Australian
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Resolution of transmission pipeline access disputes under the gas code

draft guideline

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AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Resolution of transmission pipeline access disputes under the gas code

A GUIDE TO DISPUTE RESOLUTION PROVISIONS UNDER THE
NATIONAL THIRD PARTY ACCESS CODE FOR NATURAL GAS PIPELINE SYSTEMS

Contents

Preface

The Gas Pipelines Access Law (GPAL) and the National Third Party Access Code for Natural Gas Pipeline Systems (Code) are key components of the regulatory framework supporting the development of a competitive gas supply industry. They establish a regime under which parties can access the services provided by natural gas pipelines that are regulated under the Code. The Australian Competition and Consumer Commission is responsible for regulating a number of transmission pipelines and for resolving disputes when terms and conditions of access cannot be agreed.

This guideline outlines the arbitration provisions of Part 4 of the GPAL and Section 6 of the Code and how the ACCC proposes to administer them.

Special features distinguish gas pipeline access arbitrations from typical commercial arbitrations, making them more complex. Gas pipeline access arbitrations typically involve a lack of mutual commercial incentive to reach settlement, particularly when the service is provided by means of infrastructure with natural monopoly characteristics and the service provider has related entities competing with the access seeker in downstream markets. Moreover, in arbitrating gas access disputes, the ACCC must reach its decision by applying a range of criteria including a 'public interest' criteria, rather than standard commercial criteria.

This guideline describes processes for dispute notification, handling of confidentiality claims, format and content of experts' reports, the holding of joint hearings and publication of arbitration determinations. It also proposes to introduce case management teams for arbitrations, and places emphasis on the use of alternative means of dispute resolution (ADR) such as third party mediation and the referral of particular issues to expert determination.

The views expressed in this guideline may evolve over time, particularly in the context of comments received, and as a result of practical experience.

Accordingly, this guideline will be regularly reviewed by the ACCC with updated editions or an addendum being issued from time to time. Normally the ACCC will release proposed changes for industry comment. Parties will also be able to comment on the ACCC's processes at the completion of any arbitration in which they have been involved.

1 Introduction

The National Third Party Access Code for Natural Gas Pipeline Systems (the Code) establishes a national access regime for natural gas pipeline systems.

The objective of the Code is to establish a framework for third party access to gas pipelines that:

(a) facilitates the development and operation of a national market for natural gas

(b) prevents abuse of monopoly power

(c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders

(d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users

(e) provides for resolution of disputes.

The dispute resolution framework reflects a negotiate/arbitrate model. If the parties have an interest in establishing and maintaining a commercial relationship with each other, they will often be able to negotiate terms of access without recourse to arbitration. However this will not always be the case, especially if the service provider has no commercial incentive to provide access to the access seeker. If the parties cannot negotiate acceptable access terms or use consensual dispute resolution processes, the relevant regulator can be asked to step in, if requested, and establish the terms and conditions that will govern their relationship.

For transmission pipelines, the ACCC is the relevant regulator in all jurisdictions except Western Australia. For distribution pipelines, the relevant regulator is the jurisdictional energy regulator.

This guideline explains how the ACCC generally will exercise its dispute resolution powers for the transmission pipelines it regulates.

This guideline draws upon ACCC experience in other industries, particularly the telecommunications industry.

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

Disputes about access

When a transmission pipeline service provider and the person seeking access to those services cannot agree on the terms and conditions of access, there are various avenues available to resolve their dispute. One is to notify the ACCC of an access dispute, with a view to initiating arbitration procedures set out in Section 6 of the Code. The scope of Section 6 of the Code is limited to dealing with disputes between a

prospective user and a service provider who has an Access Arrangement in place. The limited scope of this regime is depicted in Figure 1 below.

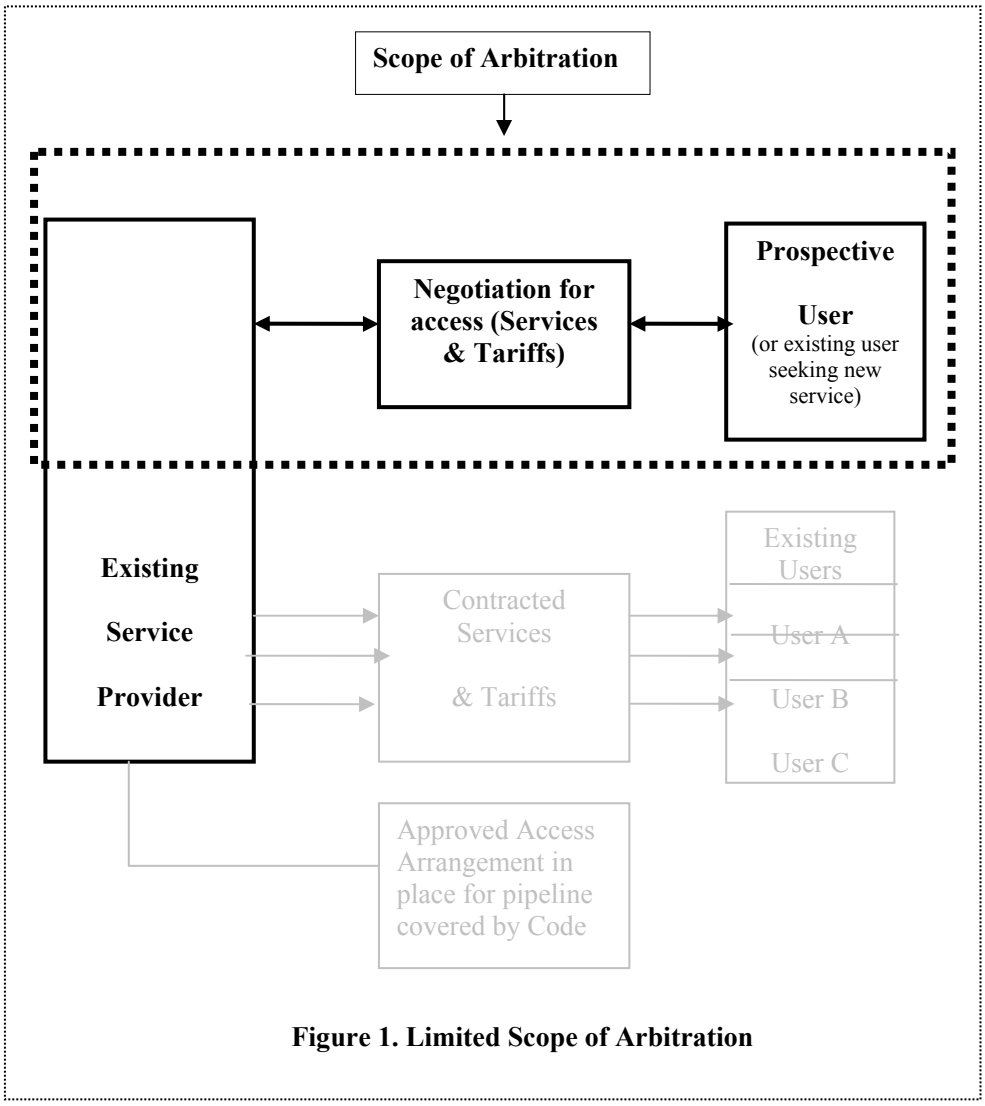


Figure 1. Limited Scope of Arbitration

Arbitration is a process where each party puts its case to an arbitrator. The arbitrator then makes a determination that binds the parties. In doing so, the arbitrator is not merely choosing between the parties' positions but must consider the issues in terms of various criteria including the 'public interest'. The arbitrator may undertake its own analysis and seek material in addition to that provided by the parties. Arbitration, therefore, can be viewed as a deliberative process.

Chapters two to seven of this guideline describe the arbitration process.

- Chapter two steps through the entire dispute resolution process sequentially.
- Chapter three deals with dispute resolution procedures.

- Chapter four covers how to deal with issues that are common to two or more arbitrations.
- Chapter five deals with information flows, procedural fairness and confidentiality.
- Chapter six describes the types of determinations the arbitrator can make and factors relevant to those determinations. The chapter also deals with termination of arbitrations.
- Chapter seven provides information about the review of arbitration determinations.

2 Structure & process of dispute resolution

When notified of an access dispute, the ACCC, or an arbitrator appointed by it, must make a written determination on access (unless the arbitration is terminated or the notification is withdrawn). In this guideline, 'arbitration hearing' refers to the conduct of the arbitration, which may involve written or oral evidence or submission. Meetings between the parties and one or more Commissioners or the independent arbitrator may be face-to-face, by telephone or video conference. These are referred to as 'conferences'.

The broad structure of the dispute resolution process under this regime encompasses three stages:

- notification
- conference, directions and ADR
- arbitration and decision.

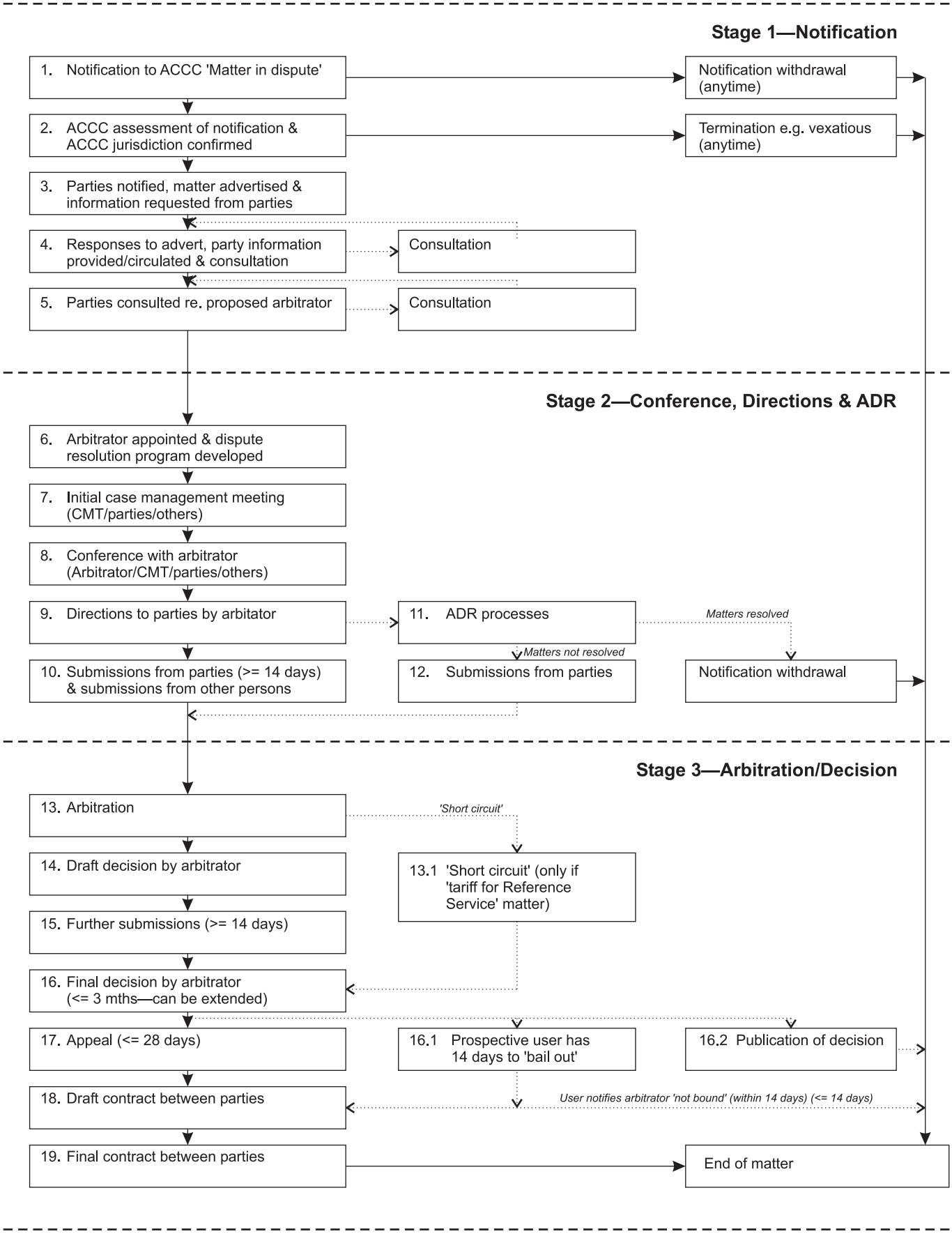
The process can be terminated in certain circumstances, for example where ADR resolves the matter and the parties notify the arbitrator.

