Telstra Corporation Limited

Submission

to the

Australian Competition and Consumer Commission

Draft Guide to Dispute Resolution Provisions under Part XIC of the *Trade Practices Act 1974* and the *Telecommunications Act 1997*

19 June 2002

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Key messages

- Telstra welcomes the opportunity to have an input into the development of the ACCC's Part XIC Dispute Resolution Guidelines.
- Telstra is strongly supportive of the Commission's attempts to streamline and improve the administration and management of the arbitration process.
- Telstra believes the independent consultant's report contains many useful and worthwhile reform initiatives.
- Telstra strongly supports the establishment of a flexible case management process for arbitration.
- Telstra welcomes the greater use of ADR processes proposed by the ACCC.
- Telstra has made a number of suggestions as to issues to be further considered by the ACCC including the threshold question required to commence an arbitration as to when parties are "unable to agree".
- Telstra has made a number of suggestions as to the publication by the ACCC of more detailed guidelines in relation to specific subjects for industry discussion. Examples of issues to be dealt with in these detailed guidelines include the procedures for dealing with disclosure of confidential information and the circumstances in which the Commission would make orders with respect to backdating of determinations.
- Telstra has also made a number of comments in relation to the Commission's processes for achieving transparency, such as the disclosure by the ACCC of briefing material prepared by ACCC staff for Commissioners and the avoidance of public statements by the ACCC on issues before it for arbitration.

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1 Introduction

1.1 Executive Summary

Telstra is pleased to provide its response to the Australian Competition and Consumer Commission's (**"ACCC"**) draft guide to the Resolution of Telecommunications Access Disputes (**"draft guidelines"**).

Telstra welcomes the draft guidelines as a positive step in the process of finding a fair, effective, efficient and fast solution to the management of telecommunications arbitrations.

Telstra is strongly supportive of the Commission's current attempts to streamline and improve that process.

Telstra notes the important and independent contribution to the current review of arbitration procedures made by the Phillips Fox *Review of the Telecommunications Arbitration Process* (**"Phillips Fox Review"**) dated 18 April 2002. Telstra considers that the Phillips Fox Review contains many useful recommendations for the improvement of the current arbitration process. The process of external review and of public release of the consultants report for discussion purposes is in Telstra's view a most worthwhile and useful reform initiative for which the ACCC deserves credit.

Telstra believes that the development of appropriate guidelines will greatly benefit the industry, both in situations where disputes arise and also in establishing a pro-ADR industry framework where parties are better informed as to the processes which will be adopted by the Commission following commencement of an arbitration and where parties will be encouraged to resolve their own disputes, with a consequent reduction in the overall likelihood of disputation.

Telstra considers the development and use of arbitration guidelines to be essential if disputes are to be managed in a way that leads to fair, effective, efficient and fast results.

Telstra accordingly welcomes and supports the ACCC's desire to "improve the efficiency and effectiveness of its arbitration processes" through the development and use of arbitration guidelines.[1] Many of the draft guidelines are likely to support the achievement of the goals mentioned above. For example, Telstra supports:

- the establishment of a case management process and case management team to progress telecommunications arbitrations in a timely manner;

[1] Draft Guidelines, p ix.

- the introduction of guidelines to govern the use and reporting of experts engaged by all parties; and
- the recognition of the benefits provided by written submissions in disputes that can be complex.

Whilst welcoming and supporting the primary thrust of the guidelines, and the majority of proposals made, Telstra has in this submission made a number of comments and suggestions in relation to the following issues:

- the underlying principles that Telstra believes should be applied to the resolution of any telecommunications arbitration dispute;
- the desirability of disputes being settled commercially and the need for incentives to encourage commercial settlement rather than the reverse. In essence, Telstra believes that regulation should only be used as a backstop if commercial solutions cannot be found. In particular, Telstra makes a number of comments with respect to the assertion in the draft guidelines that telecommunications arbitrations are "often characterised by a lack of mutual commercial incentive to reach settlement";
- the preconditions for commencing arbitrations and in particular the assertion that the "unable to agree" threshold under section 152 CM(1) and (2) of the *Trade Practices Act* (**"TPA"**) "should not be interpreted as particularly high" and can be satisfied notwithstanding the existence of a settled contract between the parties to the potential arbitration and the view that contractual provisions can have no effect on the behaviour of parties prior to the invocation of Part XIC arbitration procedures;
- the case management process. In particular, Telstra notes the need for the guidelines to place obligations on the ACCC to itself comply with timetables and other arbitral procedures designed to ensure the fast, transparent and effective resolution of disputes;
- the role of the ACCC staff and in particular the desirability of the guidelines acknowledging the often conflicting roles that ACCC advisory staff play and the need for the guidelines to include procedures to ensure that such conflicting roles, if not completely avoidable, are at least transparent to all parties;
- the use of written and oral submissions during the course of an arbitration;
- experts and experts' reports;
- the joinder of parties to an arbitration;

