



AIRLINES FOR
AUSTRALIA &
NEW ZEALAND

ECONOMIC REGULATION OF AIRPORTS



SUPPLEMENTARY RESPONSE

TO THE PRODUCTIVITY COMMISSION'S DRAFT REPORT

MAY 2019



PREFACE

A4ANZ has previously made a [submission](#) in response to the [Draft Report](#), and, following our appearance at the hearing, we were invited by the Commission to make a subsequent submission, largely focused on the details of a sector-specific negotiate-arbitrate regime.¹ We are glad to have this opportunity, however, we were not the only ones present who found the request somewhat perplexing. It seemed quite clear from the Draft Report and other public statements by Commissioners, both prior to and throughout the hearings, that they were unconvinced of the value of even considering alternative regulatory proposals.

The stated purpose of this Inquiry is “*to investigate whether the economic regulation of airport services promotes the efficient operation of airports and related industries.*”² The Commission’s task is therefore to assess the current regime to determine whether it is meeting Government policy objectives, including facilitating commercially-negotiated outcomes in airport operations.

By the final days of the hearings, however, it was plain to all that the Commission did not accept:

- Evidence presented by multiple airport users and highly-regarded economists, demonstrating the exercise of airport market power across multiple domains;
- That the existing regulatory regime is no longer fit-for-purpose, as it lacks a *credible* threat to constrain monopolistic behaviour and does not provide an effective pathway for resolving disputes between airports and their customers in an efficient and effective manner;
- That there is a case for regulatory reform on the basis that all Australian airports with monopoly characteristics have the potential to exercise their market power to the detriment of consumers; and
- That the sort of protection provided for consumers against the *potential* exercise of market power by other monopoly infrastructure operators - through industry-specific schemes - could and should similarly apply to monopoly airports.

The concerns expressed by A4ANZ and many others, about the way in which evidence and expert insights have been treated and the lack of analysis undertaken by the Commission in the Inquiry thus far, persist; so much so that many have been moved to make further submissions.³ It is an important aspect of our democracy and critical to public policy debates that stakeholders feel they can offer these assessments. No Government or statutory agency is above criticism, and particularly not the Commission, given its stated commitment to “*use the best available evidence and the most rigorous analytical techniques to reach its conclusions*”.⁴ As has become abundantly clear, the airlines are far from alone in the view that, in this Inquiry, the Commission has fallen short of this standard.

If we were to depict the Commission’s approach to this Inquiry as a decision-tree, participants are left with the sole option of accepting each flawed position in order to move to the next, with all answers ultimately leading them to the Commission’s decision to stick with the status quo.

Considered properly, however, the weight of evidence provided by airport users⁵ would take us in an entirely different direction; down a pathway laid by the experience of regulators^{6,7} informed by credible expert advice^{8,9,10,11}, and accepted by Governments.^{12,13} This alternate pathway leads not to persisting with the status quo, but instead looks ahead, to a regulatory framework that *is* fit-for-purpose, created by minor reforms, but delivering a more productive, efficient and effective future.

Thus far, the Commission has seemed steadfast in its determination not to go down that path. We are, however, encouraged by the willingness of the Commission to receive further submissions before making its final recommendations. A4ANZ offers this supplementary submission again with a desire to contribute to evidence-informed policy. It is structured to acknowledge the assumptions made by the Commission along the path it has chosen, while highlighting the points at which questions remain (as summarised on p.4).

ABOUT AIRLINES FOR AUSTRALIA & NEW ZEALAND

A4ANZ is an industry group, established in 2017 to represent airlines based in Australia and New Zealand, including: Air New Zealand, Qantas, Virgin Australia, Regional Express (REX), Jetstar and Tigerair. Member-funded and representing international, domestic, regional, full service and low-cost carriers, A4ANZ advocates on key public policy issues relevant to airline operations, including efficient access to domestic airport infrastructure.

The A4ANZ Board identified at the time of the organisation's formation that one of its highest priority issues was ensuring that the regulatory and pricing environment for monopoly airports:

- Encourages competition and innovation;
- More accurately reflects cost inputs;
- Accurately reflects a reasonable and fair return on assets;
- Keeps growth at reasonable not exponential rates;
- Supports investment and maintenance of infrastructure that is fit for purpose, efficient and timely; and
- Maintains accessible airfares for consumers across all areas of Australia and New Zealand.

SUMMARY OF UNRESOLVED ISSUES IN THIS INQUIRY

Outlined below are the stated positions of the Productivity Commission in this Inquiry thus far. As stakeholders, even if we were to accept each flawed position – and it should be noted that we don't – that instantly prompts further questions. These persistent issues require resolution, as they are fundamental to the Inquiry's purpose and, more importantly, to the effectiveness of the policy and regulatory environment in which airports and their customers operate.

Initial (flawed) positions of the PC

Outstanding issues for the Inquiry

<p>Monopoly airports should not be subject to regulation as protection against the <i>potential</i> for exercise of market power.</p> 		 <p>This does not acknowledge the existing, historical evidence that airports <i>have already been exercising</i> market power.</p>
<p>Evidence on airport profitability is either insufficient or does not demonstrate the exercise of market power.</p> 		 <p>This fails to recognise and properly consider the <i>other ways that market power can manifest</i>.</p>
<p>There are remedies available under the current regulatory regime to address any market power abuses by airports.</p> 		 <p>This ignores the clear evidence on the <i>inaccessibility & ineffectiveness</i> of existing remedies and fails to consider more <i>efficient & cost-effective</i> mechanisms.</p>
<p>A negotiate-arbitrate regime for airports risks being too complex and open to gaming and investment uncertainty.</p> 		 <p>This lacks acknowledgement of the facts: an <i>industry-specific regime with arbitrator guidance</i> can overcome such concerns.</p>
<p>The current regime is largely working well to achieve Government policy objectives. No justification for significant change to the current form of regulation.</p> 		 <p>The validity of these conclusions is questionable, given the process used to reach them would not meet Government standards for regulatory review.</p>

What the summary above shows is that, in order to arrive at the conclusions the Commission has reached, stakeholders are forced accept a whole series of propositions that are not supported by evidence nor expert advice, and are underpinned by processes that do not represent best practice. Given the issues that remain, there is a strong rationale for further work to be undertaken prior to the Productivity Commission handing its Final Report to Government, particularly when there are proposals on the table that have not been properly considered.

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BEST PRACTICE POINT ONE: REGULATION OF MONOPOLY INFRASTRUCTURE

The potential for market power exercise should be enough to warrant regulatory protection for consumers and society.

This is the widely-accepted position held by many economists, the ACCC and other local and international regulators. As ACCC Commissioner and AER Board Member Cristina Cifuentes has said, “Where there remains a potential for likely market failure and public detriment, there remains a need for consumers to be protected through appropriate regulation.”¹⁴ As a former ACCC Commissioner himself, now Productivity Commissioner Stephen King made submissions on this basis to previous Airport Inquiries; and even following that term, opined that “If competition is not possible then the privatised business needs to be regulated so that it cannot exploit its market power.”¹⁵

Interpreting the Draft Report and subsequent commentary, however, it is clear to Inquiry participants that the Productivity Commission has taken an entirely different view; one in which regulation is viewed as a penalty for airports, rather than a potential remedy, to be accessed in the event of market failure through market power exercise.¹⁶

Adopting what has been described as a “philosophical position” regarding the regulation of Australian airports, the Commission suggested that unless or until the exercise of market power has been demonstrated to the detriment of the community, subjecting the airports to any form of regulatory constraint would be “unfair”. To make provision for such a remedy as protection for consumers against the *potential* exercise of market power, would apparently be to unfairly deem all the airports “*guilty until proven innocent.*”ⁱ

This brings us to the first stated position of the Commission, and the issues that persists as a result:

Initial position of the PC:

Monopoly airports should not be subject to regulation as protection against the *potential* for exercise of market power.



Issue for the Inquiry:

This does not acknowledge the existing, historical evidence that airports *have already been exercising* market power.



What is shown here is that, even if the Commission is expecting us all to accept that the concept of regulation to protect against *future* exercise of market power by airports is somehow “unfair”, it still leaves unanswered the question of how the persistent, *historical* exercise of market power ought to be addressed. Not only does evidence of this market power exercise exist, but it has been provided to the Commission already by numerous parties. It has thus far been largely ignored.

ⁱ This commentary was made by Commissioner Professor Stephen King, at a *Policy in the Pub* session on Economic Regulation of Airports, hosted by the Economic Society of Australia (VIC Branch) on 20 March 2019.

This body of evidence includes, but is by no means limited to:

- 25 + submissions (both public and confidential) from international, domestic, regional, full service, and low-cost airlines (including Qantas, Virgin Australia, Regional Express, Jetstar, Air New Zealand and international airlines represented by BARA and IATA) outlining the comparatively high cost of Australian airport charges – as both a portion of airlines’ operating costs, and in comparison to international experience;
- Submissions from the Australian Finance Industry Association (AFIA), on behalf of its rental car operator members, providing data highlighting the fact that 9 out of the top 10 most expensive airports in the world for rental car operators are in Australia – more expensive than Heathrow, LAX or Paris-CDG.¹⁷ Their submission also showed that in Australia, rental car companies are in some cases charged up to seven times more to operate at airports compared with city locations.¹⁸
- A number of off-airport carpark operators – including Andrew’s Airport Parking and Jetport – noting that they were subject to significant fee increases with no consultation^{19,20}; and
- A submission from the Essential Services Commission (ESC) describing a situation in which airports can unilaterally increase access fees for taxi operators; with Melbourne Airport imposing almost a three-fold increase in rank access fees over a two-year period.²¹

Furthermore, a number of economic analyses were referenced in various submissions made by A4ANZ and others, including:

- The ACCC’s submission to the Inquiry which noted that the monitored airports have significantly raised aeronautical charges to airlines over time with the increases across the four airports over the last decade representing an additional \$1.3 billion in payments from airlines – and that despite these significant increases in charges, the quality ratings for most monitored airports have changed little over this period;²²
- The Grattan Institute’s 2017 publication *Competition in Australia - Too little of a good thing?*, which highlighted that the “super profits” of the 4 major airports dwarfed those made by the Australian banking sector²³;
- Leigh Fisher data included in a submission from the Department of Infrastructure, Regional Development, and Cities, showing that Australia’s four monitored airports held four of the top five spots in the world for operating profit per passenger²⁴;
- Analysis from Frontier Economics on both the financial performance²⁵ and market power of Australia’s airports²⁶, which demonstrated sustained super-normal returns across the four monitored Australian airports; and
- Analysis from Cambridge Economic Policy Associates provided as part of the Qantas Group’s confidential submission to the Commission.

We strongly urge the Commission to re-examine the substantial evidence it has received; not only from airlines, but also from landside operators, consumers, experts and independent regulators such as the ACCC. Many of the recent submissions to the Commission have made similar pleas.²⁷ Even recognising the limitations of the available data, as we have previously done, the collective information demonstrates persistent patterns over time, and provides clear evidence of Australian airports’ ability to exercise their market power through monopoly pricing.

Perhaps most importantly, it is the presence of this evidence that meets the Commission’s own stated criteria for properly investigating alternative proposals, and makes a strong case for considering reforms.

BEST PRACTICE POINT TWO: MARKET POWER ASSESSMENTS

The assessment of market power exercise should not depend solely on the use of performance parameters such as excessive profits.

Dismissing the evidence and analysis listed in the previous section, the Commission simply argued that its view was that it was inappropriate to measure returns across the whole of an airport. Rejecting the economic analysis from Frontier Economics, CEPA, Leigh Fisher, the Grattan Institute and the ACCC, the Commission instead took the view that, when using the dual till approach, aeronautical returns were *not* excessive and that there was insufficient evidence to determine the status of returns on landside areas.

This now takes us to the Commission's next assertion and the issues that it gives rise to.

Initial position of the PC:

Evidence on airport profitability is either insufficient or does not demonstrate the exercise of market power.



Issue for the Inquiry:

This fails to recognise and properly consider the *other ways that market power can manifest*.



