Resolution of telecommunications access disputes

—response to submissions on the draft guide

October 2002

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Introduction

The Commission released its draft guide to the *Resolution of telecommunications access disputes* (the draft guide) for industry comment in April 2002. The draft guide incorporated incremental changes to the Commission's process, consolidating the experience gained in conducting telecommunications arbitrations since 1997, legislative changes to the access regime, and the key findings of an independent review (by Phillips Fox) of the Commission's processes for handling telecommunications access disputes. It does not reflect potential changes to the *Trade Practices Act 1974*, proposed by Government in the Telecommunications Competition Bill 2002.

In response to the draft guide, submissions were received from:

- Macquarie Corporate Telecommunications;
- Primus Telecommunications;
- AAPT;
- Optus;
- Vodafone;
- Telstra;
- NECG (commissioned by Telstra);
- ATUG; and
- Foxtel.

Non-confidential versions of these submissions are available from the Commission's website (www.accc.gov.au). The submissions are generally supportive of the Commission's decision to release guidelines and of the case management approach that the Commission has adopted in response to the Phillips Fox report.

The Commission has considered the issues raised by submissions made in response to the draft guide and has now released its finalised guide to the *Resolution of telecommunications access disputes* (the guide).

This addendum to the guide, discussing the significant issues raised by the submissions and the Commission's response to them, has been released in the interests of promoting an informed, transparent and robust consultative process.

Distinction between dispute resolution and dispute determination

Some submissions suggested that the guide is too focussed on arbitration and does not provide enough emphasis on commercial resolution of disputes, while others warned that the Commission should not place too much emphasis on alternative dispute resolution processes.

In response, some redrafting of the preface has occurred to reflect the fact that the intention of the guide is to outline the Commission's statutory powers in relation to the resolution of access disputes, and that it must therefore predominantly deal with arbitration. There has also been some redrafting of chapter 2 to include discussion of ways that the Commission may be able to facilitate commercial negotiations.

Unable to agree

The Commission's view that 'unable to agree' is a low threshold and that the existence of a contract did not necessarily preclude notification of a dispute attracted considerable comment in many submissions. Some submissions agreed with the Commission's approach while others suggested that 'unable to agree' should be treated as a high threshold, and that parties should not be considered 'unable to agree' until all contracted alternative dispute resolution processes had been completed.

The Commission remains of the view that the existence of a contract does not necessarily preclude the notification of a dispute and that 'unable to agree' is a low threshold. However, it should be noted s. 152CS provides the Commission power to terminate an arbitration if it thinks that a party has not engaged in negotiations in good faith or if it thinks that access should continue to be governed by an existing contract. Accordingly, some redrafting has occurred in sections 2.2. ('unable to agree') and 7.5.2. ('termination of an arbitration by the Commission') to reflect the view that the Commission will usually not continue an arbitration where there is an existing (freely entered) contract for the period. The guide notes, however, that there may be some instances, such as where there are significant competition concerns, or where other concerns relevant to the long-term interests of end-users are evident, when the Commission will continue an arbitration despite the existence of a contract.

Foxtel sought further information on why the Commission considered that contractual provisions precluding or modifying the right of a person to notify a dispute under Part XIC were unenforceable. The paragraph has been redrafted to clarify that the Commission's view related to the facts of particular arbitrations where this issue has previously been considered by the Commission. The paragraph emphasises that the Commission may, after considering the particular circumstances, terminate the arbitration under s. 152CS, or make a direction under s. 152CT requiring the parties to undertake the dispute resolution process set out in the contract.

Distinction between procedural and substantive fairness

AAPT suggested that where a party wants to make a procedural point, there should be an onus on that party to show that any detriment to it and (more importantly) to end-users in the particular case, will outweigh the benefits of efficient dispute resolution.

Some redrafting has occurred (section 6.1.1.) that reflects the need for the Commission to balance the desirability of resolving disputes in a timely manner against the impact on the party raising the procedural issue. The Commission does not, however, believe that it has the ability to impose a requirement as suggested by AAPT.

Joinder and joint hearings

Macquarie and AAPT both raised concerns about the potential for joinder and joint hearings to cause delays in an arbitration. Primus did not consider that time limits for requesting joinder can, or should, be imposed by the Commission. Telstra requested that the Commission develop and release for consultation guidelines on when parties should be entitled to join an arbitration.

The guide has been redrafted to clarify that the time limits are indicative and that a request for joinder received outside the indicated time limit will be considered. However, the potential for issues of joinder to cause delay is also noted and parties are encouraged to inform the Commission that they are considering making an application for joinder at the earliest opportunity.