- the desirability of safeguards for the disclosure of confidential information and, in particular, guidelines governing the ACCC's handling and disclosure of information which give too much discretion to the ACCC; and

- the need for further clarification in the draft guidelines with respect to ACCC procedures for the backdating of Determinations and the awarding of interest.

In a number of areas, Telstra has suggested the publication by the Commission of more detailed subject-specific guidelines, for industry consultation purposes, as to how the Commission may deal with certain issues.

Telstra reiterates, however, that notwithstanding the concerns and discussion points listed above it is strongly supportive of the Commission's reform proposals and, in particular, of the case management concept proposed in the guidelines.

2 Principles of arbitration under Part XIC of the *Trade Practices Act 1974*

2.1 Fair, effective, efficient and fast

Disputes resolution procedures should be fair, effective, efficient and fast

Telstra considers that the four benchmarks identified in the Phillips Fox Review (fair, effective, efficient and fast) represent worthwhile goals that the ACCC should be aiming to achieve in the resolution of any telecommunications access dispute. While Telstra acknowledges that there has been a genuine attempt to draft the guidelines for the resolution of disputes in a way that reflects these goals, Telstra is nevertheless concerned that some guidelines do not sufficiently address the benchmarks.

2.2 Section 152CLA of the TPA

Case management timeframes should apply to all arbitration processes

Section 152CLA of the TPA states that:

"The Commission must, in exercising its powers under this Division [dealing with the resolution of access disputes], have regard to the desirability of access disputes being resolved in a timely manner (including through the use of alternative dispute resolution methods such as mediation and conciliation)"

As the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 2001* stated, the principle behind the enactment of section 152CLA was the desire to more quickly resolve disputes and to <u>reduce</u>

the number of disputes in the formal dispute arbitration process.[2] Section 152CLA requires the ACCC to act expeditiously. Telstra considers, therefore, that any use of alternative dispute resolution procedures (**"ADR"**), including the use of mediation, must be subject to case management monitored timeframes.

2.3 Arbitration under Part XIC is a last resort

Consensual agreements are preferable to arbitrated outcomes and should be encouraged

As discussed in the draft guidelines, there are many advantages in the use of ADR procedures. Telstra supports the use of properly managed ADR processes. Of particular benefit, in Telstra's opinion, is the resultant ownership of outcomes that commercial negotiations and or mediated settlements allow.

Coupled with the legislative intention behind section 152CLA (to reduce the number of disputes in the formal arbitration process), Telstra considers that formal arbitration under Part XIC should be regarded as a last resort. It follows, therefore, that the threshold for arbitration should be set at a level that recognises the primacy of contract and the significantly greater range of benefits that flow from consensual inter-party agreements compared to arbitration.

3 Incentives to settle disputes commercially

The dispute resolution framework should be designed to encourage commercial negotiation and ADR both during and before arbitration

The draft guidelines contain several assertions to the effect that telecommunications disputes are often characterised by a mutual lack of incentive to commercially agree. For example, the draft guidelines state:

"Telecommunications arbitrations concerning declared services are often characterised by a lack of mutual commercial incentive to reach settlement, particularly where the service is provided by means of infrastructure with natural monopoly characteristics and the access provider competes in downstream markets".[3]

These assertions appear to be based on similar comments contained in the Phillips Fox Review.[4] Telstra strongly rejects this "principle" and would be concerned if this misapprehension were to underlie the development of the ACCC's draft guidelines.

[2] Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 2001* at B4.
[3] Draft guidelines, p. ix.
[4] Phillips Fox Review, paragraph 4.2 and 4.4.

Telstra does have an incentive to resolve disputes commercially. Telstra has an entire business unit, Telstra Wholesale, whose primary purpose is to achieve sales of telecommunications services at a wholesale level, and to develop strong commercial relationships with its customers.