As the ACCC noted in its submission to the 2006 Productivity Commission Inquiry, the use of price and profitability of Australian airports alone is not a sufficient basis on which to establish whether airports have misused market power or not. The ACCC provided their expert opinion that further analysis – to include other domains of market power – are necessary to form a conclusive view.²⁸

This was not a view unique to the ACCC, however. A 2004 publication by Professor King and colleagues was critical of the lack of “thoughtful examination” of market power outside of pricing, and the avoidance of considering a firm’s *conduct* in determining market power exercise. As the authors argued, the degree to which a firm is able to make decisions unilaterally – and we have seen many examples of this with monopoly airports – is an important consideration from both a legal and economic perspective. *“If a firm is able to act with some degree of freedom from the constraints of competitors, suppliers and customers, then this conduct should be deemed to be evidence of market power.”*²⁹

We would therefore strongly encourage the Commission to carefully re-examine the depth and breadth of evidence provided by airport users in the now 100+ submissions, including – but by no means limited to – the following examples of market power exercise by monopoly airports, through their conduct:

Insertion of clauses in customer contracts prohibiting access to dispute resolution mechanisms

The fact that that some airports had inserted clauses invoking punitive measures or prohibiting airlines’ access to declaration provisions in the National Access Regime was acknowledged by the Commission. The very insertion of

these clauses and the expectation that airlines will sign contracts containing them represent a gross abuse of market power and ought to have been clearly called out and characterised by the Commission as such.

All the Draft Report had to say on this matter, however, was that these clauses “*have no place in agreements*” between airports and their customers, and that their presence could reduce the effectiveness of the regulatory regime.

This is of course an extreme understatement and in fact a misrepresentation of the facts: with the threat of declaration removed, the airport faces no threat, and can behave as it wishes. It leaves the airport subject to no regulation whatsoever.

Not consulting with customers on capital projects which increase charges

The Commission was provided with results from a 2017 survey which confirmed that fewer than half of regional airports (~ 45%) consult with airlines prior to “*major capital works entailing increased airport charges*”³⁰, with the concept of genuine, open consultation and co-design representing exceptional, rather than usual behaviour in Australia’s airports.

The same survey noted that increased charges are often levied with little forewarning, with an overwhelming majority (86%) of regional airports admitting that they only give airlines three to six months’ notice of changes to airport charges³¹, often after tickets have already been sold.

Substantial evidence from airlines was provided outlining how regional airports impose significant increases in head taxes as a way to account for inappropriate and unnecessary capital expenditure;³²

How this behaviour could be interpreted as anything other than a manifestation of market power is hard to fathom. A business operating in a competitive environment could not afford to simply issue increased invoices and expect no consequences.

Withholding information from customers on planned expenditure

In addition to the breadth of evidence already provided to the Commission by A4ANZ and its member airlines, a further example of the way in which airports exercise their market power through information asymmetry was provided during the public hearings. This example outlined how an Australian airport provided an airline with a large price range for a capital project to be anywhere between \$83M and \$127M, with further details only to be provided *after* the airline had signed the contract.³³ This of course left the airline with no ability to scrutinise whether the proposed expenditure was reasonable or represented an efficient investment. All the power sat in the hands of the monopoly airport operator.

More recently, a regional airport issued airlines with a unilateral 36 per cent increase in passenger charges; the expectation clearly being that the airline should simply absorb the costs even when route economics remain unchanged.

The fact that these examples of market power exercise occurred *during* the current Inquiry certainly demonstrates the total weakness in the argument that the Commission’s periodic reviews create a credible threat of consequences for airports or act as some kind of constraint on their behaviour.

Failing to meet customer service standards and expectations

BARA cited evidence from international airlines of unsatisfactory airport service outcomes, despite the high prices they were being charged.³⁴ This was in addition to evidence already provided, including on consumer reviews of Australian airports in comparison to international counterparts.³⁵

Airport market power exercise extending beyond their airline customers

Despite the Commission contending that a paucity of evidence of market power exercise in landside areas did not allow them to identify exercise of market power, it has thus far chosen to ignore what was provided in submissions, not only in this Inquiry but earlier ones. We would urge the Commission to reconsider the evidence, including, but not limited to, the following:

- A follow-up submission from AFIA which provided evidence of poor negotiating behaviour from an airport, including an example of a “take it or leave it” offer³⁶;
- Off-airport carpark operators – including Andrew’s Airport Parking and Jetport – noting the lack of consultation over fees and pick-up locations^{37,38}; and
- The publicly reported story of hire car driver who was involved in a court case with an airport for more than two years over a \$426 fine, in which the lawyer noted that “*there is no comparable example to the powers given to airport operators*”.³⁹

It is hard to conceive how any of these behaviours outlined above could be interpreted by the Commission as anything other than a manifestation of market power by airports. What other type of operator other than a monopolist with no regulatory constraint – nor any fear of regulatory constraint – could afford to treat its major customers in such a way?

The Draft Report and subsequent public hearings make it clear that the Commission has overlooked or brushed aside these non-financial, but equally significant displays of market power by airport operators. Had the Commission adopted a more rigorous analytical approach to assessing market power (such as in Fig. 1 below), it would likely have arrived at very different conclusions and for a far broader range of airports, as the terms of reference allowed.

Figure 1 - How the indicators of market power exploitation are related



Source: Frontier Economics

BEST PRACTICE POINT THREE: EX-POST REGULATION OF MONOPOLIES

Deterrent regimes rely on the regulatory threat being credible, in order to constrain monopoly behaviour.

The Inquiry naturally turned its attention to the remedies ostensibly available to airport users under the current regime to constrain the exercise of market power by monopoly airports. Despite the fact that they had received expert advice and had examples of precedents to the contrary^{40,41,42}, the Commission formed the view that existing remedies including Part VIIA Price Inquiries, declaration under the National Access Regime, future Productivity Commission Inquiries, and litigation, all represented potential remedies available to airport users or Governments to take action if airports are found to be abusing their market power.

This brings us to the Commission's next argument and the obvious issues that remain outstanding.

Initial position of the PC:

There are remedies available under the current regulatory regime to address any market power abuses by airports.



Issues for the Inquiry:

This ignores the clear evidence on the *inaccessibility & ineffectiveness* of existing remedies and fails to consider more *efficient & cost-effective* mechanisms.



There are continued assertions – yet no evidence – from airports and the Commission alike, that the existing provisions (listed above) act as a credible threat to somehow constrain airport behaviour.

We respectfully submit that this is a view that is soon likely to be unique to the Commission and those who wish to retain their unregulated monopoly standing. It was not a view shared by the Australian Competition Tribunal in its decision on Sydney Airport⁴³, nor by Michael O'Bryan QC⁴⁴, nor the ACCC, nor the AEMC. As Rod Sims has said,

*“Monitoring alone is not enough to constrain the behaviour of companies with significant market power, such as airports.... Our proposal for independent arbitration is a pragmatic solution for resolving disputes between airports and airlines.”*⁴⁵

Similarly, the recent AEMC report stated that *“a ‘lighter’ overall form of regulation (such as price monitoring and reporting) would be unlikely to be appropriate [for monopoly pipelines] as it would be unlikely to provide a sufficient constraint on the use of market power by service providers or provide sufficient assistance in negotiations.”*⁴⁶

Despite this, Productivity Commissioners repeatedly asserted that the light-handed regime, with an inherent threat of their action – that they would not hesitate to recommend increased regulation – was sufficient to create such a constraint for airports.

Commissioners noted in the public hearings that, “*If we found evidence of an exercise of market power, we would not hesitate in recommending more regulation*”.⁴⁷ They did not specify which form that would take, an issue raised by other Inquiry participants.^{48,49}

Furthermore, the Commission offered no comparative analysis of the existing regulatory remedies against others. In addition to insights and analysis already provided, we take a look at each of the existing “remedies” below.

Part VII Price Inquiries

If a Part VIIA price inquiry into airport services were to occur, any argument that such an inquiry would, of itself, constrain airport conduct is very weak, for the following reasons (as noted in A4ANZ’s original submission to the Inquiry), including:

- the fact that Price Inquiries are resource-intensive and time-consuming, meaning that there is likely to be a significant delay between the identification of inappropriate conduct and recommendations, let alone implementation of stronger regulatory measures or other forms of penalty;
- the potential benefits of the public inquiry process appear to have been replaced by Productivity Commission reviews of airport regulatory arrangements (in 2002, 2006, 2011 and current). In these circumstances, it is difficult to see what additional, meaningful constraint could result from the “possibility” of a public price inquiry; and
- while the ACCC must give the Minister a report on the results of each Inquiry, it has no independent authority to implement any recommendations made. In this context, the airports are already well-aware of the distinct lack of Government engagement. For example, in both 2006 and 2011 the Commission recommended an enhanced “credible threat” in the form of a “show cause” mechanism.⁵⁰ In the first instance the proposal was abandoned and in the second case, the Government concluded such a process was “... *not warranted, as the ACCC already has the ability under the current regulatory framework to seek additional information from airports if the ACCC considers this necessary*”.⁵¹

In our original submission, A4ANZ referenced advice on this issue from Margaret Arblaster,ⁱⁱ who argued that Part VIIA Price Inquiries are not an appropriate regulatory solution in this context. It is broadly agreed that the potential for the Australian Government to use either price restrictions, or price inquiry provisions as a threat of a stronger regulatory action against airport market power is neither credible nor desirable.

It is of note that A4ANZ, and airlines are not the only participants with this view – both Ms Arblaster and the ACCC have noted the significant cost burden of a price inquiry, with no obvious benefits, particularly when weighed against alternatives. Ms Arblaster further explained this in her comments at the hearing and in a recent submission to the Commission.⁵²

Declaration under Part IIIA

As A4ANZ has noted previously, for non-vertically integrated monopolies such as airports, declaration via Part IIIA of the Competition and Consumer Act no longer represents a credible regulatory threat. This was confirmed in advice from Michael O’Bryan QC⁵³, Johnson Winter & Slattery⁵⁴ and Gilbert & Tobin⁵⁵ – all of which was presented to the Commission prior to its draft report being published. Bafflingly, the Commission rejected this advice and instead accepted the sole supportive proposition, put forward by DLA Piper⁵⁶, whose opinion was completely contradicted by the NCC’s preliminary views on the Port of Newcastle in December 2018.

ⁱⁱ Ms Arblaster is a well-published regulatory expert with significant experience in the Australian and international aviation industry.

In accordance with both our initial and subsequent submissions to the Commission, we believe that the 2017 amendments to the CCA, specifically to declaration criterion (a), *will* have a negative effect on an airline's ability to obtain declaration, and ultimately arbitration of terms, under Part IIIA. A4ANZ also sought further, independent legal opinion from Mr Michael O'Bryan QC.ⁱⁱⁱ Mr O'Bryan's full advice was included as an appendix to A4ANZ's supplementary submission,⁵⁷ and it concludes that, following changes to criterion (a), with effect from 6 November 2017, it will be more difficult to satisfy the new criterion (a) in the case of non-vertically integrated natural monopolies, such as airports.⁵⁸

During the public hearings, Commissioners' cited both the successful declaration of Sydney Airport, and the withdrawn declaration application for Melbourne Airport as successes of the current regulatory regime. We find it curious that the Commission appeared to accept without scrutiny and indeed repeat the airports' contention that the fact that the previous 17 years had produced one declaration case and one court case was evidence of a successful regime.⁵⁹

Surely it is not beyond comprehension that the costly, protracted nature of these processes, not to mention the fact that they are expressly prohibited in some airport contracts, might act as a significant disincentive for the airlines to pursue these avenues and that *this* is in fact the reason for the absence of historical cases?

Both airports and airlines are fully aware that the threat of an application for declaration is nothing more than a paper tiger. Yet the entire airports regulatory regime is predicated on this being a credible threat to constrain monopoly airport behaviour.

Further Productivity Commission Inquiries

The idea that the impending threat of a Productivity Commission Inquiry in some five or six years' time, and the apparent countervailing power of airlines, would sufficiently constrain airports' exercise of market power ought to have conclusively been put to bed following the SACL declaration decision by the Australian Competition Tribunal back in 2005.

