



**Draft Determination for model non-price terms and
conditions for PSTN, ULLS and LCS services**

**Submission to the Australian Competition & Consumer
Commission by AAPT Limited**

31 July 2003

1 INTRODUCTION

1.1 This submission responds to the Commission's June 2003 *Draft Determination for Model Non-price Terms and Conditions of the PSTN, ULLS and LCS services*.

1.2 While the Commission's model terms and conditions are non-binding, they are nevertheless likely to form the basis of negotiated non-price terms and conditions for access to the "core" services. Further, any arbitration determination is expected to reflect the model terms and conditions. Accordingly, the model terms and conditions are likely to have a substantial effect on several markets for the period of the determination and beyond.

1.3 Having regard to these matters, AAPT has a number of concerns in relation to the Draft Determination:

- (a) AAPT's most significant concern is that the draft model clauses do not include any enforceable service level assurances. This submission includes some draft provisions that would address AAPT's concern in relation to this aspect of the Draft Determination.
- (b) AAPT is generally pleased with the proposed clauses in relation to billing and notifications, but disagrees with some of the draft model clauses in relation to the billing and dispute process.
- (c) AAPT disagrees with the way in which the Draft Determination deals with ordering and provisioning issues. In particular, AAPT submits that the draft model clauses must include a clause requiring ordering and provisioning in a non-discriminatory manner as required by section 152AR of the *Trade Practices Act 1974*.
- (d) AAPT has one significant concern in relation to the proposed clause dealing with service migration and notification of relocation of facilities.
- (e) AAPT disagrees with the Commission's reasons for rejecting proposals for a code of ethics for technicians. For reasons discussed later in this submission, AAPT submits that the determination on model non-price terms and conditions should recommend that ACIF develop such a code, and

should foreshadow that the model terms and conditions will be amended to include the provisions of any such code.

- (f) AAPT disagrees with the Commission's conclusion that it is not appropriate to impose on access providers a requirement to provide notice to access seekers in relation to variations to its standard form of agreement.
- (g) AAPT has some concerns in relation to the drafting of the model clauses in relation to dispute resolution, liability and risk allocation and suspension and termination.

1.4 For the Commission's convenience, the remainder of this submission deals with AAPT's concerns in relation to the determination in the order in which the relevant issues are dealt with in the Draft Determination, rather than in their order of importance to AAPT. AAPT reiterates that its key concern is in relation to the issue of service level assurances.

1.5 Enquiries in relation to this submission should be addressed in the first instance to:

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2 BILLING AND NOTIFICATIONS

Should an access seeker be required to pay disputed amounts prior to resolution?

- 2.1 AAPT agrees that it is reasonable for a payer to withhold disputed amounts if a dispute is notified prior to the due date for payment of the invoice, and agrees that it is appropriate for the payer to be given 20 business days within which to identify disputed amounts.

Should there be specific time frames and rules regarding billing enquiries and disputes?

- 2.2 AAPT supports the need for specific timeframes for replying to billing inquiries and disputes. With two exceptions (discussed in paragraphs 2.3 – 2.6 below), the time frames in the draft model terms and conditions strike an appropriate balance between the need for a rapid determination of billing disputes and the need to minimise the costs of dispute resolution processes.
- 2.3 However, there are some disputes of a complex nature where the timeframes specified in draft model clauses A.17 to A.25 will not be sufficiently long to enable a proper investigation of the facts giving rise to the dispute, and will result in matters being escalated, referred to mediation or litigation being commenced prematurely. Generally in such cases the complexity is apparent to both parties from an early stage.
- 2.4 AAPT submits that the billing dispute procedures need to be slightly more flexible to take into account complex disputes. Specifically, the model clauses should be amended to include a provision enabling billing dispute deadlines to be extended in the case of complex disputes (that is, where both parties agree that the relevant dispute involves complexity) by consent of the other party, such consent not to be unreasonably withheld.
- 2.5 AAPT strongly agrees that if a dispute resolution process results in one party paying money or refunding money to the other party, such payment or refund should occur within a definite and reasonable time. However AAPT disagrees with the Commission's suggestion that such payment or refund should occur within 10 business days. Billing disputes arise very frequently, and there are often several determinations made each month. [DELETED AS CONFIDENTIAL] It would have to

make significant system and process modifications to enable such frequent and irregular payments to be processed.