Indeed, Telstra Wholesale has been extremely successful in recent years in reaching commercial settlements with its customers without regulatory intervention. The vast majority of the services that Telstra Wholesale provides to its approximately 110 customers are provided on a commercial basis without any need for regulatory dispute resolution process. In this respect the previous level of arbitrated dispute resolution can be put into its proper context.

However, over the last five years there have been only approximately 30 arbitrations involving Telstra Wholesale concerning only around seven declared services.   Of those 30 arbitrations, in only seven instances, the matter was not commercially resolved and the Commission was asked to make a final determination. Furthermore, in two of those seven instances the disputes were filed by Telstra as an access seeker. Finally, it should be noted that there are no current arbitrations before the ACCC involving Telstra Wholesale.

The statement that telecommunications arbitrations concerning declared services are often characterised by a lack of mutual commercial incentive to reach settlement is also incorrect in that it assumes that the subject of any dispute involves the whole of the relationship between the two parties. This will rarely be the case. Rather, a dispute is likely to involve merely one aspect of a commercial relationship. In these situations Telstra submits there will often be a strong incentive to negotiate and resolve the problem amicably between the parties.

Telstra believes that any access dispute framework that does not put in place processes whereby commercial negotiation is encouraged, rather than the reverse, would work to the detriment of the industry and therefore to the end user. Commercial negotiation rather than disputation will be encouraged if the Commission puts in place processes which give effect to contractual dispute resolution procedures and which encourage and promote commercial negotiation and ADR even during the arbitration process itself.

Telstra is a strong supporter of the ADR process and believes there is an important role for ADR in the management of telecommunication disputes. Recent experience has shown the benefits to the industry of ADR when used as an adjunct to the Commissions processes. Those same experiences demonstrate, at least on Telstra’s part, its commitment to reaching commercial settlement rather than having to revert to Commission-imposed outcomes. Telstra believes and hopes that all industry participants will share this view and seek commercially negotiated outcomes, including outcomes obtained by ADR, in preference to arbitrated outcomes. Telstra considers that the

development of refined arbitration processes with additional emphasis and respect for ADR by the Commission will assist in achieving this outcome.

4 Commencement of an arbitration - dispute notification and the ACCC's jurisdiction to arbitrate

The setting by the ACCC of a low threshold for the commencement of arbitrations will lead to more disputation rather than less and would be counterproductive

4.1 Parties "unable to agree"

The draft guidelines discuss several pre-conditions for notification of a dispute. For example:

"the Commission does not consider the unable to agree threshold should be interpreted as a particularly high threshold. For example, the Commission considers that the existence of a contract in and of itself does not necessarily preclude a party from notifying an arbitration".[5]

Telstra strongly disagrees with the ACCC's interpretation and proposed application of the "unable to agree" threshold where there is an agreement in place between the parties - both because of the potential effects that this approach may have on the industry and therefore the end users of telecommunications services in Australia and secondly as a matter of statutory interpretation.[6]

[5] Draft Guidelines, paragraph 2.2.

[6] Telstra notes that in its final report, the New Zealand Ministerial Inquiry into Telecommunications stated that "Of all the proposals put forward by the Inquiry in its Draft Report, the one to receive the most widespread opposition was the Commissioner's ability to make a determination in the event that he/she considered that a provision in a commercial agreement was not consistent with the access objective. With the benefit of submissions, the Inquiry has withdrawn this proposal. The primary reasons for this change of view are:

- the desire to maximise certainty in the industry;
- access seekers would not be bound by the terms and conditions agreed by other parties and could request the Commissioner to make a determination for their own agreement; and
- if there are no other access seekers, and the concern is that there is collusive behaviour which is having an adverse impact on end users, then:
  - the Commerce Commission could investigate under Part II of the Commerce Act, or
  - the Minister could impose price control under Part IV of the Commerce Act, or
  - the Minister could specify or designate other appropriate services."

Section 22(a) of the New Zealand *Telecommunications Act 2000* then provides that no person may apply for a determination if the persons who would otherwise be parties to the determination have an agreement for the supply of the service for part or all of the specified period of time.

