



**SUPPLEMENTARY SUBMISSION TO THE
AUSTRALIAN COMPETITION &
CONSUMER COMMISSION**

***RESOLUTION OF TELECOMMUNICATIONS
ACCESS DISPUTES – A GUIDE***

Resolution of telecommunications access disputes

Supplementary Submission by AAPT Ltd

1. Introduction

AAPT Ltd is grateful for the opportunity to make a supplementary submission on the Commission's revised guide for the *Resolution of Telecommunications Access Disputes (Guide)* dated May 2003. AAPT raises two additional matters, both of which reflect concerns arising from Telstra's lodgement of an access undertaking in respect of its core services on 9 January 2003. The first deals with the lodgement by access providers of consecutive undertakings and the second with the procedure by which interested parties submit information as part of the undertaking process. These matters come within the scope of Chapter 9 of the Guide, 'Undertakings and Arbitrations'.

2. Summary of AAPT's position

In summary, AAPT's position is as follows:

2.1 Serial undertakings

AAPT submits that the Guide should address the possible lodgement of serial undertakings. AAPT submits that the usual presumption in favour of deferring arbitrations while an access undertaking is being considered should be displaced where an access provider lodges consecutive undertakings in respect of the same service.¹

2.2 Provision of information by access provider

AAPT submits that the Guide should require an access provider who lodges an undertaking to provide all relevant information to the Commission and the public as early in the undertaking process as possible. This will provide greater certainty for all interested parties and minimise delay, inefficient use of resources and gaming.²

¹ This issue relates to ordinary access undertakings as defined in s152BS(1), and not special access undertakings as defined in s152CBA.

² This issue relates to both ordinary access undertakings as defined in s152BS(1) and special access undertakings as defined in s152CBA.

3. Aims of the Undertaking Process

The rationale underpinning the recent reforms to Part XIC of the *Trade Practices Act 1974* (Cth) (**Act**) are well known. AAPT's mentions them only briefly as a context for its proposed revisions to the Guide.

The Productivity Commission in its *Telecommunications Competition Regulation Inquiry Report* of December 2001 described the processes for determining access conditions as:

cumbersome, resource-intensive and tardy, reflecting the failure of undertakings as a mechanism, the extensive resort to regulatory gaming and the predominance of lengthy bilateral arbitrations.³

The Explanatory Memorandum to the Telecommunications Competition Bill 2002 (Cth) makes it clear that Parliament sought to address each of these criticisms.⁴ In particular, by imposing a six month time limit on the Commission for the consideration of access undertakings, Parliament signalled its intention to '*encourage timely decision making in order to promote certainty for investors*' and to '*limit any potential for the time limit to be subject to regulatory gaming*'.⁵

The Commission has often stated its commitment to making the processes for resolving telecommunications access disputes efficient and effective.⁶ AAPT's proposed revision of the Guide is consistent with these goals.

4. Deferral of arbitrations

4.1 Legislative framework

The Commission has the power to defer consideration of an access dispute, in whole or in part, while the Commission considers an access undertaking: s152CLA(2).

In determining whether to defer consideration of an access dispute, the Commission must have regard to the fact that the access undertaking will, if accepted, apply generally to access seekers whereas a determination in relation to the access dispute will only apply to the parties to the determination: s152CLA(4)(a). The Commission is required to formulate guidelines for the purpose of exercising its power and to have regard to those guidelines and such

³ Productivity Commission's *Telecommunications Competition Regulation Inquiry Report* of December 2001 at p 303.

⁴ Explanatory Memorandum to the Telecommunications Competition Bill 2002 at pp 2, 77.

⁵ *Trade Practices Act 1974* (Cth) at ss152BU(5)-(8) and 152CBC(5)(8); Explanatory Memorandum to the Telecommunications Competition Bill 2002 at p 77.

