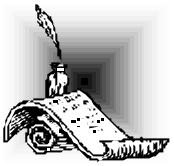

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PRIMUS TELECOMMUNICATIONS' RESPONSE TO THE COMMISSION'S DRAFT GUIDE TO DISPUTE RESOLUTION PROVISIONS UNDER PART XIC OF THE *TRADE PRACTICES ACT 1974* (CTH) AND THE *TELECOMMUNICATIONS ACT 1997* (CTH)

Primus Telecommunications ("**Primus**") welcomes the opportunity to comment on the Commission's Draft Guide to Dispute Resolution Provisions Under Part XIC of the *Trade Practices Act 1974* (Cth) and the *Telecommunications Act 1997* (Cth) (the "**Draft Guide**"). We have been asked to comment on the Draft Guide on Primus' behalf.

Primus has been involved in numerous arbitrations under Part XIC of the *Trade Practices Act 1974* (Cth) ("**Part XIC**"), as well as one review before the Australian Competition Tribunal. As a result, Primus (together with its legal advisers) has amassed a great deal of experience in the workings of the arbitration process under Part XIC and considers that it is in a good position to comment on that process.

As a general comment, Primus supports and commends the Commission on its initiative to review the dispute resolution provisions under Part XIC. Primus generally agrees with the Commission's proposed changes and refinements as described in the Draft Guide. However, it makes the following comments on particular aspects of the Draft Guide.

1. "Unable to agree"

In section 2.2 of the Draft Guide, the Commission sets out a "rule of thumb" which it proposes to use in considering whether the access seeker is unable to agree with the access provider – namely that:

- either the access seeker or the access provider must have made a request of the other party, or put a proposal to the other party; and

- that other party must have refused the request or rejected the proposal. The refusal may be an explicit refusal, or a constructive refusal (e.g. where the other party has not responded to the request or proposal within a reasonable time).

In Primus' experience, sometimes a party can delay the commencement of an arbitration by "stringing out" negotiations with the other party. In such circumstances, it is not

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necessarily immediately apparent to the other party that the negotiations are being deliberately delayed. The first party's tactics may only become apparent after some time. Whilst the amended backdating provisions in the TPA help to some extent to reduce the financial disadvantage such tactics may cause, they may not ameliorate the disadvantage to the access seeker due to business uncertainty and cash flow implications caused by such tactics. It is therefore important that the substantive conduct of the parties be taken into account in defining whether or not an access dispute exists.

Accordingly, Primus suggests that the following example be added to the Commisison's notion of a constructive refusal (*i.e.* the following should be added to the words in bracket in the second bullet point above): "*, or where the other party has made one or more responses to the request or proposal, but the response (or responses) taken as a whole evince an intention (viewed objectively) to delay or obfuscate the ability of the parties to reach agreement.*"

2. Joining an arbitration

Section 3.1.2 of the Draft Guide refers to a new process which the Commission is developing so as to enable persons not mentioned in the notification of the dispute to be given an opportunity to join the arbitration of the dispute. The proposed process provides that such persons will be notified by e-mail and will have 3 business days to apply to the Commission to become a party to the dispute.

Primus supports this initiative. However, Primus considers that a 3 business day timeframe is too short. First, an interested (or potentially interested) person (who is not a party to the dispute) would normally require sufficient time to familiarize itself with the nature of the dispute (including defining its interest (if any) in the dispute) and to obtain legal and expert economic and technical advice as to such matters. Further, Primus queries whether imposing a specific time limit on such persons to apply to become a party to the dispute would prejudice such persons' rights under section 152CO(d) of the TPA, which does not impose a time limit on persons seeking to be made a party to the dispute.

Clearly it will be in a non-party's best interests to join the arbitration as early as possible and there would normally be a strategic imperative to do so. However, Primus does not consider that strict time limits ought to be imposed.

3. The initial case management meeting

Section 3.4.2 of the Draft Guide describes the process at the initial case management meeting.

Primus suggests that the first bullet point in that section ought to be amended to read:

> "identify the issues in dispute and the respective <u>preliminary</u> positions of the access provider and access seeker on those issues;" (underlining added for clarity).

From Primus' experience, at the preliminary stage of the arbitration the parties often do not know the full extent and scope of issues that may become relevant to the arbitration. Moreover, due to the information disadvantage which an access seeker often faces, it will

often not be possible for a party (typically the access seeker) to settle its position on some issues until the other party has provided it with detailed information (for example, information as to the operation, structure or cost of the service in question). We note that this is also recognized in section 3.5.1 of the Draft Guide.

