Level 2, 35 Spring St
Melbourne 3000, Australia
Telephone +61 3 9651 0222
+61 3 1300 664 969
Facsimile +61 3 9651 3688

DRAFT RAIL ACCESS REGIME DISPUTE RESOLUTION GUIDELINE

JUNE 2007

An appropriate citation for this paper is:

Essential Services Commission (June 2007), 'Draft Rail Access Dispute Resolution Guideline'.

© 2006 Essential Services Commission.
This publication is copyright. No part may be reproduced by any process except in accordance with the provisions of the Copyright Act 1968 and the permission of the Essential Services Commission.

PREFACE

The Essential Services Commission has prepared this Draft Rail Access Regime Dispute Resolution Guideline as part of the implementation of the Victorian Rail Access Regime established by the *Rail Corporations Act 1996* (Vic).

The Guideline sets out the Commission's processes, procedures and preferred strategies for resolving access regime disputes under the RCA and describes the rights, obligations and responsibilities of access providers, access seekers, users, the Commission and affected stakeholders in relation to such disputes. The Guideline should be read in conjunction with the information paper published by the Commission entitled "Overview of the Victorian Rail Access Regime: Information Paper".

The purpose of the Guideline is to inform stakeholders of the Commission's decision-making role in relation to access regime disputes and how the Commission proposes to discharge that role, including by outlining the Commission's proposed procedures and requirements when resolving access regime disputes. By providing information in relation to the process for resolving access regime disputes, the Guideline is intended to establish workable and effective access regime dispute processes, and to enable parties to an access regime dispute to be adequately prepared for the Commission's dispute resolution processes.

It is also intended that by providing information on the rights and obligations of the parties to an access regime dispute, the Guideline can assist to facilitate commercial negotiations between parties to an access regime dispute as an alternative to the Commission's dispute resolution procedures.

In order for the Guideline to provide clear guidance to industry participants and the Commission in relation to the resolution of access regime disputes, the Commission considers it appropriate to test the Guideline and subject it to critical review. To this end, the Commission welcomes perspectives and input from stakeholders.

The Commission invites written submissions from interested parties on the Guideline by close of business on 20 July 2007. Submissions received by the Commission will be published on the Commission's website unless they are confidential or commercially sensitive. Any confidential or commercially sensitive information should be clearly marked as such and preferably included as a separate attachment to the public submission.

When finalising the Guideline, the Commission will consider all submissions received by stakeholders on or before on 20 July 2007.

Submissions should be forwarded by email to: railsubmission@esc.vic.gov.au, or in hard copy to: Rail Draft Guideline Consultation, Essential Services Commission, 2/35 Spring Street, Melbourne, VIC, 3001. Enquiries can be directed to Michael Cunningham on (03) 9651 0247.

CONTENTS

PREFACE III

Contents V

1 BACKGROUND AND PURPOSE 1

1.1 Overview of the access regime 1
1.2 Purpose and scope of the Guideline 2
1.3 Information about the rail access regime 3
1.4 Structure of the Guideline 3

2 NATURE OF ACCESS REGIME DISPUTES 5

2.1 Disputes over terms and conditions of access 5
2.2 Compliance disputes 6
2.3 Rail infrastructure-related disputes 8

3 FRAMEWORK FOR DECIDING ACCESS REGIME DISPUTES 11

3.1 Nature of the Commission's dispute resolution role 11
3.2 Statutory requirements for dispute resolution 12
3.3 Commission's dispute resolution strategy 14

4 PRECONDITIONS FOR A DISPUTE RESOLUTION DECISION 18

4.1 Informal inquiries or complaints 18
4.2 Preliminary assessment of whether an access regime dispute exists 18
4.3 Withdrawal of an access regime dispute 19
4.4 When the Commission will not make a determination 19

5 DISPUTE RESOLUTION PROCESS, STRUCTURE AND PROCEDURES 21

5.1 Preliminary phase 21
5.2 Conduct of the dispute resolution procedure 26
5.3 Commission's decision 37

APPENDIX A: APPLICATION FORM 47

APPENDIX B: EXAMPLE OF CONFIDENTIALITY DEED 55

APPENDIX A: FLOWCHART 57

1 BACKGROUND AND PURPOSE

The Essential Services Commission (the **Commission**) has produced this Rail Access Regime Dispute Resolution Guideline (**Guideline**) as part of the implementation of the Victorian rail access regime established by the *Rail Corporations Act 1996* (Vic) (**RCA**).

This Guideline sets out the Commission's processes, procedures and preferred strategies for resolving access regime disputes under the RCA and describes the rights, obligations and responsibilities of access providers, access seekers, users, the Commission and affected stakeholders in relation to such disputes.

1.1 Overview of the access regime

In 2005 the Government enacted a new Victorian Rail Access Regime (**VRAR**) contained in Part 2A of the RCA.

The new VRAR is a hybrid *ex ante/ex post* framework. Under the *ex ante* element, access providers are required to maintain an 'access arrangement' approved by the Commission that:

- describes the standard or 'reference' declared rail transport services provided by the access provider;
- sets out the indicative terms and conditions on which the access provider will make those services available to access seekers (including reference prices for services that are likely to be sought by a significant proportion of access seekers, negotiation frameworks, equitable network operational policies and a standard access agreement); and
- specifies a process for access seekers to apply for access to those declared rail transport services.

Access arrangements remain in place for three to five years. It is intended that the approval of an access arrangement will resolve the majority of issues that may otherwise give rise to access regime disputes.

The *ex post* element is the dispute resolution framework which is intended to operate as more of a 'last resort' mechanism in relation to 'access regime disputes', that is, disputes where an access provider and access seeker are unable to agree on the terms and conditions of access to the access provider's declared rail transport services or rail infrastructure or where an access seeker or user alleges that an access provider is hindering access or is not complying with its access provider obligations under the RCA.

It is intended that the approval of an access arrangement and, more particularly, the indicative terms and conditions, including price, on which access providers will make standard or reference services available to access seekers, will reduce the

likelihood of disputes arising during the course of negotiations for access to most standard or reference services provided by an access provider. This is in part due to the fact that reference services are defined very broadly in section 38A of the RCA.

In other words, the Commission considers that an access regime dispute is more likely to arise during the course of negotiations in relation to the terms and conditions of access to non-reference or non-standard services than reference services.

Division 5 of Part 2A of the RCA provides for the Commission to hear and determine access regime disputes by way of a binding enforceable decision on the parties to the dispute. Division 5 also imposes specific processes and timeframes that are designed to ensure the quick resolution of access regime disputes.

The *ex ante* elements of this regime are designed to minimise the time lapse between the making of an access application and the finalising of a commercial access agreement. At the same time, the regime does not seek to specify, up front, the outcome for every possible issue in relation to every possible access service. It allows access seekers and access providers to negotiate non-standard terms and conditions for standard services (so long as the access seeker has the standard terms and conditions available to it as a 'standing offer'), as well as to negotiate the terms and conditions for non-standard services. The *ex post* elements of the regime are designed to facilitate the speedy and cost effective resolution of access regime disputes between access seekers, users and access providers.

1.2 Purpose and scope of the Guideline

The purpose of this Guideline is to describe how the Commission intends to carry out its function of making decisions ('dispute resolution decisions') in respect of access regime disputes.

The Guideline also has the objective of enabling the parties to an access regime dispute to be adequately prepared for the Commission's dispute resolution processes. This is consistent with the Commission's preference to minimise the costs involved for all parties in resolving access regime disputes through the Commission and to provide as much certainty as possible to VRAR participants.

By providing information on the rights and obligations of the parties to an access regime dispute, the Guideline is also intended to facilitate commercial negotiations between the disputing parties as an alternative to the Commission's dispute resolution procedures.

The Guideline is also intended to establish dispute resolution processes that are workable and effective, in light of the statutory requirements that the Commission must satisfy and the nature of the disputes that can be brought to the Commission for resolution.

The Guideline addresses the following matters in relation to access regime disputes:

- what constitutes an access regime dispute that triggers the Commission's dispute resolution processes;

- the process to be undertaken when an access regime dispute arises and the Commission's role with respect to deciding access regime disputes, including the Commission's powers, obligations, responsibilities and guiding principles;
- the circumstances in which the Commission will exercise its discretion not to make a dispute resolution decision;
- the Commission's procedures and preferred strategy for resolving access regime disputes, including the steps from the time of notification of an access regime dispute to the making of a dispute resolution decision and the procedures for exchanging information and conducting hearings or conferences;
- how the Commission will perform its role in resolving access regime disputes, including the matters to which it may and must have regard when making a dispute resolution decision;
- the content and enforceability of dispute resolution decisions; and
- how the Commission will typically allocate its costs at the conclusion of the dispute resolution process.

1.3 Information about the rail access regime

The Commission has also released a publication entitled 'An Overview of the Victorian Rail Access Regime: Information Paper', which provides a summary of the VRAR, including an overview of the framework of the regime, the purpose and requirements of access arrangements, the obligations of an access provider and the roles and objectives of the Commission in performing its regulatory functions under the regime. The purpose of the Information Paper is to complement this Guideline by informing stakeholders about the rail access regime and providing information to facilitate commercial negotiations between access providers, access seekers and users.

1.4 Structure of the Guideline

The remainder of this Guideline is organised as follows:

- Chapter 2 examines the types of disputes that may come to the Commission for determination;
- Chapter 3 provides a brief summary of the statutory and procedural requirements that the Commission is bound by when resolving an access regime dispute and discusses the overall strategy that the Commission proposes to adopt in order to resolve disputes efficiently and effectively;
- Chapter 4 explains the preconditions for a dispute resolution decision, including the process for handling informal complaints prior to a formal notification of a dispute to the Commission; the initial steps the Commission will take when it receives a formal notice of an access regime dispute, including its preliminary assessment of whether an access regime dispute exists; the circumstances in which the Commission will not decide an access regime dispute; and the process for the withdrawal of an access regime dispute that has been notified to the Commission; and
- Chapter 5 provides information on the dispute resolution process and procedures, the matters the Commission must have regard to when making its

decision, the Commission's procedures for awarding costs and the enforcement of the Commission’s binding dispute resolution decision.

2 NATURE OF ACCESS REGIME DISPUTES

This chapter identifies the types of access regime disputes under the RCA which activate the Commission's dispute resolution functions under Division 5 of Part 2A of the RCA. This discussion centres on the definition of 'access regime dispute' in section 38ZU of the RCA. The Commission is required under section 38ZX of the RCA to make a decision in relation to any access regime dispute that has been notified to it in writing in accordance with section 38ZV(1).

Section 38ZU describes the types of disputes that may be access regime disputes. Broadly, there are three types of access regime disputes:

(a) disputes where an access seeker and access provider are unable to agree terms and conditions of access;

(b) disputes about the access provider's compliance with its access arrangement, the Negotiation Guidelines, the pricing principles in the Pricing Order or the Access Provider Obligations in Division 6 of Part 2A of the RCA, where:

  (i) an access seeker reasonably believes that it has not been provided with access as a result of the access provider's failure to comply with these obligations; or

  (ii) an existing user reasonably believes that the access provider, in providing it with a declared rail transport service, has not complied with these obligations; and

(c) rail infrastructure-related disputes, such as disputes between access seekers and access providers in relation to:

  (i) interconnection of the access seeker's railway to the declared rail infrastructure of the access provider; or

  (ii) extensions of the access provider's declared rail infrastructure.

The detailed legislative requirements in relation to each of these types of disputes are outlined below.

2.1 Disputes over terms and conditions of access

Access arrangements specify the standing offer prices as well as the standard form of access agreement for reference services. These terms and conditions can be varied by the access provider and the access seeker, but only if the access seeker has the opportunity to obtain access on the standing offer terms and conditions.