The structure and process of dispute resolution under this regime are outlined in Figure 2.

The numbering in Figure 2 corresponds with the subsection number in the following text, so that:

- step 1 corresponds with section 2.1
- step 2 with section 2.2
- step 3 with section 2.3, etc.

Figure 2. - Basic dispute resolution system



Notification to ACCC of 'Matter in dispute' (step 1)

Under Section 6 of the Code the process commences when the ACCC is notified in writing that an access dispute exists.

Either a prospective user of a service or the service provider may notify the ACCC of an access dispute if they are unable to agree on terms and conditions for access (Code 6.1). If a notification is withdrawn, it is taken never to have been given.

A notification can be withdrawn at any time by the person who notified the dispute or by the prospective user (Code 6.5). Where both parties notify the same dispute those notifications would be dealt with together. In this case the dispute resolution process would stop only if both parties withdrew their respective notifications, or the prospective user withdrew both notifications.

Pre-conditions for notification

For the notification of dispute to be valid, all the following conditions must exist:

- The pipeline concerned must be a Covered Pipeline under the terms of the Code.
- An access arrangement must have been approved by the ACCC, or the ACCC must have drafted and approved its own access arrangement for the pipeline concerned,
- The access seeker and the service provider are unable to agree on one or more aspects of the access to a Service.

Form of notification

The Trade Practices Regulations (Reg. 6C) set out matters that must be addressed in an access dispute notification. A preferred notification based on this format is set out in Appendix 2.

ACCC assessment of notification (step 2)

Once it receives the notification, the ACCC will assess whether:

- the preconditions have been met
- the ACCC has jurisdiction to deal with the matter
- the matter should proceed (the ACCC may terminate the process at any time if it considers: the notification is vexatious; the subject matter is trivial, misconceived or lacking in substance; or the notifying party has not negotiated in good faith (Code 6.6)).

If these aspects are satisfied the ACCC will proceed with the dispute resolution process. The parties will be advised if any of these aspects are not satisfied.

'Unable to agree'

The ACCC may reject a dispute notification if it is not convinced that the parties are 'unable to agree'.

The ACCC proposes the following rule of thumb for use in considering whether the access seeker is unable to agree with the service provider:

- The access seeker or the service provider must have made a request of the other party, or put a proposal to the other party.
- That other party must have refused the request or rejected the proposal. The refusal may be an explicit refusal, or a constructive refusal (for example, where the other party has not responded to the request or proposal within a reasonable time).

When there is insufficient information in the notification for the ACCC to be satisfied that the access seeker cannot agree with the service provider, the ACCC will write to the relevant party, seeking additional information, and will generally advise the other party that it has done so. In some instances, but not all, it may seek the views of both parties.

Seeking additional information from the notifier, or both parties, can potentially delay the start of arbitration. Accordingly, the ACCC suggests that the notifier ensures that all relevant information is included in the notification.

Parties notified, matter advertised and information requested (step 3)

On receiving a notification the ACCC will give written notice of the access dispute to the other party (service provider or prospective user) as well as any person the ACCC considers may have a legitimate interest in the dispute (Code 6.2 and 6.10). The ACCC will also advertise the matter.

If not already included with the notification documentation, the parties will be requested to provide detailed information (under Code 6.3, 6.4) to:

- identify the issues in dispute and their position on those issues
- identify previous attempts to resolve the dispute, including the use of third party mediation
- clarify whether there are any concerns with the ACCC's jurisdiction.

Who is a 'party' to the process?

The Code specifies that the parties to a dispute are the Prospective User or Users and the Service Provider or Providers who are in dispute and no other persons (Code 6.2).

There is no automatic right for persons not party to an arbitration to make submissions. On occasion, however, other interested persons such as government bodies, industry organisations or consumer groups, may wish to make their views known to the ACCC.

Accordingly, any other person who purports to have an interest in the matter and who wishes to be involved in the process may apply in writing to the ACCC. If the ACCC accepts that the applicant has a legitimate interest, they will be invited to make a written submission (Code 6.10).

Alternatively, to facilitate broader participation, the ACCC may establish a separate industry-wide or public process whereby the relevant issues can be addressed.[1]

Form of notice to parties

In general, the ACCC will give written notice to the service provider or access seeker (as appropriate) by providing a copy of the notification described in Step 1 above.

The ACCC will also advertise the dispute to identify other people with an interest in the matter. The ACCC may also ask the service provider and access seeker whether there are other persons who may have an interest in the dispute, with a view to notifying them of the dispute.

Procedural directions

The ACCC may give a party to the dispute a procedural direction requiring the party to provide reports setting out the nature of the latest offers, the basis upon which those offers were made and the nature of any conflicts of interest that the Service Provider may have that may affect its willingness to resolve the dispute with the Prospective User (Code 6.3(b)).

Responses to advertisement, information provided and consultation (step 4)

Experience in other sectors suggests that a case management approach assists in the efficient and effective management of dispute resolution processes. Accordingly, a case management approach is proposed with modifications to suit the specific circumstances in gas.

The ACCC will establish a case management team (CMT) after a dispute has been notified. The role of the CMT will be to;

- manage the dispute resolution process including arbitration if required
- co-ordinate responses to the advertisement
- manage a consultation process with the parties to confirm the scope and nature of the matters in dispute
- circulation of initial submissions for response by the other party
- coordinate the compilation and analysis of information provided by the parties
- provide advice to the arbitrator on substantive issues where required
- produce a consolidated CMT report for the arbitrator covering all relevant issues, including the interests of other persons.

The parties will be consulted regarding the proposed support staff for the CMT. While the constitution of the team will be determined case-by-case, it is likely to include

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[1] The use of separate industry-wide processes is addressed in chapter 4.

ACCC staff and may also include a person external to the ACCC with relevant experience (for example, mediation experience). The arbitrator will not be part of the CMT.

As a general rule staff will not be appointed to the CMT where they were recently employed by one of the parties or hold shares in one of the companies involved in the dispute.

An important issue in the appointment of the CMT is that it does not have a role in making arbitration decisions, which remain the exclusive responsibility of the arbitrator.

The structure of the CMT may change during the course of a dispute as circumstances change. The parties will be consulted about such changes.

Parties consulted about the proposed arbitrator (step 5)

The ACCC has discretion, in dealing with a notification of dispute, to arbitrate itself, or to appoint a person to arbitrate (GPAL 16 (1)), but should consult the parties before making that appointment (Agreement 11.3).

Accordingly, prior to making this decision, the ACCC will consult the parties to identify whether the service provider or prospective user have any concerns with the arbitrator proposed. Where relevant, the ACCC would advise the parties of any members' past involvement in matters relating to that pipeline.

ACCC conducting arbitration

Constitution of the ACCC

The GPAL provides that, where the ACCC is the arbitrator, the ACCC is to be constituted by two or more members[2] nominated in writing by the Chairperson. If the Chairperson is one of those members, the Chairperson must preside at the arbitration. If not, the Chairperson must nominate a member to preside at the arbitration (GPAL 17).

As soon as the ACCC has been constituted for the arbitration it will inform all parties.

Reconstitution of the ACCC

If a member arbitrating a dispute stops being a member of the ACCC or for any reason is not available for the arbitration, then the Chairperson must either:

- direct that the ACCC be constituted to finish the arbitration by the remaining member or members; or
- direct that the ACCC be constituted for that purpose by the remaining member or members together with one or more other members of the ACCC.

[2] Members of the Commission are known as Commissioners.

The ACCC as reconstituted must continue and finish the arbitration and may, for that purpose, have regard to any record of the proceedings of the arbitration made by the ACCC as previously constituted (GPAL 17(4) & (5)).

Decisions of the ACCC

When the ACCC is constituted for arbitration by two or more members, any question before the ACCC is to be decided according to the opinion of the majority of those members, or, if the members are evenly divided on the question, according to the opinion of the member presiding (GPAL 17(6)).

Prior involvement of Commissioners

A member of the ACCC is not prohibited from being an arbitrator merely because the member has performed functions, or exercised powers, in relation to the matter or one related to the dispute.

However, the Commissioners arbitrating a dispute will disclose to the parties any relevant interests and their involvement in related matters. This will assist parties in considering whether they have any objections to a particular Commissioner constituting the ACCC for an arbitration.

Support staff

While members are responsible for making decisions in the arbitration, they are supported by staff drawn from the ACCC that are appointed to the CMT. Generally these will be drawn from the Gas Group, however, in some circumstances they may be drawn from other areas of the ACCC. Staff will generally perform the following roles:

- Some will perform a case management role as part of a team. This is an administrative role and does not involve staff providing advice to Commissioners on the merits of the substantive issues in dispute.
- Some CMT staff will provide advice to Commissioners and assist them in considering the substantive issues in dispute. This may involve providing oral or written advice to Commissioners and drafting correspondence, directions, determinations and reasons for decision. However, Commissioners must ultimately form their own views on the issues and any relevant considerations will be reflected in their reasons for decision.

CMT staff may facilitate or encourage conciliation or mediation for particular issues that are the subject of the arbitration. However, the participation of CMT staff in conciliation or mediation (or other alternative dispute resolution) processes can be problematic because while they often have knowledge and expertise that can help the process, they also perform other roles in relation to the gas industry. This may result in parties being less willing to participate in a full and frank exchange of views. This situation can, of course, be overcome by seeking the consent of the parties. Accordingly, the ACCC will consider the role of staff in alternative dispute resolution processes on a case by case basis, in consultation with the parties.

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

Independent arbitrator conducting arbitration

Constitution of the Independent arbitrator

Where the ACCC appoints a person to conduct an arbitration it will do so according to a written terms of reference which is compatible with the GPAL and the Code. The terms of reference will generally cover:

- a description of the dispute and parties involved
- guidelines for procedural matters such as document management.

The appointment of an arbitrator may be terminated if for any reason they become unfit to continue (GPAL16(2)).

Support staff

Support staff for an independent arbitrator will be provided in the same manner as if the ACCC were the arbitrator, as set out above.

