (r. 18 (1)). This means the common issues can be considered in a single process.

The ACCC may decide to hold a joint inquiry into two or more disputes where it considers it is appropriate to do so because the disputes involve sufficiently similar issues or the complainant in each dispute is the same person.

In general the ACCC will only agree to holding a joint inquiry if at least one inquiry process has not already commenced, or is only at an early stage after commencement.

If a joint inquiry is conducted, the ACCC must make separate recommendations in relation to each dispute dealt with at the inquiry (r. 18 (3)).

A joint inquiry would involve the ACCC using similar processes to those outlined in Chapters 2 to 5 for a single inquiry.

The ACCC may also issue confidentiality directions to protect the interest of parties to the inquiry. This issue is discussed further in Chapter 8.

8 Confidentiality

This chapter sets out the ACCC's approach to the treatment of confidential information.

8.1 General confidentiality direction

The ACCC may issue a general confidentiality order to the parties (including their employees, contractors and agents) at an early stage of the inquiry into the dispute (r. 17(3)).

This general confidentiality order may provide that the recipient not use or disclose any information obtained from the other party or the ACCC in the course of the inquiry (other than information that is already in the public domain) except to the extent that the use or disclosure is:

- necessary for the purpose of the inquiry
- required by law
- permitted by the ACCC or the provider of the information.

In the ACCC's view, issuing this type of order at the commencement of an inquiry into a bulk interconnection service dispute contributes to the establishment of an environment in which the parties can more openly discuss issues with each other and the ACCC.

8.2 Requests for confidentiality from other parties

Regulation 21 of the APCR requires the ACCC to consider a request for confidentiality, any objection to the request for confidentiality and any further submissions about that request. The ACCC must consider each document that is said to contain confidential commercial information individually. Accordingly, a separate request must be made for each document provided to the ACCC that contains confidential commercial information.

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

- A party to the dispute wanting to request confidentiality should inform the ACCC in writing that 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 (r. 21(1)).
- Upon receiving the request, the ACCC must inform the other party that a request has been made and the general nature of the matters to which the relevant part of the document relates (r. 21(2)).
- The other party is given an opportunity to object to the request for confidentiality.

- If there is no objection, the ACCC will usually decide that the information be dealt with according to the request.
- If there is an objection, the party should inform the ACCC in writing and provide a submission setting out reasons for the objection, along with any alternative methods of presenting confidential information.

The ACCC will also consider any further submissions made by any party in relation to the request.

After considering:

- the request
- any objection
- any further submissions that any party has made in relation to the request;

the ACCC may decide not to give the other party a copy of so much of the document as contains confidential commercial information that the ACCC reasonably believes should not be given to the other party (r. 21(4)).

8.3 Other matters relevant to claims of confidentiality

The ACCC's starting point is generally that disclosing information to all parties will facilitate a more informed decision-making process. By not disclosing relevant information to all parties, the ACCC is less able to test the veracity of that information and therefore may be entitled to give less weight to that information.

In cases where a party has demonstrated that information is, in fact, confidential commercial information, the ACCC will have regard to these three factors when assessing a request for confidentiality:

- 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 (i.e. in this context, to assess the veracity of the information).

Appendix: Notification of bulk interconnection service dispute (template)

A.1 Covering letter

<Date>

General Manager

Fuel, Transport and Prices Oversight Branch

Australian Competition and Consumer Commission

GPO Box 520

MELBOURNE VIC 3001

Dear Sir/Madam

I enclose notification of a bulk interconnection service dispute with Australia Post under Part 3 of the Australian Postal Corporation Regulations 1996.

Yours sincerely

<Signatory>

Attachment: Notification

B2 Notification of dispute to ACCC (template)

Notification of a bulk interconnection service dispute under Part 3 of the Australian Postal Corporation Regulations 1996

Between

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

Contact: <name and position of contact>

Telephone: <contact phone number>; facsimile: <contact fax number>;

email: <email address>

and

2. < Australia Post>

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

Telephone: <contact phone number—if known>; Facsimile:

<contact fax number—if known>; Email: <email address—if known>

<the notification should specify the name of the Australia Post bulk interconnection service>

Notifier's address for delivery of documents

<specify street address>

Details of the bulk interconnection service to which the dispute relates

<specify the bulk interconnection service to which the dispute relates and any term of conditions of access to the service to which the dispute relates>

Details of the dispute and dispute resolution efforts

<specify in detail the nature of the dispute>

Note: The information included in the notification should establish that the complainant is unable to agree with Australia Post about one or more aspects of the terms and conditions of access to the bulk interconnection service.

The following information is required:

- if the rate reduction is in dispute — the amount that the complainant proposes should apply
- if the period during which the service will be supplied is in dispute — the period during which the complainant proposes that the service should be supplied at the reduced rate
- if any other terms and conditions on which the rate reduction is or would be provided are in dispute — the terms and conditions that the complainant proposes should apply
- the rate reduction (if any) that Australia Post has offered for supply of the service to the complainant
- the period (if any) during which Australia Post has offered to supply the service to the complainant at the reduced rate
- any other terms and conditions to which Australia Post's offer is subject
- a copy of any document in the possession or under the control of the complainant that may be relevant to this dispute

ACCC contacts

The ACCC cannot give legal advice. However, it can give you information on the issues discussed in this guide. For more information contact the ACCC.

General Manager

Fuel, Transport and Prices Oversight Branch

Australian Competition and Consumer Commission

GPO Box 520

MELBOURNE VIC 3001

Tel: (03) 9290 1800

Email: postalservices@acc.gov.au

For all general business and consumer inquiries

ACCC Infocentre: 1300 302 502

email: infocentre@acc.gov.au

website: www.acc.gov.au