Since the terms and conditions of reference services are specified *ex ante*, the sources of disputes over an inability to agree on the terms and conditions of access appear to be limited to:

- an inability to agree on the terms and conditions of non-reference or non-standard services;
- a belief that the access provider has not complied with the required process for offering access to reference services, has not negotiated in good faith, or has otherwise hindered access to reference services, all of which are, properly-speaking, compliance disputes and are discussed in section 2.2 below; and
- in relation to an application for access to reference services:
  (i) a belief that the access provider has not offered access to an access seeker on the same terms and conditions as it has offered the service to itself or a related body corporate — this is also a compliance dispute;
  (ii) a belief that the access provider has not offered access to an access seeker on the same terms and conditions as it has offered the service to another access seeker where the characteristics or nature of the services sought are the same – which is again a compliance dispute.

2.2 Compliance disputes

An access regime dispute may arise in relation to compliance matters if an access seeker or a user reasonably believes that an access provider has not complied with:

(a) its binding access arrangement;

(b) the Negotiation Guidelines;

(c) the pricing principles contained in the Pricing Order; or

(d) its statutory obligations in Division 6 of Part 2A of the RCA (as described in section 3.1 of the Information Paper), including compliance with the Commission Instruments,

and:

- in the case of an access seeker, as a result, the access seeker has not been provided a declared rail transport service by the access provider (**access seeker compliance dispute**); or
- in the case of a user, the non-compliance occurs in providing declared rail transport services to the user (**user compliance dispute**).

Compliance with a binding access arrangement

An access regime dispute can arise in connection with the following matters, among others, that are covered in an access arrangement:

- the access application and negotiation protocols — for example, an access seeker compliance dispute may arise where an access seeker considers that the access provider has not complied with the procedures in the access arrangement for assessing the access seeker's application for access and, as a result, the access seeker has not been provided a declared rail transport service by the access provider;
- available reference services and non-reference services;
- reference pricing;

- network service standards (including 'minimum service standards' and performance indicators);
- management of capacity and network management; and
- account keeping and ring fencing.

Compliance with the Negotiation Guidelines

The requirements of the Negotiation Guidelines — which oblige access providers to establish certain procedures and processes for dealing with applications for access, requests for additional works and interconnection — are reflected in each access arrangement.

An access seeker compliance dispute may arise in circumstances where an access seeker believes that the access provider is not complying with its obligations under the Negotiation Guidelines, e.g., by refusing to assess an application for access and, as a result, the access seeker is not provided with a declared rail transport service.

Discriminatory pricing

Section 4.1 of the Pricing Order sets out a number of principles that govern the setting of rail access prices. For the purpose of this Guideline, it is worth noting that multi-part pricing and efficient price discrimination are allowed where this aids efficiency.

However, although an access provider can price differentiate between various freight haul tasks, an access provider must not price discriminate between different operators/access seekers where the nature and characteristics of the services to be provided are the same, or charge a different price for the same reference service between itself and a given access seeker.

Compliance with the Rules

The access provider must comply (at all times) with the following Commission Instruments (the **Rules**):

- Account Keeping Rules;
- Ring Fencing Rules;
- Capacity Use Rules; and
- Network Management Rules.[1]

The Rules place the onus on the access provider to comply with certain protocols, procedures and systems approved by the Commission.

An access seeker compliance dispute can arise in circumstances where an access seeker reasonably believes that an access provider is not complying with its obligations under the Rules: e.g., it is allocating the capacity of its rail network in a manner that favours itself or a related body corporate over the access seeker, and, as a result, the access seeker is not provided with a declared rail transport service.

---

[1] The Negotiation Guidelines have a special status.

Hindering access

It is a statutory obligation under section 38ZZS of the RCA that an access provider must not hinder access. The obligation not to hinder access is essentially a 'catch all' obligation that could also encompass some forms of conduct not strictly proscribed by any specific provision of the RCA, the Rules or under an access arrangement if it is conduct that is deemed to have the purpose and the effect of preventing or deterring access. In practice, a number of issues of non-compliance with the access arrangements or the Rules could be argued to be a hindering of access. For example, an inability to reach agreement on terms and conditions may be believed to be due to the access provider not negotiating in good faith as required under its access arrangement. Certain non-compliance with the Capacity Use Rules or the Network Management Rules could also constitute a hindering of access.

2.3 Rail infrastructure-related disputes

An access regime dispute may be a dispute between an access seeker and an access provider over interconnection of railway tracks to the access provider's network, or a dispute in relation to an extension to the access provider's rail infrastructure.

Disputes relating to interconnection

Section 38ZT of the RCA requires that if an access seeker who owns or operates a railway track or railway siding (or intends to own or operate a proposed railway track or railway siding) notifies an access provider of its desire to connect its railway track or railway siding (or proposed railway track or railway siding) to the access provider's declared railway track, then the access provider must do all things reasonably necessary to enable the access seeker to connect its railway track or railway siding (or proposed railway track or railway siding) to the access provider's declared railway track.

The access seeker or the access provider may apply to the Commission for a dispute resolution decision if the parties cannot agree as to:

- the terms and conditions for the connection, including the costs to be paid by the access seeker; or
- the nature or content of the construction requirements in relation to the construction of the connection.

Section 7 of the Negotiation Guidelines also establishes a process that an access provider must comply with when responding to, assessing and negotiating an application for interconnection. The access seeker can apply to the Commission for a dispute resolution decision if the access provider does not follow the steps in section 7. However, this kind of dispute would be a compliance dispute (see section 2.2 above).

Disputes relating to an extension of capacity

An access provider's access arrangement is required to contain protocols which set out a framework and process for assessing and approving requests for additional capacity.

It is difficult to be definitive about what types of works may constitute additional capacity, but they may include:

- works that would increase the number of train paths that could be made available on a line, for example, by the construction of new passing loops;
- works to enhance the quality of the track, which may enable faster operating speeds (and hence more train paths), or higher axle loads (and hence greater train carrying capacities); and
- an extension of the tracks.

Certain provisions of the RCA mirror some of the elements of the Competition Principles Agreement (**CPA**). For example, in a dispute resolution decision the Commission can require an access provider to extend its declared facility. However, under section 38ZZG of the RCA, the Commission cannot require an access provider to extend its rail infrastructure:

(a) unless the Commission is satisfied that:

(i) the extension is technically and economically feasible and consistent with the safe and reliable operation of the relevant rail infrastructure; and

(ii) the access provider's legitimate business interests in the rail infrastructure are protected; or

(b) if to do so will require the access provider to bear some or all of the costs of extending that rail infrastructure or maintaining that extension.

These conditions are similar to those in section 6(4)(j) of the CPA.

Access regime disputes that arise from a request for additional capacity works may be about an inability to agree on the terms and conditions of access, about a hindering of access, or about a failure by the access provider to comply with the procedures and protocols in its access arrangement for assessing and responding to requests for additional capacity.

An inability to agree on the terms and conditions may relate to the proposed costs to the access seeker arising from the costing of the project or the method of allocating cost, or it may relate to other terms and conditions.

Disputes over the hindering of access are generally discussed in section 2.2 above. However, in relation to disputes about additional capacity works and interconnection, these kinds of disputes may be about the processes followed by the access provider, rather than the proposed terms and conditions. For example, this may include:

- procedures for assessing works required to extend or otherwise add capacity to the rail track;

- procedures for allowing access seekers to have inputs into the assessment of work;
- procedures for varying timeframes;
- procedures for resolving disputes that may arise in connection with any matter referred to in the protocols; or
- project management issues.

Disputes about an alleged failure by an access provider to comply with the procedures and protocols in its access arrangement for assessing and responding to requests for additional capacity would properly constitute compliance disputes, which are discussed in section 2.2 above.

3 FRAMEWORK FOR DECIDING ACCESS REGIME DISPUTES

This chapter outlines the statutory requirements that the Commission must address when resolving access regime disputes. It also discusses the dispute resolution strategy that the Commission proposes to adopt for dispute resolution processes. The detail of the dispute resolution process and procedures is addressed in Chapter 5.

3.1 Nature of the Commission's dispute resolution role

The Commission's decision-making role in relation to access regime disputes is similar to that of an arbitrator (although the process is not an 'arbitration' for the purposes of the *Commercial Arbitration Act 1984* (Vic)). The Commission's role in resolving access regime disputes involves the parties putting their case to the Commission, which then makes a determination that binds the parties. In doing so, the Commission is not merely choosing between the parties' positions but must consider the issues in terms of various criteria including the 'public interest'. The Commission may undertake its own analysis and seek material in addition to that provided by the parties.

Privacy

Subject to the possibility of joining two or more disputes (discussed in section 5.2.6), specific statutory requirements in relation to consulting in certain circumstances with the Secretary to the Department of Infrastructure and the Director of Public Transport (discussed in section 5.3.2) and the possibility that the parties agree to a hearing or part of a hearing for the purpose of a dispute resolution proceeding to be conducted in public, the Commission conducts dispute resolution proceedings in private. Although the Commission will publish an announcement on its website that it has received notification of an access regime dispute and will also publish a notice that it has made a dispute resolution decision on its website, the Commission otherwise recognises the need to ensure that the privacy of the dispute resolution proceeding itself is maintained. To this end, the Commission may give directions as to who may be present at any hearing and also that any party not divulge information given to the party during the course of the access regime dispute.

The privacy of the proceedings requires that:

- all communications between the parties, and between the parties and the Commission, in connection with the dispute resolution proceeding are also private and should not be published or otherwise disclosed; and

- the parties should not comment publicly on the conduct or content of the dispute resolution proceeding.

Privacy of the proceedings is a distinct and separate obligation to confidentiality, which is discussed in 5.2.1 below.

3.2 Statutory requirements for dispute resolution

The statutory framework of the VRAR establishes the following processes and requirements for access regime dispute resolution proceedings.

3.2.1 Notification of an access regime dispute

An access seeker, a user or an access provider may notify the Commission in writing of an access regime dispute (s 38ZV RCA). If the notifying party (hereafter 'applicant') is an access seeker or user then the 'respondent' will be an access provider, and vice versa.

The respondent must be notified in writing by the Commission on receipt of the application (s 38ZV(2)).

The applicant and respondent are the parties to the access regime dispute (s 38ZV(3)).

The applicant can withdraw the application at any time during the dispute by notice in writing to the Commission (s 38ZW). The Commission can recover costs from a withdrawing party (s 38ZZR(2)). Withdrawal of applications is discussed in section 4.3 below.

3.2.2 Timeframes for reaching a decision

In hearing an access regime dispute, the Commission is required to act as speedily as a proper consideration of the dispute allows, having regard to the need carefully and quickly to inquire into and investigate the dispute and all matters affecting the merits and fair settlement of the dispute (s 38ZZH(2)(b) RCA).

In any event, under section 38ZY, the Commission must decide on access regime disputes within 45 (calendar) days of receipt of a notification under section 38ZV(1), or by the date specified by the Minister under section 38ZZ.

Section 38ZZ provides that the Commission may, at any time before the expiry of the 45 day period, request the Minister for an extension of time. Such an extension must not exceed the time that is six (6) months of the date on which the Commission received notification of the access regime dispute.

The Commission notes that in certain circumstances the Commission is not required to make a dispute resolution decision: e.g., if a notification is withdrawn or the Commission forms the view that the notification is vexatious or the subject matter of the dispute is trivial, misconceived or lacking in substance (this is discussed in more detail in section 4.4 below).

3.2.3 Dispute resolution process requirements

Subject to certain procedural requirements in the RCA, the Commission can adopt a process that it considers will most effectively enable it to carry out its dispute resolution role. It has general powers, for example, under s 38ZZK(1)(e) to:

> *generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and making of a dispute resolution decision.*

The dispute resolution process is discussed in detail in Chapter 5. In summary, some of the requirements and powers of the Commission for the purpose of resolving an access regime dispute are as follows.

