



**Overview of proposed revisions to  
Resolution of telecommunications access  
disputes — a guide**

**May 2003**

## Introduction

In October 2002, the Commission released *Resolution of telecommunications access disputes — a guide* (the Guide). The Guide is intended to serve as a handbook for both practitioners and the industry explaining how the Commission uses its powers under both the *Trade Practices Act 1974* (the Act) and the *Telecommunications Act 1997* to resolve telecommunications access disputes.

Since releasing the Guide, the *Telecommunications Competition Act 2002* has been passed and this has effected significant changes to the access provisions of the Act. These changes implement the Government's response to the Productivity Commission's report on its inquiry into Telecommunications Competition Regulation.

As a result of these changes, it is appropriate to revise the Guide. This document provides an overview of the main changes to the Guide and indicates where to find the changes.

In revising the Guide, the Commission has incorporated two sets of guidelines that it is now required to formulate under s. 152DNA(8) and s. 152CLA(5) of the Act. The first concerns the backdating of arbitration determinations and is largely based on provisions in the first edition of the Guide. The second concerns new provisions about the deferral of an arbitration where the Commission is considering an undertaking that relates to the same matter.

The Commission will continue to apply the revised Guidelines in the resolution of any telecommunications access disputes before it. However, the Commission seeks comments on the proposed changes by no later than **5.00 pm, Friday 27 July 2003**. While the Commission has previously consulted on the Guidelines, parties making submissions may have reason to provide comments on those parts of the Guidelines which have not changed. The Commission will consider these comments also.

Submissions should be sent to:

Mr Ken Walliss  
Director — Convergence  
Telecommunications Group  
Australian Competition and Consumer Commission  
GPO Box 520J  
MELBOURNE VIC 3001

[ken.walliss@acc.gov.au](mailto:ken.walliss@acc.gov.au)

The Commission prefers that all written submissions are publicly available to foster an informed, transparent and robust consultative process. Accordingly, submissions will be treated as public documents unless otherwise specified. It is preferred that where industry participants wish to submit confidential information, they should provide confidential and non-confidential versions of their submission.

Once all submissions are received, the Commission will place non-confidential submissions on its website. The Commission will then make any changes it believes may be required to the Guidelines, and issue an addendum to the Guidelines.

# Proposed revisions to the Guide

## Guidelines on backdating of arbitration determinations

In its first edition of the Guide, the Commission explained its approach to the backdating of arbitration determinations. In part, this was in response to recommendations in the Productivity Commission's report on Telecommunications Competition Regulation.

Since then, the Government has amended the Act to require the Commission to formulate guidelines concerning backdating (new s. 152DNA(8)). In light of the material included in the first edition of the Guide, only minimal changes are necessary.

The changes that have been made concern the power to award interest on the backdated amount. Amendments to the Act have clarified that the Commission does have power to award interest (new s. 152DNA(6)) and the Guide has been updated accordingly. Moreover, the Explanatory Memorandum stated:

It is proposed that the guidelines will also include a method that the ACCC will use for calculating interest under the express power provided in the amendments.<sup>1</sup>

Accordingly, the Guide has been revised to include an explanation of the methodology that the Commission proposes to adopt in its calculation of interest on backdated payments. **See section 7.4.4.**

The approach put forward in section 7.4.4. concerning the methodology for calculation of interest on backdated payments should be viewed as a preliminary approach. The Commission has not previously undertaken public consultation in relation to this matter and accordingly, if appropriate, there may be revision to this section in light of submissions. In this regard, the Commission would be interested to receive submissions in relation to:

- the principles which should be used to determine the appropriate interest rate; and
- whether it would be useful and appropriate for the Commission to specify a proxy rate (such as a particular lending rate) which the Commission would generally use in determining the interest on backdated payments and, if so, what it should be.

---

<sup>1</sup> Explanatory Memorandum for the Telecommunications Competition Bill 2002, p. 52.

## **Guidelines on the deferral of an arbitration while considering an access undertaking**

New s. 152CLA(2) confers power on the Commission to defer an access arbitration while it is considering an access undertaking that relates to the same matter. In deciding whether to defer the arbitration, s. 152CLA(4) provides that the Commission must have regard to:

- the fact that the access undertaking, if accepted, will apply generally to all access seekers, not just those involved in the arbitration;
- any guidelines that the Commission has made, and which are in force, in relation to the deferral of arbitrations; and
- such other matters which the Commission considers relevant.

Revisions to the Guide explain how the Commission will administer these new provisions, and set out the proposed guidelines to which the Commission must have regard. **See chapter 9.**

## **Model terms and conditions for core services**

New s. 152AQB of the Act requires the Commission to make a written determination setting out model terms and conditions in relation of access for the following services (referred to as ‘core services’):

- Domestic PSTN Originating Access Service;
- Domestic PSTN Terminating Access Service;
- Unconditioned Local Loop Service;
- Local Carriage Service; and
- any declared service specified in regulations made under the Act.

The objective of the model terms and conditions is to provide guidance as to what the Commission’s views would be if it were called upon to arbitrate an access dispute or assess an access undertaking. This is intended to assist parties to reach commercial negotiations, as well as assisting persons providing undertakings to the Commission.

It is anticipated that the model terms and conditions for a particular declared service would be reflected in arbitration determinations concerning that service.<sup>2</sup> Accordingly, in light of the relationship between access arbitrations and the model terms and conditions, the Commission has included a new section in the Guide explaining the criteria to which it will have regard when formulating the model terms and conditions. **See section 7.3.**

## **Removal of merits review for arbitration determinations**

Amendments to the Act have removed the right of merits review in respect of arbitration determinations. This has necessitated a number of consequential amendments to the Guide. The main changes involve section 7.1.4. of the Guide which has been removed, and section 8.1. which has been re-written. **See chapter 8.**

## **Miscellaneous changes**

A number of changes have been made in order to reflect amendments to particular legislative provisions described in the Guide. These include:

- the requirement in new s. 152ALA for declaration instruments to include an expiry date — **see section 1.1.1.**;
- the ability of the Commission to revoke a declaration without holding a public inquiry where the declared service is of minor importance (new s. 152AO(1A)) — **see section 1.1.1.**;
- changes to restrictions on the arbitration determinations that the Commission can make (s. 152CQ) — **see section 7.2.2.**;
- removal of references to the Telecommunications Access Forum as a result of its abolition and removal from the Act — **see section 1.1.1. and appendix 1**; and
- changes to the hindering provisions (s. 152EF) — **see section 3.4.4.**

In addition, the Commission has:

- included its model confidentiality undertaking, previously released as a draft in October 2002<sup>3</sup> — **see appendix 5**;

---

<sup>2</sup> Explanatory Memorandum for the Telecommunications Competition Bill 2002, p. 40.

<sup>3</sup> Only one submission was received in response to the draft confidentiality undertaking, namely a submission from Vodafone.

- included reference to article 9.8(b) of the Singapore-Australia Free Trade Agreement, which requires the Commission to make interim determinations within 180 days in particular circumstances — **see sections 7.1.1. and 9.2.2.**; and
- updated the dispute notification form in order to describe additional information that the Commission believes will be of assistance in refining the issues and identifying the scope for alternative dispute resolution at the initial case management meeting — **see appendix 2.**