The Commission does not consider that additional guidance on the 'sufficient interest' (for joinder) test is possible at this stage. The Commission also does not consider further consultation should be undertaken at this time. Telstra has not identified any particular areas that would benefit from further consultation, nor has it otherwise supported its request for further consultation.

Role of consumer groups

Primus suggested that the reference to consumer groups making submissions (chapter 5) should be deleted as it creates an inappropriate expectation that such groups will have a role in arbitrations. The Commission considers that consumer groups may be able to provide evidence that is relevant to an arbitration determination and that a possible approach is to conduct a process outside (but affecting) the arbitration. Clarifying comments have been added.

Initial case management meetings

Primus suggested that 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. Accordingly, it suggests that 'preliminary' be added to the first bullet point in section 3.4.2.

The Commission has not adopted this suggestion as it believes that, in the interests of expeditious dispute resolution, when notifying a dispute the onus must be on the notifier to state clearly the issues in dispute. While this does not preclude raising other issues at a latter date, the Commission would generally require justification for the issue not being raised at the commencement of the arbitration.

Confidentiality processes and information requests

Confidentiality processes also attracted a large amount of attention in the submissions. Some submissions supported a 'strong onus of proof' being applied to parties seeking to maintain the confidentiality of their documents. Other submissions argued for a reversal of the onus, arguing that the party seeking the information should be required to establish the need for wider circulation. Some submissions also argued for greater acceptance of the recommendations relating to confidentiality processes in the Phillips Fox report.

The Commission considers that the guide sufficiently adopts the Phillips Fox recommendations on confidential information and that the views expressed in the guide are appropriate.

Primus requested an opportunity to comment on the proposed 'standard form' confidentiality undertaking before it is adopted, as it is not a member of SPAN.

As noted in the guide, the timing of the development of a standard form confidentiality undertaking in the SPAN process remains uncertain. Accordingly, the Commission has drafted and released a proposed 'standard form' confidentiality undertaking for industry comment.

AAPT proposed two additional factors to be considered by the Commission when assessing a request for confidentiality under s. 152DK:

- the extent to which non-disclosure of the documents would not be in the public interest; and

- the extent to which disclosure or non-disclosure would encourage early resolution of the dispute.

The three factors put forward in the draft guide have been developed in the context of court proceedings and are well established. However, the additional factors suggested by AAPT may come into consideration when considering the extent to which non-disclosure will be likely to harm the ability of the Commission to perform its functions. Accordingly, some redrafting to include these factors has been undertaken in section 6.3.1.

Telstra and Foxtel requested the Commission develop separate guidelines for consultation on the use of confidential information in arbitrations.

The Commission does not consider additional guidelines are necessary, nor does it consider further consultation should be undertaken at this time. Telstra and Foxtel have not sufficiently identified any particular areas that would benefit from further consultation, nor have they otherwise supported their requests for further consultation. Parties should note, however, that the Commission is currently seeking further comment on the form of a standard form confidentiality undertaking.

Roles of staff

AAPT, Telstra, and Foxtel requested that staff papers be provided to the parties, and parties be given the opportunity to comment on them. The Commission does not consider this is necessary as the Commission's reasoning process is set out in a draft determination, in relation to which the parties are given an opportunity to comment.

Telstra and Foxtel raised concerns about the role of staff in alternative dispute resolution processes. The Commission notes the issues raised by the involvement of staff in such processes. Section 3.2.5. has been redrafted to reflect these concerns.

Written & oral submissions

Numerous submissions commented on the relative worth of written and oral submissions. Some acknowledged the benefits of limiting the length of written submissions in some circumstances. Most submissions were of the view that written submissions should continue to be the primary source of providing information to the Commission in the course of an arbitration.

The Commission's view has not changed in this area. It will continue to consider the use of written submissions and oral hearings/conferences with Commissioners as outlined in the guide.

Use of experts

AAPT suggested that a better approach for ensuring the independence of experts may be for the parties to have their own experts and to assist the Commission in the selection of an independent expert to advise the Commission.

Telstra and Foxtel considered that recommendations R11 and R12 of the Phillips Fox report (development of guidelines for engaging an expert) had not been sufficiently adopted in the draft guide. Telstra also submited that parties should be consulted in *all cases* (instead of *normally* – as in the draft guide) to ensure that an expert appointed by the Commission has all necessary information.