The final determination said, "*We are satisfied that the ability of SACL to exercise monopoly power in relation to the airlines' use of the Airside Service is not subject to any effective constraints. We do not consider that the airlines have any significant countervailing power, or that the threat of re-regulation by the Commonwealth Government is an effective constraint upon SACL, or that SACL's ability to derive non-aeronautical revenues operates as a sufficient constraint on SACL's monopoly power.*"⁶⁰

The fact that reviews are only undertaken every 5 years, hardly creates a credible threat to constrain airport behaviour. Indeed, some of the examples provided at the public hearings were of monopolistic airport behaviour that had occurred *during the Inquiry period*.

Yet in this Draft Report, the decades-old myth persists. The Commission claim that the "*ongoing potential for such consequences [tighter regulation] acts as a deterrent against the exercise of market power.*"

Not only is this statement fundamentally untrue, but to see the Commission making it in the face of significant evidence from a wide range of airport users to the contrary, serves to further highlight the stark contrast between the Commission's perspective and others such as the ACCC, who have a deep understanding of the challenges of monopoly infrastructure and the importance of effective regulation to mimic the effects of a competitive market.

ⁱⁱⁱ Mr O'Bryan QC was a member of the panel appointed by the Commonwealth Government in 2014 to conduct a review of Australia's competition laws and policy (now known as the Harper Review), which resulted in the enactment of the Competition and Consumer (Competition Policy Review) Act 2017.

Litigation

Contrary to the rather incredible – and baseless – claim made at the Public Hearings that “*the courts are actually faster, more cost effective in bringing that certainty to a conclusion [than arbitration]*”⁶¹ – the evidence from other sectors indicates that an appropriately designed negotiate-arbitrate regime provides an efficient, timely process for dispute resolution.

As noted earlier, in the 20 months since the new National Gas Rules became operational in August 2017, there has been only one dispute referred for arbitration.⁶² This is of course the purpose of such a regime; it is intended to incentivise parties to reach agreement, before they need to resort to arbitration.

In this case, the single access dispute was referred to the arbitrator by the Australian Energy Regulator (AER) on 29 November 2017, with the final access determination made 12 April 2018 – a period of just over 4 months (which included the Christmas/New Year period) from referral to final decision.⁶³ Perhaps even more important to note is the fact that just 2 weeks after the final determination, on 26 April 2018, the shipper gave notice that it wished to enter an access contract in accordance with the final access determination.⁶⁴

None of this reflects the drawn-out, costly scenarios being painted by those who wish to retain the status quo.

Furthermore, in most OECD countries there has been a trend towards the conglomeration of industry regulation to sectoral specific regulation as infrastructure regulatory regimes have evolved over the past 10 to 15 years.⁶⁵ This leads participants in this current Inquiry to again ask the question – why has the Commission seemed thus far so unwilling to properly examine the weaknesses of the existing regulatory regime and to explore the potential benefits of carefully-considered alternatives?

BEST PRACTICE POINT FOUR: FACILITATING COMMERCIAL NEGOTIATIONS

Private agreement between access seekers and infrastructure service providers should be underpinned by binding arbitration in the event parties cannot reach agreement.

This sensible, pragmatic proposition was recommended by the Hilmer Committee when devising a revised framework for Australia’s national competition policy.⁶⁶ It is the approach that now underpins much of the work of the ACCC and other regulators, and it accords with standard commercial practice in other sectors and settings. As the AEMC recently found,

“the negotiate-arbitrate regime represents an appropriate balance between the direct and indirect cost of regulation on the one hand and the ability for the regulation to constrain market power on the other.”⁶⁷

Extensive analysis, consultation and expert advice led to these findings, now well-accepted by regulators. A4ANZ well understands that neither the Australian airports and their investors, nor the Productivity Commission support changing the approach to regulation of Australian airports. The reasons for rejecting a negotiate-arbitrate regime for airports and their customers, however, appear to be based not on considering the evidence in the way that other sectors have done, but instead on hypothetical scenarios that have not been subject to scrutiny and have very little basis in reality.

This leads us to the next flawed assumption from the Commission, and the issues that persist as a result.

Initial position of the PC:

A negotiate-arbitrate regime for airports risks being too complex and open to gaming and investment uncertainty.



Issues for the Inquiry:

This lacks acknowledgement of the facts: an industry-specific regime with arbitrator guidance can overcome such concerns.



The focus of A4ANZ’s work has always been to find the simplest, most pragmatic solution to deliver the outcome required; that is, to have a credible threat of arbitration to facilitate commercial negotiations between airports and airport users, on reasonable terms and conditions.

Unsurprisingly, after significant research and consultation with other industry stakeholders, regulatory and economic experts both in Australia and globally, A4ANZ and others reached the conclusion that a more effective alternative to the current regime is to create an industry-specific regulatory model.

It is of note that throughout the public hearings held by the Commission, a negotiate-arbitrate framework was repeatedly referred to by Commissioners solely as “A4ANZ’s proposal” rather than an alternate regulatory option

for consideration.^{iv} Through this mischaracterisation, the Commission had seemingly overlooked the fact that the ACCC had and continues to be a proponent of the proposal for introducing an option for parties to access commercial arbitration⁶⁸, not to mention other parties to Inquiry whose submissions were on the public record.⁶⁹ It is perhaps most intriguing that the Commission chose to not to recognise advice from the administrator of the current regime, instead proposing enhancing the monitoring currently conducted by the ACCC as a potential solution to addressing airports' market power.

It is also important to note that submissions to the Commission's Issues Paper and response to the Draft Report had already outlined the following:

- evidence that the existing regime does not facilitate commercial negotiations;
- the need for an appropriate and accessible dispute resolution framework;
- the justification for a sector-specific approach;
- analysis of why objections to a change in regime are unfounded and overstate concerns regarding risk and uncertainty; and
- evidence that regulatory regimes can and do deliver efficient investment.

Rather than repeat these arguments, however, we would encourage the Commission to thoroughly and carefully re-examine previous submissions – given that many respondents have commented on the Draft Report's inadequacies in regards to the consideration and analysis of information already provided.⁷⁰

A4ANZ has previously provided the Commission with detail regarding the proposed arbitration framework, potential framework characteristics, and how such a framework could be implemented. It was disappointing that this information had not been appropriately considered by the Commission prior to the hearings. Many of the questions asked by Commissioners during the public hearings highlighted the fact that these details had been overlooked.

Notwithstanding this, we are happy to respond to the Commission's request to provide additional detail these aspects.⁷¹ A4ANZ would like to stress that this information has been included for information and further discussion – we would encourage the Commission to also undertake its own analysis and investigation – as there are a significant number of examples to draw on in the Australian and global environment.

This section of our submission covers provisions for the application of the framework and potential processes and guidance for any arbitrations that may result. The options and our rationale in offering them for consideration by the Commission are discussed in two parts; firstly, an outline of the practical aspects of how an arbitration framework could operate under an airport-specific regulatory regime, and secondly, how the proposed regulatory regime could be implemented, via amendments to the *Airports Act 1996* and *Airports Regulations 1997*.

Importantly, we address the issues the Commission and others raised with a proposed negotiate-arbitrate framework, and outline what effective change would look like – with a clear focus on the minimum change required to create an effective policy and regulatory framework for Australia's airports and the community.

^{iv} See [transcripts from the Productivity Commission's Public Hearings](#) in both Sydney and Melbourne.

PRACTICAL CONSIDERATIONS FOR AN INDUSTRY-SPECIFIC ARBITRATION FRAMEWORK

Reading through the unprecedented number of submissions in response to both the Productivity Commission's Issues Paper and Draft report, it is clear that two of the principal issues for airport users are the information asymmetry between parties and the significant negotiating advantage conferred by the monopoly position of airport operators.⁷²

To address these and other issues in accordance with the prevailing perspectives on best practice regulation outlined previously and above, this section of A4ANZ's submission sets out a potential industry-specific negotiate-arbitrate framework for airports. Its objective is to give effect to a pathway for binding commercial arbitration to facilitate efficient commercial solutions, while avoiding unnecessary regulatory burden through retaining a light-handed approach.

Commercial arbitration is a common, standard method of resolving disputes in commercial settings and is included in regulatory regimes for other important national infrastructure such as telecommunications and gas pipelines. It is not an unreasonable request that airports and their customers should have the same circuit-breaker available to them in the event that commercial negotiations break down, so that either party can access arbitration.

In putting forward this framework, A4ANZ has sought to suggest the minimum change possible to provide an effective pathway to arbitration in the case of disputes and negotiation breakdowns between airports and their customers.

Firstly, however, we address the concerns raised by the Commission and others about this approach, and explain how our proposal actually overcomes these potential issues.

Concerns raised about a negotiate-arbitrate framework for Australian airports

We have grouped the major arguments raised against a negotiate-arbitrate regime from submissions, testimony at the public hearings, and direct commentary from Commissioners themselves, into five broad categories: investment risk, gaming, competition, complexity and public interest.

In almost all cases, the arguments have been premised on hypothetical scenarios and an assumption that arbitrations *would* occur, rather than the very existence of the regime acting as a credible threat to drive parties to reach agreement. As we have highlighted since the start of this Inquiry, all of the evidence about such regimes points to their existence acting as an *incentive* for parties to reach agreement, without referral to arbitration. And this has been borne out in practice; not only in the 11th-hour agreement brokered between Sydney Airport and Virgin Blue, but in other sectors such as the gas code, where just one case of arbitration has been undertaken in over 20 months, despite over 50 pipelines being covered by the regime.

Moreover, as Commissioners heard in testimony at the Public Hearings, Sydney Airport was declared for a period of five years, and in that time open for applications for arbitration by the ACCC.⁷³ Not one arbitration was completed during that five-year period; parties were instead incentivised instead to reach agreement.

Nevertheless, we have summarised the key concerns expressed by Commissioners and others, and facts that address these concerns below. We respectfully request that this be read together with our earlier submissions⁷⁴, so as to limit the repetition of text in this document.

Investment uncertainty

Claim: If there was a change to the regulatory regime, investor groups would withdraw from airports, and important capital investment by airports would be at risk.

Arguments were made during the hearings that to change the regulatory environment for airports in any way would be a material matter which would have significant impact on investors.⁷⁵

This is not a new concern; the same issue was raised in the review of the gas code by Infrastructure Partnerships Australia.⁷⁶ As we noted in our earlier submission, however, Dr Michael Vertigan and Committee, the COAG Energy Council and the Federal Government all reached the conclusion that the perceived risks were able to be mitigated by appropriate provisions in the framework. It was therefore surprising and disappointing to find that the Productivity Commission appeared unaware of or unconvinced by this, despite the comprehensive analysis and consideration of stakeholder perspectives undertaken in the Vertigan Review. We urge the Commission to take another look at this substantial – and highly relevant – body of work.

In fact, there are many similarities between the pricing principles detailed in the National Gas Rules⁷⁷ and the Aeronautical Pricing Principles; the latter which A4ANZ and others have proposed should be adopted as part of a negotiate-arbitrate framework to guide both negotiations and arbitrations, and seem broadly acceptable to most parties. The principles state that prices should:

- be set so as to generate expected revenue for a service or services that is at least sufficient to meet the efficient costs of providing the service or services;
- include a commercial return on investment that is commensurate with the market for funds and reflects the regulatory and commercial risks involved in providing the service; and
- reflect a reasonable sharing of risks and returns, as agreed between airports and their customers (including risks and returns relating to changes in passenger traffic or productivity improvements resulting in over or under recovery of agreed allowable aeronautical revenue).

An arbitrator would need to take all of the above into account in the event of a dispute. Even without an arbitration, parties are incentivised to negotiate agreements according to these principles. It seems hard to argue, therefore, that investment would be put at risk under either scenario.

Given some investors' contention that that airports currently deliver returns that are less certain and less predictable than other forms of infrastructure⁷⁸, one might argue that this type of regime in fact creates a more desirable outcome for airport investors than the status quo.

This is indeed borne out in practice, as we showed in our earlier submissions which included international airport case studies.⁷⁹ It is also worth noting that the view from analysts when similar reforms were introduced into the gas sector, was that the negotiate-arbitrate framework, “[did] not fundamentally alter investment [cases]”, and it “seemed to strike a reasonable balance between the interests/needs of the shippers and the pipeline operators”.⁸⁰

While there are legitimate concerns around airport infrastructure investment that do need to be acknowledged and provision made to mitigate risk (as we have indicated above), raising the spectre of investment risk in an alarmist manner is at best a purely hypothetical exercise and, at worst, an attempt to protect the excessive returns and “unregulated revenue streams in a monopoly environment” enjoyed by airport investors.⁸¹

Claim: If one airline doesn't think investment is necessary, but the airport, and other airlines do, that one airline may have incentive to delay investment in capacity so as to collect 'scarcity rents.'