- 2.6 On the other hand, when AAPT succeeds in a billing dispute against Telstra the refund is often not credited to the relevant bill for [DELETED AS CONFIDENTIAL]. This is also unacceptable to AAPT.
- 2.7 AAPT submits that having regard to all these circumstances, it is reasonable and preferable for the model terms and conditions to specify that payment must occur as soon as practicable (that is, in conjunction with the next billing cycle or with the next due payment as the case may be) and in any event no later than one month after resolution of a dispute.
- 2.8 Finally, AAPT submits that it is appropriate for the model clauses to provide that the access provider must compensate the access seeker, and vice versa, in relation to any loss or damage suffered as a result of a breach by that party of any of the clauses relating to resolution of billing disputes, within one month after resolution of the dispute. Such a clause is necessary because billing dispute resolution may be such a lengthy process that at the end of the process the access seeker is not able to bill its customer, because the customer contract includes a clause preventing backbilling beyond a specified period, often 90 days. AAPT submits that the party that caused the delay must compensate the other party in relation to the amount that it would have billed the customer but for the delay, and any other losses.

What limits should apply to delays in notifying and access seeker of incorrect invoicing (backbilling)?

2.9 AAPT agrees that access providers should only be permitted to invoice access seekers for charges within 95 days from the date on which the charges were incurred. As stated in its earlier submission, AAPT also considers it reasonable that in the case of a manifest error which is detected outside the 95-day period, the access provider should have the ability to request the access seeker's permission to invoice the access seeker for the older charges and provide reasons for doing so, and that the access seeker should be required to consider any reasonable request in good faith.¹ AAPT is pleased to see that draft model clauses A.5 and A.6 have implemented these suggestions. Access seekers should also be able to dispute bills retrospectively, in excess of the 6-month limit proposed by draft clause A.15, subject to similar limitations (see paragraph 7(c) of this submission).

3 COMMUNICATIONS WITH END USERS

Should a code of ethics be introduced for technicians visiting an access seeker's end users?

3.1 AAPT disagrees with the Commission's conclusion that such a measure is neither necessary nor practical in terms of addressing an access seeker's legitimate concerns in relation to an access provider's contact with the access seeker's end users.

3.2 AAPT is reliably informed that Telstra technicians often:

- tell AAPT's customers that they would receive better service if they were direct customers of Telstra;
- tell AAPT's customers that their choice of product is inferior to a Telstra product;
- generally behave in a less enthusiastic, helpful and professional way than they do when providing services to Telstra's retail customers.

3.3 It is unlikely that Telstra technicians are instructed by Telstra to say and do the things outlined in paragraph 3.2. The anti-competitive effect may well be unintended, but it is nevertheless important that such conduct be prevented. Further, the Trade Practices Act is unlikely to provide an effective remedy because no single incident of this nature

¹ Submission by AAPT Limited to the Australian Competition & Consumer Commission, *Model non-price terms and conditions for "core" services*, 31 January 2003.

is likely to cause significant damage to a competitor or to competition even though the cumulative effect of such conduct is that competition is damaged.

- 3.4 Accordingly AAPT submits that the determination on model non-price terms and conditions should recommend that ACIF develop a code of ethics for technicians visiting an access seeker's end users, and should foreshadow that it will consider amending the model terms and conditions to include the provisions of any such code as may be developed.

4 SERVICE MIGRATION

What notice period should an access provider provide to access seekers in relation to re-location of facilities used for core services?

- 4.1 The minimum notice period must be 120 days rather than 60 days. Sixty days would be an inadequate period of notice for many major facility relocations.

Should an access provider provide access seekers with notice in relation to its variations to its standard form of agreement, where such variations may result in a variation to the terms on which the access seeker provides service to its customers?

- 4.2 The Commission does not consider that it should impose a requirement for an access provider to provide access seekers with notice in relation to variations to its standard form of agreement, because the model terms and conditions only apply to core services and services provided pursuant to Telstra's standard form of agreement (**SFOA**) are not core services.

- 4.3 AAPT disagrees, and submits that:

- (a) the Commission has the power to impose such a requirement as part of the model terms and conditions under section 152AQB(2) of the Act; and
- (b) it would be unreasonable for the Commission to refuse to exercise that power.