The draft guide included guidelines for the use of experts that have been adapted from those used by the Federal Court. The Commission is of the view that, at this time, these guidelines are a sufficient adoption of the Phillips Fox recommendations.

The Commission will generally consult the parties with respect to the information the experts need to be provided, however it believes that to amend the guide to consult in all cases may be too prescriptive (i.e. it may not provide for particular case by case considerations).

Public statements by the Commission

Telstra and Foxtel both submitted that the Commission should make a policy statement in the guide adopting recommendation R3 of the Phillips Fox report (not to make public statements in relation to issues in dispute before it).

It has been Commission practice not to comment publicly on an arbitration before it. A statement to this effect has been included in section 6.1.2. However, the statement also notes that the Commission has other roles in the telecommunications industry and it will be necessary to continue to undertake, and comment on, these roles.

Adherence to agreed time limits

Macquarie suggested that some form of sanction needs to be available to the Commission to enforce compliance with time limits in the arbitration process.

Subsection 152DC(4) sets out sanctions that a Court may impose where a person contravenes a direction made by the Commission under s. 152DC(1)(a) or (f). However, the Commission also considers that where conduct is unsatisfactory, other options, either for limiting such conduct, or sanctioning such conduct without court action, are available such as:

- requiring parties to make a submission by the date of a scheduled meeting or conference where a particular issue or course of action is to be decided;
- varying the awarding of hearing costs from the standard 50:50 to the disadvantage the party that has not met agreed time limits; or
- commenting on conduct issues (such as meeting agreed time limits in the arbitration) if publishing the determination.

Telstra and Foxtel both submitted that the Commission should also be bound by time limits agreed in case management processes.

The Commission is considering the use of indicative timeframes as recommended in the Phillips Fox report (R53). However, the Commission must satisfy its statutory obligations in conducting an arbitration and in reaching a determination. Accordingly, it is difficult to envisage a situation where the Commission could be bound by a time limit agreed in the case management process. That said, the Commission considers the use of indicative time limits, and monitoring any departure from them, to be an important tool that it intends to utilise in the management of future arbitrations.

Issues to be considered in making determinations

NECG's submission commented on the interpretation of terms that the Commission must take into account in making a determination, namely the:

- long-term interests of end-users;
- legitimate business interests;
- interests of persons who have rights to use the service;
- efficient operation; and

- operational and technical requirements.

The interpretation of these terms has previously been considered in several other contexts and the Commission's interpretation of these terms remains unchanged.

Backdating

Primus was concerned that comments in the draft guide will have the effect of creating a presumption that 'failure to agree' will constitute grounds for refusing, or limiting, backdating.

AAPT was concerned that not backdating where an offer – that is ultimately 'substantially similar' to a final determination – has been rejected favours procedural efficiency (creating incentives for settling the dispute) over substantive fairness (setting the correct access price for the period in question). Moreover, AAPT argues that the information asymmetry that exists means that it cannot be assumed that an access seeker will be able to recognise an offer that will be 'substantially similar' to the Commission's final determination.

Vodafone was disappointed that the Commission's general view is 'inclined to backdate'. It believes that backdating should be assessed on a case by case basis, and should consider issues such as whether lower prices have been passed onto end-users.

Telstra requested stronger statements as to when backdating will or will not be applied. It argued that the guidelines should express a view that parties could expect backdating to apply in all arbitrations unless the Commission came to the view that there had been some conduct of the access seeker which disentitled it to backdating for the full period. It also argued that a stronger statement on this issue would be beneficial in achieving greater certainty and would thereby assist the long-term interests of end-users.

The Commission does not propose to change its approach to backdating. It is of the view that it must consider backdating on a case by case basis and that the approach proposed in the guide provides the appropriate incentives for parties to reach commercially agreed outcomes.

Interest

AAPT supported the awarding of interest when backdating a determination. Telstra did not agree that the Commission has the power to award interest.

The Commission remains of the view that it has the power to award interest.

Regular reviews of the guide

Telstra suggested that the guide should include references to compulsory review of arbitral processes (and the guide itself).

The preface has been redrafted to note that the Commission intends to review and update the guide and that the Commission will obtain detailed feedback from parties after each completed arbitration.

Regulatory opinion

The Commission was recently asked to (and did) provide a 'regulator's advisory opinion' on a methodological issue to facilitate further commercial negotiations between two parties. While this issue was not raised in submissions on the draft guide, the Commission's consideration of this role has prompted it to include a discussion of advisory opinions in chapter 2 of the guide.