Arbitrator appointed and dispute resolution program developed (step 6)

As indicated previously the ACCC will either appoint an independent arbitrator or fulfil the role of arbitrator itself. The ACCC will consult the parties concerning the proposed appointment and will advise the parties when the arbitrator has been appointed.

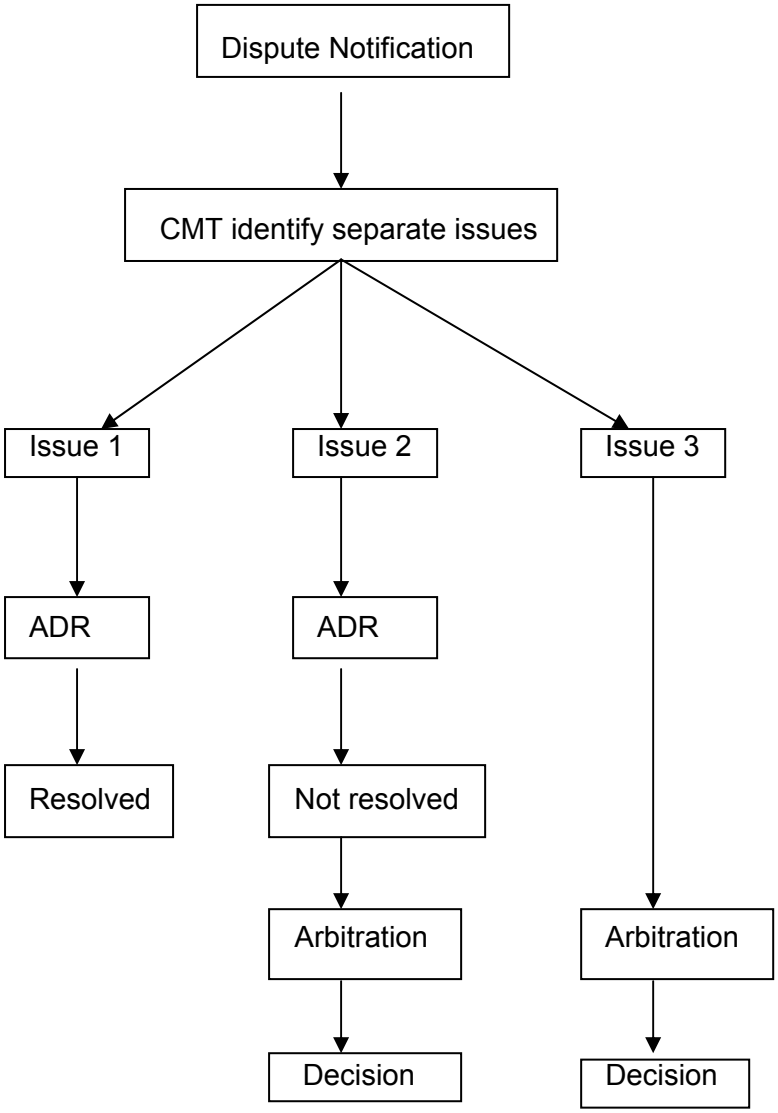
The arbitrator and CMT will develop a dispute resolution program. Disputes are likely to relate to a range of issues, rather than a single issue (for example, connection, capacity, queuing, coverage, gas specification, or any non-reference service issue), and it may be appropriate to use different approaches to resolve various issues.

A dispute resolution system that can deal with disputes incorporating multiple issues is therefore proposed. The CMT will review each notified dispute to identify issues that can be treated separately via ADR (mediation, conciliation, expert advice, etc) or arbitration. Figure 3 displays this process in schematic form.

Where multiple issues are being dealt with through different dispute resolution processes, the CMT will monitor progress and seek to ensure consistency of outcomes.

Sequencing of dispute resolution processes

Figure 3 - Separation of notified dispute into issues



Initial case management meeting (CMT/parties/others) (step 7)

The next step involves the CMT convening a meeting with the service provider and prospective user. This initial meeting does not involve the arbitrator; rather it is preparation for the first meeting with the arbitrator. At the meeting the CMT will report on its consultations with each of the parties regarding the nature of the dispute and will facilitate consensus between the service provider and prospective user concerning the approach to be adopted. The CMT will consider whether other persons should be invited to participate in the meeting.

At the meeting, the CMT will seek to:

- report on its consultation with the parties

- discuss whether the service provider or prospective user have any concerns with the proposed support staff arrangements
- discuss the approaches that could be used to resolve the dispute—such as mediation by a third party, referral to an expert for determination or arbitration by the ACCC, or a combination of these methods
- discuss whether the ACCC is conducting any other arbitrations involving similar issues where it may be useful to hold joint hearings and seek the views of the service provider and prospective user
- discuss the responses to the advertisement (step 3) and any need to involve other persons in the discussions (either by telephone at the meeting, or subsequently)
- identify any potential barriers and delays to resolution of the dispute, as well as the skills that are likely to be necessary to resolve the dispute.

The meeting will usually be held within two to three weeks of the ACCC receiving the notification of dispute. Before the meeting the CMT leader will send an agenda to the service provider and prospective user. The parties may be asked to provide necessary information not already included with the notification documentation.

The CMT will not have the authority to decide whether other persons should be invited to be involved in the dispute resolution process—the arbitrator hearing the dispute will make this decision. The purpose of the discussion at the case management meeting is to identify the parties' views and distil the relevant issues for consideration by the arbitrator.

Following the meeting the CMT leader will prepare a report setting out the substance of discussions. The report will be provided to the arbitrator and copied to the service provider and prospective user. Where appropriate, an extract dealing with the interests of other persons will also be copied to the parties and the other persons.

The report will also reflect the parties' agreement, if any, on referring particular matters to ADR. If they cannot agree, the report will set out their views on particular dispute resolution approaches as well as any observations or recommendations from the CMT.

Case management meetings

During the dispute resolution process, it may be appropriate to hold further case management meetings. While the matters addressed at each case management meeting are likely to depend on the case at hand, meetings may be called to:

- identify the information that is relevant to the matters on which the arbitrator is deliberating, including claims for confidentiality
- identify and discuss the issues which have subsequently emerged as being in dispute between the parties—these may be issues which have only recently emerged following a decision by the arbitrator on particular matters in the arbitration
- receive reports on the progress of matters that were referred to mediation or expert determination

- explore the reasons for missing major deadlines.

These meetings should ensure that the arbitration process is kept on track. When new issues arise during the dispute resolution process (for instance, issues not in dispute at the time of the notification), case management meetings enable the parties to consider the scope for mediation and expert determination.

Conference with arbitrator (arbitrator/CMT/parties/others) (step 8)

The arbitrator will hold a conference with the service provider and prospective user to discuss the outcome from the initial case management meeting. The main input for the conference will be the CMT report from the initial case management meeting.

The arbitrator will consider the report, discuss the issues and any previous attempts to resolve them with the parties, consider whether other persons should be invited to make a submission or join the process in some other way and discuss with the parties how to proceed. The objective of the conference will be for the parties to agree on the dispute resolution process to be followed or failing that for the arbitrator to have enough information and understanding of the issues to give directions to the parties about the dispute resolution process.

Two key matters that the arbitrator will address at the conference will be the dispute resolution program and the involvement of other persons.

If the service provider and prospective user have been unable to reach agreement on the use of particular dispute resolution approaches, the arbitrator may wish to explore this with them, especially alternative dispute resolution methods such as mediation and expert determination, if they are likely to lead to more timely resolution.

Where there are multiple disputes of a similar nature the arbitrator may seek the agreement of the parties to deal with matters jointly or, in other cases where there is potentially wider interest, deal with matters publicly (GPAL 18).

Further conferences with the arbitrator

As with case management meetings, it may be useful to hold further conferences with the arbitrator during the arbitration.

These conferences may be called, for example, so the parties can discuss their views on particular issues with the arbitrator rather than setting them out in written submissions. In such a case, the arbitrator might require a written summary of submissions, with the parties then supplementing those submissions at the conference.

The arbitrator may also find it useful to hold a conference with the parties when significant process issues emerge.

Directions by the arbitrator (step 9)

The arbitrator may issue directions to the parties (GPAL 21, Code 6.3). These might deal with a range of matters including:

- the referral of particular matters to ADR
- processes for matters to be arbitrated
- confidentiality[3].

In making directions, the arbitrator will seek to use the most efficient and appropriate method of resolving each dispute with a preference for enabling the parties to reach agreement whenever possible.

Submissions from parties and submissions from other persons (step 10)

The arbitrator will require submissions from the parties in respect of those issues going to arbitration (Code 6.3, 6.4). A submission sets out the view or conclusion that the party believes the arbitrator should adopt on particular issues, along with supporting reasons.

The arbitrator may also seek submissions from persons who are not parties to the dispute and take those submissions into account when making a decision (Code 6.10). The arbitrator must nominate a due date for submissions from the parties, not less than 14 days from the date of the request (Code 6.11).

Submissions will not be required for matters being referred for ADR.

Written submission will be the primary means by which the arbitrator receives argument from the parties. Detailed written submissions are particularly appropriate in disputes involving:

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

However, providing written submissions tends to delay the arbitration process especially when the submissions are voluminous or become a series of replies to each other's submissions. In certain circumstances, the arbitrator may direct the parties that submissions should be provided in summary only, with the parties then being given the opportunity to supplement them at conferences with the arbitrator.

The relevant arbitrator will generally issue directions specifying the information that it needs from the parties. When information is likely to be required over the course of the arbitration then the arbitrator may issue several directions for it, or, if apt, may

[3] Confidentiality is addressed in detail in Chapter 5.

require continuous disclosure. Each party will generally be required to provide the information to all other parties, subject to requests for confidentiality (GPAL 29).

Before issuing these directions, the arbitrator 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 arbitrator or by written submission. However it is ultimately the arbitrator that determines what information the parties must provide.

Alternative dispute resolution processes (step 11)

Arbitration is not the only method available to resolve a dispute and may not always be the most efficient means for doing so. Moreover, arbitration involves imposing an arrangement on the parties that the arbitrator has determined rather than one for which they have 'ownership'. Accordingly alternative dispute resolution (ADR) processes may provide a more efficient and satisfactory outcome for resolving some issues in a dispute.

A single notification may actually contain a number of issues some of which are referred for ADR and others which go directly into arbitration.

Issues will be referred for ADR in accordance with an agreement reached during the initial case management meeting or any directions from the arbitrator after the conference.

In deciding to refer an issue to ADR, the arbitrator will also set a time frame for resolution of that process. If the ADR process is unable to resolve the issue, it will be arbitrated with the other remaining issues in dispute.

Where issues referred to ADR processes are resolved, the party which notified the dispute is required to inform the ACCC that the issue has been resolved and withdraw that issue from the list of matters originally notified as being in dispute.

The ACCC expects the most commonly used ADR processes will be mediation and expert determination. These processes are discussed below.

Mediation

Mediation is a consensual approach, where the mediator seeks to facilitate agreement between the parties. It usually involves the following characteristics:

- commitment by the parties to participate in the mediation in good faith
- agreement that the contents of the mediation remain confidential
- the ability for private conferencing to occur between the mediator and any party
- agreement to embody the outcome of the mediation in an enforceable contract between the parties.

These matters would be set out in a resolution contract between the parties.

When referring particular issues to mediation during arbitration, the arbitrator will generally seek to ensure strict time limits for resolution of these issues. The discipline imposed by such time limits is more likely to result in timely resolution of these issues. If mediation is not successful within the time limit the arbitrator will usually make a determination.