- **Hearings**. The Commission must conduct at least one hearing during the dispute (s 38ZZH(1) RCA), although it can hold more than one hearing. All hearings must be conducted in private, unless the parties to the dispute agree to a hearing being conducted in public (s 38ZZI). This is discussed in more detail in section 5.2.4.
- **Conduct of hearings**. The Commission has broad powers in relation to the conduct of hearings. The Commission can specify where and how the hearing will be held and who may attend the hearing, and is required to give approval before a party may be represented by someone else at a hearing (see sections 38ZZI(3) and 38ZZJ). This is discussed in more detail in section 5.2.4.
- **Taking evidence**. During a hearing the Commission is not bound by technicalities, legal forms, or rules of evidence (s 38ZZH(2)(a)) and may inform itself of any matter relevant to the access regime dispute in any way it thinks appropriate (s 38ZZH(2)(c)).The Commission may also set timeframes for the parties to present arguments (s 38ZZH(3)) and require the parties to give oral or written evidence (s 38ZZH(4)). For example, it may refer any matter to an expert and accept the expert's report as evidence (s 38ZZK(1)(d)). It can also take evidence on oath or affirmation (s 38ZZL). This is discussed further in section 5.2.4.
- **Giving directions**. The Commission can give a direction in the course of, or for the purposes of a hearing (s 38ZZK(1)(a)). For example, the Commission can give directions for the purpose of facilitating negotiations, including directing parties to negotiate in good faith, or to do or refrain from doing a specified act or thing relating to the conduct of negotiations. As another example, the Commission can direct any party not to divulge information given to them in the course of a dispute (s 38ZZK(3)). This is discussed further in sections 4.1 and 5.2.1.
- **Interim decisions**. Section 38ZZO provides that the Commission may make an interim decision. However, this does not relieve the Commission from its duty to make a final dispute resolution decision. An interim decision takes effect from the date specified in the interim decision. In making an interim decision, the Commission may take into account any matter it considers relevant. An interim decision is binding on the parties to the dispute.
- **Joining of issues**. Section 38ZZN allows the Commission to decide on two or more access regime disputes simultaneously, where the access provider is a party to each of those access regime disputes. If it permits joinder of this kind,

the Commission may disclose or give information in relation to one access regime dispute to a party of another access regime dispute if it considers it appropriate to do so.

- **Consultation with the Secretary to the Department of Infrastructure and the Director of Public Transport**. Section 38ZZF requires the Commission to notify and consider submissions from the Secretary to the Department of Infrastructure and the Director of Public Transport in relation to certain dispute resolution decisions prior to making the dispute resolution decision. This is discussed in more detail in section 5.3.2 below.

3.2.4 When a decision takes effect

Dispute resolution decisions may operate both prospectively and retrospectively.

Section 38ZX(4) provides that a dispute resolution decision takes effect from the date it is made, or from the date stated in the decision. In addition, section 38ZX(5) states that a dispute resolution decision may have effect from the day on which an access seeker has requested the access provider to provide to them a declared rail transport service.

3.3 Commission's dispute resolution strategy

This section outlines the Commission's guiding principles with respect to determining access regime disputes.

Of particular importance within the VRAR is the speedy resolution of disputes in light of the short statutory timeframe provided for the Commission to make its decision.

3.3.1 Commercial resolution of disputes

Sometimes, disputes may be resolved without the need for the parties to enter into a costly dispute resolution proceeding. It is preferable for an outcome to be secured between the disputing parties without intervention from the regulator. In administering and implementing the VRAR, the Commission recognises that it is desirable to encourage the relevant parties (i.e. access seekers, access providers, users and other affected stakeholders) to resolve matters through commercial negotiation, where possible.

The Commission endeavours to facilitate commercial negotiation by:

(i) ensuring that access seekers are provided with adequate information by access providers. This is a requirement of the Negotiation Guidelines. Part 2 of the Negotiation Guidelines specifies the information that must be made available by access providers to access seekers;

(ii) responding to access seekers' requests for information about their rights, and to access providers' requests for clarification of their obligations. For example, where an access seeker makes an inquiry of the Commission about the fairness or reasonableness of an access provider's offered terms and conditions (prior to notifying the Commission of an access regime

dispute), the Commission may provide information to both parties about their rights and obligations under the VRAR, including referring both parties to the Information Paper and this Guideline; and

(iii) encouraging the parties to an access regime dispute to attempt to resolve the dispute through commercial negotiations or other alternative dispute resolution mechanisms before seeking a determination by the Commission. Each access provider's access arrangement contains a process of negotiating access agreements as well as steps for seeking to reach a commercial resolution of disputes in the first instance. These processes are intended to facilitate negotiated outcomes.

The Commission may also give directions for the purposes of facilitating negotiations (s 38ZZM RCA). Such directions may require the exchange of information or documents between the parties, or require a person to carry out research or investigation in order to obtain information. The Commission may use such directions where it considers that to do so may assist the parties to reach agreement.

In relation to access regime disputes notified to the Commission in writing, and where those are disputes over an inability to come to an agreement over the terms and conditions of access, the Commission notes that the legal threshold for demonstrating that the parties 'cannot agree' is not high. However, the Commission will encourage the parties to explore reasonable avenues of negotiation where it is appropriate for it to do so.

3.3.2 Facilitative and advisory approaches

Within some access regime dispute resolution processes, facilitative approaches such as mediation and conciliation, or advisory approaches such as non-binding expert determination, are sometimes used. These approaches are to be contrasted with determinative approaches such as determination by the regulator.

The RCA empowers the Commission to adopt facilitative and advisory processes – for example:

- under section 38ZZK(1)(d) the Commission may refer any matter to an expert and accept the expert's report as evidence (although the RCA contemplates that this may only occur for the purpose of making a dispute resolution decision); and
- under section 38ZZM the Commission may give directions in relation to negotiations.

Nevertheless, the RCA imposes a tight 45 day timeframe within which the Commission must make a decision on an access regime dispute which has been notified to it (with the exception of the possibility of a time extension where there is Ministerial approval). This timeframe may therefore impose practical constraints on the use of facilitative and advisory processes within the Commission's dispute resolution process in circumstances where the Commission has been formally notified of the access regime dispute. Accordingly, the Negotiation Guidelines require each access arrangement to contain a negotiation protocol, which should include facilitative or advisory dispute resolution processes. Hence, in relation to disputes where the parties are unable to agree on the terms and conditions of

access, the Commission would expect that such disputes would have been subject to the dispute resolution processes set out in the access arrangement before being notified to the Commission if the parties were still unable to reach agreement.

This means that before an access regime dispute is notified to the Commission for resolution, the Commission would normally expect that the parties should have explored, and ideally exhausted, commercial negotiation and the processes contained in the relevant access arrangements for facilitative and advisory dispute resolution.

Therefore, when a dispute is notified to the Commission, it will usually favour a dispute resolution strategy based on a 'determinative' process, rather than on negotiation and facilitative dispute resolution processes. It will normally be assumed that such processes have been exhausted, and that there will not be practical benefits in directing the parties to such processes.

However, if the parties see merit in undertaking facilitative or advisory dispute resolution processes after the dispute is notified to the Commission, and if they would prefer to suspend the Commission's determinative process while this takes place, then the Commission may apply to the Minister for an extension of time (pursuant to section 38ZZ of the RCA). In the absence of the parties wanting this course of action, the Commission would proceed to determine the dispute.

3.3.3 Case management

Notice of Dispute

When an access regime dispute is notified to the Commission by a party, the Commission will seek to define clearly and precisely the nature of the dispute, and each of the issues that comprise the grounds of the dispute.

To this end, the Commission will normally issue a Notice of Dispute which defines the substance of the dispute, and after consulting with the parties to ensure accuracy, this will be provided to the party notifying the dispute and to the respondent. Preparation of the Notice of Dispute will assist to crystallise the matters in dispute and reduce the likelihood of these moving and changing during the course of the dispute resolution proceeding.

Decision makers and case management team

In any access regime dispute to be determined by the Commission, the decision makers are the Commissioners of the Commission.

However, for most disputes the Commission will also establish a case management team, made up of staff of the Commission. The case management team will have an appointed Project Manager, as well as a Registrar. The Project Manager and Registrar will be the points of contact at the Commission for the parties to an access regime dispute. The Registrar will be the point of contact at the Commission for parties to lodge documents. The Project Manager will lead the case management team and be responsible for briefing the Commissioners, coordinating conferences and liaising with experts.

The parties to a dispute will be promptly notified of the names and contact details of the Project Manager and Registrar.

The role of the case management team will be the process management and administration of the dispute, and provision of formal reports to the Commission.

Informing the parties in relation to the process

The Commission acknowledges that it is a fundamental requirement of the process that each party should have the right to a fair hearing, to make its case known, to know the case of the other party and to have an opportunity to respond.

The Commission will formulate the process to be followed during the dispute resolution proceeding in a document provided to the parties, which will include the procedures for ensuring that the parties are promptly informed of any subsequent changes in process. This document will also provide information in relation to:

- the decision makers and the case management team, the role of the case management team and the process of communication;
- the stages in the process at which the parties will be invited to submit evidence or arguments in support of their case or to rebut arguments or evidence put forward by the other party;
- the use of conferences and hearings, and who may represent the party in a conference or hearing;
- whether submissions must be made in writing, or will be made orally in hearings (or both);
- the use of experts; and
- the principles that the Commission will employ in relation to information exchange.

The Commission will also prepare a timetable for the determination of the access regime dispute, which will specify the dates for:

(i) submission of written material by the parties to the dispute;

(ii) the release of the Commission's interim decision (if any); and

(iii) the release of the final decision.

The Commission will work towards concluding the dispute resolution proceeding in accordance with the relevant timetable.

4 PRECONDITIONS FOR A DISPUTE RESOLUTION DECISION

This Chapter describes the preconditions for a dispute resolution decision, including the circumstances in which the Commission is not required to make a dispute resolution decision, e.g., because the dispute does not constitute an 'access regime dispute' within the meaning of the RCA; the access regime dispute is withdrawn; or the Commission forms the view that the access regime dispute notified is vexatious, or else that its subject matter is trivial, misconceived or lacking in substance.

4.1 Informal inquiries or complaints

Where an access seeker makes an inquiry of the Commission about the fairness or reasonableness of an access provider's offered terms and conditions, the Commission may provide information to both parties about their rights and obligations under the access regime in the RCA, including referring both parties to the Pricing Order, the Commission's Rail Access Pricing Guideline, the relevant access arrangement, the Information Paper and this Guideline.

The Commission may also give directions to the parties to an access regime dispute for the purposes of facilitating negotiations. Such directions may require the exchange of information or documents between the parties, or require a person to carry out research or investigation in order to obtain information. The Commission may use such directions where it considers that to do so may assist the parties to reach agreement.

4.2 Preliminary assessment of whether an access regime dispute exists

When the Commission receives notice of an access regime dispute it will need to make a preliminary assessment of whether an access regime dispute (as defined in section 38ZU RCA) in fact exists. Matters to which the Commission would expect to have regard to when making such a preliminary assessment are as follows.

In relation to a dispute where an access seeker alleges that the parties are 'unable to agree' terms and conditions of access, it would be appropriate to expect the access seeker to provide information demonstrating that the parties have not been able to reach such agreement, which could be information showing that the access seeker has made a request for access to the access provider and that the access provider has refused that request, failed to respond or refused to negotiate terms and conditions of access. The Commission expects that the matters under dispute

should have been the subject of negotiation between the parties, and that the access seeker will provide to the Commission all relevant information about the negotiations between the access seeker and the access provider (subject to any applicable statutory obligations of confidentiality).

In relation to a dispute where an access seeker or user alleges that the access provider has not complied with a statutory obligation (e.g., has hindered access) or has not complied with the relevant Commission Instruments, the Pricing Order or an access arrangement, the Commission will expect the applicant to provide information to support the applicant's belief that such a non-compliance has occurred. If the applicant is an access seeker, this information should also show how this non-compliance has resulted in the access seeker not being able to obtain access on fair and reasonable terms and conditions. If the applicant is an existing user, the information should support the applicant's belief that there has been non-compliance.

