



Resolution of telecommunications access disputes

—proposed ‘standard form’ confidentiality undertaking

October 2002

Introduction

The Commission released its draft guide to the *Resolution of telecommunications access disputes* (the draft guide) for industry comment in April 2002. At the time the draft Guide was published, it was envisaged that a 'standard form' confidentiality undertaking may be one of the outcomes of the Service Providers Industry Association (SPAN) alternative dispute resolution process and if this occurred, it would be adopted by the Commission.

The timing of the development of such an undertaking, in the SPAN process, remains uncertain. Accordingly, in the interests of generating industry debate, the Commission has drafted a proposed 'standard form' confidentiality undertaking and seeks industry comment on the proposed undertaking. The Commission remains committed to participation in the SPAN process and will, if appropriate, feed any input on the proposed confidentiality undertaking into the SPAN process as it develops.

As discussed in section 6.3.3. of the guide, where a party to an arbitration has requested the Commission under s. 152DK of the Act to treat material as confidential, the Commission may decide that disclosure of the material should be restricted to identified representatives of the other party subject to the provision by those representatives of a confidentiality undertaking.

In the past, disputes between the parties to the arbitration, in regards to the nature and extent of such confidentiality undertakings has delayed the progress of the arbitration. Accordingly, the Commission is seeking to adopt a standard form confidentiality undertaking. This document sets out, for industry comment, a draft form of the confidentiality undertaking.

Submissions on the proposed standard form confidentiality undertaking should be made to the Commission by no later than **5.00pm, Thursday 31 October 2002**. Once all submissions are received, the Commission will place all non-confidential submissions on its website.

The Commission prefers that all written submissions be 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.

Submissions should be addressed to:

Mr Ken Walliss
Acting General Manager
Telecommunications Group
Australian Competition and Consumer Commission
GPO Box 520J
MELBOURNE VIC 3001

In addition to a hard copy, persons making submissions are encouraged to provide an electronic copy of the submission to ken.walliss@acc.gov.au. Ken Walliss can be contacted on (03) 9290 1869.

Draft Undertaking:

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974

IN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

ACCESS DISPUTE NOTIFIED BY: (ACCESS SEEKER / ACCESS PROVIDER)

OTHER PARTIES: (ACCESS PROVIDER / ACCESS SEEKER)
 – IDENTIFY OTHER PARTIES]

DATE OF NOTIFICATION:

DECLARED SERVICE:

NOTIFIED UNDER: *Trade Practices Act 1974 (Cth) s 152CM(1) [or s 152CM(2)]*

CONFIDENTIALITY UNDERTAKING

I, _____ of _____ undertake to [INFORMATION PROVIDER] and to the Australian Competition and Consumer Commission (“**the ACCC**”) that:

- 1 Subject to the terms of this Undertaking and any order of the ACCC, 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 arbitration.
- 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 ACCC.
- 4 I acknowledge that I may disclose the [INFORMATION PROVIDER] confidential information to which I have access to:

- (a) the ACCC; and
- (b) any employee, internal legal advisor, external legal advisor or independent expert currently employed or retained by [PARTY] for the purposes of the conduct of the arbitration 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 ACCC;
 - (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [INFORMATION PROVIDER]; and
 - (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 arbitration; or
- (b) my ceasing to be employed or retained by a party to this arbitration;

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 arbitration may be finalised where:

- (a) the notification is withdrawn under s 152CN of the *Trade Practices Act 1974* (Cth) (“**the Act**”);
- (b) the ACCC terminates this arbitration under s 152CS of the Act; or
- (c) the ACCC makes a final determination under s 152CP of the Act.

However, if an application is made to:

- (d) the Australian Competition Tribunal (“**the Tribunal**”) under s 152DO of the Act for review of a final determination made in this arbitration, or

(e) a court in relation to this arbitration or any review by the Tribunal;
the arbitration will not be regarded as finalised until those proceedings are finalised.

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 arbitration;

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 arbitration or a breach of any other obligation of confidence in favour of [INFORMATION PROVIDER] or any other unlawful means.

Signed: _____

Dated: _____