Expert determination

As an alternative to mediation, the parties may agree to refer particular issues to expert determination. This is a consensual process where the parties ask an expert to express a view on particular issues.

Expert determination could enable the more timely resolution of particular issues outside the scope of the arbitrator's expertise (for example, technical issues).

The referral of matters to expert determination would also be set out in a resolution contract between the parties. This contract would set out:

- the issues requiring expert determination
- whether the determination was binding or non-binding
- whether the determination would include reasons
- agreement that there would be no appeal from the determination.

It is important to distinguish expert determination as an ADR approach in this instance, from the arbitrator's ability to refer a matter to an independent expert and to accept the expert's report as evidence under GPAL 21(1) (e).

Submissions from parties (post ADR) (step 12)

Where issues referred to ADR are not resolved they then revert to the arbitrator for formal arbitration. The arbitrator must be advised the issue has not been resolved and will be able to access information from the ADR process if both parties agree; otherwise the parties will be required to prepare fresh submissions on the unresolved issue.

Arbitration (step 13)

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

The regulatory regime provides flexibility in relation to the conduct of the arbitration. It provides that the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties in the arbitration hearing, and it may require that the cases be presented within those

periods. Also, the arbitrator may determine whether evidence and argument should be provided in writing or orally (GPAL 20).

The arbitrator will generally hear and determine disputes with as little formality as possible. The process of hearing the dispute will usually be conducted by written submissions, supplemented by response submissions as appropriate. There may also be further conferences with the arbitrator to address particular issues.

The arbitrator's powers in the conduct of arbitration under this regime are relatively broad and are principally set out in GPAL 20 and 21. These powers are discussed in Chapter 3 of this guideline.

The GPAL also contains provisions governing contempt, evidence, witnesses, questions and intimidation (GPAL 23–28).

'Short circuit' (only if 'tariff for reference service' matter)

If the only matter in dispute relates to which tariff should apply to a reference service, then the arbitrator must make a decision in accordance with the access arrangement, provided that decision is consistent with 6.18 (queuing policy) and 6.21 (safe operation of a pipeline) of the Code. In these circumstances the arbitrator is not required to issue a draft decision to the parties (Code 6.13 and 6.14).

Interim determination and draft determination (step 14)

The arbitrator is required to consider the submissions received and, unless the arbitration is terminated or the notification of dispute withdrawn, make a determination on access to the relevant service by the prospective user.

Interim determination

The arbitrator can, but is not required to, make an interim determination, particularly when the deliberation process is likely to take considerable time. Assessing requests for an interim determination does, however, divert resources from considering the substantive issues in dispute and this is something that parties requesting an interim determination should bear in mind. In considering whether to make an interim determination, the arbitrator will be mindful of whether there would be any irreversible actions undertaken or significant consequences flowing from such a decision.

Draft determination

Before making a final determination on a dispute, the arbitrator must first make a draft determination available to the parties, and then consider further submissions from the parties (Code 6.7, 6.9).

The arbitrator will seek to ensure that all relevant factual information not subject to confidentiality constraints is open to both parties before a determination is made. Once the arbitrator has considered this material as well as submissions made by the parties, it will proceed to form its view on particular issues, applying the criteria set out in section 6.15 of the Code.

The Code sets out a number of restrictions on arbitrator's decisions and circumstances in which the arbitrator can refuse to make a decision (Code 6.17, 6.18 and 6.21).

Further submissions (step 15)

The arbitrator must first make a draft determination available to the parties, and then consider further submissions from the parties before making a final determination (Code 6.9). The arbitrator must allow at least 14 days for lodgement of further submissions (Code 6.11).

Final determination by arbitrator (step 16)

The arbitrator is required to consider the submissions received and, unless the arbitration is terminated or the notification of dispute withdrawn, make a decision on access to the relevant service by the prospective user.

The Code sets out a number of restrictions on an arbitrator's decisions and the circumstances in which the arbitrator can refuse to make a decision (Code 6.17, 6.18 and 6.21).

When arbitrating a dispute the arbitrator must, subject to sections 6.18(b), (c) and (d) of the Code, apply the provisions of the access arrangement for the covered pipeline concerned. In addition, the arbitrator must take into account the matters set out in section 6.15 of the Code. These are discussed in detail in chapter 6 of this guideline.

Prospective user has 14 days to refuse to be bound

The prospective user has a period of 14 days after the final decision within which to notify the arbitrator that it does not intend to be bound by the decision. This notification should be given in writing (Code 6.24).

Publication of determination

Arbitration determinations will generally be published, subject to the confidentiality provisions in the Code (which could mean part publication or publication of generalised information). This is important to promote transparency. It should also facilitate future commercial negotiations and reduce the likelihood of disputes on similar grounds.

Appeal (step 17)

The parties have 28 days after the final determination in which they can appeal a decision of the arbitrator to the Court (GPAL 31). The court may make an order staying the decision of the arbitrator.

Draft contract between parties (step 18)

The arbitrator may require the parties to represent the arbitration determination in the form of a contract, and to submit to the arbitrator within 14 days either a draft contract or a copy of a signed contract (Code 6.26).

Final contract between parties (step 19)

If, following a request to do so, the parties do not submit a draft contract or copy of a signed contract within 14 days, the arbitrator may decide the terms and conditions of the contract (Code 6.27).

3 Dispute resolution procedures

General

The GPAL and Code provide flexibility in relation to the conduct of the arbitration. It provides that the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an access dispute and it may require that the cases be presented within those periods (GPAL 20(2)). Furthermore, the arbitrator may determine whether evidence and argument should be provided in writing or orally (GPAL 20(3)).

The arbitrator will generally hear and determine disputes with as little formality as possible. The process of hearing a dispute will usually be conducted by written submissions, supplemented by response submissions as appropriate. There may also be conferences with the arbitrator to address particular issues.

The arbitrator's powers in the conduct of an arbitration are relatively broad (GPAL 20(4) & 21(1). For the purpose of arbitrating an access dispute, the arbitrator may:

- determine that a hearing is to be conducted by telephone, closed circuit television, or other means of communication
- give a direction in the course of, or for the purposes of, an arbitration hearing
- hear and determine the arbitration in the absence of a person who has been given notice of the hearing
- summon a person to appear before the arbitrator to give evidence and to produce documents (if any) as are referred to in the summons
- sit at any place
- adjourn to any time and place
- refer any matter to an expert and accept the expert's report as evidence
- make an interim determination
- give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an arbitration, unless the person has the arbitrator's permission.

Evidence

The arbitrator is not a court, similarly neither are arbitrations court proceedings. Due to the nature of proceedings, the formalities associated with the courtroom may be neither helpful nor appropriate to arbitration hearings.

Specifically, the arbitrator:

- is not bound by technicalities, legal forms, or rules of evidence

- must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly investigate the dispute and all matters affecting its merits and fair settlement

- may gather information about any matter relevant to the dispute in any way the arbitrator thinks appropriate (GPAL 20(1)).

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

First, the arbitrator may obtain the evidence or information voluntarily from the parties or from other persons. This includes referring a matter to an expert and receiving the expert's report as evidence.

Second, the arbitrator may use its direction powers (GPAL 20(1)(a)) to require one or more parties to provide evidence or information, usually in documentary form.

Third, the arbitrator may summon a person to appear before it to give evidence and to produce documents referred to in the summons (GPAL 25(2)).

The arbitrator may take evidence on oath or affirmation and, for this purpose, may administer an oath or affirmation (GPAL 25(1)).

A person issued with a summons to appear before the arbitrator is usually required to appear in the context of a conference with the parties. A full transcript will be taken for these conferences. That part of the transcript recording the appearance of the person answering the summons or notice will generally be provided to that person as soon as practicable afterwards.

Representation

While parties to a dispute are entitled to be represented by other persons (GPAL 19), the ACCC considers that disputes may be most expeditiously resolved where the parties are able to quickly focus on areas of genuine disagreement between them. Therefore the ACCC expects representatives of the parties with authority to make binding decisions to be present at the proceedings and to take an active part.

Privacy

Generally, the arbitration hearing is held in private (GPAL 18(1)) — that is, only the parties themselves, their advisers, and the arbitrator and CMT staff will be present.

There are, however, two exceptions:

- Provided all parties agree, the arbitrator has the discretion to permit the hearing, or part of it, to be conducted in public (GPAL 18(2)).

- The arbitrator can seek the agreement of the parties to jointly hear two or more access disputes involving common issues. This is addressed in Chapter 4.

In a private hearing, the arbitrator may give written directions about who may be present (GPAL 18(3)). In doing so, the arbitrator must consider the wishes of the parties and the need for commercial confidentiality (GPAL 18(4)). If necessary, this power may be exercised to exclude certain parties from part of the hearing to maintain the commercial confidentiality of information being presented by another party.

Confidentiality issues about information given to the arbitrator by the parties are addressed in Chapter 5.

Use of experts

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

If the arbitrator 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 (4 Sept. 2003)*.

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 arbitrator will generally ask the parties to limit themselves to two expert witnesses, with only one expert witness in any one field of expertise.

Expert appointed by the arbitrator

The arbitrator may refer any matter to an expert and receive the expert's report as evidence (GPAL 21(1)(e)). Before making the referral, the arbitrator will generally seek comments from the parties.

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, whether it involved 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.

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.

In general, when a party provides the expert's report to the arbitrator, 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 arbitrator.

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

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

While the arbitrator must take into account the information from the expert report, it is not legally bound by the expert findings when making a decision.

If a party wishes to dispute the capacity or qualifications of a person to give an expert opinion, it should give written notice to the other parties and to the arbitrator immediately after it has become aware of the expert's appointment. The written notice should set out why the expert's qualifications are in dispute. 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, they should make a request under GPAL 29(1).

Experts' conference

If there are several experts' reports expressing conflicting conclusions, a forum[4] may be convened to discuss relevant issues. In such cases, it would be improper for the expert to be given or to accept instructions not to reach agreement with others. If the experts cannot reach agreement, they should specify the reasons for their differences.[5] This then helps to further refine the areas of difference between the parties.

Experts' costs

Each party must meet the costs of engaging their own experts. Any costs the arbitrator incurs in engaging an expert, may be recovered as part of their general costs. Costs and fees for arbitration are discussed below.

Improper conduct

Failure to attend or comply with an order of the arbitrator

If any party fails or refuses:

- to attend a conference
- to comply with any requirement of the arbitrator

the arbitrator may continue with the conference and ultimately determine the dispute.

It is an offence with a penalty of imprisonment for up to six months if a person who is served as prescribed with a summons to appear as a witness before the arbitrator, without reasonable excuse:

- fails to attend as required by the summons
- fails to appear and report from day to day unless excused, or released from further attendance, by the arbitrator (GPAL 26).

Failure to answer questions or produce documents

It is an offence with a penalty of imprisonment for up to six months, for a person appearing as a witness before the arbitrator, without reasonable excuse, to:

- refuse or fail to be sworn or to make an affirmation

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[4] This may be a private forum or, where the issues are being addressed publicly as part of an industry-wide process, the forum may be open to members of the public.

[5] For instance, at the conclusion of a forum, each expert may be requested to summarise his or her position, whether he or she agrees with the views expressed by the other experts and if not, what he or she perceives as being the areas of difference between him or her and the other experts.