Under current arrangements, it cannot simply be presumed that airports are investing the right amount on the right things, at the right time. Everything we collectively know about monopolies in fact suggests that Australian airports face *disincentives* to invest efficiently, and the Commission has in front of it several examples which clearly illustrate this in practice.⁸²

As Frontier Economics outlined in an earlier submission, the economic literature supports the fact that when an airport has market power, it faces several incentives that reduce the efficiency of investment, including;

- Airports may have an incentive to underinvest, as this would allow the service provider to increase profitability by justifying and charging scarcity rents. As noted above, this reduces consumer surplus and results in welfare loss for society.^v
- Airports may have an incentive to undertake inefficient investment by spending resources to obtain or protect a monopoly position ("rent seeking" behaviour).⁸³
- Airports may not chase productive efficiencies that minimise its costs (or lead a 'quiet life'). A lack of competitive pressure may reduce the incentive for the firm to look for way to minimise costs by adopting cost-saving or innovative technologies.⁸⁴

Importantly, and as discussed in further detail later on in the sections of this document dealing with competition and complexity, arbitration frameworks can state that when making a determination an arbitrator must consider:

- the legitimate business interests of the service provider; and
- the interests of *all* persons who have rights to use the airport (this could include other airlines and other airport users i.e. travellers)

'Gaming' by airlines or other airport customers

While no party at the Public Hearings was able to articulate what "gaming" by airlines would actually entail – the concept was raised by investors, airport operators and the Commission within two contexts – the potential gaming of negotiations and the gaming of the eventual arbitration process.

Claim: Airlines will 'game' negotiations as access to arbitration removes the incentive to negotiate in good faith.

Far from the removal of an incentive, negotiate-arbitrate frameworks are in fact specifically designed to incentivise parties to negotiate in good faith, rather than relying on arbitration which comes with risks for both parties.

As outlined in our previous submissions, this accords with international experience and local precedents. Where commercial processes are working effectively, resorting to arbitration will be undesirable and rarely the preferred option; and this has certainly been the experience with the new gas rules, with one arbitration in the 20 months since the new rules came into effect.

By contrast, there are few, if any, incentives for monopoly infrastructure owners to engage in good faith negotiations under the current regime. As noted in recent submissions to the NCC⁸⁵, having such a high threshold

^v There is a body of literature on the risk that monopolies will defer investment or under invest in capacity expansions. Dobbs (2004) found that firms with monopoly power who are able to control the scale of their investments will under-invest and will wait too long before adding to such investment. Consequently, prices to final customers are always higher than in competitive markets. .

for declaration under the National Access Regime acts as a disincentive to infrastructure operators to provide access on reasonable terms and conditions, as the likelihood of their customers seeking declaration is virtually non-existent.

When compared to time-unlimited negotiations, enabling access to arbitration within a framework that involves time and information transparency requirements is far more likely to lead to a timely, and therefore lower-cost resolution of any disagreements, than under the status quo.⁸⁶

Claim: Airlines will ‘game’ the arbitration process by putting in a ‘low-ball’ offer.

The rules or guidelines of a negotiate-arbitrate regime can and do specifically discourage and control for this risk. As Dr Vertigan noted in his final report to COAG, the framework was “*designed for expeditious resolution of the dispute with provisions to avoid delay and gaming. Structures such as final offer arbitration (FOA) could be considered.*”⁸⁷

The Options Paper designing the gas rules suggested that if the arbitrator believes a fair and reasonable settlement lies between the disputant’s final offers, the rules of FOA can be used (where the specific aspects to be decided by the arbitrator are suitable for such), and if it falls outside the range provided by the final offers, conventional arbitration rules are used.⁸⁸

As Commissioners and other parties to the Inquiry would know, this is in fact one of the key reasons A4ANZ has been recommending the Commission consider the inclusion of FOA in any proposed arbitration framework; the procedure forbids the arbitrator from ‘splitting the difference’ between two offers, thereby neutralising any incentive to be unreasonable, because the arbitrator is unlikely to choose the less reasonable offer. Essentially, it offers an incentive for both parties to put forward *more reasonable* bargaining positions.

This matter was well-covered by the Gas Market Reform Group, and we would again encourage the Commission to consider their work on this^{89,90}, before forming a final position about the airports sector.

Competition

Claim: If only one airline seeks arbitration, the arbitrator would not be able to take into account the interests of other airlines operating at the same airport to ensure they won’t be adversely impacted.

The objective of a negotiate-arbitrate framework is to facilitate access to airport services on reasonable terms, which is taken to mean at prices and on other terms and conditions that, so far as practical, *reflect the outcomes of a workably competitive market.*

One could readily argue that far from a risk, this represents an *improvement* on the status quo, in which there is no requirement for monopoly airport operators to consider competition in their negotiations with airlines or other customers. Negotiate-arbitrate frameworks are specifically designed to ensure that this *does* happen, either in the negotiations or as part of an (unlikely) arbitration.

In the National Gas Rules, for example, the principles guiding the arbitrator state that she/he is required to carefully consider these aspects in making a determination.⁹¹

This is reflected in Rule 546, by means of (emphasis added):

- requirements for the publication and exchange of information to facilitate timely and effective commercial negotiations in relation to access to non-scheme pipelines;
- *a commercially-orientated arbitration process to resolve access disputes in a cost-effective and efficient manner;*
and

- principles that the arbitrator must have regard to when determining access disputes, which are consistent with the outcomes of a workably competitive market.

It is further reflected in Rule 569, which states that when making the final access determination the arbitrator will also consider (emphasis added):

- the interests of all persons who have rights to use the pipeline;
- the value to the service provider of any extension or expansion of the pipeline the cost of which is borne by another person; and
- the value to the service provider of interconnections to the pipeline the cost of which is borne by another person.

In other words, provisions have been made to ensure that these aspects relating to competition must form part of the arbitrator's decision. In the following section on complexity, we also address the issue of common-user infrastructure provisions.

Complexity

Claim: Agreements between airlines and airports are so complex – no arbitrator would be able understand the complexities of them.

As we have indicated previously, under the proposal put forward by A4ANZ, a pool of appropriately-credentialed and experienced arbitrators would be available for parties to choose from – analogous to the pool of arbitrators identified by the AER.

An arbitration framework may also have a clause which allows parties to choose and agree upon an arbitrator. In an instance where there is no agreement by parties on their preferred arbitrator, the regulator may assign parties an arbitrator from the pool.

Agreements *are* complex, but experience has shown that it is unlikely that every aspect which forms part of an agreement between an airport and an airline (or indeed any airport customer) will be in dispute. Only those elements that have reached the stage of intractable disagreement would be referred to the arbitrator.

Again, when we contrast this to the current regime, which has given rise to a WA Supreme Court judge being asked to make determinations on matters over which she/he likely has no expertise and with no parameters to guide the decision, it must surely give the Commission good reason to question the credibility of the airports' arguments that engaging an experienced arbitrator would somehow be a *less* favourable option?

Claim: There would be no ability for the arbitrator to take into account the complexities associated with common-user infrastructure.

Arbitration frameworks are able to be, and in fact are routinely designed to take into account the complexities associated with common-use infrastructure; this is not a new concept. As mentioned above, under Part 23 of the NGR, the principles guiding the arbitrator state that when making the final access determination the arbitrator will also consider the interests of other users of the infrastructure.

Furthermore, additional pricing principles in Part 23 state that (emphasis added):

- the price for access to a pipeline service should reflect the cost of providing that service, including a commercial rate of return that is commensurate with the prevailing conditions in the market for funds and reflects the risks the service provider faces in providing the pipeline service; and

- when applying the principle to a pipeline service that when used affects the capacity of the pipeline available for other pipeline services and is priced at a premium or a discount to the price for a firm haulage service on the relevant pipeline – the premium or discount must be consistent with the price for the pipeline service providing a reasonable contribution to joint and common costs.

As A4ANZ has said now for some time, there is no reason why these principles, in addition to the ones on competition above, could not be adapted for an airport-specific framework.

Public Interest

Claim: An arbitration framework for disputes between airports and their customers does not allow for the views of the consumer to be taken into account.

As we have stated previously, there is nothing to prevent the welfare of consumers or public interest from being included in guidelines as an essential consideration for an arbitrator, in the event of a dispute reaching arbitration. This is of course what would occur if an arbitration was undertaken following a Part IIIA declaration of an airport, which specifies that the arbitrator (in that case the ACCC) must have regard to “*the public interest, including the public interest in having competition in markets (whether or not in Australia).*”⁹²

It was therefore surprising to hear contradictory claims from the Commission that an arbitrator “*would not consider the broader public interest, nor the interests of the numerous users of airports not subject to arbitration or not being party to arbitration.*”⁹³ These aspects can be written into the arbitration criteria, as they are in Part IIIA, and have been in the gas pipeline scheme – something the Commission has itself acknowledged in the Draft Report. We urge the Commission to take a second look and ensure that its statements are consistent with the facts.

Furthermore, given that all new proposals are meant to be assessed against the existing regulatory arrangements, it is worth noting that for all the concerns raised about the consumer voice not being heard, the *existing* Aeronautical Pricing Principles – which many, including the Commission, have said provide an appropriate framework for negotiations – do not have regard for the public interest.

It is also of note that the proposal for implementing a negotiate-arbitrate regime with *commercial* arbitration, as put forward by A4ANZ, the ACCC and others, is a commercially-orientated arbitration process to resolve intractable commercial disputes in a cost-effective and efficient manner. This is also the basis for the gas framework.

That said, we believe that the proposed negotiate-arbitrate regime has the potential to facilitate efficient commercial solutions while avoiding unnecessary regulatory burden – something which benefits all parties, be they airlines, airports, travellers, or the Australian taxpayer.

The cost-benefit analysis provided by Frontier Economics – even the most conservative estimate – puts the net benefit at almost \$450M.⁹⁴ The economists from Frontier addressed the Commission’s and others’ misinterpretation of this analysis in a subsequent submission⁹⁵ and evidence at the public hearings.⁹⁶

To completely ignore these potential economic gains as well as the estimated flow-on benefits from reduced administration costs from negotiations (for both parties), improvements in connectivity and travel time, and innovation, seems to represent a significant departure from due process by the Commission.