4.3 Withdrawal of an access regime dispute

At any time before the Commission makes its final decision in relation to an access regime dispute, the applicant can withdraw the dispute by making a written request to the Commission.

If the application is withdrawn the Commission will write to each party notifying them of the withdrawal and confirming that the Commission will not make a decision in relation to the dispute. The Commission will also publish a notice on its website stating that the dispute has been withdrawn and prepare its order for costs (if applicable) as discussed in section 5.3.8.

The withdrawal of a dispute does not set any precedent or have any implications for the Commission’s approach to any future dispute between the parties.

4.4 When the Commission will not make a determination

The Commission is not required to make a determination in circumstances where the Commission considers that the notification of the access regime dispute was 'vexatious' or that the subject matter of the dispute is 'trivial, misconceived or lacking substance' (s 38ZZA).

Therefore, upon receipt of a request to make a dispute resolution decision, the Commission will make a preliminary assessment as to whether it should exercise its powers to determine the dispute. If the dispute is considered by the Commission to be lacking in substance, misconceived etc, it may exercise its right not to make a determination and the parties will be informed accordingly. The Commission also reserves the right to exercise its discretion not to make a determination at any later stage in the dispute resolution process.

The Commission would expect to have regard to the following matters, among others, when considering whether a notification of the access regime dispute was vexatious or the subject matter of a dispute is trivial, misconceived or lacking substance:

- whether the dispute involves matters of consequence or is based on trifling or unimportant matters — in other words, whether there are matters of consequence to be determined by the Commission;
- whether the notice of the access regime dispute appears to have been lodged for a collateral purpose or an improper motive (e.g., to obtain financial information about the operator that would otherwise not be available);
- whether there appears to be a reasonable basis for the dispute (e.g., if the dispute is based on the claim that a reasonable right of access has been hindered, but the access seeker is unable to provide evidence or supporting information to show how this has occurred); and
- whether the request for a determination is obviously untenable or manifestly groundless.

In assessing these criteria the Commission may also take into account other factors such as whether an access seeker would be able to satisfy reasonable prudential requirements or can make use of the declared rail transport services (e.g., whether the access seeker can obtain the rolling stock necessary to use the declared rail transport services). Whether or not there has been a genuine effort on the part of the access seeker or user to resolve the dispute may also be relevant.

If the Commission decides not to make a determination for any of the reasons noted above, it will provide the access seeker and the access provider with written reasons for its decision. Section 5.3.3 of the Guideline describes the formal requirements of the *Essential Services Commission Act 2001* (Vic) (**ESC Act**) with respect to decisions of the Commission.

5 DISPUTE RESOLUTION PROCESS, STRUCTURE AND PROCEDURES

This Part outlines the general format for the conduct of the Commission's dispute resolution procedures and describes in detail the procedures that the Commission would expect the parties to follow if an access regime dispute is notified to the Commission.

The flowchart in Appendix C contains a summary of the key procedural steps and timeline for the resolution of an access regime dispute notified to the Commission.

In general there will be three main phases of the dispute resolution procedure, namely:

- the preliminary phase (notification of dispute and holding of initial case management meeting);
- the substantive phase (exchange of information, conducting hearings, Commission deliberations and interim decisions); and
- the decision phase (making a decision, the formal requirements of a decision, appeals, costs, etc).

The remainder of this chapter is organised around these three main parts of the dispute resolution proceeding.

5.1 Preliminary phase

The Commission's formal dispute resolution process begins when an access seeker, user or access provider applies in writing to have the Commission decide an access regime dispute. For the purposes of this Guideline, the notice of an access regime dispute is described as an 'application'.

5.1.1 How notifications should be made to the Commission

As the Commission will need to understand the nature of the dispute before it commences to determine a dispute, applications for the Commission to decide an access regime dispute will need to include:

- an accurate and comprehensive statement of the nature and substance of the dispute; and
- all of the information and documents relevant to the dispute.

This Guideline provides information on how applications should be notified to the Commission. At the outset, it should be noted that the Commission considers it important that the applicant should properly consider the matters in dispute before

an application is lodged and pay careful attention to the preparation of the application (including, where appropriate, seeking professional advice). In order for the Commission to be able to determine a dispute quickly and efficiently, it is important that the issues in dispute are well defined in the application and that all relevant information is provided with the application.

The applicant should be aware that the application lodged with the Commission will be used to define the dispute and the matters upon which the Commission will make a determination. The application will also be copied to the respondent and, subject to maintaining the appropriate confidentiality in relation to the parties' confidential information, will be made publicly available.

So that the Commission can conduct the dispute resolution proceeding within the prescribed statutory timeframe, the Commission may not be able to have regard to matters that are not addressed in the application, particularly in circumstances where such matters could properly have been raised at the time the application was lodged. The Commission also expects that the applicant will provide all of the information and documents in its possession that are relevant to the dispute at the time of making the application. The form of application is discussed in section 5.1.4.

5.1.2 Parties to an access regime dispute

The principal parties to the determination of an access regime dispute are:

- in relation to a dispute over the terms and conditions of access, the access provider and the access seeker;
- in relation to a dispute over the compliance by the access provider with a statutory obligation or with its access arrangement, the Pricing Order, the relevant Commission Instruments (the Rules) or the requirements of the Negotiation Guidelines (i.e. a 'compliance dispute'), the parties are either an access seeker and the access provider, or a user and the access provider. These kinds of disputes can be notified to the Commission by either an access seeker or a user, who will be the applicant. The access provider will be the respondent in these types of access regime disputes; and
- in relation to a rail infrastructure-related dispute over the terms and conditions of access, an access seeker and the access provider. Either party can apply to the Commission to decide a dispute of this kind.

5.1.3 Preconditions

The following conditions must exist for an application to be made:

- an access regime dispute exists within the meaning of the RCA; and
- the dispute has arisen because:

(i) the parties cannot reach agreement either in relation to the terms and conditions of access;

(ii) the applicant reasonably believes that the access provider has not complied with its statutory obligations, or requirements in the Pricing Order

or the relevant Commission Instruments (the Rules) or the requirements of the Negotiation Guidelines, or with its access arrangement; or

(iii) the parties cannot reach agreement in relation to rail infrastructure works.

Upon receipt of an application for a determination, the Commission will consider whether these conditions are met.

In relation to disputes about the terms and conditions of access, the Commission expects that the matters in dispute will have been the subject of negotiation between the parties. Unless the applicant alleges that the dispute is a compliance dispute, the Commission will normally expect the applicant to provide some evidence that the parties have followed the processes in the access provider's binding access arrangement with respect to processing the access seeker's access application, negotiating terms and conditions of access, using alternative dispute resolution procedures and acting in good faith. It should be noted that this evidentiary threshold, in itself, is not regarded as a high threshold by the Commission.

5.1.4 Form of application

In light of the limited time within which the Commission must make a determination, it is suggested that applicants should make their application in writing by way of a standard form. This is intended to enable the Commission to focus on the principal area of dispute and to assist the applicant to include the necessary preliminary information for the Commission to promptly commence the dispute resolution proceeding.

The Application Form is set out in Appendix A to this Guideline. It is not compulsory to make an application using the Application Form. However, applications that do not include all of the necessary preliminary information may cause a delay in the dispute resolution process. The Commission notes that this would not generally be in the interests of the applicant.

All applications should include the name and contact details of the respondent and an initial summary statement of the substance of the dispute as well as the documents and information specified below. Note that the documents and information that will be required will vary according to the substance of the dispute.

Dispute over terms and conditions of access

Information that should accompany an application for determination of a dispute about terms and conditions of access should include:

1. a copy of the access seeker’s request for access, specifying the relevant declared rail transport service(s) to which access is sought, including the type of train and freight carried, and the relevant dates;

2. any price and scheduling offer or offers made by the access provider, or any letters refusing access;

3. all other relevant correspondence (including emails) between the access seeker and the access provider. The Commission would expect this

information to show that the parties are not able to reach agreement about the terms and conditions of access;

4. a copy of any expert reports or findings in relation to the dispute;

5. a copy of any current agreements between the access seeker and access provider relevant to the access seeker's request for access to the declared rail transport service(s); and

6. a clear specification of the terms of the determination sought by the applicant and any procedural or other directions which the applicant requests the Commission to make, including directions as to the provision of information by the respondent.

Dispute concerning non-compliance by the access provider

Information that should accompany an application for a decision in relation to a failure of the access provider to comply with a binding statutory or regulatory obligation should include:

1. details of the alleged non-compliance clearly identifying the section and paragraph reference to the RCA or regulatory instrument containing the obligation in question, as well as all particulars of the actions of the access provider that are alleged to be non-compliant;

2. details of any detriment (if relevant) to the access seeker or user resulting from this non-compliance. This would include specification of the relevant declared rail transport service(s) and the nature of any disruption caused to the applicant's access to, or use of, the service(s);

3. any access agreement or agreements in force between the applicant and the respondent;

4. all relevant correspondence (including emails) between the applicant and the respondent; and

5. a clear specification of the terms of the determination sought by the applicant and any procedural or other directions which the applicant requests the Commission to make, including directions as to the provision of information by the respondent.

Dispute over rail infrastructure works

Information that should accompany an application for a determination in relation to rail infrastructure-related disputes (such as interconnection or additional capacity works) should include:

1. a copy of the access seeker's request for interconnection, or additional capacity works, specifying the details of the relevant rail infrastructure or nature of the interconnection or extension sought or the additional capacity works requested to be undertaken, and the relevant dates;

2. any offers of terms and conditions made by the access provider, or any letters refusing to undertake the requested rail infrastructure works or relevant assessments, e.g., of the feasibility of such works;

3. all other relevant correspondence (including emails) between the access seeker and the access provider. This should demonstrate that the parties are not able to reach agreement about the terms and conditions or any other relevant matter that would form part of an agreement, for which infrastructure works are to be carried out;

4. a copy of any expert reports or findings in relation to the dispute;

5. a copy of any current agreements between the access seeker and access provider relevant to the access seeker's request for access to the access provider's rail infrastructure, rail network or track or declared rail transport service(s); and

6. a clear specification of the terms of the determination sought by the applicant and any procedural or other directions which the applicant requests the Commission to make, including directions as to the provision of information by the respondent.

In all cases, where there is insufficient information in the application for the Commission to ascertain the specific details of the dispute, or be satisfied that it meets the definition of an access regime dispute, the Commission may write to one or both parties seeking additional information. Seeking additional information can potentially delay the start of dispute resolution process.

5.1.5 Notification to parties to a dispute

The Commission expects that an applicant lodging an application for a decision by the Commission will also serve a copy of the application, with a complete set of supporting materials, on the respondent on the same day. The applicant should also confirm to the Commission that this has been done, and the Commission will confirm with the respondent that it has all of the documents provided to the Commission. If the respondent does not have all of the documents submitted by the applicant, the Commission will endeavour to provide the outstanding documents to the respondent on the same day.

The Commission notes that in any event the Commission is required to notify the respondent of the access regime dispute (s 38ZV(2)).

If any further clarifications are required by the Commission as to the substance of the dispute, the Commission will provide a copy of its request for clarification to both the applicant and the respondent.

As soon as practicable after receiving an application and determining that the application relates to an access regime dispute, the Commission will announce on its website that it has received notice of an access regime dispute. This announcement will include a summary statement of the substance of the dispute (as discussed in section 3.3.3, this is called a Notice of Dispute) prepared by the Commission on the basis of the application.

In a situation where the application does not provide the Commission with sufficient information as to the substance of the dispute, and where additional information has subsequently been sought and received by the Commission, the Commission may issue an Amended Notice of Dispute. The Amended Notice of Dispute will replace the original Notice of Dispute as the official reference document for defining the nature of the dispute.

5.1.6 Preliminary case management steps

The establishment of a case management team made up of Commission staff to manage the process and administration of the dispute has been discussed in section 3.3.3.