- refuse or fail to answer a question that he/she is required by the arbitrator to answer
- refuse or fail to produce a document that he/she was required to produce by a summons properly served on him/her (GPAL 26(1)).

It is a reasonable excuse for an individual to refuse or fail to answer a question or produce a document on the ground that this might tend to incriminate them or expose them to a penalty. This definition does not limit what constitutes a reasonable excuse (GPAL 27(2) & 27(3)).

Intimidation

It is an offence with a penalty of imprisonment for up to 12 months for a person to:

- threaten, intimidate, or coerce another person
- cause or procure damage, loss, or disadvantage to another person

because that other person:

- proposes to produce, or has produced, documents to the arbitrator
- proposes to appear, or has appeared, as a witness before the arbitrator (GPAL 28).

Contempt

A person must not do any act or thing in relation to the arbitration of an access dispute that would be a contempt of court if the arbitrator were a court of record (GPAL 23). Contempt carries a maximum penalty of imprisonment for 6 months.

Contempt in this context generally comprises a failure to comply with a specific order or direction given by the arbitrator.

Fees

The arbitrator has discretion to deal with arbitration costs, including directing to and by whom and in what manner the whole or any part of those costs are to be paid.

The arbitrator may also:

- tax or settle the amount of costs to be so paid or any part of those costs
- award costs to be taxed or settled as between party and party or as between solicitor and client (GPAL (30)).

There are several approaches that could be followed in respect of addressing the costs of arbitration.

Where an external arbitrator is appointed then the costs of arbitration will be determined and apportioned by that arbitrator in accordance with the statutory provisions. It is anticipated the external arbitrator would discuss costs with the parties early in the process.

Where the ACCC is the arbitrator, it will apply the fees determined for access arbitrations[6] as set out in the Trade Practices Regulations.

The following standard fixed plus variable fees will apply:

- a notification fee of $2 750, inclusive of GST, payable by the person notifying the dispute at the time of notification (regs. 6C(2))
- a pre-conference fee of $10 850, inclusive of GST, payable by the party notifying the dispute to be paid before the start of the conference (regs. 6F(2)(a)(ii))
- a daily conference fee of $4 340, inclusive of GST (regs. 6F(2)(b)), payable by the parties in proportions determined by the ACCC. At the conference, it likely the ACCC will discuss apportioning the conference fee between the parties. The conference fee will typically be divided equally among the parties unless parties put forward in submissions why this would be inappropriate for the matter at hand.

The arbitrator may jointly hear issues set out in two dispute notifications. In such circumstances, the arbitrator may apply a single set of charges (as if there were only one dispute) apportioned between the parties.

[6] While the fees set out in the Trade Practices Regulations relate specifically to access arbitrations under the National Access Regime (Part IIIA of the Trade Practices Act), the ACCC believes it is appropriate to use the same fees for access arbitrations under the Gas Code.

4 Joining parties, joint hearings and separate processes

Sometimes the parties to a dispute raise issues that are common to one or more other arbitrations, or which are likely to arise in other arbitrations. While there is no requirement to adopt a consistent approach to an issue across all arbitrations, some issues are of such significance that a consistent approach should be viewed as the default position.

In situations where there are common issues the ACCC would generally manage the arbitration. The private nature of arbitration hearings means that the ACCC dealing with a common issue within the context of separate arbitrations would raise management issues:

- Each time the ACCC considered the issue in separate arbitrations, the ACCC would need to duplicate previous processes.
- If a party in one arbitration raises a matter that influences the ACCC's thinking on an issue, it would be necessary to inform the parties to the other arbitrations of this development, and provide them with an opportunity to comment.
- When a service provider is party to several arbitrations for the same service, it will be privy to submissions from several access seekers, which may be useful in enabling it to develop and refine its arguments. On the other hand, each access seeker in those arbitrations will only receive the service provider's submission and therefore may be unaware of relevant points raised by the other access seekers.

These logistical challenges, while manageable, may result in an inefficient use of resources and unnecessary delays. Consequently, to develop a consistent approach to a particular issue, it may be preferable to use a single process that provides all interested parties with an opportunity to comment on the issue simultaneously.

To involve other parties in matters common to two or more arbitrations, there are two basic approaches that the ACCC could use:

- holding a joint hearing
- establishing a separate process outside the arbitration.

Holding a joint hearing

When the ACCC is conducting two or more arbitrations involving common issues it may seek the consent of the parties to hold a joint hearing. This would allow the common issues to be considered in a single process.

The distinction between a joint hearing and joining persons as parties to a single arbitration is that a joint arbitration hearing is a procedural mechanism that allows the

ACCC to hear matters common to more than one dispute at the same time. It is a joint hearing of matters common to more than one arbitration, not the joining of the parties into a single arbitration. At the end of each joint arbitration hearing the parties will return to their particular arbitration proceedings and the ACCC will make an appropriate determination in relation to each particular arbitration.

It may, for instance, be appropriate to hold a joint hearing where:

- there are common technical issues across arbitrations
- there is an issue about capacity limitations and how to ration access in accordance with those limitations.

The joint hearing process will only be used in situations where:

- the ACCC is arbitrating two or more access disputes at that time
- one or more matters are common to those disputes
- the Chairperson is of the view that holding the joint hearing is likely to result in the disputes (covered by the joint hearing) being resolved in a more efficient and timely manner
- the parties consent to a joint hearing.

Procedural arrangements for joint hearings will be similar to those for single arbitration hearings.

Once a joint hearing has reached a conclusion, the Chairperson may give a direction terminating the joint hearing and returning the parties to their particular arbitration proceedings. The findings of fact made for the purposes of a joint hearing, and the record of proceedings, are incorporated within each of the arbitrations covered by the joint hearing. The ACCC would then proceed to finalise each of those arbitrations separately.

Establishing a separate process

Alternatively, the ACCC may establish a process separate from the arbitration to specifically consider a matter common to several arbitrations. The process would typically be as follows:

- A discussion paper is released, outlining the matter under consideration and the particular issues that the ACCC wishes to explore.
- Submissions are invited from interested persons, including the parties to each arbitration. Submissions will usually be available to anyone on request, fostering a more robust and open deliberative process. However, particular information may be treated as confidential, for example, commercially sensitive financial information.

- A draft report is released by the ACCC outlining its initial views on the matter under consideration, with supporting reasoning.

- Further submissions are invited from interested people.

- The ACCC releases a final report setting out its views on the matter and supporting reasoning.

The ACCC would then seek submissions from parties in each individual arbitration about whether the ACCC's views contained in the final report should be applied in that arbitration.

5 Flow of information, procedural fairness and confidentiality

The receipt of timely information is crucial to the arbitrator's ability to arbitrate access disputes.

Procedural fairness

The precise requirements of procedural fairness (or natural justice) vary and depend on the circumstances of the access dispute. There are, however, two key requirements that have a bearing on the manner in which arbitrations are conducted:

- The parties to an arbitration should have a reasonable opportunity to present their case to the arbitrator.
- The arbitrator should be free from bias or the perception of bias.

Reasonable opportunity to present the case

As a starting point, the arbitrator should disclose all relevant matters to parties involved in the arbitration of any access dispute. If the arbitrator does not give other parties an opportunity to comment on information it has received from one party, this may impair the ability of the other parties to present their case and it may affect the weight the arbitrator ought to give to that information.

All parties to an access dispute should ensure that copies of all submissions and any other information provided to the arbitrator are also given to all other parties to the dispute. While the arbitrator is empowered to withhold confidential information from a party, it is likely to use this power sparingly, and only after balancing the extent to which non-disclosure may harm the interests of the party not receiving the information (this is addressed in more detail below).

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

In resolving procedural issues, the arbitrator must balance several competing considerations including the detriment to the party raising the issue and the desirability of resolving disputes in a timely manner. Accordingly, parties should bear these issues in mind, particularly GPAL 20 (1)(b), when making submissions on procedural issues.

Freedom from bias

Another element of procedural fairness is the question of bias or the perception of bias. During the preliminary phase of an arbitration, generally the parties will be advised of any relevant interests or involvement in related matters of both the arbitrator and of staff assisting the arbitrator. If a party has any concerns in this regard they should be raised at this point.

A perception of bias can also arise when public comments are made about the issues in dispute. To avoid this perception, the arbitrator will usually not publicly comment on specific issues in an arbitration until it has been completed, and after the determination for that arbitration has been published, if it is published.

Confidentiality between the parties

Arbitration hearings are held in private unless the parties otherwise agree (GPAL 18). While this is a statutory requirement, the courts have noted that privacy is an ordinary incident of an arbitration and can be important to the efficacy of an arbitration.[7]

However courts have drawn a distinction between the private nature of an arbitration hearing and the question of confidentiality.[8] In the absence of a specific contractual or statutory provision, there is no general obligation of confidentiality in respect of information used in the conduct of an arbitration.

The Code gives the arbitrator extensive powers, including the power to give a direction for an arbitration hearing and to ensure a speedy hearing and determination of the dispute (GPAL 20 & 21). The arbitrator can also order a person not to divulge specified information given to that person in the course of the arbitration without the arbitrator's consent (GPAL 24 (1)). Contravention of these directions or orders is a criminal offence (GPAL 24 (2)).

The arbitrator will rely on these powers and, as standard practice in arbitrations, give a confidentiality direction and order to the parties (including their employees, contractors and agents). The direction provides that they must not use or disclose any information obtained from the other party or the arbitrator during the arbitration (other than information in the public domain) unless the use or disclosure is:

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

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

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

The arbitrator may need to review the form of any confidentiality direction and order when it makes a final determination about an access dispute and the form of any variation will depend on the circumstances of the access dispute. In general, however, the arbitrator will seek to ensure that the confidentiality of information contained in

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7 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

8 ibid.

correspondence or submissions exchanged during the arbitration remains protected after finalisation of the arbitration.

Similarly, the confidentiality arrangements after an arbitration is finalised generally only provide for disclosure of information:

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

Withholding confidential information from a party

A statutory framework for resolving any disputes in relation to confidential commercial information has been included in the Code. GPAL 29 gives the arbitrator a discretion to withhold a document, or part of a document, from another party to the dispute.

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

- The arbitrator may direct a party to provide certain information about a particular access dispute. In response, a party may indicate that the request relates to confidential commercial information, which it does not want to provide to the other party.
- A party's written submission to the arbitrator on matters in dispute may include particular items which that party considers are confidential commercial information, and which it does not want to provide to the other party.
- A party's oral or written submission to the arbitrator may require technical clarification. To clarify these issues, a party may need to refer to other information considered to be confidential.

When a request for confidentiality is made in respect of information that is initially provided to the arbitrator orally, the following process generally applies:

- Before providing the information, the party must advise the arbitrator that it wishes to make a request under GPAL 29. Support staff will then arrange for the information to be provided during a private transcribed meeting with the arbitrator.
- The party will be given a full transcript after the meeting and can identify parts of the transcript that it believes contain confidential commercial information.
- The party can then make a request for confidentiality for identified items in the transcript.

Matters relevant to consideration of a GPAL 29 request

Disclosing information to all parties is likely to facilitate a more informed decision-making process. By not doing so, the veracity of that information cannot be tested.

However, the requirements of procedural fairness are not absolute and can be modified by the need for confidentiality.