Potential Effects of the ACCC's Approach

Telstra believes that the introduction of a test for notification in which the existence of a contract does not necessarily preclude a party from notifying an arbitration will lead to industry uncertainty as to whether a particular contract is enforceable at any particular time. This is particularly so if the ACCC is willing to invoke its jurisdiction where one party merely wants to vary an existing contract before the completion of the contract's term. In fact, the ACCC's draft guidelines (at paragraph 2.2) suggest that such action is an appropriate trigger of its jurisdiction:

"[the ACCC may commence an arbitration where] one party has sought to vary the contract and the other party has refused the request or refused to negotiate …"

Telstra predicts that this resulting uncertainty in turn may lead to:

- a reduced incentive for parties to enter into longer term agreements (which usually involve volume discounts) or deals in which a number of issues are resolved;
- a reluctance on the part of parties to enter into serious and bona fide negotiations – as parties will not ever be entirely certain that a genuine agreement has been reached and settled as between the parties; and
- therefore further industry disputation and arbitrations. Telstra notes that if the low threshold test does lead to more arbitrations, this would be at odds with the new section 152CLA which seeks to restrict the number of formal arbitrations.

Telstra strongly submits that the only time in which the ACCC should commence an arbitration is where the scope of the disagreement is outside the ambit of the contract. If the matter in dispute is dealt with by an existing contract, then the terms and conditions of that contract must stand, or must stand to the extent that they are governed by the contract, and the ACCC should not arbitrate in such circumstances because the parties are not "unable to agree". To do otherwise would be to undermine the primacy of the contract, the certainty of the contract, and also the parties' abilities to legally enforce the contract as they are otherwise entitled to do.

Telstra submits that even in the unlikely event a contract is entered into as a result of fraud, misrepresentation, deception, duress, or in breach of a provision of Part IV of the TPA, the remedy should not be the commencement of an arbitration under Part XIC. Rather, the remedy should be the remedy normally associated with the corresponding cause of action. Only if one of those circumstances results in the setting aside of the contract, or its variation, so that the subject matter of the dispute between the parties is not covered by a contract, and the parties are subsequently unable to strike a new bargain, may the parties notify a dispute and the ACCC entertain an arbitration.

Telstra also submits that parties should consider at the time of entering in the original agreement as to whether they may wish to vary certain terms and conditions of the agreement prior to the expiry of the agreement. If they foresee this as a possibility then they should negotiate to include an appropriate review clause in the agreement.

Telstra is extremely concerned that the setting of a low threshold for the commencement of arbitrations will lead to more Part XIC arbitrations rather than less and be disruptive and detrimental to the industry as a whole.

Telstra has asked NECG Consultants to review, among other things,[7] the Commission's "low threshold" approach as outlined in the draft Guidelines. Attached to this submission is an NECG report entitled "Resolution of telecommunications access disputes: a draft guide – Comment on the draft guidelines issued by the Australian Competition and Consumer Commission" dated June 2002 ("**NECG Report**") which includes NECG's analysis of this approach. Telstra adopts the comments by NECG and asks the Commission to consider the matters raised.

In conclusion, Telstra requests that the Commission give further consideration to the potential industry impact and the counterproductive effects of adopting a "low threshold unable to agree" test and instead provide an assurance that agreements will be respected in all but very limited circumstances. Telstra requests that the Commission carefully consider the industry-wide implications of its policy in this area, and adopt an approach which will provide certainty, reduced disputation, and which will encourage meaningful commercial negotiations and settlement.

Legal Position

Telstra submits that the Commission's view is at odds with several fundamental legal principles.

Freedom of Contract / Primacy of Contract

First, the ACCC's position is inconsistent with principles of freedom of contract and primacy of contract. Telstra submits that as a matter of general commercial principle parties ought to have freedom of contract. That is, they ought to be free to take risks and to make whatever bargain will promote their self interest, with the knowledge that it will be enforced by the courts and statutory authorities. Persons entering into commercial relationships are best placed to assess their own risks and judge their own self interest. Telstra notes that all its wholesale customers are represented by legal staff during the negotiation and finalisation of contractual arrangements for the supply of

[7] Telstra also asked NECG to review and provide some brief, high-level comments in relation to the Commission's interpretation of the statutory criteria it must take into account when making a Final Determination as set out in paragraph 7.2 of the draft Guidelines. Telstra's comments on this subject are contained at paragraph 11.1 of this submission.

telecommunications services, and in full knowledge of the regulatory environment in which those deals are made. As such, it would be difficult to sustain any argument that other parties to a contract were unaware of what they are contracting for and the consequences that would flow from their decisions.