During the preliminary phase the Commission will endeavour to ensure that the issues in dispute are identified as early as possible with as great a degree of clarity as possible. The Commission's approach of issuing a Notice of Dispute has also been described in sections 3.3.3 and 5.1.5.

The Commission will inform the parties at the outset of the Commission's proposed process for resolving the dispute, and notify the parties promptly of any changes in the process.

For the purposes of facilitating the dispute resolution process, the Commission may issue directions to the parties as to:

- the broad procedures to be followed in the conduct of the access regime dispute;
- the timetable of steps in the resolution of the access regime dispute, including the timetable for the provision and exchange of information, submissions and expert reports (if any);
- the timetable for any hearings or conferences;
- whether the Commission proposes to issue an interim decision;
- whether the Commission proposes to determine jointly other access regime disputes; and
- any other matters raised by the parties or the Commission to expedite the dispute resolution process.

The Commission's preferred strategy will normally be to hold an initial case management meeting with the parties to clarify more fully the matters in dispute and assist the Commission to formulate the processes that it will adopt in the course of determining the dispute.

5.2 Conduct of the dispute resolution procedure

The key procedures during the substantive phase of the dispute resolution proceeding will include:

- exchange of information, access to information and confidentiality;
- requirements in regard to the conduct of the parties;
- directions in relation to negotiations;

- use of experts;
- joining two or more access regime disputes; and
- interim decisions.

5.2.1 Exchange of information, access to information and confidentiality

This section sets out the Commission's processes for managing the provision and flow of information between the parties and the Commission.

Principles and process for information exchange

The information exchange process is a crucial factor in a dispute resolution proceeding. Delays may occur if parties seek an unnecessarily large amount of information that is in excess of that reasonably required or relevant to resolving the dispute. An unnecessarily broad information discovery process can result in considerable delays and inefficiency in the dispute resolution process.

The short statutory timeframe for the Commission to resolve a dispute makes it all the more important that the matters in dispute, and the factual information that must serve the basis for resolving the dispute are clearly identified and agreed upon by the parties at an early stage in the process.

For this reason the Commission will adopt a proactive role in defining the information that should be provided and exchanged by the parties, and will use its powers of direction to endeavour to limit the information sought to relevant information. To this end, it will:

- direct the parties to define clearly the issues in dispute at the outset;
- direct them to list the documents they require by reference to the issues to which they relate;
- assess whether information sought is relevant to the Commission's task of deciding the dispute;
- assess any claims for confidentiality in light of the general approach to information disclosure;
- establish the specific arrangements to protect confidential information (e.g., confidentiality undertakings); and
- direct the parties as to the documents to be exchanged and the arrangements for exchanging those documents, subject to any specific arrangements with respect to confidential information.

Information sharing protocol

All communications between the Commission and any party to a dispute resolution proceeding must be copied to each other party to the dispute resolution proceeding. The Commission will ensure that any correspondence it issues is copied to all parties to the dispute resolution proceeding. It is the responsibility of the individual parties to ensure that all correspondence they send to the Commission is copied to all other parties to the dispute resolution proceeding. Furthermore, all correspondence between parties to a dispute resolution

proceeding must be copied by the sending party to all other parties and the Commission.

There may also be other information that the Commission proposes to use. To the extent that the Commission intends to draw upon or rely on any information not provided by the parties, the Commission will make this information available to the parties.

These requirements are subject to confidentiality obligations, which are discussed later in this section.

Power to obtain information

For the purposes of resolving an access regime dispute the Commission may require the parties to produce and exchange information relevant to the dispute. This section of the Guideline outlines the procedures that the Commission will follow when requiring a party to produce information for the purposes of making a dispute resolution decision.

The Commission has general powers to obtain information for the purposes of performing its regulatory functions under Part 4 of the ESC Act. Section 37(1) provides that if the Commission has reason to believe that a person has information or a document that may assist it in the performance of any of its functions, the Commission may require the person to give the Commission the information or a copy of the document. If the Commission wishes to exercise this power, it will issue, pursuant to section 37(2), a written notice to the person specifying:

- the information or document required;
- the period of time within which the requirement must be complied with;
- the form in which the information or copy of the document is to be given to the Commission; and
- that the requirement is made under section 37 of the ESC Act.

However, the Commission notes that these general powers may be less than fully effective within the timeframe requirements of the dispute resolution process.

The RCA provides the Commission with additional relevant powers to obtain information. Section 38ZZK(1)(e) gives the Commission the power to give directions generally, and this would include directions with respect to the exchange of information. This may facilitate the dispute resolution process but may also facilitate a negotiated outcome. Under section 38ZZH(2)(c), which only applies to dispute resolution hearings, the Commission is given the power to inform itself of any matter relevant to the dispute in any way it thinks appropriate.

The Commission can also undertake investigations to inform itself more adequately about information pertaining to the dispute. This includes the commissioning and consideration of independent expert reports (s 38ZZK(1)(d)). This is discussed in section 5.2.5.

Protection of confidential information

Confidentiality issues can arise in the dispute resolution proceeding where the Commission is asked by a party to consider information held by another party and that other party considers this information to be confidential.

This section outlines the Commission's powers to direct the exchange of confidential information and the procedures to be followed to protect confidential information exchanged or disclosed in the course of a dispute resolution proceeding.

(a) Powers to direct the exchange of confidential information

During the dispute resolution proceeding, the fact that a party considers information to be confidential does not exempt a party from providing that information to the Commission if that information is within the scope of an information notice issued by the Commission (s 37 ESC Act). However, under sections 38(2)(a) and 38(2)(b) of the ESC Act, the Commission may not disclose information and/or documents provided to it which it has accepted on a confidential basis, except where it is of the opinion that disclosure would not cause any detriment to the information provider or other party, or the public benefit in disclosing it outweighs the detriment to the information provider or other party. In these circumstances the procedures in sections 38(2)(c) and 38(2)(d) of the ESC Act will be followed.

The relevant procedures include a requirement that the Commission not disclose the information or the contents of a document without first giving the owner of the information a written notice stating that it proposes to disclose the document. Such notice must set out detailed reasons why the Commission wishes to make the disclosure, why that disclosure would not cause the person providing it any detriment, or why the public benefit in disclosing it outweighs the detriment to the person.

When a party provides information to the Commission which it considers to be confidential, the process to be followed includes the following steps:

- the party making the claim for confidentiality must identify the information claimed to be confidential and the basis of the claim for confidentiality and advise whether they or any other person will suffer any detriment as a result of the information or the contents of the document being disclosed and, if so, what that detriment will be;
- the Commission will provide to the other parties a copy of the claim, including the descriptive information;
- the Commission will seek submissions on the claim from the other parties; and
- the Commission will make a decision as to whether the information is in fact confidential information and, if so, how such information should be made available to the other parties.

If a party notifies the Commission that it considers the information referred to in a Commission direction to be confidential, the Commission may nevertheless require that the information should be exchanged, but will require that the party receiving

the confidential information execute confidentiality undertakings. This is discussed in more detail below.

(b) Assessment of whether confidential information should be provided

When considering whether confidential information should be disclosed to another party to an access regime dispute, the Commission will consider:

- the relevance of the information to the dispute in hand; and
- whether the disclosure would be consistent with the level of information that would reasonably be available to participants in an industry (such as that required to be provided under the Negotiation Guidelines). For example, the Commission considers that it is likely that there are types of confidential information an access provider would not normally be required to provide to an access seeker to enable the access seeker to make a decision on whether to seek access, or to formulate its proposed terms and conditions.

Once confidential information has been identified by the Commission as information that should be disclosed for the purposes of the dispute resolution proceeding, the Commission will need to decide on the terms on which this should be exchanged, including the requirements in relation to the handling of this confidential information by a recipient, and who can receive the information (e.g., information can be made available only to nominated representatives of the other party, or information can be made available only to an independent consultant on behalf of the other party).

The Commission does not intend that there would be information that is made available only to the Commission. That is, it is the Commission's preferred position that there should be no information that is made available only to the Commission. The Commission will endeavour to disclose all relevant matters to the parties involved in the resolution of an access regime dispute or their representatives.

If the Commission were not to give other parties an opportunity to comment on information it has received from one party, this may impair the ability of the other parties to present their case. Furthermore, this information cannot be properly tested. For these reasons, the Commission may disregard or give less weight to any confidential material which has not been disclosed to the other party.

When confidential information is being made available to nominated representatives of a party or to a consultant, the recipient should enter into an appropriate confidentiality deed. An example of a confidentiality deed is provided in Appendix B.

(c) Protecting confidential information exchanged

As noted in sections 3.3.1 and 5.2.1 above, the Commission can direct a person who is or was a party to an access regime dispute to give relevant information to another person for the purposes of facilitating negotiations in relation to that access regime dispute.

During a dispute resolution proceeding the Commission expects that confidential material will be exchanged between the parties subject to agreed confidentiality arrangements.

When directing parties to exchange confidential information, the Commission will usually require the information supplier to notify the Commission of the proposed terms of any confidentiality agreement to be entered into by the other parties to the dispute, or consultants, as recipients of the confidential information. The Commission may issue procedural directions to modify the terms and conditions of the proposed confidentiality agreement if it deems them to be unreasonable.

An example of a confidentiality deed is provided in Appendix B. However, the confidentiality deed need not conform to the example in Appendix B. Furthermore, nothing limits the parties agreeing on appropriate confidentiality arrangements between themselves.

(d) Protecting other confidential information

The Commission can also direct the parties with respect to the communication of confidential information received during the course of the dispute resolution procedure (e.g., during the course of a hearing), and can require the parties not to divulge such information.

5.2.2 Conduct of the parties

The Commission expects that the parties to a dispute resolution proceeding will at all times do all things required by the Commission to enable a fair determination to be made. No party should knowingly give information that is false or misleading, or produce a document that it knows is false or misleading.

The Commission notes that a party to an access regime dispute:

- must not do any act or thing in relation to the hearing of an access regime dispute that would be a contempt of court if the Commission were a court of record (s 38ZZK(2) RCA);
- must comply with a direction not to divulge or communicate to anyone else specified information that was given to the party in the course of an access regime dispute unless the party has the Commission's permission (s 38ZK(4)); and
- must not contravene a direction by the Commission requiring the person to do, or refrain from doing, a specified act or thing relating to the conduct of negotiations (s 38ZZM(3)).

Certain requirements relating to the formal conduct of hearings will be notified to the parties at the time a hearing is notified.

5.2.3 Directions in relation to negotiations

The Commission can direct the parties for the purposes of facilitating negotiations between them (s 38ZZM RCA). This may include directing the parties to negotiate in good faith, or to do or refrain from doing a specified act or thing relating to the conduct of negotiations.

In some circumstances, the Commission may direct the parties to a dispute resolution proceeding to attend a mediation hearing. However, it will generally only do so if it is reasonably satisfied that the parties were close to agreement,

recognising that the success of mediation processes requires a willingness on the part of both parties to participate in the mediation in good faith, and with the objective of reaching agreement. In other words, the Commission accepts that, for mediation to be successful, the parties to the dispute must be committed to the mediation process.

On this basis, the Commission may use its powers to direct parties to attend mediation after:

- information is provided to the Commission which indicates to the Commission that the parties are reasonably close to agreement; or
- information is exchanged between the parties (and copied to the Commission), which informs each party about the commercial position of the other party and highlights the points upon which the parties both agree and disagree and the Commission is reasonably satisfied that mediation would have reasonable prospects of success.

5.2.4 Hearings and conferences

Given the tight timeframes for making a dispute resolution decision, the Commission's obligation to conduct at least one hearing for the purposes of making a dispute resolution decision and the Commission's broad powers with respect to hearings, the Commission considers that an important part of the process for resolving access regime disputes will be the use of hearings and conferences.