Courts have generally balanced three factors when considering whether it is appropriate to allow access to information. In cases where a party has demonstrated that information is in fact confidential commercial information, the arbitrator will consider these three factors when assessing a request under GPAL 29:

- 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 arbitrator to perform their functions (that is, in this context, to assess the veracity of the information).

The arbitrator will need to make each assessment on a case-by-case basis. Nevertheless, the following general points are provided as guidance.

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

With respect to information about the costs of commercial operations, generally it is appropriate to draw a distinction between current (or contemporaneous) information and past (or out of date) information. Disclosure of past information would be less likely to cause harm. Also, in general, it is appropriate to distinguish between situations in which the cost information concerns operations that are similar to those conducted by the party from whom the document is to be withheld. If the information does not concern competing operations, disclosure would be generally less likely to cause harm.

With respect to information concerning the prices at which services are supplied to competitors, generally disclosure would not be likely to cause harm merely because it would improve the state of knowledge of the party from whom it is to be withheld.

Second, it should be established that existing restrictions on the use of information (for example, those set out in the standard confidentiality direction made at the start of the arbitration) are not enough to prevent or minimise the likelihood of harm. If existing restrictions are insufficient, it may be possible to strengthen them by limiting disclosure to certain internal staff of the party and external advisers, prohibiting those people communicating contents of the documents to other staff. In rare situations it may be appropriate to limit disclosure to external advisers only, to minimise the likelihood of harm. However, this is usually the most limited form of disclosure that the arbitrator orders.

Third, the arbitrator will consider the materiality of the information. Where the information is likely to have a material bearing on the arbitrator's determination, then the case for providing the document to the party in question is stronger. This is because non-disclosure is likely to cause greater harm to that party than in other situations. Moreover, in such a case, limiting disclosure to external advisers could constrain the ability of the party to adequately provide instructions to its advisers and therefore hamper its ability to provide submissions to the arbitrator.

Procedure for a request in relation to GPAL 29

GPAL 29 requires the arbitrator to consider a request for confidentiality, any objection to the request for confidentiality and any further submissions about that request. The arbitrator must consider each document that is said to contain confidential commercial information individually under GPAL 29(4). Accordingly, a separate request must be made for each document provided to the arbitrator that contains confidential commercial information.

The procedural steps envisaged are as follows:

- A party to the access dispute wanting to request confidentiality should inform the arbitrator in writing that a specified part of a document contains confidential commercial information and ask that the arbitrator not give a copy of the document to a particular party (GPAL 29(1)). The party making the request should also provide a submission describing the information as comprehensively as possible, setting out the grounds for its request and outlining the form of the proposed decision sought from the arbitrator.
- When the arbitrator has received a request, it must inform any other parties of the request and the general nature of the matters to which the part of the document relates (GPAL 29(2)). In general, this will involve providing those parties with a copy of the requesting party's submission setting out the grounds for the request. However, when the party making the request has not described the information in enough detail, the arbitrator will supplement the description so that the other parties can adequately consider the request. The arbitrator will ask these parties whether they have any objection to the arbitrator complying with the request. The arbitrator will try to do this within seven days of receiving the confidentiality request.
- If there is no objection to the request for confidentiality, the arbitrator will usually decide that the information be dealt with according to the request.
- If there is an objection, a party objecting should inform the arbitrator in writing and provide a submission setting out reasons for the objection, along with the form of any proposed decision sought from the arbitrator. This should usually occur within seven days of receiving the notice of the request for confidentiality from the arbitrator. The party objecting to confidentiality should also provide a copy of the submission to other parties, including the party making the request.
- If there is an objection to the request for confidentiality, the arbitrator may ask the party making the request to reply to issues raised by the objection. This reply submission should usually be provided to the arbitrator (and copied to the other party) within seven days of the arbitrator seeking a reply submission.

Decision of the arbitrator in relation to requests under GPAL 29

After the arbitrator has considered the request, any objection to the request, and any reply submission, he/she may decide:

- that the document does not contain confidential commercial information
- that the document does contain confidential commercial information, but it is nevertheless appropriate to give other parties a copy of those parts of the document
- that the document does contain confidential commercial information, and it is not appropriate to give other parties a copy of those parts of the document.

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

If the arbitrator is satisfied that a party has produced confidential commercial information, the arbitrator may decide to direct a modified form of disclosure. The types of disclosure that the arbitrator could direct include:

- an order to disclose the specified part of the document to a limited number of internal representatives of the party, subject to satisfactory confidentiality undertakings; and
- an order to disclose the specified part of the document to identified external representatives of the party (usually legal advisers or technical experts), subject to satisfactory confidentiality undertakings.

The arbitrator will consider whether, in the interests of procedural fairness, it should require that all confidential commercial information be disclosed to identified external representatives (subject to satisfactory confidentiality undertakings).

When the arbitrator orders disclosure subject to confidentiality undertakings, then the persons who are entitled to receive the documents would be expected to execute a confidentiality undertaking. A ‘standard form’ confidentiality undertaking is provided in Appendix 2. The arbitrator will consider modifying this undertaking to suit particular circumstances.

Disclosure of information by the ACCC

The existence of an access dispute

Once notified of a dispute, the ACCC will send a copy of the notification to the service provider or access seeker (as the case may be).

Giving information to parties in another arbitration

The ACCC may receive information relevant to an arbitration:

- in the context of other arbitrations (for example, other arbitrations concerning the same service)

- in the performance of other responsibilities.

Arrangements for joint hearings are discussed in Chapter 4. These would generally be run where the ACCC is the arbitrator of multiple disputes with common issues. To determine whether giving the parties information and documents from another arbitration would be likely to result in the present arbitration being conducted more efficiently and in a timely manner, the ACCC will generally consider the alternative scenario. This could involve the ACCC issuing a direction or summons to the person who originally provided the information and documents.

When the ACCC believes that giving the parties information and documents from another arbitration would be more timely and efficient, it nevertheless has a discretion to decide not to do so if there are grounds for not adopting this course of action. The ACCC will consider:

- any objections from the person who provided the information or documents to the ACCC
- confidentiality requirements currently applying to the information or document
- any other matter that the ACCC considers relevant.

If the ACCC provides information and documents to the parties, the ACCC can make directions and orders limiting the use and disclosure of the information and documents by those parties.

Information received by the ACCC outside arbitrations

The ACCC may receive information relevant to an arbitration in the context of performing other (non-arbitration) responsibilities.

If the ACCC wished to use this information in an arbitration, it would provide it to the parties. Before doing so, however, the ACCC would normally advise the person who provided the information and seek their views on providing the information to the parties.

If the information provider objects, the ACCC would need to consider whether there are any restrictions on disclosure without the provider's consent. If the ACCC is restricted in its use of the information, then it would need to consider whether to use its information gathering powers under GPAL 20(1)(c) and 25(2) to acquire the information for the arbitration at hand.

ACCC conducting joint arbitration hearings

When the ACCC conducts a joint hearing (see Chapter 4), it may consider the record of proceedings for any arbitration covered by the joint hearing. In these circumstances, the ACCC may consider it appropriate to disclose information to all parties to the joint hearing. To do this, the ACCC would usually follow the process set out above (see 'Giving information to parties in another arbitration').

Publication of determination and reasons for a determination

The ACCC proposes to maintain a register setting out the following information for each arbitration determination:

- the names of the parties
- the service
- the date on which the determination was made.

The register will be a public register and people wanting certified true copies of documents on the register will be able to make a request in person or in writing.

The ACCC also intends to publish (in whole or part) an arbitration determination and the reasons for making the determination.

Before publishing the determination and reasons, the ACCC (or independent arbitrator if appointed) will provide each party with a copy of the determination and reasons marked-up to show those parts which it intends to publish. Each party will then have 14 days to provide a written submission identifying any parts that should not be published along with reasons for that view.

In deciding whether to publish a determination and reasons (or part of them), the ACCC (or independent arbitrator if appointed) will consider the following matters:

- any objections from the parties
- whether disclosure of the determination would be unduly harmful to the legitimate business interests of the parties
- whether publication would be likely to promote competition in relevant markets
- any other matter that the ACCC considers relevant.

Publication of a determination and the accompanying reasons is likely to enable other access seekers to estimate, with greater certainty, the likely outcome of an arbitration. Negotiations are more likely to succeed when the outcome of an arbitration can be predicted within relatively narrow boundaries. Thus publication of a determination might be expected to result in access to pipelines being settled in a more timely manner, through negotiation rather than arbitration.

For these reasons, the ACCC will generally publish determinations and accompanying reasons. However, when the objections of the parties establish grounds for not publishing a determination and reasons (or particular parts of those documents) then the ACCC (or independent arbitrator if appointed) will consider whether those grounds outweigh the benefits from publication in that particular case.

Use of information obtained during an arbitration for other purposes

ACCC Commissioners and staff are subject to a number of general limitations in the use of information:

- ACCC staff cannot make improper use of information.[9]

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

- When information provided under a statutory power is confidential, the ACCC must comply with any specific statutory restrictions on disclosure.

The ACCC recognises that it is critical to adopt sound information handling practice to maintain the confidence of all parties to an access dispute. However, it takes the view that if it has legitimately obtained information using its powers for one purpose, and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other statutory function.[10]

Specific obligations on the ACCC to disclose information

The ACCC can be compelled to produce material given to it during the conduct of an access dispute:

- in response to a request under the *Freedom of Information Act 1982*;
- as part of its duty to provide discovery or comply with a notice to produce in proceedings it commences or in proceedings against it;
- in response to a subpoena in relation to proceedings between third parties; and
- in response to statutory disclosure obligations or its obligations as a government body.

Before complying with such requirements, the ACCC will usually first seek to advise a party who has produced confidential information. However, the ACCC will not seek to consult with parties about the release of non-confidential information. In circumstances where a party has not requested confidentiality, the ACCC may still consider that the information may be confidential in nature and, accordingly, will seek to clarify this with the provider.

Courts and tribunals understand the need to protect confidentiality of information where appropriate and the ACCC can, in consultation with the provider of information, ensure that the disclosure of information is subject to a court-imposed confidentiality regime.

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

6 Determinations and termination of an arbitration

Interim determinations

At any time before issuing the final determination, the arbitrator has the power to issue an interim determination (GPAL 21(2)). This does not terminate an arbitration, nor does it relieve the arbitrator of its duty to make a final determination. It merely enables the arbitrator to establish terms and conditions for access while it conducts an arbitration.

Interim determinations can be important for the smooth operation of the access regime, as they help ensure access seekers get timely access to pipeline services. This is because service providers may see arbitration disputes as a way of delaying the provision of access. Arbitration processes can be lengthy because of the need for detailed analysis of the views presented to the arbitrator.

Relevant matters

In deciding whether to make an interim determination, the arbitrator may choose to consider any matters it thinks relevant, including those that it must consider when making a final determination. However, the Code does not set out any matters that must be considered when making an interim determination.

Interim determinations, therefore, enable the arbitrator to strike a balance between conducting a thorough examination of the matters it must take into account when making a final determination and ensuring timely access to those services that are the subject of arbitration disputes.

Generally, the arbitrator will focus on two matters:

- whether the arbitrator is satisfied that it has sufficient information on which to make an interim determination
- whether the arbitrator is satisfied that, in all the circumstances, it is appropriate to make an interim determination.