⁶ Australian Competition & Consumer Commission's May 2003 revision of *Resolution of telecommunications access disputes – a guide* at p x-xi.

other matters as the Commission considers relevant in so exercising its power: ss 152CLA(4)(b), 152CLA(4)(c) and 152CLA(5). The guidelines are now found in Chapter 9 of the Guide.⁷

The Commission's understanding of its statutory obligation effectively amounts to a presumption in favour of deferral of an arbitration when a relevant undertaking is lodged.⁸

4.2 Serial undertakings

AAPT is generally supportive of the Commission's guidelines on the deferral of arbitrations, and agrees that the Commission needs to be flexible in exercising its discretion on a case-by-case basis.⁹ Serial undertakings represent a potential abuse of the undertakings process which AAPT believes should be specifically addressed in the Guide.

By serial undertaking, AAPT refers to the possible practice of an access provider lodging consecutive undertakings in relation to the same service. This could occur in two ways. The first is where the Commission rejects an undertaking and the access provider then lodges a further undertaking in respect of the same service. The second is where an access provider submits an undertaking and then withdraws it, only to subsequently submit an undertaking in respect of the same service. This could be done after other parties have dedicated significant time and effort to preparing submissions on the original undertaking. Either of these tactics could be used by an access provider in an attempt to delay arbitrations.

The Commission is aware of the possibility of parties attempting to misuse the undertakings process to delay arbitrations.¹⁰ One such misuse, being the lodgement of undertakings late in the arbitration process, is specifically addressed in the Guide. The Guide states:

If the Commission were to rigidly apply the principle of deferring arbitrations while considering an access undertaking relating to the same matter, then this could lead to adverse consequences. Particularly, it could have the effect of creating an incentive for access providers to offer access undertakings only once an arbitration has progressed through its

⁷ Australian Competition & Consumer Commission's *Overview of proposed revisions to Resolution of telecommunications access disputes – a guide*; May 2003 explains that Chapter 9 of the Guide fulfils the statutory requirement.

⁸ Australian Competition & Consumer Commission's May 2003 revision of *Resolution of telecommunications access disputes – a guide* at 9.2.

⁹ Australian Competition & Consumer Commission's May 2003 revision of *Resolution of telecommunications access disputes – a guide* at 9.2.2.

¹⁰ See for example: Australian Competition & Consumer Commission's *Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation*, August 2000 p 88., referred to in AAPT's *Inquiry into Telecommunications Competition Bill 2002 – Submissions to the Committee by AAPT Limited*, 11 October 2002 at p 7

substantive phase, with a view to delaying further progress, or completion, of arbitration.¹¹

The Guide goes on to state that where the matters in an access undertaking have already been substantively addressed in an arbitration, the Commission may go on to determine the arbitration even where an undertaking has been lodged.

AAPT submits that the Guide should specifically address the possibility of serial undertakings just as it specifically addresses strategic late lodgement of undertakings. AAPT believes that the Guide should state that where an undertaking is rejected or withdrawn and the same party lodges an undertaking in respect of the same declared service within 6 months the Commission should not in the ordinary course postpone a related arbitration.

AAPT recalls public comments by a representative of an access provider at a SPAN meeting on 6 November 2002 to the effect that in order to protect itself from the Commission's 'sub-commercial pricing' it would need to 'lob in undertakings'. AAPT believes that a clear statement in the Guide that the Commission is aware of and will not permit this potential misuse of the undertaking process would provide a powerful deterrent to any access provider contemplating such conduct.

5. Provision of information by party lodging undertaking

5.1 Difficulties with the current guidelines

The Guide should require the access provider to submit all relevant information as early as possible in the undertakings process. AAPT submits that the absence of this requirement creates the opportunity for gaming and is inconsistent with promoting timely and efficient determination of the undertaking.

The party providing the access undertaking has invoked the undertaking process. It should not be permitted to shift an inappropriate burden of the work of considering the undertaking onto the Commission and other parties, in circumstances where it has information that could assist the assessment process and indeed proposes to lodge that information at a later time.

It is conceivable under the current Guide that an access provider could lodge an undertaking with no supporting material and then provide that material on the latest possible date for submissions from the interested parties. This will delay the Commission's consideration of the undertaking. Further, to ensure procedural fairness to other parties, the Commission would likely have to extend the deadline

¹¹ Australian Competition & Consumer Commission's May 2003 revision of *Resolution of telecommunications access disputes – A Guide* at 9.2.2.

for other interested parties to respond to the late submission of the access provider, resulting in further delay.