Statutory Requirements

The Commission must conduct at least one hearing during the dispute resolution process (s 38ZZH(1)), although it can hold more than one hearing. All hearings must be conducted in private, unless all of the parties to the dispute agree to a hearing being conducted in public (s 38ZZI). Whenever the Commission holds a hearing it must, in conducting the hearing, 'act as speedily as a proper consideration of the access regime dispute allows, having regard to the need to carefully and quickly inquire into and investigate the access regime dispute and all matters affecting the merits, and fair settlement, of the access regime dispute' (s 38ZZH(2)(b)).

Purposes and use of hearing and conferences

‘Conferences’ are round table meetings between the parties to the dispute and Commission staff, whereas ‘hearings’ are the sessions which are presided over by the Commissioners that have been designated to act as decision makers of the dispute, and at which oral submissions and oral evidence are put before the Commissioners and a transcript is taken.

Conferences have the general purpose of clarifying and prioritising issues, and are used as a case management tool to monitor the progress of directions and to keep the dispute resolution proceeding moving forward.

The Commission's view is that conferences will generally be used as a case management tool to monitor and manage the progress of the dispute and to enable the Commission in the very early stages of the dispute resolution process to:

- identify the key issues in dispute;
- identify the relevant documents and information required by the parties and the Commission to progress the dispute;
- identify the types of expertise that may be required or useful for the purposes of making a dispute resolution decision;
- give directions for the production of documents and exchange of information; and
- give directions for the continuation of the dispute resolution procedure, including the conduct of a hearing.

Hearings, on the other hand, are typically used for resolving factual issues, and are used to take evidence on oath, provide an opportunity for limited cross examination, and may be used to deal with expert evidence.

Hearings will normally be held for testing the quality of the factual information and evidence and arguments presented by the parties through a process in which the Commissioners, as well as expert advisors, question the parties about their submissions. This would also allow the parties the opportunity to challenge evidence or statements of the other party, and for the Commission to ask questions to clarify questions of fact.

Commission's Powers in relation to Hearings

The Commission has broad powers in relation to the conduct of hearings. For example, the Commission can give a direction in the course of, or for the purposes of a hearing (s 38ZZK(1)(a)), and during a hearing it is not bound by technicalities, legal forms, or rules of evidence (s 38ZZH(2)(a)).

The Commission can specify where and how the hearing will be held and who may attend the hearing, and is required to give approval before a party may be represented by someone else at a hearing (see ss 38ZZI(3) and 38ZZJ).

In particular, the Commission may set timeframes for the parties to present arguments, require the parties to give oral or written evidence, and inform itself of any matter relevant to the dispute in any way it thinks appropriate, including referring any matter to an expert (ss 38ZZH and 38ZZK(1)(d)). It can also take evidence on oath or affirmation (s 38ZZL) and direct persons not to divulge information given to them in the course of a dispute (s 38ZZK(3)).

Procedures for Conducting Hearings

Prior to a hearing, the Commission will usually require the parties to provide written submissions, supporting information and witness statements. All information and submissions filed on behalf of a party in writing for the purposes of a hearing should be certified as true and correct by the person filing that information or, in the case of a body corporate, an appropriate representative of the company.

Where parties propose that evidence should be filed in the form of witness statements and the Commission has not required the parties to provide such statements, they should seek a specific direction to that effect and set out the basis for their request to proceed in that manner. The Commission does not propose as a general rule to permit oral examination. If a party wishes to provide oral evidence or to test the evidence submitted by another party by way of oral examination they

should seek a specific direction to that effect and set out the basis for their request to proceed in that manner.

If the Commission requires, evidence shall be given on oath or affirmation, or by affidavit. The Commission may administer an oath or affirmation or take an affidavit for the purposes of the dispute resolution proceeding.

The Commission will generally hold a hearing by personal attendance. The Commission expects that hearings will have the following format:

- the Commissioners will preside;
- the Registrar will issue the parties with an agenda, procedural notes and a list of the persons who may attend the hearing. Matters to be addressed at the hearing will be limited to the matters on the agenda, and the hearing will be conducted in accordance with the procedural notes;
- a recorded transcript will be taken of the hearing and sent to all parties;
- the parties will be given prior notice of the matters on which the Commissioners will hear oral testimony (if any). On such matters the Commissioners may ask questions following oral testimony;
- unless the Commission directs the parties otherwise, the Commission will generally permit the Commission and the parties to the dispute to have their legal counsel present; and
- the hearing will be conducted in private unless all the parties consent to a public hearing.

5.2.5 Use of experts

The parties may engage an expert during a dispute resolution procedure, including for providing evidence or analysis of factual material. The Commission may refer any matter to an expert and accept the expert's report as evidence (s 38ZZK(1)(d)).

Experts can be used in a number of ways. The Commission expects to use experts in two principal ways:

- to provide a formal report on a specific issue where the Commission considers that independent, technical expertise is required; and
- to break deadlocks, including by conducting a conference of experts.

Given the time constraints for resolving disputes under the VRAR there may be practical limitations to seeking formal reports from experts.

Where the Commission considers that it is necessary to obtain an expert report (eg, if the Commission considers that the information provided by the parties is insufficient for the Commission to be sufficiently well informed on certain matters on which its decision will turn), it will usually request a time extension from the Minister under section 38ZZ(1) for this stated purpose.

When using experts, the Commission will ensure that appropriate confidentiality procedures and requirements are maintained.

Guidance on the submission of expert reports

The Commission will generally require expert reports to contain certain information to enable the parties to assess the report and its conclusions, and to assist to remove concerns about potential bias in the instructions of the expert or the independence of the opinion provided. The required information will typically include:

- details of the expert's qualifications and experience;
- the questions or issues the expert has been asked to address;
- the oral and written instructions given (both initial and supplementary) and details of any documents that the expert has been asked to consider;
- the factual material considered by the expert;
- details of any assumptions made, including any with which they were briefed and which underpin their report;
- the process used by the expert (including any consultations) and analysis employed;
- a copy of any calculations (including supporting spreadsheets), reports or plans referred to in the report; and
- the limitations of the report, including any limitations of information available to the expert, and how this information is relevant to the issues addressed.

Use of experts to break deadlocks

For certain kinds of disputes it may be useful to use a conference of experts, e.g., in the early stages of the process to assist to further clarify facts and technical issues.

If the Commission considers that a conference of experts may be useful it will:

- consult with the parties and seek comments in relation to the usefulness of an experts' conference; and
- issue directions to the parties in relation to the use of experts for the purpose of the conference (e.g., in relation to the number of experts that a party may use and limits on the instructions that may be given, for the purpose of this conference).

5.2.6 Joinder

Section 38ZZN allows the Commission to make a dispute resolution decision in respect of two or more access regime disputes simultaneously, where the access provider is a party to each of those access regime disputes. If the Commission permits joinder of this kind, it may disclose or give information in relation to one access regime dispute to a party of another access regime dispute or disputes if it considers it appropriate to do so.

Joinders may be useful where:

- there are common technical issues between dispute resolution proceedings involving the same access provider;

- there is an issue relating to capacity limitations and capacity is sought by two access seekers that are parties to the two disputes;
- the access provider would be unfairly advantaged in dealing with common issues through a series of bilateral disputes, and fairness to the access seekers would be served better by joining the dispute resolution proceedings;
- it would be more practical and reduce the costs of the Commission and the parties for the access regime disputes to be dealt with jointly; and
- the Commission's objectives in resolving the dispute would be better served if, due to the commonality between the matters in the two dispute resolution proceedings, the common issues in the disputes could be addressed concurrently.

The RCA does not provide for the joinder of third parties to the resolution of a single access regime dispute on the basis that they have a sufficient interest in the decision.

The use of joinder needs to be considered in light of the timeframes available for determining the dispute, the practical considerations and complexities in relation to case management of multilateral disputes, and the practical and procedural benefits of jointly addressing relevant issues common to contemporaneous disputes.

For the purpose of making a dispute resolution decision in relation to two or more access regime disputes involving the same access provider, the Commission may hold a joint hearing. If it proposes to hold a joint hearing, the Commission will advise the parties of the specific matters that it proposes to deal with through this common process, and will typically seek the parties' consent to the joint hearing. Procedural arrangements for a joint hearing will be similar to those for other dispute resolution hearings. The Commission will notify the parties of these procedures prior to the joint hearing.

5.2.7 Interim decisions

Section 38ZZO(1) of the RCA provides that the Commission may make an interim decision in respect of any access regime dispute before making a final dispute resolution decision. Making an interim decision does not relieve the Commission from its duty to make a final dispute resolution decision within the timeframe specified in the RCA (or as extended by the Minister) (s 38ZZO(2)).

In making an interim decision, the Commission may take into account any matter it considers relevant. An interim decision is binding on the parties to the dispute.

Normally, before considering whether to make an interim decision, the Commission would expect to have received a request from one of the parties for an interim decision. The Commission will then make an assessment of this request on its merits.

The circumstances in which the Commission would consider making an interim decision are likely to be dependent on the nature of the issues in dispute and whether there is likely to be a practical benefit to making an interim decision, given that the final decision will normally need to be made within a 45 day period (unless

an extension of time has been granted by the Minister). Relevant matters to be taken into account when deciding whether to make an interim decision may include whether sufficient information is available to make an interim decision, the impact of an interim decision on the parties and affected stakeholders, and whether certain actions should be undertaken in a timely manner in the interim prior to the Commission making its final decision.

Before making an interim decision the Commission expects to provide a draft version of the interim decision to the parties for comment.

An interim decision takes effect from the date specified in the interim decision. An interim decision will remain in effect until the first to occur of:

- a final decision is made;
- the interim decision is revoked by the Commission;
- the interim decision expires; or
- the notification of the dispute is withdrawn.

5.3 Commission's decision

The Commission must make a decision in relation to a dispute notified to it (s 38ZX(1)) unless the dispute is withdrawn or the Commission determines that the notification of the access regime dispute is vexatious (s 38ZZA(a)) or that its subject matter is trivial, misconceived or lacking substance (s 38ZZA(b)).

The RCA and the ESC Act contain relatively detailed provisions with respect to the content of dispute resolution decisions. This section of the Guideline describes the matters that the dispute resolution decision may address and the typical contents of a dispute resolution decision.

5.3.1 Requirements of dispute resolution decisions

The matters that the Commission must take into account in making a dispute resolution decision, pursuant to section 38ZZB(a) of the RCA, are:

- the objectives referred to in section 38F;
- the matters set out in sections 38ZI(b) to (i) of the RCA, which mirror clause 6(4)(i) of the National Competition Policy Agreement (see Box 5.1); and
- information given to it in accordance with Part 4 of the ESC Act.

The Commission, pursuant to section 38ZZB(b), may also take into account any other matter that it considers relevant. This may include:

- any information that the Commission obtains during the dispute resolution proceeding using its information-gathering powers under the RCA; and
- in relation to certain dispute resolution decisions, submissions received from the Secretary to the Department of Infrastructure and the Director of Public Transport.

The dispute resolution decision must not be inconsistent with:

- the Rules (ss 38ZZC(a)–(d));

- the Pricing Order and any pricing methodology made by the Commission (e.g., the Rail Access Pricing Guideline) (s 38ZZC(e));
- the principle of passenger priority (s 38ZZC(f)); and
- the relevant binding access arrangement (s 38ZZD(1)).

It must not set a price higher than the access provider's internal transfer terms (s 38ZZD(2)). Furthermore, a decision must not interfere with directions of the Safety Director without the Safety Director's prior consent (s 38ZZE) (this is discussed further in section 5.3.2 below).