The ACCC's adoption of a "low threshold" of what constitutes being unable to agree will weaken the principles of freedom of contract and primacy of the contract because it will discourage firms from ensuring their own interests are adequately protected. That is, a party may enter into a relationship with the knowledge that the later enforcement of rights by the other party may be avoided by seeking to invoke a Part XIC arbitration. This will seriously affect the manner in which parties approach initial negotiations.

Usually commercial parties who choose to enter into transactions, do so in the hope of financial benefit, but with the knowledge of financial risk on both sides. In the usual circumstance and in a competitive market the transaction will only be entered into if the expected gain outweighs the risk. Commercial parties expect that obligations will be performed and rights enforced and plan their affairs accordingly. Sanctity of contract requires that transactions entered into are capable of enforcement so that the outcome of the bargaining process can be predicted with a reasonable degree of certainty.

As noted above, the introduction of the low threshold test in the draft guidelines will lead to uncertainty, particularly if the ACCC is willing to invoke its jurisdiction where one party merely wants to vary an existing contract before the completion of the contract's term.

Lack of statutory authority

Second, Telstra submits that the ACCC has no power, whether statutory or otherwise, to allow it to, in effect, override settled contracts and invoke its jurisdiction where there is agreement between the parties (that is, there is a concluded agreement in place that covers all necessary aspects of the supply of the declared service).

Section 152CM(1) and (2) state that one of the pre-conditions for the notification of an access dispute is that "an access seeker is *unable to agree* with the carrier or provider …" [emphasis added]. Telstra acknowledges that section 152CM(1) and (2) allows the ACCC to arbitrate where the parties are *genuinely* unable to agree.

However, a settled contract is, at least, *prima facie* evidence of agreement. Telstra cannot, therefore, understand how the ACCC forms the view that, notwithstanding the existence of a valid contract, the parties are "unable to agree".

In the absence of specific and express statutory authority, the ACCC does not have power to override legal rights, including those arising under contract, existing between parties. This basic principle, known as the rule of law, is fundamental to the Australian legal system.[8]

The ACCC's draft guidelines, at paragraph 7.1.1, state that:

"… in the Commission's view, its arbitration powers … are not limited (expressly or by implication) where there is a contractual arrangement between the parties". [emphasis added]

However, Telstra submits that it is irrelevant that there is no express or implied *limitation* on the ability of the ACCC to hear an arbitration. The correct issue is whether the ACCC has the *power* to entertain an arbitration where the parties have a contract on foot that deals with all necessary aspects of the supply of a declared service (that is, where the parties have agreed).

The draft guidelines then go on to cite three provisions in support of the ACCC's view.[9] Telstra questions the ACCC's reliance on these provisions, unless the ACCC can otherwise demonstrate that the parties are genuinely "unable to agree":

- section 152AG(3) does not, Telstra submits, do anything more than define who an access seeker is for the purposes of Part XIC. Whilst section 152AG(3) defines a service provider to be an access seeker if *inter alia* the service provider wants to change some aspect of the provider's existing access to the service, it does not expressly (or by implication) give the ACCC the power to hear an arbitration when there is a valid contract on foot that covers all necessary aspects of the declared service.

- section 152CS(1)(d) indicates when the ACCC may *terminate* an arbitration. The draft guidelines cite this provision as support for the fact the ACCC may *commence* an arbitration when a contract is in place between the parties. However, Telstra submits that this section, contrary to the ACCC's view, reinforces the proposition that arbitrations cannot be commenced when a valid contract is in place that covers all necessary aspects of the declared service.

- regulation 28T(1) of the *Trade Practices Regulations 1974* indicates the types of information that a notifying party must provide to the ACCC if it wants to notify a dispute. At regulation 28T(1)(f)(i) is the requirement to provide "a description of the access dispute, including whether the dispute is about varying *existing access arrangements* …" [emphasis added]. Telstra submits that this regulation does not

[8] For example, see *A v Hayden* (1984) 156 CLR 532.
[9] Draft Guidelines, paragraph 7.1.1.

support, as the ACCC suggests, the ACCC's ability to commence an arbitration. The better view is that "existing access arrangements" is intended to refer to a range of possible relationships governing access to declared services (which may or may not include contractual relationships). Telstra submits, if there is a valid contract covering all necessary aspects of supply of the declared service, regulation 28T should be read as being inapplicable. Regulation 28T is not intended to infer that the ACCC may nevertheless deem the parties to be "unable to agree" and thereby allow the ACCC to commence an arbitration.