- 4.4 While services provided pursuant to the Telstra SFOA are not "core services" for the purposes of section 152AQB(1), terms and conditions in relation to variations to the SFOA are nevertheless terms and conditions "relating to access to [a] core service" within the meaning of section 152AQB(2), namely the Local Carriage Service. This is

because the only way in which an access seeker is able to acquire access to the Local Carriage Service is by reselling a Telstra local exchange line. A number of services are acquired with the line which are neither part of the Local Carriage Service nor preselectable calls, for example: calls to 1900 numbers, calls to paging services, reverse charge calls from international operators, chargeable directory entries, some equipment, and call waiting and MessageBank services. Access seekers have no choice as to whether or not to re-bill these services. They cannot be separated from the Local Carriage Service.

- 4.5 It would be very unreasonable to permit Telstra to force its competitors to acquire these additional services unless Telstra is required to provide at least 90 days notice of variations of the charges or other terms and conditions of supply of those services, to enable access seekers to vary the terms on which they provide service to their own customers. Generally customer contracts may be varied on 30 days notice, but an additional 30 to 60 days is usually necessary for drafting the necessary amendments to the contract, obtaining approvals, printing, mailing the amended contracts to customers, and re-training call centre staff and dealers.

5 FAULTS AND MAINTENANCE

Timeframes

- 5.1 The Commission considers that ACIF C513 *Customer and Network Fault Management* Industry Code adequately deals with issues relating to fault rectification timeframes. AAPT agrees that on its face the code seems to deal with all fault management issues. [DELETED AS CONFIDENTIAL] This makes it impossible for AAPT to inform its customers properly about matters such as the vital issue of when a fault is likely to be rectified. This is an extremely important aspect of management of the customer relationship. AAPT has asked Telstra to commence providing this information. Telstra has said it will, but at a cost which is unacceptable to AAPT.
- 5.2 Having regard to the current lack of compliance with ACIF 513, AAPT submits that the model terms and conditions should specifically adopt clauses 6.1.4 and 6.1.6 of ACIF C 513 (i.e. the provisions set out on page 29 of the Draft Determination) and should clarify that such reporting must be provided free of charge.

Service level standards

- 5.3 The Commission considers that clause 6.1.9 of ACIF 513 *Customer and Network Fault Management* Industry Code adequately addresses the issue of non-discrimination in relation to service level standards. Whilst acknowledging the difficulty of applying service level assurances to the core services (with the exception of ULLS), AAPT submits that the failure to include any enforceable service level assurances is a serious omission. Such an omission would undermine the usefulness of the model terms and conditions both as a precedent for negotiated terms and conditions for access to the core services and as a basis for any arbitration determination on non-price terms and conditions. Existing service level arrangements are not satisfactory as, among other things, they do not enforce the requirement that an access provider must provide services on a non-discriminatory basis.
- 5.4 Attached are AAPT's proposed draft provisions, with accompanying explanatory notes and guiding principles, which address AAPT's concerns in this area (Attachment A).

6 ORDERING AND PROVISIONING

Non-discriminatory ordering and provisioning

- 6.1 AAPT notes that the Commission "would be concerned if access agreements were not providing for ordering and provisioning to be in a non-discriminatory manner in contravention of the standard access obligation." However the model terms and conditions do not in fact include any such requirement except in relation to ULLS. AAPT has experienced a variety of forms of discrimination in relation to ordering and provisioning, and submits that it is essential that the model terms and conditions include a clause to address this issue.

7 COMMENTS ON DRAFT MODEL CLAUSES

AAPT makes the following specific comments in relation to the draft model clauses (Part 3 of the Draft Determination):

Billing and Notifications

- (a) [DELETED AS CONFIDENTIAL] AAPT recommends amendment of the draft clause by adding ", but not more than weekly," after "more frequently than once a month" in the second line.