Box 5.1 **Matters to be taken into account when making a dispute resolution decision (ss 38ZZB(a) and 38ZI(b) to (i) RCA)**

In making its dispute resolution decision, the Commission must take into account the following matters specified in paragraphs (b) to (i) of section 38ZI:

(b) the access provider's legitimate business interests and investment in the rail network owned or operated by that access provider; and

(c) the costs to the access provider of providing access, including any costs of extending the rail network owned or operated by that access provider but not including costs associated with losses arising from increased competition in upstream or downstream markets; and

(d) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake; and

(e) the interests of other users; and

(f) existing contractual obligations of the access provider and users of the rail network owned or operated by that access provider; and

(g) the operational and technical requirements necessary for the safe and reliable operation of the rail network owned or operated by the access provider; and

(h) the economically efficient operation of the rail network owned or operated by the access provider; and

(i) the benefit to the public in having competitive markets.

Note: The matters specified in paragraphs (b) to (i) are consistent with the matters specified in paragraph (i) of clause 6(4) of the Competition Principles Agreement made on 11 April 1995 between the Commonwealth and all of the States and Territories of the Commonwealth.

Matters the Commission may address

The Commission has significant scope in relation to the matters it may address in an access regime dispute resolution decision. However, some examples of what the decision can do are contained in section 38ZX(2), and include:

- addressing or dealing with any matters relating to the provision of a declared rail transport service to the access seeker or user who is party to the dispute –

including the terms and conditions, and price in respect of, the provision of that service; and

- requiring an access provider to extend, or permit the extension of, rail infrastructure used to provide declared rail transport services (see discussion in section 2.3).

Matters the Commission must consider in relation to infrastructure extensions

In any decision in relation to extensions of rail infrastructure used to provide a declared rail transport service, the Commission will not make a decision requiring an access provider to extend, or to permit the extension of, the rail infrastructure unless it is satisfied, pursuant to section 38ZZG, that:

- the extension is technically and economically feasible and consistent with the safe and reliable operation of the relevant rail infrastructure; and
- the access provider's legitimate business interests in the rail infrastructure are protected; and
- the access provider will not be required to bear some or all of the costs of extending that rail infrastructure or maintaining that extension.

5.3.2 Directions of the Safety Director and consultation with the Secretary to the Department of Infrastructure and the Director of Public Transport

Section 38ZZE of the RCA requires that the Commission must not, without the written consent of the Safety Director, make a dispute resolution decision that interferes with or has the effect of interfering with a direction of the Safety Director made under section 42 of the *Rail Safety Act 2006* (Vic), being a direction specifying the arrangements to apply to enable the safe operation of an access seeker's rolling stock on the rail network of an access provider, in circumstances where the access provider is unreasonably refusing to grant access.

Furthermore, section 38ZZF of the RCA requires that the Commission consult with the Secretary to the Department of Infrastructure and the Director of Public Transport before making any dispute resolution decision that:

- requires or directs an access provider to provide the declared rail transport service the subject of the access regime dispute;
- requires an access provider to provide interconnection; or
- requires an access provider to extend, or permit the extension of, rail infrastructure owned or operated by the access provider to provide a declared rail transport service.

Before making a dispute resolution of this kind, the Commission must inform the Secretary and Director at least 20 days before making its decision (s 38ZZF(1)). The Secretary and Director must be provided the opportunity to make a submission and the Commission must consider any such submission (s 38ZZF(1)).

5.3.3 Decision

When making a decision, such as a dispute resolution decision under section 38ZX of the RCA, the Commission is bound by section 35 of the ESC Act and the specific provisions of the RCA. The matters for consideration by the Commission when making a determination will differ according to the nature of the access regime dispute.

Decision regarding terms and conditions of access

When making a dispute resolution decision that deals with or prescribes access terms and conditions the Commission will generally consider:

- whether the making of such a dispute resolution decision would substantially impede the existing right of access of another person;
- all of the matters required to be considered as discussed in section 5.3.1 above; and
- any other matter that the Commission considers relevant.

Dispute over prices

If the dispute relates to the price component of the terms and conditions offered by an access provider, the Commission may have regard – consistent with the requirements of the Pricing Order and the Rail Access Pricing Guideline – to matters such as:

- the access provider's entire schedule of charges for reference services, and representative prices for non-reference services, including the average level of charges, and the price relativities between various types of services;
- historical prices of the services and the prices charged for comparable services elsewhere; and
- the costs of providing the services, including the long-run average cost of supply, the incremental costs of additional supply, the stand alone cost of supply and the opportunity costs for the access provider or the access seeker.

The Commission may also consider:

- relevant changes in the cost structure, e.g., associated with capital expenditure to improve the standards or timeliness of services;
- special characteristics of the service requested by the access seeker that may impose additional costs on the access provider;
- any opportunities that the access provider may forego in order to provide access; and
- the right of the access provider under the Pricing Order to have flexibility in the structuring of charges, subject to certain disallowed price discrimination (e.g., under section 38ZZY).

Dispute over other terms and conditions

In determining the terms and conditions of access other than price, the Commission may also give consideration, where it considers relevant, to matters including:

- good industry operating practice and standards, including the operational and technical requirements for the safe and reliable operation of the facility;
- the alternatives available to the access seeker and how current developments in competition may impact on these; and
- the Commission's general objectives to promote competition, ensure the financial viability of regulated businesses and to provide incentives to invest.

Determination where access has been hindered

The types of matters which may be considered by the Commission when making a determination on whether or not access has been hindered may include, in addition to matters which arise from the particular circumstances of the dispute:

- what the Commission understands to be a reasonable right of access, in the context of the agreement between the parties;
- congestion during certain periods;
- operating efficiency and good industry practice; and
- the legitimate commercial interests of the access provider.

5.3.4 Formal requirements of dispute resolution decisions

Status of a dispute resolution decision

As noted earlier, dispute resolution decisions of the Commission are binding on the parties to the access regime dispute. A dispute resolution decision takes effect either on and from the date it is made or, if the dispute resolution decision states a day on and from which it is to take effect, on and from that day (s 38ZX(4)). This may be the day that an access seeker has requested the access provider to provide them with a declared rail transport service in accordance with the access provider's access arrangement (s 38ZX(5)).

The Commission will provide a copy of its dispute resolution decision to each of the parties without delay (s 38ZX(7)).

Formal requirements of a dispute resolution decision

As noted earlier, when the Commission makes a dispute resolution decision, or decides not to make a dispute resolution decision, it will include a statement of the purpose and reasons for its decision.

Under section 35(2) of the ESC Act, notice of the making of a dispute resolution decision must be published in the *Victoria Government Gazette*, in a daily newspaper generally circulating in Victoria and on the internet.

The notice must include a brief description of the nature and effect of the dispute resolution decision, details of when the dispute resolution decision takes effect, and how a copy of the dispute resolution decision can be obtained from the Commission (s 35(3)).

If the dispute resolution decision contains any confidential information, then those parts of the decision containing the confidential information will be masked or removed in the public version of the Commission's decision and the original version will only be made available to the parties to the dispute.

5.3.5 Variation and revocation of dispute resolution decisions

The Commission can vary or revoke dispute resolution decisions (s 38ZZP RCA) where it has received an application in writing by a party to the dispute resolution decision.

Such an application must state the reasons for the proposed variation or revocation, and in the case of an application for a variation include a description of the proposed variation (s 38ZZP(2)).

After receiving an application, the Commission must, without delay:

- notify any other party bound by the dispute resolution decision of the application; and
- provide at least 21 days for that party (or parties) to make a submission and provide comments (ss 38ZZP(3) and 38ZZP(4)).

An application to vary or revoke a dispute resolution decision may be withdrawn at any time before the Commission makes its decision (s 38ZW). The withdrawal of the application must be given in writing. If the application is withdrawn, it is taken never to have been given (and hence does not affect the parties' rights with respect to future applications to the Commission).

In making a decision whether to vary or revoke a dispute resolution decision, the Commission:

- must consider every submission or comment it receives on or before the date specified by it in accordance with s 38ZZP(3)(b); and
- on receipt of an application under s 38ZZP(1), the Commission may, as the case requires, decide whether to vary or revoke the decision.

While the circumstances in which the Commission may consider it appropriate to vary or revoke a dispute resolution decision cannot be readily foreseen, these may include a relevant change in legislation, or where abnormal circumstances arise which materially affect a party’s capacity to fulfil its obligations under the binding dispute resolution decision.

The Commission is not required to conduct a hearing for the purposes of making a decision whether to vary or revoke a dispute resolution decision.

By section 38ZZP(7), the process requirements in sections 38ZW to 38ZZG and sections 38ZZN and 38ZZO also apply to an application for the variation or revocation of a dispute resolution decision, subject to any necessary modifications or alterations being made. This means that the Commission:

- must make a decision to vary or revoke the dispute resolution decision within 45 days of receiving the application or by a later date specified by the Minister (ss 38ZY and 38ZZ);
- must make a decision to vary or revoke the decision unless the application is withdrawn or the Commission considers that the application is vexatious or that its subject matter is vexatious, trivial, misconceived or lacking in substance (ss 38ZX, 38ZW and 38ZZA);

- must take into account the matters set out in section 38ZZB (discussed in section 5.3.1 above) and may take into account any other matter it considers relevant;
- must not make a decision that is inconsistent with the Rules, the pricing principles and any methodology for the calculation of prices set out in the Pricing Order, the principle of passenger priority; or the relevant access arrangement (ss 38ZZC and 38ZZD);
- must not make a decision that interferes with certain directions of the Safety Director (s 38ZZE);
- must not make certain decisions (see section 5.3.2 above) without prior consultation with the Secretary to the Department of Infrastructure and the Director of Public Transport (s 38ZZF);
- must not make a decision pertaining to extensions of rail infrastructure unless it is satisfied that the criteria set out in section 38ZZG are satisfied (see section 5.3.1 above);
- may make a decision in respect of two or more applications if the same access provider is party to the dispute resolution decisions the subject of the applications (s 38ZZN); and
- may make an interim decision (see section 5.2.7 above) in respect of an application to revoke or vary a dispute resolution decision (s 38ZZO).

The formal requirements of a decision to revoke or vary a dispute resolution decision are the same as the requirements applying to dispute resolution decisions (see section 5.3.4 above).

5.3.6 Enforcement

The RCA provides for three different mechanisms for the enforcement of access providers', access seekers' and users' obligations under the RCA with respect to matters that may be the subject of an access regime dispute.

Firstly, an access seeker or user may apply to the Commission for the determination of an access regime dispute in circumstances where the access seeker or user reasonably believes that the access provider is not complying with an obligation under Division 6 of Part 2A of the RCA, the pricing principles, the Negotiation Guidelines or a binding access arrangement. In such a case, the Commission can make a decision on whether the access provider is or is not complying with the relevant obligations, and is able to make directions as part of its decision with regard to ceasing any non-compliance.[2]

Secondly, in respect of a contravention of a penalty provision (described below) in the context of an access regime dispute, the Commission can apply to the Supreme Court for a pecuniary penalty (s 38ZZE), an injunction (s 38ZZZG), or declaratory relief directing the party to cease the contravention, remedy it, or prevent its reoccurrence (s 38ZZZH) .

---

[2] Section 38ZX of the RCA is very broad in relation to the kinds of decisions the Commission can make when deciding an access regime dispute.

Relevant penalty provisions include:

- section 38ZZK(2) (the obligation not to do anything that would constitute a contempt of court);
- section 38ZZK(4) (the obligation not to divulge specified information given in the course of an access regime dispute); and
- section 38ZZM (the obligation to comply with the Commission's directions with respect to the conduct of negotiations).

Thirdly, a party to an access regime dispute where the Commission has made a dispute resolution decision may apply to the Supreme Court for an injunction or other orders in circumstances where another party to the dispute has engaged, is engaging or is proposing to engage in conduct that constitutes a contravention of a dispute resolution decision (s 38ZZZI).

It is important to note that it is possible for the Commission to commence proceedings in the Supreme Court when it becomes aware of non-compliance irrespective or prior to any notification of non-compliance. However, the Commission anticipates that normally an alleged non-compliance by an access provider will have been notified to the Commission by an access seeker or user and the Commission would investigate this allegation before undertaking any enforcement action.