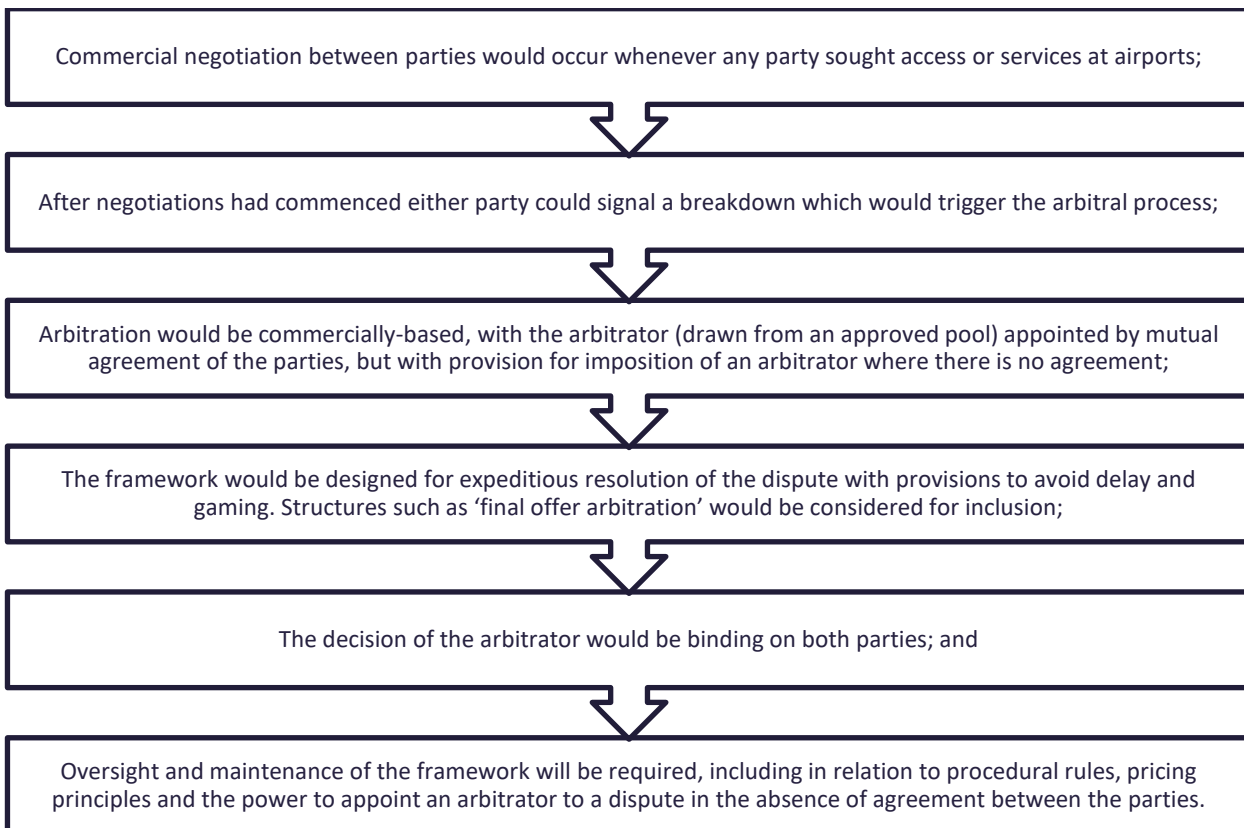
Later in this document, we discuss Government requirements and expectations in the process of undertaking regulatory reviews, and where the gaps remain for this Inquiry. In the next section, however, we move on to look at potential characteristics of a regulatory framework for airports.

Framework characteristics

Undoubtedly, the development of commercial relationships between airports and their customers would be encouraged by the existence of a credible ability to seek arbitration in the case of intractable disputes. The minimal change we have proposed not only acknowledges the concerns outlined above, and mitigates against unnecessary risks, but leaves airlines and airports free to negotiate agreements, with a clear pathway for commercial arbitration if required.

It simply provides an ability for any party to an agreement, arrangement or understanding (or any negotiations in respect of such an agreement, arrangement or understanding), relating to the provision of a service by an airport, to refer to commercial arbitration, with some guiding principles for the arbitration, should it occur.

As A4ANZ have stated previously, characteristics for an arbitration framework could include, but are no means limited to, the following:^{vi}



These framework characteristics would provide an effective and streamlined mechanism to resolve disputes according to agreed-upon standards, including existing pricing principles that are already in force, or equivalent principles,^{vii} and criteria which guide arbitrators in making their decisions.

^{vi} Adapted from the [Vertigan report](#)

^{vii} In an airport-specific regulatory framework, for disputes between airports and airlines, these could be drawn from the existing *Aeronautical Pricing Principles* and adapted as required, through a robust stakeholder consultation process. See **Appendix A**, for example.

Guidance for arbitrators

A list of draft principles has been included in **Appendix A** for consideration by the Commission and as a prompt for further discussion on guidance for arbitrators under an airport-specific regulatory framework.

We believe that, in addition to clear objectives and principles, the key to any arbitration framework is ensuring there are appropriate provisions regarding timeframes and information disclosure. These requirements and timeframes are specified in **Appendix B**.

Mandating these elements of the framework would lend greater clarity and efficiency to its operation, and, importantly, should allay concerns raised by the Commission and others about the complexity of the issues on which arbitrators may be asked to decide.⁹⁷

IMPLEMENTATION OF THE PROPOSED NEGOTIATE-ARBITRATE FRAMEWORK

This section covers the implementation of a potential negotiate-arbitrate framework via amendments to the *Airports Act 1996* and *Airports Regulations 1997*. We would again stress that this section has been included as an option for consideration – in no way is this example the only way a negotiate-arbitrate framework could be implemented. As stated previously, A4ANZ welcomes further discussion on this with the Commission and other key stakeholders, including and especially the Department.

Potential Amendments to the Airports Act 1996

Under *Part 13 – Access to airports and demand management at airports, Division 2 – Application of access regime in <new> Part 9 of the Airports Regulations 1997*, a new section 192A and 192B could be inserted (See Boxes 1 and 2).

The proposed Section 192A (Box 1) has been informed by IIIA of the CCA⁹⁸, Chapter 6A of the NGL,⁹⁹ and earlier iterations of S192¹⁰⁰, which have been removed altogether in the current Airports Act.

Instead of a focus on competition and declaration (as per Part IIIA and the previous S192), the new S192A aims to simply provide parties with access to an arbitration framework, which is then outlined in the new Part 9 of the Airports Regulations.

The draft Section 192B (Box 2) has been created to enable airports *outside* of Commonwealth control to under the proposed regime. Section 192B(2) aims to address jurisdictional and constitutional issues in a way that is in keeping with and has been informed by sections 3UL and 3UM of draft legislation by Home Affairs – the *Crimes Legislation Amendment (Police Powers at Airports) Bill 2018*.¹⁰¹

Box 1**New Section 192A Application of the airports access regime in <new> Part 9 (Draft)**

(1) This section contains provision for or with respect to seeking access to an *airport service* provided, or to be provided by means of a *core regulated airport*

(2) A prospective user or user seeking access to an *airport service* provided or to be provided by means of a *core regulated airport*, and the service provider, must negotiate in good faith with each other regarding the terms and conditions for the provision of access to the prospective user

(3) Subject to subsection (2), if a prospective user and a service provider cannot agree about 1 or more aspects of access to an airport service after a request has been made, the prospective user or service provider, may notify the scheme administrator, in writing, that an access dispute exists.

(4) If the scheme administrator receives notification of an access dispute under subsection (3), the dispute must be referred to arbitration

(5) The arbitration must be undertaken in accordance with the arbitration process and principles specified by Part 9 of the regulations.

(6) In this section:

airport service means a service provided at a core regulated airport, where the service;

- (a) Is necessary for the purposes of operating and/or maintaining civil aviation services at the airport; and
- (b) Is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated;

and includes the used of those facilities for those purposes.

scheme administrator means the Australian Competition and Consumer Commission (ACCC) each of the following airports is a ***core regulated airport***:

- (a) Sydney (Kingsford-Smith) Airport;
- (b) Sydney West Airport;
- (c) Melbourne (Tullamarine) Airport;
- (d) Brisbane Airport;
- (e) Perth Airport;
- (f) Adelaide Airport;
- (g) Gold Coast Airport;
- (h) Hobart International Airport;
- (i) Launceston Airport;
- (j) Alice Springs Airport;
- (k) Canberra Airport;
- (l) Darwin International Airport;
- (m) Townsville Airport;
- (n) an airport specified in the regulations, where the site of the airport is a Commonwealth place.
- (o) an airport determined by the Minister under section 192B

For the purposes of paragraph (n), the boundaries of the site of an airport are to be ascertained in accordance with the regulations.

For the purposes of paragraph (o), the Minister refers to the *Minister for Infrastructure, Transport and Regional Development*.

Box 2**New Section 192B Determination of airports (Draft)**

- (1) The Minister, may by legislative instrument, determine an airport for the purposes of the definition of core regulated airport in Section 192A(6).
- (2) This Division applies in relation to an airport determined under subsection (1) only if the airport is ordinarily used for the purposes of any of the following:
 - (a) flights that start or end in a Territory;
 - (b) flights between Australia and a foreign country in which aircraft are used in the course of trade or commerce, for the carriage of passengers;
 - (c) flights between one State and another State in which aircraft are used in the course of trade or commerce, for the carriage of passengers

Potential Amendments to Airports Regulations 1997

After reviewing the current *Airports Regulations 1997*¹⁰² – it was determined that a potential new section would fit best as a new Part 9, as Part 8 of the Regulations refers to Quality Monitoring only. It is therefore proposed that a potential new *Part 9 – Access to airport services* could be inserted, empowered by the new S192A of the Act (Box 1).

We have provided it in full at **Appendix B**, but key issues pertinent to the concerns raised by the Commission and others have been summarised below. The new Part 9 would include the following information (Box 3):

Box 3

Key inclusions in proposed *Part 9 – Access to Airport Services* (detailed in full at Appendix B)

- **Division 1: The objectives of Part 9 and preliminary matters including:**
 - The objective of this Part is to facilitate access to airport services on reasonable terms, which, for the purposes of this Part, is taken to mean at prices and on other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market.
 - This Part aims to contribute to achieving the objective by means of:
 - facilitating timely and effective commercial negotiations in relation to access to airport services;
 - a commercially-orientated arbitration process to resolve access disputes in a cost-effective and efficient manner; and
 - principles that the arbitrator must have regard to when determining access disputes, which are consistent with the outcomes of a workably competitive market.
- **Division 2: Provisions for access requests and negotiations.**
 - Outlines provisions for both parties to access appropriate information to enable them to negotiate in good faith.
- **Division 3: Provisions for the arbitration of access disputes.**
 - Outlines processes for disputes and arbitrations including:
 - timeframes
 - the conduct of parties
 - information requirements for arbitration
 - costs
 - Includes pricing principles and other principles to guide arbitrations. See *Appendix A* for example principles.
- **Division 4: Provisions about the role of the negotiate-arbitrate scheme administrator.**
 - Includes the role of the administrator, how arbitrators are selected, appropriate selection criteria for arbitrators, and reference to a separate arbitration process guide (to be drafted separately by the administrator).

BEST PRACTICE POINT FIVE: ENSURING REGULATION IS FIT-FOR-PURPOSE

Conclusions about the impacts and effectiveness of existing regulation must align with the evidence presented in the review.¹⁰³

Following the Draft Report's release and at the public hearings, A4ANZ was by no means alone in expressing its dismay about the Commission's lack of engagement with the evidence provided by stakeholders. Many other submissions, coming from a range of interest groups, all shared the same theme, perhaps best summarised by this statement: *"we were hoping for an in-depth analytical, forensic assessment of the practices adopted by these airports and their customers based on actual experience and with real data."*¹⁰⁴

This is not what we collectively got in the Draft Report. Respondents noted the absence of explanation for why such evidence was deemed irrelevant, and why proposals considered acceptable in other sectors were deemed so unworthy of any further consideration; all simply rejected in favour of the status quo.

Rather inexplicably, the Commission arrived at the following position, which raises further issues and prompts additional questions to be answered.

Initial position of the PC:

The current regime is largely working well to achieve Government policy objectives. No justification for significant change to the current form of regulation.



Issues for the Inquiry:

The validity of these conclusions is questionable, given the process used to reach them would not meet Government standards for regulatory review.



The approach taken by the Commission in undertaking this Inquiry thus far appears to fall well short of what the Office of Best Practice Regulation (OBPR) has set as its expectations of Government departments and independent statutory agencies when they undertake reviews of existing regulations. As their guidance says, this is critical for both decision-makers, *"for whom a balanced assessment of the performance of the regulation is critical"* and for stakeholders, *"who have a right to accurate, timely, transparent, and accessible information."*¹⁰⁵

The OBPR's guidance would suggest that the Commission ought to have undertaken an assessment of the net impact of the *current* regulation for airports on the community as a whole, including a balanced presentation of the costs, benefits and impacts on different stakeholder groups.¹⁰⁶ In encouraging a systematic evaluation, the OBPR argues that this allows *all regulatory proposals* to be assessed in a standard manner, which promotes comparability, and discourages decision-makers from reaching conclusions based only on the impacts of a single stakeholder group.¹⁰⁷

Guidance from the OBPR further notes that the Government is committed to the use of a cost-benefit analysis (CBA) to assess regulatory proposals in order to encourage better decision making.¹⁰⁸ In preparing its Draft Report, the Commission did not undertake such an analysis for any of the proposals put forward – whether the status quo, its

own suggestion of increased ACCC monitoring, a potential price inquiry, or indeed the introduction of a negotiate-arbitrate regime.

The goal of a CBA is to provide the decision-maker with as much information about a regulatory proposal as is relevant to informing their decision.¹⁰⁹ It is therefore hard to see how – in neglecting to undertake such analysis – the Commission has reached an informed view to the extent that is appropriate for it to make final recommendations to Government.