Telstra believes that the ACCC's position (that is, that parties might still be considered to be "unable to agree" notwithstanding the existence of a valid contract that covers all necessary aspects of the declared service) is without statutory basis. As well, there is no support for the ACCC's position in the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*.

4.2 Contractual arrangements for dispute resolution

Consistent with policy intent the ACCC should respect and enforce agreed dispute resolution processes prior to commencement of an arbitration

Telstra submits that a relevant consideration as to whether a dispute exists is whether or not the dispute processes set out in any relevant contract have been adhered to.

The draft guidelines state that:

"the Commission understands that, in some cases, contractual arrangements between the parties may provide for a dispute resolution process. … In instances where the ACCC has considered such contractual provisions it has formed the view that contractual provisions cannot preclude or modify the statutory right of a person to notify a dispute under Part XIC. In its view a court will regard such a provision as being unenforceable. Therefore, a person can notify an access dispute even if there is a contractual provision precluding notification until a dispute resolution process has been completed provided that the parties are " unable to agree".[10]

Telstra disagrees with the ACCC's view that contractual arrangements specifying dispute resolution processes to be completed before a dispute can be notified are unenforceable.

Under the Act, the ACCC may only commence an arbitration where the parties are "unable to agree". Yet if the parties have contractually agreed to undertake certain dispute resolution processes before notifying a dispute, the ACCC ought not commence an arbitration until the parties have completed

[10] Draft Guidelines, p 7.

the contractually agreed processes, as until agreed processes are completed the parties cannot be said to be "unable to agree". [11]

More importantly, however, as the contractual provisions relating to pre-notification dispute resolution processes may (and are likely to) involve the use of ADR and/or mediation, the ACCC should ensure that those provisions have been given effect to before a dispute is notified. Telstra submits that such provisions accord with the principle underlying section 152CLA, that mediation and ADR are preferable to arbitration. Therefore, assuming that the contractual provisions do not unduly delay arbitration, the use of such provisions is consistent with the legislative intent of the arbitration process as a dispute resolution mechanism, and consistent with the notion of encouraging the parties to resolve their disputes, with reference to the regulator as a last resort.

5 Transparency of ACCC processes and bias

5.1 The role of ACCC staff in the arbitration process

In order to avoid conflicts of interest ACCC staff ought not be performing the roles of mediator or conciliator

The draft guidelines, at paragraph 3.2.5, state:

"… Commission staff may perform a conciliation or mediation role in relation to particular issues which are the subject of the arbitration".

Telstra notes that at the SPAN Steering Committee meeting on 4 June 2002 the ACCC recognised that there exist practical difficulties with Commission staff performing a conciliation or mediation role in relation to matters the subject of the arbitration.

However, Telstra believes that it is important it puts its view to the Commission as to why it believes the ACCC should not itself be directly involved in the actual conduct of mediation or other ADR processes but that the ACCC staff should encourage and facilitate mediation between the parties using appropriately qualified or skilled specialists.

There are a number of reasons why it is not appropriate for ACCC staff to conduct mediations or other ADR procedures.

First, ACCC staff and/or Commissioners already fulfil the roles of regulator and arbitrator. It is inappropriate to give another role, that of mediator or

[11] In this respect, Telstra notes and supports the approach set out under the New Zealand *Telecommunications Act 2000* in which no person may apply for a determination if that person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination.

conciliator, to ACCC staff. To do so is likely to lead to internal confusion and conflicts of interest because ACCC staff will not be sure of which role they are supposed to be fulfilling. In this regard, Telstra wishes to emphasise that its proposed restriction on ACCC staff performing mediations does not prevent ACCC staff providing expert opinions.

Second, there may be some reluctance for a party to take part in a full and frank discussion in front of ACCC staff who are subsequently involved in an arbitration process (and possibly a Part XIB investigation) on the same subject or related matter. For example, a party will be less likely to suggest possible commercial alternatives in front of ACCC staff members who may later use that knowledge of the party's position in an arbitration or enforcement context. This will have the effect of undermining the mediation process, with the resultant likely limitation on the potential for resolving the dispute in that setting.