5.3.7 Appeals

A person who is dissatisfied by a dispute resolution proceeding decision of the Commission may appeal against the decision on the grounds that there has been bias or the determination is based wholly or partly on an error of fact in a material respect. The types of Commission dispute resolution decisions that are subject to appeal are: a dispute resolution decision; an interim decision; and a decision to vary or revoke a dispute resolution decision (s 38ZZQ).

Section 56 of the ESC Act requires that an appeal panel must hear such an appeal. Appeal panel members are appointed by the Registrar of the Victorian Civil and Administrative Tribunal, and are drawn from a pool of persons appointed by the Governor in Council based on their knowledge or experience in one or more of the fields of industry, commerce, economics, law or public administration.

The procedural protocols to be followed by the appeal panel are also specified in section 56 of the ESC Act. In particular, the panel must hear and decide an appeal against a determination within 30 working days of the appeal panel being constituted, or if the appeal panel requires further time, within a further period not exceeding 15 working days. Under section 56(12), the Commission must take such action as is necessary to give effect to a decision of the appeal panel.

5.3.8 Costs

Under section 38ZZR(2) of the RCA the Commission has the power to make an order as to the 'Commission's Costs' in respect of an access regime dispute. In this context the Commission’s Costs are defined in section 38ZZR(1) of the RCA, as reproduced in Box 5.2, and include the total amount of the costs and expenses in

relation to the dispute resolution decision or a decision not to make or to vary or revoke a dispute resolution decision.

An order for costs issued by the Commission is binding on the party to the access regime dispute to whom it is directed (s 38ZZR(3)), and once issued, is a debt due to the Commission (s 38ZZR(4)).

Generally, the costs of the Commission in making a determination under the RCA will be paid equally by the parties to the dispute. However, the Commission may require the parties to pay different proportions of its costs, and/or may decide to bear some of its own costs. To illustrate, this could potentially occur where:

- the Commission considers that one of the parties is largely responsible for excessive costs (e.g., because it has not complied with notices issued by the Commission, and/or has caused additional costs to be incurred by the Commission during the dispute resolution proceeding through its conduct than would otherwise be the case if it had complied promptly and thoroughly with all requirements); and/or
- one of the parties is likely to experience unreasonable hardship by bearing an equal proportion of the costs.

However, the Commission will assess the question of costs on a case by case basis and by reference to all the relevant circumstances.

These principles will also apply in the event an application is withdrawn. However, if the Commission decides not to make a dispute resolution decision (in accordance with section 38ZZA, the costs of the Commission in considering the application will generally be payable by the party that made the application for a dispute resolution decision.

Box 5.2 **"Commission's costs" (s 38ZZR(1) RCA)**

In this section:

"Commission's costs" means the total amount of the costs and expenses of the Commission that —

(a) are incurred or are likely to be incurred by the Commission in the exercise of powers for or in connection with the making of a relevant decision; or

(b) are incurred by the Commission in the exercise of its powers for or in connection with the making of a dispute resolution decision after the notification of an access regime dispute under section 38ZV and before the withdrawal of that notification under section 38ZW.

"relevant decision" means a dispute resolution decision or a decision not to make or to vary or revoke a dispute resolution decision (ss 38ZZA and 38ZZP).

Framework for calculating costs

The Commission's view is that the costs of the Commission in making a dispute resolution decision will be directly referable to the conduct of the parties. To illustrate, if an application is poorly drafted and does not specify the matters in dispute with precision, this may delay the process while the matters in dispute are clarified and in turn lead to higher costs. If a party does not co-operate with the Commission in the conduct of the dispute resolution proceeding (e.g., by resisting production of information requested by the Commission), this may delay the process and also lead to higher costs. These are important issues for the parties during the course of a dispute resolution proceeding.

Once the Commission has received an application in relation to an access regime dispute, the Commission will separate ('ring-fence') its management of the dispute resolution process from its other operations, so that the costs attributable to the dispute can be identified.

Costs associated with the dispute will be monitored through a tracking system, incorporating the timesheets of Commission staff working on the dispute resolution proceeding and invoice allocation processes.

Costs incurred by the Commission that can be passed onto the parties include:

- staff hourly costs (including on-costs such as leave loading and superannuation);
- direct staff overheads (such as accommodation and support costs);
- expenses (mailing, telecommunications, transport etc);
- fees paid to external consultants (including experts); and
- any other costs directly attributable to the dispute.

APPENDIX A: APPLICATION FORM

APPLICATION FOR DETERMINATION OF AN ACCESS REGIME DISPUTE UNDER THE RAIL CORPORATIONS ACT 1996

Applicant's Details (Access Seeker or User)

Company	
ABN	
Contact person (including title/position)	
Address	
Phone	
Fax	
Email	

Respondent's Details (Access Provider or User)

Company	
ABN	
Contact person (including title/position)	
Address	
Phone	
Fax	
Email	

Type of dispute

Place a tick in the relevant box(es):

- ❑ Inability to agree the terms and conditions for the provision of a declared rail transport service
- ❑ Dispute concerning alleged non-compliance by access provider with a statutory or regulatory requirement or instrument, including alleged hindering of access
- ❑ Dispute over interconnection or extension to rail infrastructure

Has a copy of this application been served on the Respondent? Yes / No

If no, when will this application be served? ________________________

Description of declared rail transport service, applicable access provider obligations, interconnection and/or extension to rail infrastructure (as applicable) to which the dispute relates

Description of declared rail transport service (e.g., railway track access, siding access, terminal access and specific type of service) (if applicable):

Description of type of trains (including axle load, length, number of wagons, type of freight etc) (if applicable):

Description of train paths (including origin, destination, stopping points, entry and exit times and dates) (if applicable):

Description of terminal service (if applicable):

Description of relevant access provider obligations (if applicable):

Description of interconnection or proposed interconnection or extension to rail infrastructure or proposed rail infrastructure (if applicable):

Relevant statutory provisions:

Statement of the substance of the dispute, summarising the relevant facts and contentions relied upon:

Details of dispute resolution efforts

Supporting information

The following information is relevant to the Commission's determination and should be included with this application if available. The scope of information required by the Commission will vary according to the nature of the dispute (i.e. whether it is a dispute over terms and conditions of access or a dispute about compliance or a dispute about interconnection or an extension to rail infrastructure).

The following lists indicate the attachments which should be included with this application in respect of each type of dispute. Where documents are attached, please place a tick in each relevant box below.

1. Inability to agree the terms and conditions of access

- A copy of the access seeker's request for access provided to the access provider including a copy of the access seeker's access application. This should specify the relevant declared rail transport service(s) to which access is sought, including the type of train and freight carried or the type of terminal service sought (as applicable) and relevant dates.

- Any response from the access provider to the request for access, including any price or scheduling offers and or any correspondence refusing access.

- A copy of all other relevant correspondence between the access seeker and the access provider (including emails), or information about when other communications occurred. This should demonstrate that the parties are not able to reach agreement about the terms and conditions of access and provide details of alternative dispute resolution processes undertaken. If the correspondence is extensive, it should be accompanied by an index that lists the relevant correspondence and meetings.

- A copy of any expert reports or findings in relation to the dispute.

- A copy of any current agreements between the access provider and the access seeker relevant to the access seeker's request for access to the declared rail transport service(s).

- A clear specification of the terms of the determination that is being sought by the access seeker and any procedural or other directions which the access seeker requests the Commission to make, including directions as to the provision of information by the respondent.

2. Dispute concerning alleged non-compliance by the access provider with a statutory or regulatory requirement or instrument, including alleged hindering of access

- ❑ Details of the alleged non-compliance clearly identifying the section and paragraph reference to the RCA, regulatory instrument or access arrangement containing the obligation in question, as well as all particulars of the actions of the access provider that are alleged to be non-compliant.
- ❑ Details of any detriment suffered by the access seeker or user (if relevant) as a result of this non-compliance. This would include specification of the relevant declared rail transport service(s) and the nature of any disruption caused to the applicant's access to, or use of, the service(s).
- ❑ A copy of any access agreement or agreements in force between the applicant and the respondent.
- ❑ A copy of any expert reports or findings or determinations in relation to the dispute.
- ❑ All relevant correspondence (including emails) between the applicant and the respondent.
- ❑ A clear specification of the terms of the determination sought by the applicant and any procedural or other directions which the applicant requests the Commission to make, including directions as to the provision of information by the respondent.

3. Dispute over interconnection or extension to rail infrastructure

- ❑ A copy of the access seeker's request for interconnection, extension to rail infrastructure or additional capacity works, specifying the details of the relevant rail infrastructure or nature of the interconnection or extension sought or the additional capacity works requested to be undertaken, and the relevant dates.
- ❑ Any offers of terms and conditions made by the access provider, or any letters refusing to undertake the requested rail infrastructure works or relevant assessments, e.g., of the feasibility of such works.
- ❑ All other relevant correspondence (including emails) between the access seeker and the access provider. This should demonstrate that the parties are not able to reach agreement about the terms and conditions or any other relevant matter that would form part of an agreement, for which infrastructure works are to be carried out.
- ❑ A copy of any expert reports or findings in relation to the dispute.
- ❑ A copy of any current agreements between the access seeker and access provider relevant to the access seeker's request for access to the access

provider's rail infrastructure, rail network or track or declared rail transport service(s).

- A clear specification of the terms of the determination sought by the applicant and any procedural or other directions which the applicant requests the Commission to make, including directions as to the provision of information by the respondent.

Costs

I acknowledge that pursuant to section 38ZZR of the *Rail Corporations Act 1996*, the Essential Services Commission may make an order in relation to the payment of its costs by the parties to an access regime dispute, and that such order may be made after it makes or refuses to make a determination, or when an application is withdrawn. I acknowledge that the company making this notification may therefore be required to pay the Commission's costs, bear the Commission's costs equally with other parties to this dispute, or bear the Commission's costs in different proportions to other parties.

Signature of person notifying dispute

<Name of signatory and position>

<date>

APPENDIX B: EXAMPLE OF CONFIDENTIALITY DEED

In the Essential Services Commission:

ACCESS REGIME DISPUTE NOTIFIED BY:

OTHER PARTIES:

DATE OF NOTIFICATION:

DECLARED SERVICE:

NOTIFIED UNDER: *Rail Corporations Act 1996* (Vic)

CONFIDENTIALITY UNDERTAKING

I, [*information recipient*] of [*information recipient address*] undertake to [*information provider*] and to the Essential Services Commission (***the Commission***) that:

1. Subject to the terms of this undertaking and any order of the Commission, I will keep confidential at all times the information provided by [INFORMATION PROVIDER] listed at Attachment 1 to this undertaking (***the [INFORMATION PROVIDER] confidential information***).
2. I will only use the [INFORMATION PROVIDER] confidential information for the purposes of this dispute resolution proceeding.
3. Subject to paragraph 4 below, I will not disclose any of the [INFORMATION PROVIDER] confidential information to any other person without the prior written consent of [INFORMATION PROVIDER] or without first obtaining an order authorising such disclosure from the Commission.
4. I acknowledge that I may disclose the [INFORMATION PROVIDER] confidential information to which I have access to:

    (a) the Commission;

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

    (i) the person to whom disclosure is proposed to be made (the person) is named in Attachment 2 or has otherwise been approved of by [INFORMATION PROVIDER] in writing, or by order of the Commission;

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

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

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

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

(a) the finalisation of this dispute resolution proceeding; or

(b) my ceasing to be employed or retained by a party to this dispute resolution proceeding

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

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

(a) the notification is withdrawn under section 38ZW of the RCA;

(b) the Commission decides not to make a dispute resolution decision under section 38ZZA of the RCA; or

(c) the Commission makes a final determination under section 38ZX of the RCA.

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

(a) which is in the public domain; or

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

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

Signed:______________________________ Dated:_________________

APPENDIX C: FLOWCHART

OVERVIEW OF ARBITRATION PROCESS