4. Information requests

Section 3.5.1 of the Draft Guide deals with information requests by the Commisson. The information required to be disclosed by a party for the purposes of an arbitration can sometimes be dynamic in nature – that is, it can change over time. Therefore, Primus suggests that the Commission ought to consider including in section 3.5.1 of the Draft Guide an ability in the Commission to give a direction requiring the parties to provide ongoing information (or continuous disclosure), as and when the information changes during the course of the arbitration. This is conceptually similar the general rule in litigation that parties are required to make ongoing discovery. Whilst this may not always be necessary, it would give the Commission flexibilty in terms of the way in which it requests, and receives, inforamtion from the parties. Primus considers that the Commission already has the power to make requests for continuous disclosure (see sections 152DB(1)(c) and 152DC(1)). However, it would assist the Commission and the parties to an arbitration to include continuous disclosure in the Draft Guide.

5. Role of consumer groups

The opening part of Chapter 5 makes an oblique reference to consumer groups making submissions to the Commission in an arbitration. Primus considers that this reference ought to be deleted, as it creates an inappropriate expectation.

An arbitration is essentially a resolution of a commercial dispute as between two competing companies and therefore it would be extremely rare for a consumer group to have a sufficient interest in the matter so as to warrant being joined as a party pursuant to section 152CO (notwithstanding that the object of Part XIC being to promote the long-term interests of end-users of relevant carriages services).

Nor would a consumer or consumer group have standing in a joint arbitration hearing pursuant to the new section 152DMA, because they would not be a party to any of the arbitrations to be joined.

Consumers or consumer groups may become involved in a hearing process outside the arbitration (if the Commission decides to conduct such a process). However, Primus considers that it is important that the Draft Guide not create an expectation or presumption that consumers or consumer groups may take part in an arbitration.

6. Confidentiality

Section 6.3.3 of the Draft Guide refers to a standard form of confidentiality undertaking which SPAN is in the process of preparing. Primus supports the approach of a standard form of confideniality undertaking. However, Primus would appreciate the opportunity to review and comment on the SPAN document, once it has been prepared. In particular, the standard form of confidentialty undertaking should be drafted in such a way that a party cannot unnecessarily require the other party's representatives to sign separate undertakings

for each confidentiality request. In other words, the standard form should be drafted such a single undertaking covers all confidentialty requests made during the course of the arbitration and persons are not required to sign multiple undertakings throughout the course of the arbitration.

In addition, Primus considers that the Commission ought to give more emphasis in the Draft Guide to recommendations R9 to R20 of the Consultants' Report. Given the past conduct of one particular company in "gaming" the arbitral regime, Primus considers that the Commission has given insufficient emphasis, and indeed has failed to adopt some key recommendations of the Consultants, in the Draft Guide. Primus suggests that the Commission ought to review and amend Chapter 6 of the Draft Guide so as to include all of recommendations R9 to R 20 of the Consultants' Report.

7. Approach to backdating

Section 7.3.2 of the Draft Guide deals with the Commission's approach to backdating of a final determination. That section contains a proposition that:

> "if prior to notification of the dispute, the access provider offered the access seeker a price and non-price terms and conditions that are substantially similar to those determined by the Commission and the access seeker refused, then it may not be appropriate to backdate…Similarly, if the access seeker has been tardy in responding to offers put forward by the access provider, then it may not be appropriate to backdate to the commencement of negotiations."

Primus is concerned that the Commission, in making these statements, ought not create a presumption that a failure by the parties to reach agreement – or even a refusal by one party to reach agreement, for instance because it has insufficient information as to the true cost of a service or because it feels that it is being unduly pressured into accepting a certain offer – constitutes grounds for refusing or limiting backdating. We note that there is nothing in the TPA to suggest that the Commission's discretion as to backdating ought to be exercised in this way, or that a party ought to be "punished" for failing to reach agreement. Further, Primus is concerned that the backdating provisions ought not be seen or used as a *quasi* measure comparable to putting a party at risk for costs for failing or refusing to accept a without prejudice offer.

Accordingly, Primus suggests that the second and third paragraphs in section 7.3.2 be deleted; these are matters which may be taken into account by the Commission in exercising its discretion if appropriate, but they ought not be used to create a presumption to refuse or limit backdating.

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