What seems to be the case is that the Commission has essentially deemed these analyses unnecessary, given it did not accept evidence of a problem under the existing regime. This rather extraordinary position was reaffirmed during the hearings, with comments from Commissioners including, *“there’s a lot of debate here about solutions in search of a problem”*¹¹⁰ and, *“When we’re convinced...that there needs to be a change to something, we would usually investigate different alternatives and then we would try and judge ones against the other.”*¹¹¹

The question must be asked, however, if the Commission’s justification for *not* undertaking this analysis meets the Government’s own requirements in relation to best-practice regulation. The requirements, as set out by the OBPR, include (but are not limited to) the following expectations of any Department or independent Statutory body undertaking a review of existing regulation:¹¹²

- *Examine and discuss whether or not the regulation continues to be appropriate for its purpose;*
- *Discuss the impacts (including the regulatory costs) on all stakeholders – businesses, community organisations and individuals;*
- *Be measured and prudent in your arguments and avoid making assertions that cannot be substantiated;*
- *Check the accuracy of every claim;*
- *Report the views of all stakeholders in a balanced way. This includes acknowledging any views that are not supported by the available evidence; and*
- *Draw logical conclusions based on the evidence and the strength of the data and information presented.*

Having decided not to undertake its own comparative analyses, the Commission also used its initial position (that no problem existed) to justify ignoring or rejecting outright the expert analyses presented by various stakeholders.¹¹³ This is of particular concern given the analysis undertaken by Frontier Economics specifically addressed the key pitfalls in undertaking CBAs.¹¹⁴ The OBPR has cautioned that a common mistake made in a CBA is to downplay or ignore non-financial social costs and benefits.¹¹⁵ Frontier’s analysis of the potential costs and benefits of introducing a negotiate-arbitrate regime addressed this; considering monetised and quantifiable benefits, and more broadly – wider economic benefits including welfare gains. Despite this, the Commission dismissed Frontier’s analysis in its entirety, based on what it considered to be deficiencies in the report, but without offering further explanation.^{viii}

As we highlighted in an earlier submission, the presence of status quo bias can often lead to existing regulation being hailed as successful, even if it wouldn’t pass a CBA applied to proposed new or amended regulation.¹¹⁶ Hopefully these important comparative analyses will be undertaken by the Commission before the final report is delivered to Government in June.

Without this rigour, decision-makers in Government will be left with little confidence in the Inquiry findings; and unable to place much reliance on them to inform decisions about the future of airport regulation in Australia. Moreover, there is a case to be made for Government to request a further review if it finds that the *“regulatory analysis presented to policy makers at the final decision point sufficiently diverges from best practice.”*¹¹⁷

^{viii} Both A4ANZ and Frontier Economics dispute the Commission’s critique and the way in which this evidence was contextualised within the Commission’s report. This issue is dealt with in more detail in [Frontier Economics’ own, independent submission to the Productivity Commission](#).

Concluding comments

A4ANZ and its members will be ensuring that Government is aware of what is possible with some minor change to regulatory settings, whilst still retaining a light-handed approach. History has shown that when airlines have been able to reduce costs in any part of their business they have reinvested in improving the consumer experience, including: reducing fares, increasing capacity on routes, renewing fleet capacity, preserving essential regional air services, collaborating with airports to progress innovations in customer experiences, improving domestic and international service levels, technological innovation; and other new and important initiatives such as pilot academies.

As the Draft Report states, “*Essential to a light-handed regulatory regime is transparency as to how an airport operator is performing and a credible threat of further regulatory intervention.*”¹¹⁸ This current regime has neither. The Commission has itself pointed to the lack of transparency, citing insufficient data to enable conclusions in a whole range of performance areas. Furthermore, numerous submissions and expert testimony have confirmed the lack of a credible threat. The effectiveness of the regime should be judged accordingly.

Stakeholders endorsing the Productivity Commission’s draft finding that “*wholesale changes to the regulatory regime are not justified*”¹¹⁹, will hopefully now see clearly that there is nothing in what A4ANZ has suggested in the proposed arbitration guidance that deviates significantly from the current provisions if an arbitration were to occur (in the event that an airport had been declared under Part IIIA). Given Commissioners and airport representatives have expressed a degree of comfort with that process, the proposal we have made should surely not be in any way troubling.

Regarding the Commission’s likely contention that – troubling or not – change is not necessary, it is important to acknowledge that what the proposal addresses is the key issue of *the credibility of the threat of airport users being able to access arbitration* in the event of an intractable dispute. This is what necessitates the pragmatic, minor reforms we – and others, including the ACCC – have proposed. Far from a wholesale change, these reforms retain the existing light-handed regime but ensure that the deterrent element necessary for such a regime’s effectiveness can actually operate to the benefit of all parties.

We hope that in this context, the Commission will be able to see beyond its initial fierce adherence to the status quo, contemplate the minimal changes proposed, and allow the sector to collectively deliver benefits to consumers and the economy.

APPENDIX A

Principles to guide arbitration (draft)

Potential pricing and other principles to guide arbitration could include, but are not limited to, the following:

- (1) When making a final access determination under this Part, the arbitrator must take the following matters into account:
 - (a) the principle that access to airport services must be on reasonable terms
 - (b) the Aeronautical Pricing Principles; and
 - (c) the operational and technical requirements necessary for the safe and reliable operation of the airport.
- (2) When making a final access determination under this Part, the arbitrator may also take the following matters into account:
 - (a) the legitimate business interests of the service provider;
 - (b) the interests of all persons who have rights to use the airport (this could include other airlines and other airport users i.e. travellers);
 - (c) the value to the service provider of any extension or expansion of the airport, the cost of which is borne by another person;
 - (d) the value to the service provider of interconnections to the airport the cost of which is borne by another person;
 - (e) the public interest, including the public interest in having competition in markets (whether or not in Australia); and
 - (f) any previous capital base determination or access determination made in respect to the airport under accordance with the Regulations
- (3) The aeronautical pricing principles are:
 - a) that prices should:
 - (i) be set so as to generate expected revenue for a service or services that is at least sufficient to meet the efficient costs of providing the service or services; and
 - (ii) include a return on investment in tangible (non-current) aeronautical assets, commensurate with the regulatory and commercial risks involved and in accordance with these Pricing Principles;
 - b) that pricing regimes should provide incentives to reduce costs or otherwise improve productivity;
 - c) that prices (including service level specifications and any associated terms and conditions of access to aeronautical services) should:
 - (i) be established through commercial negotiations undertaken in good faith, with open and transparent information exchange between the airports and their customers and utilising processes for resolving disputes in a commercial manner (for example, independent commercial mediation/binding arbitration); and
 - (ii) reflect a reasonable sharing of risks and returns, as agreed between airports and their customers (including risks and returns relating to changes in passenger traffic or productivity improvements resulting in over or under recovery of agreed allowable aeronautical revenue);
 - d) that price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency (including the efficient development of aeronautical services); and
 - (ii) notwithstanding the cross-ownership restrictions in the *Airports Act 1996*, not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher;
 - e) that service-level outcomes for aeronautical services provided by the airport operators should be consistent with users' reasonable expectations;
 - f) that aeronautical asset revaluations by airports should not generally provide a basis for higher aeronautical prices, unless customers agree; and
 - g) that at airports with significant capacity constraints, peak period pricing is allowed where necessary to efficiently manage demand and promote efficient investment in and use of airport infrastructure, consistent with all of the above Principles.

APPENDIX B

Airports Regulations 1997 – Draft Part 9

Part 9 – Access to airport services

Division 1 Preliminary

9.01 Objective

- (1) The objective of this Part is to facilitate access to airport services on reasonable terms, which, for the purposes of this Part, is taken to mean at prices and on other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market.
- (2) This Part is intended to contribute to achieving the objective in subrule (1) by means of:
 - (a) facilitating timely and effective commercial negotiations in relation to access to airport services;
 - (b) a commercially-orientated arbitration process to resolve access disputes in a cost-effective and efficient manner; and
 - (c) principles that the arbitrator must have regard to when determining access disputes, which are consistent with the outcomes of a workably competitive market.

9.02 Application

- (1) This Part is made for sections 192A of the *Airports Act 1996* (the Act).

9.03 Structure of this Part

- (1) Division 1 sets out the objectives of this Part and deals with preliminary matters.
- (2) Division 2 provides for access requests and negotiations.
- (3) Division 3 provides for the arbitration of access disputes.
- (4) Division 4 contains provisions about the role of the scheme administrator.

9.04 Definitions and Interpretation

Scheme Administrator – for the purposes of this Part the Scheme Administrator refers to the ACCC

airport service – for the purposes of this Part, refers to a service provided at a core regulated airport, where the service:

- (a) is necessary for the purposes of operating and/or maintaining civil aviation services at the airport; and
- (b) is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated; and includes the use of those facilities for those purposes.

core regulated airport – for the purposes of this Part, core regulated airport refers to airports listed in Section 192A(6) of the Act.

Division 2 Access Requests and Negotiations

9.05 Negotiation

- (1) A prospective user who has made an access request for an airport service may by notice to the service provider request negotiations under this Part in relation to any aspect of access to an airport service including:
 - (a) whether access can be granted; and
 - (b) the price and other terms and conditions of an access offer.

9.06 Access negotiation information

- (1) In negotiations under this Part, each party to the negotiations must, in requesting or providing access negotiation information, do so in a manner and at a time consistent with the duty of the party to negotiate in good faith.
- (2) A prospective user who is party to negotiations under this Part may from time to time by notice request a service provider who is party to the negotiations to provide access offer information in relation to any aspect of the matters being negotiated.

Division 3 Arbitration of Access Disputes

9.07 Application of this Division

- (1) An access dispute notice may be given to the scheme administrator under this Division in relation to:
 - (a) a request for access to an airport service under a new access contract;
 - (b) a request to add a new airport service to an existing access contract;
 - (c) a request for a new access contract to take effect on the expiry of an existing access contract; and
 - (d) a request for an airport service commencing after the expiry of the service term for the same service under an existing access contract.
- (2) The following matters are excluded from reference to arbitration under S192A of the Act, and this Part:
 - (a) a dispute about an airport service provided under an existing access contract;
 - (b) a request to vary the terms and conditions of access applicable to an airport service provided under an existing access contract for any part of the current service term for that airport service;
 - (c) an access request that would require the extension of an airport; and
 - (d) an access dispute about standard terms and conditions for secondary trading of capacity excluded from the operation of this Part by a provision of the Act or the Regulations.
- (3) Matters that may be referred for determination by an arbitrator under this Division include, subject to subrule (2), any dispute arising under any rule in this Division between a service provider for an airport service and a prospective user including any dispute about whether a matter is an access dispute.

9.08 Access dispute notice

- (1) An access dispute notice is a notice given under section 192A(3) of the Act under which a prospective user or a service provider gives notice to the scheme administrator that an access dispute exists.
- (2) An access dispute notice must be in writing and must state:
 - (a) the airport service to which the access dispute notice relates and where applicable the access request and the access offer made in response to the request;
 - (b) the matters (if any) on which agreement has been reached and the matters that are in dispute;
 - (c) the name and address of the person giving the notice;
 - (d) the name and address of each other party involved in the access dispute; and

- (e) where the person giving the access dispute notice reasonably believes another person may be joined as a party – the name and address of that person.
- (3) An access dispute notice must be given to the other parties to the negotiations under this Part as soon as practicable after it is given to the scheme administrator.
- (4) An access dispute notice must be accompanied by the fee (if any) set by the scheme administrator from time to time and specified on its website.
- (5) If an access dispute notice is given by a prospective user, the prospective user may withdraw the access dispute notice at any time before an arbitrator appointed to determine the dispute makes a final access determination.
- (6) If an access dispute notice is given by a service provider, the service provider may only withdraw the access dispute notice if the other parties to the access dispute agree.