- (b) In clause A.14, the reference to "access seeker" should be a reference to "access provider".
- (c) Access seekers should be able to dispute bills retrospectively, in excess of the 6-month limit proposed by draft clause A.15. This right would be subject to appropriate limitations, reflecting the similar limitations imposed on the ability of an access provider to bill retrospectively (see draft clause A.5).
- (d) The words "try to" should be removed from draft model clause A.18 so that there is a positive obligation to resolve a billing dispute as soon as practicable.
- (e) AAPT submits that interest should not be payable to either the access seeker or the access provider under clause A.20 or A.21 unless the disputed amount has been owing for a period of 60 days or more. Interest calculations and payments in relation to small amounts owing for very short periods would be administratively onerous for both the access provider and access seeker.
- (f) For consistency with clause A.18 and the latter part of clause A.22, the two references in clause A.22 to "determination" (in lines 1 and 3) should be changed to "proposed resolution".
- (g) In clause A.29, the second sentence has an internal inconsistency. The words "the sole" should be deleted, so that the sentence then reads: "The remedy set out in this clause A.29 shall be without prejudice to any other right or remedy available to the access seeker in respect of the incorrect invoicing". The final sentence in clause A.29 should be deleted. An access seeker's entitlement to rebates should be in accordance with standard commercial practices, that is, it should be payable by the access provider without the need for any action on the part of the access seeker.

Liability (Risk Allocation) Provisions

- (h) In clause C.8, the indemnity regarding death or personal injury should be in respect of *any person* and should not be restricted to the "People of the Innocent Party". Under the current wording, if the Indemnifying Party or its People caused the death or personal injury of a member of the public and an

action was brought against the Innocent Party, the Innocent Party would not have the benefit of the indemnity.

- (i) For consistency with the equivalent wording in clauses C.9 and C.10, in the last line of C.8 replace "Indemnifying Party's People" with "its People".
- (j) For consistency with the equivalent wording in clause C.10, in clause C.9 insert "facilities," before "Network" in line 3.
- (k) For consistency with the equivalent wording in clause C.9, in clause C.10 insert "any" before "equipment" in line 2.

Suspension and Termination

- (j) [DELETED AS CONFIDENTIAL] AAPT recommends amendment of the draft clause by adding the following text at the end of the first paragraph, after "reasonably practicable": "and uses reasonable endeavours to update the access seeker".
- (k) In clause H.4(c)(iii), the reference to "the other party" should be replaced by "the party in breach".

Attachment A

Service Level Assurances

Introduction

The purpose of this document is to propose a set of principles to govern service level performance and reporting by Telstra, and to suggest appropriate clauses that apply those principles for use in agreements with Telstra. It is not the purpose of this document to propose the actual service levels and associated methodologies that will apply.

1. Service Levels

Principles:

- Wholesale customers of Telstra are to be no worse off than Telstra's retail business ("Telstra Retail") in terms of the levels of service received from Telstra.
- This is not simply a matter of having the same service level applied to a wholesale customer as is applied to Telstra Retail. What needs to be measured and reported on is the *actual* level of service provided to each of Telstra Retail and the wholesale customer, including the level of any "over-achievement" by Telstra against a service level.
- This is essential for ensuring non-discriminatory performance by Telstra.
- For example, in relation to, say, Ordering and Provisioning, it is not sufficient to simply measure the percentage of services installed within the target timeframe for each of Telstra Retail and the wholesale customer (as has been proposed by Telstra). Even where performance under Telstra's proposal is, say, 90% in both instances, it will not necessarily be indicative of non-discriminatory performance by Telstra. This is because the target timeframe only represents the minimum acceptable level of performance - there will always be a range of actual performances within that timeframe. For example, where the target timeframe for a particular service is 7 days, Telstra's proposed reporting methodology would not reveal circumstances where the majority of those services are routinely provided to Telstra Retail within, say, 4 days, but only a minority of those services are provided to wholesale customers within 4 days. In both cases the

target timeframe of 7 days has been met, yet performance has not been non-discriminatory.

- A more appropriate, and useful, measure for such services is to monitor and report by performance "bands". For example, Telstra would be required to report on bands within a target timeframe. In the case of the Ordering and Provisioning example above, Telstra would report on the % of services installed (for each of Telstra Retail and the wholesale customer) in, say, less than 3 days, the % installed in between 3-5 days, between 5-7 days, etc. In this way, there is a true "like for like" comparison of respective performance.
- Monitoring by performance bands will also assist in establishing whether there is any leeway built into the service levels proposed by Telstra. For example, if a service level is, say, 7 days, but Telstra's performance is regularly at 90-95% completion within 5 days, then that would suggest the applicable service level should be 5 days rather than 7 days.