The problems of information asymmetry between access providers and other interested parties are well documented.¹² Requiring the provision of information from the access provider early in the undertakings process assists in redressing this imbalance.

In relation to the submission of material in the undertakings process, the Guide says:

...the Commission is of the view that all information and submissions that it proposes to take into account in assessing the access undertaking should be publicly disclosed and as early as possible in the process. This enables persons with an interest in access undertakings to comment on matters affecting their interests. Also, it enables the Commission to test the veracity of the information, thereby improving the accuracy of information used by the Commission and promoting transparency of decision making.¹³

Although the Commission discusses this aim in the context of the need for submissions to be public rather than confidential, AAPT believes that this rationale applies equally to the need for submissions to be provided sufficiently early in the undertakings process for these benefits to be realised.

5.2 Telstra's undertakings for core services

AAPT submits that Telstra's conduct in relation to the process for assessing its undertakings lodged in January 2003 illustrates the need for the revisions advocated by AAPT.

Telstra lodged its undertakings on 9 January 2003. The Commission published the supporting statement which Telstra provided with the undertakings on 17 January 2003. In March 2003 the Commission published its discussion paper and formally published Telstra's undertakings together with Telstra's additional supporting material. The Commission sought submissions on the undertakings by no later than four weeks from the date on which Telstra made certain information reasonably available for industry assessment.

Once the Commission was satisfied that this had occurred, it required submissions on the discussion paper by 1 August 2003. Telstra then indicated for the first time

¹² For example, this is recognised in the context of the Commission's accounting separation direction, an aim of which is to promote the amelioration of information asymmetries, particularly in relation to core services, to improve the basis for access negotiations; *Explanatory Statement* to the Australian Competition & Consumer Commission (Accounting Separation – Telstra Corporation Limited) Direction (No 1) 2003 at p 3.

¹³ Australian Competition & Consumer Commission's May 2003 revision of *Resolution of telecommunications access disputes – a guide* at 9.3.2.

that it also intended to lodge a detailed submission by the 1 August 2003 deadline, which it did.

AAPT, and no doubt others including the Commission, wasted significant time and resources in considering Telstra's undertakings in the absence of Telstra's detailed submissions.

5.3 AAPT's model process

AAPT suggests the following model process:

(a) Lodgement of undertaking

The access provider lodges an undertaking together with a submission containing all material that it believes the Commission requires to consider properly the undertaking.

(b) Release of discussion paper

The Commission, having considered the undertaking and the submission lodged by the access provider, releases it with a discussion paper. The Commission will invite the access provider to lodge a submission in response to the discussion paper (***supplementary submission***) within two weeks from the date of the publication of the discussion paper. The Commission will invite all other interested parties to lodge submissions within three months from the date of the discussion paper.

(c) Supplementary submissions in response by access provider

The access provider's supplementary submission in response to the Commission's discussion paper (submitted within two weeks of the release of the discussion paper) will be published by the Commission. The access provider's response should only address new matters raised in the discussion paper.

(d) Submissions from other interested parties (excluding the access provider)

Within three months from the date of the discussion paper any interested parties, other than the access provider, may make submissions to the Commission on the undertaking. The Commission will publish submissions received.

(e) Draft report

The Commission will consider all information provided and publish a draft report setting out the Commission's proposed decision to accept or reject the access undertaking, along with its reasons. It will invite all interested parties to lodge submissions in response to the draft report within a certain time limit.

(f) Submissions in response to the draft report

All interested parties, including the access provider, may lodge submissions in response to matters raised in the draft report by a deadline provided by the Commission. AAPT suggests that this deadline should normally be one month from the date of the draft report. The Commission will publish submissions received.

(g) Final determination

The Commission will make a final decision whether to accept or reject the access undertaking. It will notify the access provider and publish a report setting out its reasons for its final decision.