9.09 Reference to arbitration

- (1) For section 192A(4) of the Act, the scheme administrator must refer an access dispute to arbitration applying the procedures in this rule and no later than 15 business days after the receipt of the access dispute notice.
- (2) The scheme administrator must within 5 business days of receipt of an access dispute notice determine the parties to the access dispute for the purposes of section 192A(5) of the Act and give a notice to each party to the access dispute in which the scheme administrator:
 - (a) identifies the parties to the access dispute;
 - (b) invites the parties to the access dispute to give the scheme administrator within 10 business days of the access dispute notice being given written submissions as to which (if any) of the pool arbitrators should be disqualified from appointment, with reasons;
 - (c) requires the parties to the access dispute to notify the scheme administrator of the identity of the pool arbitrator agreed by the parties to determine the access dispute (if any) within 10 business days of the access dispute notice being given; and
 - (d) informs the parties that in default of agreement being reached and notified to the scheme administrator within that time, the scheme administrator will select the arbitrator.
- (3) The parties to an access dispute identified in a notice under subrule (2) must:
 - (a) as soon as practicable after an access dispute notice is given notify the other parties to the dispute of at least two pool arbitrators the party will agree to be appointed as the arbitrator to determine the access dispute;
 - (b) negotiate in good faith to agree to the identity of a pool arbitrator to be the arbitrator for the access dispute; and
 - (c) notify the scheme administrator if agreement has been reached, including confirmation that the pool arbitrator is available to undertake the arbitration.
- (4) If the parties to the access dispute do not notify the identity of the pool arbitrator agreed by the parties to determine the access dispute to the scheme administrator within 10 business days of the access dispute notice being given, the scheme administrator must select one of the pool arbitrators to determine the access dispute, taking into account any submissions from the parties under subrule (2)(b) given within the specified time.
- (5) The scheme administrator must refer the access dispute (with the access dispute notice) to the pool arbitrator notified by the parties under subrule (3)(c) or selected by the scheme administrator under subrule (4) within 15 business days after the receipt of the access dispute notice and notify the parties to the access dispute of the referral.
- (6) The scheme administrator's selection of a pool arbitrator to determine an access dispute under subrule (4) is final and binding on the parties to the access dispute.
- (7) An arbitrator is not liable for anything done or omitted to be done in good faith in his or her capacity as

arbitrator.

- (8) An arbitrator may, before acting in relation to the access dispute, require each party to the access dispute (and any one of them) to execute a release and indemnity in favour of the arbitrator in relation to any loss, damage or liability that party may suffer or incur as a consequence of anything done or omitted to be done in good faith in his or her capacity as arbitrator.
- (9) If for any reason the arbitrator for an access dispute does not make a final access determination within the time provided for in this Division or withdraws from or abandons the arbitration or is unable to continue the arbitration, any party to the access dispute may notify the other parties and the scheme administrator that they require a new pool arbitrator to be appointed.
- (10) If a notice is given under subrule (9), subject to subrule (11), the scheme administrator must refer the access dispute to a new pool arbitrator no later than 15 business days after the receipt of the notice. Subrules (2) to (9) will apply as if the notice were an access dispute notice for the purposes of this rule.
- (11) If a notice is given under subrule (9) on the grounds that the arbitrator has failed to make a final access determination within the time provided for in this Division and the arbitrator makes the final access determination before the scheme administrator refers the access dispute to a new pool arbitrator, the notice under subrule (9) lapses and the scheme administrator must not refer the access dispute to a new pool arbitrator.

9.10 Conduct of the parties

- (1) The parties must do all things necessary for the proper and expeditious conduct of the arbitration.
- (2) Without limitation to subrule (1), the parties must comply without undue delay with any order or direction of the arbitrator with respect to any procedural, evidentiary or other matter.
- (3) A party must not wilfully do or cause to be done any act to delay or prevent an access determination being made.

9.11 Statements to be provided to the arbitrator on appointment

- (1) Within 10 business days of the access dispute being referred to the arbitrator, each party must give to the arbitrator and to the other parties to the access dispute a statement:
 - (a) listing the access negotiation information of the party that the party provided to the other parties to the negotiations before the access dispute notice was given; and
 - (b) identifying with reasonable particularity any other access negotiation information:
 - (i) not provided by the party to the other parties to the negotiations before the access dispute notice was given and that the party seeks leave under regulation 9.12(1) to submit and rely on in the arbitration; and
 - (ii) that the party requested from another party to the negotiations and that has not been provided by that other party.
- (2) Within 15 business days of the access dispute being referred to the arbitrator, each party to the dispute must give to the arbitrator and to the other parties a statement of the access determination the party claims should be made and the matters supporting the party's claim.
- (3) Within the time determined by the arbitrator, each party must give to the arbitrator and to the other parties to the access dispute:
 - (a) its statement in response to the statement provided under subrule (1), which must:
 - (i) identify with reasonable particularity any areas of disagreement; and
 - (ii) state whether it consents to the provision of any of the information identified under subrule (1)(b)(i); and

- (b) its statement in reply to the statement provided under subrule (2).
- (4) With the leave of the arbitrator, a party may amend or supplement any statement made by the party under this rule during the course of the arbitration.
- (5) A statement under subrule (1) must, if the arbitrator so requires, be verified by statutory declaration of an appropriate officer of the party.

9.12 Arbitrator to give effect to regulation 9.06

- (1) A party to an access dispute must seek leave of the arbitrator to submit and rely on in the arbitration access negotiation information of that party that it did not provide to the other parties to the negotiations before the access dispute notice was given.
- (2) In determining whether to grant leave under subrule (1), the arbitrator must:
 - (a) seek to give effect to regulation 9.06 insofar as doing so is consistent with the proper consideration of the access dispute; and
 - (b) have regard to whether the party seeking leave was given a reasonable opportunity to provide the access negotiation information to the other parties to the dispute before the access dispute notice was given.
- (3) An arbitrator may direct a party to an access dispute to provide access negotiation information that it did not provide to the other parties to the negotiations before the access dispute notice was given. A party given a direction under this subrule must comply with the direction without undue delay.
- (4) If the arbitrator is satisfied that there has been inordinate and inexcusable failure by a party to comply with the obligation of the party to provide access negotiation information in accordance with regulation 9.06 or subrule (3) or if a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration, the arbitrator may do any one or more of the following:
 - (a) direct that the party is not entitled to rely on any specified information or materials;
 - (b) draw such adverse inferences from the failure to comply as the circumstances justify; and
 - (c) proceed to an access determination solely on the basis of information relied on by that party that has been provided by that party in negotiations under this Part in accordance with regulation 9.06.

9.13 Pricing and other principles

- (1) When making a final access determination under this Part, the arbitrator must take the following matters into account:
 - (a) the principle that access to airport services must be on reasonable terms as defined in regulation 9.01(1);
 - (b) the Aeronautical Pricing Principles as defined in regulation 9.13(3); and
 - (c) the operational and technical requirements necessary for the safe and reliable operation of the airport.
- (2) When making a final access determination under this Part, the arbitrator may also take the following matters into account:
 - (a) the legitimate business interests of the service provider;
 - (b) the interests of all persons who have rights to use the airport;
 - (c) the value to the service provider of any extension or expansion of the airport, the cost of which is borne by another person;
 - (d) the value to the service provider of interconnections to the airport the cost of which is borne by another person;
 - (e) the public interest, including the public interest in having competition in markets (whether or not in

Australia); and

- (f) any previous capital base determination or access determination made in respect to the airport under accordance with the Regulations.

(3) The Aeronautical Pricing Principles are:

- a) that prices should:
- (i) be set so as to generate expected revenue for a service or services that is at least sufficient to meet the efficient costs of providing the service or services; and
 - (ii) include a return on investment in tangible (non-current) aeronautical assets, commensurate with the regulatory and commercial risks involved and in accordance with these Pricing Principles;
- b) that pricing regimes should provide incentives to reduce costs or otherwise improve productivity;
- c) that prices (including service level specifications and any associated terms and conditions of access to aeronautical services) should:
- (i) be established through commercial negotiations undertaken in good faith, with open and transparent information exchange between the airports and their customers and utilising processes for resolving disputes in a commercial manner (for example, independent commercial mediation/binding arbitration); and
 - (ii) reflect a reasonable sharing of risks and returns, as agreed between airports and their customers (including risks and returns relating to changes in passenger traffic or productivity improvements resulting in over or under recovery of agreed allowable aeronautical revenue);
- d) that price structures should:
- (i) allow multi-part pricing and price discrimination when it aids efficiency (including the efficient development of aeronautical services); and
 - (ii) notwithstanding the cross-ownership restrictions in the *Airports Act 1996*, not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher;
- e) that service-level outcomes for aeronautical services provided by the airport operators should be consistent with users' reasonable expectations;
- f) that aeronautical asset revaluations by airports should not generally provide a basis for higher aeronautical prices, unless customers agree; and
- g) that at airports with significant capacity constraints, peak period pricing is allowed where necessary to efficiently manage demand and promote efficient investment in and use of airport infrastructure, consistent with all of the above Principles.

9.14 Matters that may be dealt with in a determination

- (1) An access determination may deal with any matter the subject of the access dispute.
- (2) Without limiting subrule (1), an access determination may:
- (a) require the service provider for an airport to provide access to an airport service; and
 - (b) specify the price and other terms and conditions on which the prospective user must be given access to the airport service;
- (3) An access determination may require access to be provided for a service term different to that sought by the prospective user but must otherwise be made in relation to the airport service or services sought by the prospective user.

9.15 Interim access determinations

- (1) An interim access determination that provides for access to an airport service before the final access determination is made must specify the terms and conditions on which the prospective user must be given access to the airport service including reasonable payment terms.
- (2) If an arbitrator makes an interim access determination that provides for access to an airport service before the final access determination is made, the final access determination must provide for adjustments to reflect any differences between the interim access determination and the final access determination in respect of the period:
 - (a) prior to the prospective user gaining access on the terms of the final access determination; or
 - (b) if the prospective user does not elect to seek access on the terms of the final access determination – prior to access on the terms of the interim access determination ceasing under rule 9.17(5)(b).
- (3) An interim access determination must:
 - (a) be in writing and dated and signed by the arbitrator;
 - (b) identify the parties to the interim access determination and the place the determination is made;
 - (c) be communicated by email when it is made to the parties to the access dispute and the scheme administrator; and
 - (d) be sent by post to the parties and the scheme administrator within 5 business days of being made.
- (4) An interim access determination takes effect from the later of the time specified in the access determination and the time it is communicated to the parties to the access dispute.

9.16 Final access determinations

- (1) Unless it terminates the arbitration under the Act and subject to subrule (2), the arbitrator must determine the access dispute as quickly as possible, and in any case the arbitrator must make a final access determination within:
 - (a) 50 business days after the date the access dispute was referred to the arbitrator; or
 - (b) if agreed by the parties to the access dispute, any greater number of business days, up to a maximum of 90 business days, after the date the access dispute was referred to the arbitrator.
- (2) In determining the number of business days elapsed since the date the access dispute was referred to the arbitrator, the following must be disregarded:
 - (a) if the arbitrator appoints an independent expert in accordance with regulation 9.19 – any day within a period allowed by the arbitrator for the independent expert to report and that the arbitrator directs must be disregarded; and
 - (b) any day within a period allowed by the arbitrator for a party to prepare access negotiation information not provided in negotiations and that the arbitrator directs must be disregarded.
- (3) A final access determination must:
 - (a) be in writing and dated and signed by the arbitrator;
 - (b) identify the parties to the determination and the place the determination is made;
 - (c) set out the matters agreed by the parties and the matters in dispute;
 - (d) set out the arbitrator's determination of the access dispute;
 - (e) be communicated by email when it is made to the parties to the access dispute and the scheme administrator; and
 - (f) be sent by post to the parties and the scheme administrator within 5 business days of being made.

- (4) The arbitrator must give the parties and the scheme administrator a statement of reasons for the arbitrator's final access determination, which must explain how the arbitrator took into account the principles and other matters in regulation 9.13. The statement of reasons must be given to the parties and the scheme administrator with the final access determination or within 20 business days of the final access determination being made.