Sufficient information

In terms of sufficient information, the arbitrator does not need to have all the information necessary for making the final determination, or to have reached a view on all outstanding issues between the parties. To set the information threshold at that level would seem to restrict unnecessarily the arbitrator's ability to make interim determinations. Rather, the information should provide a reasonable basis for the terms and conditions set out in the interim determination.

Appropriate in all the circumstances

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

- the scope and nature of the dispute

- the state of negotiations between the parties
- the likely impact of an interim determination on end-users
- the likely timing of the final determination.

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

Draft of the interim determination

Before making an interim determination, the arbitrator will issue a draft to the parties. The arbitrator will also provide the parties with a draft statement of reasons, enabling them to focus their submissions on issues that the arbitrator has so far considered relevant but does not limit the submissions that the parties may make.

Duration of an interim determination

An interim determination has effect from the date specified in the determination. An expiry date will generally be specified in the interim determination of no more than 12 months after the determination takes effect.

The determination remains in force for this period unless one of the following events occurs:

- a final determination is made and takes effect
- the interim determination is revoked by the arbitrator either on request by the parties or at the arbitrator's discretion
- the notification of the dispute is withdrawn.

Final determinations

The arbitration continues until a final determination is made, unless terminated or the notification is withdrawn before that time.

The determination may deal with any matter relating to the provision of a service to a prospective user (Code 6.8).

The Code lists several examples of matters with which the determination may deal. These include:

- requiring the Service Provider to offer to enter into a contract to provide a Service to the Prospective User at a specified Tariff and on specified terms and conditions

- requiring the Service Provider to install a New Facility to increase the Capacity of the Covered Pipeline provided a number of conditions are met – as set out in section 6.22 of the Code.

The arbitrator may refuse to make a decision that requires the Service Provider to provide a particular Service to the Prospective User if the arbitrator considers there is substantial competition in the market for the provision of the Service in question (Code 6.17).

Matters that the arbitrator must take into account

When arbitrating a dispute the arbitrator must, subject to certain conditions[11], apply the provisions of the Access Arrangement for the Covered Pipeline concerned. In addition, the arbitrator must take the following matters into account in making a final determination:

- the Service Provider's legitimate business interests and investment in the Covered Pipeline
- the costs to the Service Provider of providing access, including any costs of extending the Covered Pipeline, but not costs associated with losses arising from increased competition in upstream or downstream markets
- the economic value to the Service Provider of any additional investment that the Prospective User or the Service Provider has agreed to undertake
- the interests of all Users
- firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline
- the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline
- the economically efficient operation of the Covered Pipeline
- the benefit to the public from having competitive markets (Code 6.15).

As there has yet to be an arbitration conducted under the Code, there is no specific precedent that interprets these matters. Some of the principles underlying these matters, however, appear elsewhere in the Code – see s.2.24 and s.8.1. There have been Australian Competition Tribunal rulings and a Western Australian Supreme Court decision that in part address these principles and may provide some guidance.[12]

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[11] These conditions are that the arbitrator must not make a decision that would impede the existing right of a User to obtain Services; would deprive any person of a contractual right that existed prior to the notification of the dispute, other than an Exclusivity Right which arose on or after 30 March 1995; or is inconsistent with the applicable Queuing Policy.

[12] Application by Epic Energy South Australia Pty Ltd [2003] ACompT 5 (10 December 2003) Application by GasNet Australia (Operations) Pty Ltd [2003] ACompT 6 (23 December 2003) Re: Dr Ken Michael AM; ex parte EPIC Energy (WA) Nominees Pty Ltd & Anor [2002] WASCA 231 (23 August 2002)

Without seeking to be definitive, the ACCC offers the following comments as an indication of the types of things the arbitrator may take into account when considering these matters.

Clearly within the context of a particular arbitration, the parties are free to put their own views as to how the arbitrator should interpret these matters, which the arbitrator will take into account in making its decision.

Legitimate business interests

Legitimate is defined in the Oxford Dictionary as 'Lawful, proper, regular, conforming to standard type'. It may be helpful to keep in mind the objectives of the Code when seeking to understand this element. These include to prevent the abuse of monopoly power and to provide rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users.

To the extent that a dispute relates to the determination of a tariff for transmission services (other than for a Reference Service), the arbitrator is likely to have regard to the general principles for determining reference tariffs contained in section 8.1 of the Code. These are:

(a) providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that service

(b) replicating the outcome of a competitive market

(c) ensuring the safe and reliable operation of the Pipeline

(d) not distorting investment decisions in Pipeline transportation systems or in upstream or downstream industries

(e) efficiency in the level and structure of the Reference Tariff

(f) providing an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services.

Costs of providing access

In seeking to determine an appropriate price for access to a particular service, the cost of providing that service is one of a range of factors to consider. This cost should include all relevant capital and non-capital costs, including a fair allocation of joint costs. The Code explicitly states that any costs associated with losses arising from increased competition in upstream or downstream markets should not be taken into account.

Economic value to service provider of additional investment

This criterion requires the arbitrator to take account of the fact that on occasions, investment undertaken by a Service Provider to meet the specific needs of a prospective user can have a value to the Service Provider beyond that service provided. An example may be where a capacity augmentation is required to meet an access request and the additional capacity provided by the augmentation (say the installation of a new compressor) exceeds that required by the prospective user. To

the extent the capacity beyond that required for the prospective user is likely to earn revenue, it has value to the Service Provider.

In such circumstances, it may not be reasonable to require the prospective user to pay an access price that covers the entire cost of the capacity augmentation.

Similarly, where a capacity augmentation is required and the smallest available capacity increment exceeds that sought by a prospective user but there is no prospect of the service provider being able to earn revenue from that additional capacity, it may be reasonable for the prospective user to pay an access price that covers the entire cost of the capacity augmentation.

Interests of all users

In making a determination with respect to a particular user, the arbitrator must be mindful of any impact such a decision may have on other users of the pipeline.

There can be a tension between the short-term interest of users (typically focussed on lower prices) and their long-term interests (ongoing maintenance and investment in the facility to ensure the service can continue to be provided).

The ACCC believes that the long-term interests of users is a more appropriate benchmark to take into account in making arbitration determinations. In practice, there is likely to be considerable overlap between the matters the ACCC takes into account in considering the long-term interests of all users and in considering the economically efficient operation of a pipeline.

Existing contractual obligations

A consistent theme running through the Gas Code is that parties pre-existing contractual rights are protected (other than for an Exclusivity Right[13] which arose on or after 30 March 1995 – Code 2.25, 2.47, 8.18(c)).

Safe and reliable pipeline operation

An access determination should not lead to arrangements between service providers and access seekers that encourage the unsafe or unreliable operation of a pipeline. This criterion may often be more relevant to non-price terms and conditions. An access price, however, should include a component to cover efficient maintenance of a pipeline and ongoing investment that is required to maintain an acceptable level of reliability in service provision.

Section 6.21 of the Code restricts an arbitrator from making a decision that the Service Provider reasonably believes is not consistent with the safe operation of the pipeline and prudent pipeline practices accepted in the industry.

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[13] An Exclusivity Right is defined in the Code to be a contractual right that by its terms either expressly prevents a Service Provider supplying Services to persons who are not parties to the contract, or expressly places a limitation on the Service Providers ability to supply Services to persons who are not parties to the contract.

Economically efficient pipeline operation

Economic efficiency consists of three components:

- productive efficiency—the efficient use of resources within each firm so that all goods and services are produced using the least cost combination of inputs
- allocative efficiency—the efficient allocation of resources across the economy so that the goods and services that are produced in the economy are the ones most valued by consumers
- dynamic efficiency—the efficient deployment of resources between present and future uses so that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

In the context of an arbitration determination, the ACCC may consider whether particular terms and conditions are required to enable a pipeline to be operated efficiently. This may involve, for example, examining whether they allow for the service provider supplying the service to recover the efficient costs of operating and maintaining the infrastructure used to supply the service under consideration.

Benefit from competitive markets

This criterion requires the arbitrator to take account of benefits that would flow from an access determination that can be beyond those directly experienced by the Service Provider or prospective user. Access to the services of a gas transmission pipeline is generally an input in the supply of a downstream service – the delivery of gas to a particular customer, or just one of the transportation legs of an input fuel for an electricity generator. Provision of access to these inputs, or improving the terms and conditions on which they are supplied, can promote competition in markets for these downstream services by creating conditions conducive to the entry of efficient firms. Such an increase in competition is of benefit to the wider community.

Obligation to develop capacity

In making a determination, the arbitrator may require the Service Provider to expand the Capacity of a Covered Pipeline to meet the requirements of a Prospective User, provided that:

- the Service Provider is not required to extend the geographical range of a Covered Pipeline
- the expansion is technically and economically feasible and consistent with the safe and reliable provision of the Service
- the Service Provider's legitimate business interests are protected
- the Prospective User does not become the owner of a Covered Pipeline or part of a Covered Pipeline without the agreement of the Service Provider
- the Service Provider is not required to fund part or all of the expansion (except where the Extensions/Expansions Policy in the Access Arrangement for the Covered Pipeline states that the Service Provider will fund the New Facility and

the conditions specified in the Extensions/Expansions Policy have been met) (Code 6.22).

Effect of a surcharge

When a capacity enhancement is required that results in a new facility[14] being added to a pipeline and the cost of that new facility cannot be fully recovered at the prevailing tariffs, the service provider can elect as part of its Access Arrangement to impose a surcharge on the use of that capacity (Code 8.25).

If the ACCC as Regulator has approved the use of a surcharge for incremental capacity, it has the effect of binding the arbitrator in the event of a dispute.

If the arbitrator would, in the absence of a surcharge, have determined a particular price for access to incremental capacity, then it can require the provision of that service at that price, plus the surcharge (Code 6.19).

Prior capital contributions

Users sometimes make capital contributions towards part or all of the costs of constructing part of a pipeline. This can take the form of an up-front payment or by agreeing to pay a higher charge than it would otherwise have paid.

Where a user claims it has made a prior capital contribution, the arbitrator must first consider whether such a capital contribution was made. It must then consider the extent to which the User or Prospective User has recouped any such capital contribution.

If the arbitrator considers that the User or Prospective User has made a capital contribution which has not been fully recouped, the arbitrator may require the Service Provider to provide the Service at a tariff set in a way that allows the User or Prospective User to recoup some or all of the unrecouped portion of the capital contribution (Code 6.20).

Reservation of Capacity During an Access Dispute

No priority rights of a User or Prospective User who is a party to a dispute shall be altered during the period of that dispute until the arbitrator's decision has been made (Code 6.25).

Restrictions on access determinations

Subject to the special treatment of surcharges and prior capital contributions discussed above, the arbitrator must not make a decision that:

(a) subject to paragraphs (b), (c) and (d), is inconsistent with the Access Arrangement

(b) would impede the existing right of a User to obtain Services

[14] A new facility could be an expansion of or extension to a pipeline, or any other capital asset constructed or acquired to provide pipeline services.

(c) would deprive any person of a contractual right that existed prior to the notification of the dispute, other than an Exclusivity Right which arose on or after 30 March 1995

(d) is inconsistent with the applicable Queuing Policy

(e) requires the Service Provider to provide, or the User or Prospective User to accept, a Reference Service at a Tariff other than the Reference Tariff (Code 6.18).