5.4 Differences between the current process and AAPT's model process

AAPT's model process is very similar to that outlined by the Commission in Chapter 9.3.1 of the Guide. The key difference is that AAPT advocates greater specificity about the timeframe for the provision of information by the party submitting the undertaking. Specifically:

- (a) The access provider should use its best endeavours to provide the Commission at the time of lodgement of the undertaking all the relevant information that the Commission is likely to need both to prepare the discussion paper and to determine whether to accept the access undertaking. Currently there is nothing in the Guide requiring the provision of any information to the Commission at the time the undertaking is lodged.¹⁴
- (b) The access provider should submit any response to the Commission's discussion paper within two weeks of the release of the discussion paper. As other parties have three months to respond to the Commission's discussion paper they have some ten weeks to consider the access provider's supplementary submission.

5.5 Advantages of AAPT's model process

(a) No detriment to the access provider giving the undertaking

AAPT submits that its proposed model process would not cause any detriment or denial of procedural fairness to the party providing the undertaking.

As noted above, it is the access provider who invokes the undertaking process. In AAPT's view where an access provider does so in a manner

¹⁴ Australian Competition & Consumer Commission's May 2003 revision of *Resolution of telecommunications access disputes – a guide* at 9.3.1

consistent with the legislative intention underpinning the reforms to the undertaking regime, two things follow:

- (i) the access provider will have properly considered all relevant information before lodging an undertaking. A requirement to provide information to the Commission early in the undertaking process should not therefore prove onerous in practice; and
- (ii) the access provider will wish to have the matter resolved expeditiously.

AAPT recognises that the Commission may wish to obtain additional information or may assess the undertaking in a manner that the access provider had not anticipated, with the result that the access provider needs to provide further information beyond that initially believed to be required. The Commission's discussion paper should make any need for further submissions from the access provider clear.

Assuming that the access provider has genuinely attempted to place all relevant information before the Commission initially, the areas on which the access provider needs to make further submissions can be expected to be relatively confined. Two weeks is therefore a reasonable period in which to require the access provider to submit any further information.

(b) Efficient use of the Commission's resources

If the access provider submits all information relevant and necessary to considering the undertaking early in the process, the Commission will be far better placed to provide a meaningful discussion paper that clarifies the parameters of the debate and promotes targeted, succinct submissions from other parties. This will in turn make the process of considering submissions a quicker and more efficient process for the Commission.

(c) Efficient use of the resources of other interested parties

Interested parties, such as likely access seekers, cannot provide reasoned, relevant submissions when they are unsure of the detailed arguments and evidence to be advanced by the access provider. Without this information, interested parties are likely to feel compelled to address all possible issues, whether or not they are ultimately relevant, at significant time and cost both to themselves and to the Commission.

(d) Time to test the veracity of the information

As discussed above, the Guide states that one benefit of information being provided to the Commission and published early in the process is that it allows for the veracity of the material provided to be tested publicly. AAPT

endorses this view and cites it as another argument in favour of requiring the early provision of information by the access provider.

(e) Certainty and gaming

The addition of clear and enforced time limits would promote certainty for both access providers and access seekers, and limit the potential for gaming by all parties. If deadlines are clear and enforced, the incentive for an access provider to attempt to delay the process by submitting information late is limited. Similarly, other parties will not delay providing information in the belief that the access provider will submit information late and that they should wait until that has occurred.

(f) Procedural fairness

Procedural fairness requires that parties have an opportunity to be heard and to respond to any information that may be adverse to their interests.¹⁵ If the access provider does not submit its information until the end of the submission period, other parties who may be significantly affected by the undertaking do not have sufficient time to respond meaningfully to that information before the issue of the draft report.

There is no denial of procedural fairness to the access provider in the AAPT model. The access provider has two weeks after release of the Commission's discussion paper to address any new issues raised by the Commission or to clarify any issues. The access provider will also have a period after the release of the draft report to provide further submissions.

(g) Tribunal review

The Competition Tribunal, in reviewing a Commission's undertaking decision, may only have regard to material that was before the Commission when the Commission made its decision: s152CF(4). Without de novo review it is crucial that the undertaking process be clearly articulated so that all parties know when they can make submissions and the permissible content of the submissions at each stage. AAPT's model provides this necessary clarification of the current process.

¹⁵ *Kioa v West* (1995) 159 CLR 550.