9.17 Effect of final access determination

- (1) A final access determination takes effect from the later of the time specified in the access determination and the time it is communicated to the parties to the access dispute.
- (2) A final access determination is binding on the parties to the access dispute.
- (3) A prospective user wishing to enter into an access contract that gives effect to a final access determination must notify that decision to the other parties to the access dispute and the scheme administrator in writing within 10 business days of the access determination being made.
- (4) If the prospective user gives a notice under subrule (3), the parties to the access dispute must enter into an access contract for the provision of access in accordance with the final access determination (as may have been corrected under regulation 9.23).
- (5) If a prospective user does not give a notice under subrule (3) within the period specified in that subrule:
- (a) the prospective user and any associate of the prospective user must not give an access dispute notice about the same or a substantially similar airport service for a period of one year from the date of the final access determination; and
 - (b) if the prospective user had access under the terms of an interim access determination, that access ends at the end of that period.
- (6) The parties to an access dispute must comply with a final access determination to the extent it provides for adjustments under regulation 9.15(2), even if the prospective user does not give a notice under subrule (3).

9.18 Arbitration procedures

- (1) Subject to Section 192A(5) and this Division, the arbitrator may determine the procedures for the arbitration and conduct the arbitration in such manner as it considers appropriate and is to decide whether to hold any dispute hearings.
- (2) The arbitrator must as soon as practicable after the arbitrator's appointment and after consultation with the parties to the access dispute, notify the parties of the procedures and timetable to apply to the arbitration. The arbitrator may in the arbitrator's discretion amend the procedures specified by the arbitrator during the course of the arbitration.
- (3) If documents are produced to an arbitrator, the arbitrator may take possession of, make copies of, and take extracts from, the documents and may keep the documents for as long as is necessary for the purposes of the arbitration.
- (4) All statements, documents or other information supplied to the arbitrator by a party must be communicated to the other parties.
- (5) Any expert report or evidentiary document on which the arbitrator may rely in making its decision must be communicated to the parties.

9.19 Experts appointed by the arbitrator

- (1) Unless otherwise agreed by the parties, if the arbitrator appoints an independent expert, the arbitrator may require a party to give the independent expert any relevant information or to produce, or to provide access to, any relevant documents or places for the independent expert's inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitrator considers it necessary, the independent expert must, after delivery of the expert's written or oral report, participate in a hearing where the

parties have the opportunity to put questions to the expert and present expert witnesses in order to testify on the points at issue.

- (3) Before appointing an independent expert under subrule (1), the arbitrator must:
- (a) notify the parties to the access dispute of its intention to refer a matter to an independent expert, the proposed independent expert and the amount the independent expert will charge or the manner in which that amount will be determined; and
 - (b) obtain the consent of the parties to the maximum amount that may be charged by the independent expert in connection with the reference.
- (4) A party to an access dispute must not unreasonably withhold its consent under subrule (3)(b).

9.20 Confidentiality

- (1) The parties to an access dispute must not disclose confidential information in relation to the course of the arbitration unless the disclosure is allowed under this rule.
- (2) An arbitrator must not disclose confidential information in relation to the course of the arbitration unless the disclosure is allowed under this rule.
- (3) Confidential information in relation to the course of the arbitration may be disclosed by a party or the arbitrator:
- (a) with the consent of all the parties to the access dispute;
 - (b) in the case of a party, to a professional or other adviser of the party who agrees to maintain the confidentiality of the confidential information;
 - (c) in the case of the arbitrator, to an independent expert appointed by the arbitrator who agrees to maintain the confidentiality of the confidential information;
 - (d) if it is necessary to ensure that a party has a reasonable opportunity to present the party's case and the disclosure is no more than reasonable for that purpose;
 - (e) if it is necessary for the establishment or protection of a party's legal rights in relation to a third party and the disclosure is no more than reasonable for that purpose;
 - (f) if it is necessary for the purpose of enforcing an access determination and the disclosure is no more than reasonable for that purpose;
 - (g) if it is required by, or necessary for the purposes of, these Regulations or the Act
 - (h) if the disclosure is in accordance with an order made or a subpoena issued by a court of competent jurisdiction; or
 - (i) if the disclosure is authorised or required by a law of a participating jurisdiction or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure (including an explanation of the reasons for the disclosure) to:
 - (i) if the person is a party – the other parties and the arbitrator; and
 - (ii) if the arbitrator is making the disclosure – all the parties.

9.21 Conflict of interest

- (1) In this rule, there are justifiable doubts as to the impartiality or independence of a pool arbitrator or arbitrator to whom an access dispute has been referred only if there is a real danger of bias on the part of the person in conducting the arbitration.
- (2) A pool arbitrator approached in connection with the pool arbitrator's possible appointment to determine an access dispute must disclose any circumstances likely to give rise to justifiable doubts as to the pool arbitrator's impartiality or independence.
- (3) An arbitrator, from the time of the arbitrator's appointment and throughout the course of the arbitration,

must without delay disclose any circumstances of the kind referred to in subrule (2) to the parties unless they have already been informed of them by the arbitrator.

(4) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

(5) A party may challenge an arbitrator agreed by the party only for reasons of which the party becomes aware after the appointment has been made.

(6) A party who intends to challenge an arbitrator must, within 15 days after becoming aware of any circumstance which gives rise to a justifiable doubt as to the impartiality or independence of the arbitrator, send a written statement of the reasons for the challenge to the arbitrator and the other parties to the dispute.

(7) Unless the arbitrator withdraws from office or the other parties to the access dispute agree to the challenge, the arbitrator must decide on a challenge under subrule (6).

(8) If a challenge under subrule (6) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the Court to decide on the challenge.

(9) A decision of the Court on a request under subrule (8) which is within the limits of the authority of the Court is final.

(10) While a request under subrule (8) is pending, the arbitrator may continue the course of the arbitration and make an access determination.

9.22 Termination of arbitration

(1) The arbitration of an access dispute is terminated by:

- (a) the making of a final access determination;
- (b) an order of the arbitrator under section 192A(5) of the Act made in accordance with subrule (3); or
- (c) notice from the prospective user

(2) A specified dispute resolution circumstance occurs if the parties to the access dispute agree on the termination of the arbitration.

(3) A decision of an arbitrator to terminate an arbitration under section 192A(5) of the Act must:

- (a) be in writing and dated and signed by the arbitrator;
- (b) include a statement of reasons for the termination of the arbitration;
- (c) be communicated by email to the parties to the access dispute and the scheme administrator;
- and
- (d) be sent by post to the parties to the access dispute and the scheme administrator within 5 business days of being made.

(4) A decision of an arbitrator to terminate an arbitration takes effect from the later of the time specified in the decision and the time it is communicated to the parties to the access dispute.

9.23 Correction of errors

(1) Within 30 days of receipt of the arbitrator's statement of reasons under regulation 9.16(4), a party may by notice to the other parties to the access dispute and the arbitrator, request the scheme administrator to correct any of the matters specified in the final access determination.

(2) If the scheme administrator, after consultation with the parties to the access dispute and the arbitrator considers a request under subrule (1) to be justified, the scheme administrator must make the correction.

(3) The arbitrator may correct any error on the arbitrator's own initiative within 30 days of giving the arbitrator's statement of reasons under regulation 9.16(4).

(4) A correction of a final access determination must:

- (a) be in writing and dated and signed by the person making the correction;
- (b) identify the final access determination;
- (c) set out the corrections;
- (d) when it is made, be communicated by email to the parties to the access dispute and the scheme administrator or arbitrator as applicable; and
- (e) be sent by post to the parties to the access dispute and the scheme administrator or arbitrator as applicable within 5 business days of being made.

9.24 Costs

- (1) The parties to an access dispute referred to arbitration under this Division must bear their own costs
- (2) Subject to subrule (3), the parties to an access dispute referred to arbitration under this Division must each pay an equal share of the following costs of the arbitration:
 - (a) the fees and expenses of the arbitrator;
 - (b) the fees and expenses of any expert retained by the arbitrator under regulation 9.19, to the extent those fees and expenses are consistent with the costs agreed under that rule;
 - (c) the costs of room hire; and
 - (d) the cost of any additional input agreed by the parties to be necessary to the conduct of the arbitration.
- (3) The arbitrator may, in making a final access determination or within 30 business days after the final access determination is made, direct that the parties must pay the costs of the arbitration referred to in subrule (2) in unequal shares, taking into account:
 - (a) in the case of a party to the access dispute other than the service provider or prospective user – the role of the party in the access dispute and the arbitration;
 - (b) whether the prospective user elects not to enter into an access contract in accordance with the access determination;
 - (c) whether a party has conducted itself in the arbitration in a way that unnecessarily disadvantaged another party by conduct such as:
 - (i) failing to comply with an order or direction of the arbitrator without reasonable excuse;
 - (ii) failing to comply with the Act or the Regulations;
 - (iii) asking for an adjournment as a result of paragraph (i) or (ii);
 - (iv) causing an adjournment;
 - (v) attempting to deceive another party or the arbitrator; or
 - (vi) vexatiously conducting an access dispute;
 - (d) whether a party has been responsible for unreasonably prolonging the time taken to complete the arbitration; and
 - (e) any other matter the arbitrator considers relevant.
- (4) Costs that are payable under this rule:
 - (a) are a debt due by the party to the arbitrator, or the person to whom the arbitrator has ordered that they be paid; and
 - (b) may be recovered by that person in a court of competent jurisdiction.

9.25 Information to be published about access determinations

- (1) Within a reasonable time of a final access determination being made, the scheme administrator must publish on its website the following information:

- (a) the airport the subject of the arbitration;
 - (b) with the consent of the prospective user, the parties to the access dispute;
 - (c) the name of the arbitrator who made the final access determination;
 - (d) the time elapsed between the access dispute being referred to the arbitrator and the making of the final access determination;
 - (e) which of the airport services offered by the airport was the subject of the access dispute;
 - (f) whether the prospective user has given notice that it wishes to enter into an access contract in accordance with the final access determination; and
 - (g) if the final access determination includes a determination with respect to asset valuation, the valuation method adopted, the assets to which the valuation applied and the determination of the asset value.
- (2) The scheme administrator must publish on its website information about the number of access disputes referred to arbitration under this Part and brought to an end before a final access determination is made.

Division 4 Scheme Administrator

9.26 Role of the scheme administrator

- (1) The scheme administrator has the functions provided for the scheme administrator under Section 192A of the Act and this Part.
- (2) Without limiting subrule (1), the functions of the scheme administrator include:
- (a) establishing a pool of arbitrators;
 - (b) publication of guides, including an arbitration guide;
 - (c) referring access disputes to arbitration and appointing the arbitrator;
 - (d) correcting errors in access determinations; and
 - (e) publishing information about access determinations under regulation 9.25.
- (3) The scheme administrator has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
- (4) The scheme administrator does not incur any civil monetary liability for an act or omission done or made under or for the purposes of this Part unless the act or omission is done or made in bad faith.

9.27 Pool of arbitrators

- (1) The scheme administrator must establish and maintain a pool of suitably qualified and experienced commercial arbitrators who may be appointed to determine access disputes referred to arbitration under this Part.
- (2) The scheme administrator may at any time change the composition of the pool of arbitrators and may include commercial arbitrators in the pool of arbitrators on a temporary basis.
- (3) The scheme administrator must publish on its website and keep up to date the name, contact details and a professional profile of each person in the pool of arbitrators.
- (4) The scheme administrator may determine in its discretion from time to time the process for identifying candidates for the pool of arbitrators.
- (5) In identifying candidates for the pool of arbitrators, the scheme administrator may consult with any person it considers appropriate including current pool arbitrators, other nationally or internationally recognised commercial arbitrators and nationally or internationally recognised institutions with relevant experience in the appointment of commercial arbitrators.

- (6) The scheme administrator must establish and maintain for each pool arbitrator an indicative schedule of fees for the conduct of arbitrations under this Part by the pool arbitrator which may include fixed or capped rates for specified categories of access dispute.
- (7) The scheme administrator must at the request of a prospective user, a service provider or any party to an access dispute provide the indicative schedule of fees of one or more pool arbitrators.

9.28 Arbitration guide

- (1) The scheme administrator must publish and maintain an arbitration guide containing guidance for pool arbitrators and any person who may become a party to an access dispute about the process for the determination of access disputes under the Act and these Regulations including the matters that may be referred to arbitration under this Part, timelines and information requirements.
- (2) The arbitration guide may include model arbitration terms and conditions and model procedures for arbitrations conducted under this Part.
- (3) The arbitration guide is not binding on an arbitrator or the parties to an access dispute.
- (4) The scheme administrator may in its discretion develop and publish and may from time to time amend, other non-binding guides relating to this Part.

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