Process

Before making a determination, the arbitrator must give a draft determination to the parties. This will set out the arbitrator's proposed decision. In addition, the arbitrator will provide a draft statement of reasons.

Parties will generally be given 14 days to comment on the draft and a further seven days to reply to each other's responses. Once a draft determination is given to the parties, there may be an additional opportunity to allow commercial negotiations to resume.

Once the arbitrator makes a final determination and gives it to the parties, the process of arbitration ends.

Obligation to reflect the decision in a contract

Where an arbitrator requires the Service Provider to provide a Service to the Prospective User on terms and conditions specified in a determination, the arbitrator may require the Service Provider and Prospective User to represent that determination in the form of a contract between the parties (Code 6.26). The parties must then submit to the arbitrator, within 14 days following the date the determination comes into effect, either (at the choice of the Service Provider or Prospective User):

(a) a copy of a draft contract

(b) a copy of a signed contract.

If the parties do not submit the draft contract (or a copy of a signed contract) to the arbitrator within this 14 day period, the arbitrator may make a decision on the form of any terms and conditions in the draft contract that have not been resolved within that time (Code 6.27).

Effect of determination

When does it come into effect?

The Prospective User becomes bound by the determination of the arbitrator on the 14th day after the day on which the determination was made unless it notifies the arbitrator that it does not intend to be bound within those 14 days. The Prospective User can become bound by the determination earlier than the 14 day period if he/she notifies the Service Provider of his/her intention to be so bound (Code 6.24).

A service provider is required to comply with a determination of the arbitrator from the date specified by the arbitrator (Code 6.16). The ACCC will typically specify a

date 14 days after the day it makes a determination so as to align with the date the Prospective User is bound.

The parties are able to appeal a determination within 28 days of it being made. If the determination is appealed, the Court can make an order staying the determination pending finalisation of the appeal (see Chapter 7).

Enforcement of determination

Both the provisions of the Code that require the Service Provider and Prospective User to comply with a determination of the arbitrator are defined as 'conduct' provisions (Code 10.7(b)). This means that the relevant Regulator or any other person may bring civil proceedings against a party for a breach of these provisions.

If any party to a determination believes that another party has engaged, is engaging, or is proposing to engage, in conduct that constitutes a contravention of the determination, the first party may apply to the Court for an injunction. If the Court is satisfied that a person has engaged or is proposing to engage in conduct that contravenes or attempts to contravene the determination, it may grant an injunction in such terms as it determines to be appropriate - including restraining the other party from engaging in the conduct, or if the conduct involves refusing or failing to do something, requiring the other party to do that thing (GPAL 35, 37).

If a party suffers loss or damage as a result of action that was in contravention of a determination, a Court order can be sought to recover the amount of that loss or damage. Such Court action must be commenced within 3 years of the date on which the cause of action occurred (GPAL 36).

Variation of determination

If a determination of an arbitrator contains:

- a clerical mistake
- an error arising from an accidental slip or omission
- a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination
- a defect in form,

the arbitrator may correct the determination or the Court, on the application of a party, may make an order correcting the determination.

Once the parties have entered into a contract based on a determination, the parties may make their own agreed amendments as for any contract.

Termination without a determination

Termination by a party

The party who notified an access dispute or the Prospective User can withdraw the notification any time before the arbitrator makes a final determination (Code 6.5). Once a notification is withdrawn, the arbitrator is precluded from subsequently making an interim or final determination.

A notice of withdrawal must be made in writing to the arbitrator and takes effect when it is received. The notice must include the following information:

- the name of the person withdrawing the notification
- whether the person withdrawing the notification is the person who notified the dispute and is the Service Provider, or the access seeker
- a short description of the access dispute to which the notification relates.

At the time of giving the notice of withdrawal to the arbitrator, the person giving the notice must also give a copy to any other party to the arbitration. Also, the arbitrator will give a copy of the withdrawal to each person to whom it notified the dispute.

The arbitrator may issue a media release advising that the notification has been withdrawn.

Termination by the ACCC

The ACCC may terminate an arbitration at any time without making a determination (Code 6.6), if it is satisfied that:

- the notification of the dispute was vexatious
- the subject matter of the dispute is trivial, misconceived or lacking in substance
- the party who notified the dispute has not engaged in negotiations in good faith.

In considering whether an arbitration should be terminated, the arbitrator will consider each notification on its merits.

Generally, parties whose interests are likely to be adversely affected by a decision to terminate an arbitration will be notified of the ACCC's intention to terminate and will be given the opportunity to make submissions about whether the ACCC ought to continue with the arbitration.

7 Review

Appeal to Court

A party to a dispute may appeal to the Court, on a question of law, from a determination of an arbitrator under the provisions of the Code (GPAL 31(1)).

An appeal must be instituted:

(a) not later than the 28th day after the day on which the decision is made or within such further period as the Court (whether before or after the end of that day) allows

(b) in accordance with the relevant Rules of Court (GPAL 31(2)).

The Court may make an order staying or otherwise affecting the operation or implementation of the determination of the arbitrator that the Court thinks appropriate to secure the effectiveness of the hearing and determination of the appeal (GPAL 31(3)).

Abbreviations & glossary

ACCC	Australian Competition and Consumer Commission
Access Arrangement	an arrangement for access to a Covered Pipeline that has been approved by the Relevant Regulator under the Code.
Access dispute	a dispute between a service provider and a prospective user that, in accordance with the Code, may be referred to arbitration under GPAL 14.
Act	Trade Practices Act 1974 (Commonwealth)
ADR	Alternative Dispute Resolution. ADR can refer to a number of different dispute resolution avenues, including expert determination, mediation, conciliation, conferences and facilitated negotiation.
Agreement	Council of Australian Governments Natural Gas Pipelines Access Agreement (7 Nov. 1997).
Arbitrator	the relevant Regulator or a person appointed by the relevant Regulator to conduct an arbitration relating to an access dispute.
CMT	Case Management Team. The CMT may be composed of staff from the ACCC or outside persons, which assist in facilitating and mediating the dispute resolution process.
Code	National Third Party Access Code for Natural Gas Pipeline Systems
Covered Pipeline	a pipeline or those parts of the pipeline that are subject to the provisions of the Code.
GPAL	Gas Pipelines Access Law. This means: (a) in the case of South Australia: (i) the provisions referred to in paragraph (a) of the definition of "Gas Pipelines Access Law" in section 3(1) of the Gas Pipelines Access (South Australia) Act 1997 of South Australia, as applying as a law of South Australia; and (ii) Regulations in force under Part 3 of that Act; and (b) in the case of Western Australia:

(i) the provisions of an Act of Western Australia corresponding to the provisions of the South Australian Act that are referred to in paragraph (a)(i); and

(ii) Regulations in force under the Western Australian Act that make provisions corresponding to the provisions of Regulation under Part 3 of the South Australian Act; and

(c) in the case of other jurisdictions which are Scheme Participants:

(i) the provisions referred to in paragraph (a) of the definition of "Gas Pipelines Access Law" in section 3(1) of the South Australian Act, as applying as a law of that Scheme Participant; and

(ii) Regulations in force under Part 3 of the South Australian Act, as applying as a law of that Scheme Participant.

GST Goods and Services Tax

Prospective User a person who seeks or who is reasonably likely to seek to enter into a contract for a Service and includes a User who seeks or may seek to enter into a contract for an additional Service.

Regs. Trade Practices Regulations

Service a service provided by means of a Covered Pipeline including:

(i) haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul)

(ii) the right to interconnect with the Covered Pipeline

and services ancillary to the provision of such services, but does not include the production, sale or purchasing of Natural Gas.

Service Provider in relation to a pipeline or proposed pipeline, the person who is or is to be the owner or operator of the whole or any part of the pipeline or proposed pipeline.

User means a person who has a current contract for a pipeline service or an entitlement to a pipeline service as a result of an arbitration.

Appendix 1. Notification of access disputes

A1.1. Covering letter

<Date>

General Manager
Gas Group
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Sir/ Madam

I enclose notification of an access dispute with <Name of company> under Clause 6.1 of the National Third Party Access Code for Natural Gas Pipeline Systems.

A cheque for dispute notification fees is enclosed.

Yours faithfully

<Signature>

<Name>

<Position>

Attached: Notification

A1.2. Notification

NOTIFICATION OF AN ACCESS DISPUTE

UNDER

CLAUSE 6.1 OF THE NATIONAL THIRD PARTY ACCESS CODE

FOR NATURAL GAS PIPELINE SYSTEMS

Between (Notifier)

<name of notifying person/company> **of** <address of notifying person/company>

Contact: <name and position of contact>
Telephone: <contact's phone number>;

Facsimile: <contact's fax number>;
Email: <email address>

And (Other party to dispute)

<name of other person/company> **of** <address of other person/company>

Contact: <name and position of contact – if known>
Telephone: <contact's phone number – if known >;

Facsimile: <contact's fax number – if known >;

Email: <email address – if known>

<specify which party is the 'prospective user' and which party is the 'service provider'>

<the notification should specify the name of the owner(s) of the facility used to supply the service; where each owner is a legal entity separate from the persons specified above, the notification should separately identify the facility owner(s), if known.>

Notifier's address for delivery of documents

<specify street address>

Notifier's business

<provide a short description of the business (existing and anticipated) of the notifier.>

Details of the service to which the dispute relates

<specify the service to which the dispute relates>

<provide a description of the service and of the facility used to provide the service.>

Details of the dispute and dispute resolution efforts

<specify in detail the nature of the dispute>

<provide a description of the access dispute, including:

(i) each aspect of access to the service on which the parties to the dispute are able to agree; and

(ii) each aspect of access to the service on which the parties to the dispute are not able to agree.>

<A description of efforts, if any, to resolve the matter(s) in dispute. This should include a history of negotiations (particularly details, and evidence, of when negotiations commenced) and indicate whether the parties have used dispute resolution mechanisms (for example, conciliation, mediation). A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful.>
<Details of any options or proposed solutions put forward during negotiations, or in the context of dispute resolution mechanisms, and the parties' responses.>

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

Note—The information included in the notification should establish that the prospective user is **unable to agree** with the service provider about the terms and conditions on which access will be provided to a Service.

Signature of person notifying dispute

<name of signatory and position>

<date>

Appendix 2. Draft confidentiality undertaking

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974

IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

ACCESS DISPUTE NOTIFIED BY: [X] (ACCESS SEEKER / SERVICE PROVIDER)

OTHER PARTIES: [X] (SERVICE PROVIDER / ACCESS SEEKER)
[X – IDENTIFY OTHER PARTIES]

DATE OF NOTIFICATION: [X]

COVERED PIPELINE: [X]

NOTIFIED UNDER: Clause 6.1 of the National Third Party Access Code for Natural Gas Pipeline Systems

CONFIDENTIALITY UNDERTAKING

I, < insert name>

of <insert address>

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

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

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

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

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

   (a) the ACCC; and

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

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

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

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

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

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

   (a) the finalisation of this arbitration; or

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

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

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

   (a) the notification is withdrawn under s 6.5 of the National Third Party Access Code for Natural Gas Pipeline System ("the Code");

   (b) the ACCC terminates this arbitration under s 6.6 of the Code ; or

   (c) the ACCC makes a final determination under s 6.7 of the Code.

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

   (a) which is in the public domain; or

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

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

Signed:_____ Dated:_____