Suggested clause:

1. Service Levels

- 1.1 The access provider must provide services to the access seeker so as to meet or exceed the Service Levels.
- 1.2 The Service Level for a particular service is determined as follows:
 - 1.2.1 where Table [X] sets out a level of service for that service, the Service Level is:
 - (a) the level set out in Table [X]; or
 - (b) the level of service that the access provider provides to its own retail business in respect of the same or an equivalent service, whichever is the more favourable to the access seeker; or
 - 1.2.2 where Table [X] does not provide a level of service for that service, the Service Level is the level of service that the access provider provides to its own retail business in respect of the same or an equivalent service.
- 1.3 For the avoidance of doubt, the level of service that the access provider provides to its own retail business in respect of a service includes the level of service provided within any Performance Band set out in Table [Y].

- 1.4 The access provider must meet its obligations under the Service Level regime described in clauses [1, 2 and 3] at no additional cost to the access seeker.

2. Reporting

Principles:

- For the reasons set out under Section 1 ("Service Levels") above, customers must have visibility of Telstra's performance in providing services to Telstra Retail as well as to the wholesale customer, including at the performance band level.
- Monthly reports, at a minimum.
- Where reported performance figures are disputed, the matter is referred to an agreed dispute resolution process.
- Reports are to detail, at a minimum:
 - performance against "target" service levels (ie, the minimum acceptable service levels to be set out in the Table [X] referred to in draft clause 1.2 above);
 - performance against "performance bands" within that target service level; and
 - Telstra Retail's performance figures for the same period, also by performance band.

Suggested clause:

2. Reporting

- 2.1 Within [#] days after the end of each month the access provider must give the access seeker a written report providing details of the access provider's performance for that month in providing each service including, at a minimum, details of:
- (a) the actual level of service provided by the access provider to the access seeker for that month; and

(b) the actual level of service provided by the access provider to its retail business for that month,

in each case, broken down into the Performance Bands set out in Table [Y] in respect of that service; and

(c) the applicable Service Level for that service.

2.2 All monthly reports must contain a level of detail sufficient to:

(a) verify the access provider's compliance with the Service Levels; and

(b) verify the calculation of any Rebates that may be due to the access seeker.

2.3 If the access seeker disputes any matter related to a report provided by the access provider, the access seeker may refer the matter to dispute resolution under clause [#].

2.4 The access provider must implement appropriate measurement, monitoring and management tools and procedures to enable it to notify and report to the access seeker in accordance with this clause [2].

3. Consequences of not meeting Service Levels

Principles:

- Meaningful financial rebates payable to customers for a failure to meet service levels.
- Where entitlement to, or calculation of, a rebate is disputed, the matter is referred to an agreed dispute resolution process.
- Repeated or habitual failures to meet service levels are subject to a tiered rebate scheme under which the level of the rebate increases. For example, a single instance of failure to meet a particular service level might result in a rebate of, say, 10% of the fee for that service. Where the access provider fails to meet the same service level in any two consecutive months, or in any two months in a rolling three month period, then the level of rebate would increase to, say, 15% of the fee for that service, and so on. (Note: this aspect has not been incorporated into the suggested clause below as it is proposed that it be set out in table format for clarity and ease of calculation.)

Suggested clause:

3. Consequences of not meeting Service Levels

- 3.1 If the access provider fails to meet a Service Level in any month:
- (a) the access provider must pay a Rebate to the access seeker without the need for any action on the part of the access seeker; and
 - (b) the access seeker may refer the failure to dispute resolution under clause [#].
- 3.2 The amount of any Rebate is determined in accordance with Table [Z].
- 3.3 Rebates are payable by the access provider within [#] days of the end of the month in which the relevant Service Level failure occurred. Where agreed by the access seeker, in lieu of paying the Rebate, the access provider may credit the amount of the Rebate against the following month's invoice to the access seeker.
- 3.4 The parties agree that the access seeker's entitlement to a Rebate is in addition to, and does not limit or affect, any other right or remedy the access seeker may have in connection with the access provider's failure to meet a Service Level.
- 3.5 If either party disputes an entitlement to a Rebate or the calculation of a Rebate, that party may refer the matter to dispute resolution under clause [#].