Telstra submits that the best way to ensure effective ADR processes is to have a neutral mediator or conciliator. Involving the use of the ACCC staff as mediators would completely undermine the principle underlying section 152CLA that seeks to capture the benefits that can flow from ADR processes.

5.2 ACCC staff advisory opinions

Parties to arbitrations should be provided with, and given the opportunity to comment on, ACCC advisory opinions to Commissioners

Telstra is also concerned that the draft guidelines do not deal with the lack of transparency resulting from the 'expert role' ACCC staff play in the arbitration process. This role is not as a true independent "expert" in the sense discussed in section 8 below, but in the sense that the staff member provides advisory opinions and summaries of matters before the ACCC to Commissioners during the conduct of an arbitration.

Telstra notes that the draft guidelines attempt to provide some demarcation between the case management team and ACCC staff providing advice (see paragraph 3.4 and 3.25). However Telstra submits that the draft guidelines do not sufficiently deal with the lack of transparency that exists in staff advice given as part of the arbitration process.

While the draft guidelines attempt to demarcate the three roles that ACCC staff may play in the context of an arbitration (at paragraph 3.25), the guidelines do not appear to directly incorporate the Phillips Fox recommendation (R7) that parties be given the right to submit any concerns or objections they may have about the factual or theoretical basis for expert staff input to the arbitration process.

Telstra acknowledges that the ACCC guidelines do note (at paragraphs 3.6 and 7.1.2) that section 152CP(4) of the TPA requires the parties to be given the

opportunity to make comments on the analysis in the ACCC's draft determinations. However the draft guidelines do not require that staff reasoning be "fully incorporated" in the draft determination. Rather the draft guidelines only indicate it is Commissioners who must ultimately form their own views on the issues and any relevant consideration will be reflected in their reasons for decision. Therefore, staff input will remain largely opaque unless Commissioners directly note the reasoning of their "expert staff input" in the draft determination.

5.3 Public statements made by the ACCC

To avoid a perception of bias the ACCC should not make public statements in relation to issues in dispute before it.

Telstra is concerned that the draft guidelines do not presently address recommendation 3 from the Phillips Fox Review regarding the making of public statements by the ACCC in relation to issues in dispute.

As noted in the Phillips Fox Review there is a risk of perception of pre-judgment if the ACCC makes public comment on matters in dispute. The Phillips Fox Review also noted concerns expressed about the Commission's neutrality. Telstra asks that the draft guidelines be amended to adopt the recommendation of the Commission's own consultants that:

> "*The risk of any perception of pre-judgment can be minimised by ensuring that the ACCC does not make public comments in relation to issues which are in dispute, or it if does, that the comments are clearly distinguished as the views of an individual and not the Commissioners involved in arbitrating a dispute.*"

Telstra asks that the ACCC include in the guidelines a policy statement adopting this recommendation.

Telstra acknowledges that the Commission has specific powers to determine in writing principles relating to the price of access to a declared service.[12] Telstra submits that in exercising all its powers the ACCC must be cognisant of the risk of a perception of pre-judgment and take all appropriate steps to minimise this risk, as recommended in the Phillips Fox Review.

[12] *Trade Practices Act* section 152AQA

6 The case management process and the role of ACCC staff

6.1 The case management process

The use of case management will improve the arbitration process

Telstra reiterates its strong support for the ACCC's plans to use case management procedures, and case management teams, to provide much needed "strategic focus". Telstra is extremely hopeful that such procedures will be beneficial in addressing issues such as delay, a significant problem in arbitrations to date.

Telstra has a number of suggestions with respect to some of the case management procedures proposed in the ACCC's draft guidelines. For example, Telstra considers that it is critical that the ACCC itself participate in the case management process by being a party to agreed timetables. Telstra believes that the Commission, as well as the parties, must commit to case management principles for it to be effective.

Telstra also notes the ACCC's advice to the SPAN Steering Committee on 4 June 2002 that it intends to undertake regular reviews of the guidelines. Telstra considers that it would be desirable for the guidelines to include a references to compulsory processes for subsequent review of the case management process (or the guidelines in general). Telstra also considers that it would be desirable for the ACCC to seek feedback on the operation of the guidelines, and the case management process, at regular intervals.

6.2 Determining the appropriate dispute resolution process

ADR will be a useful adjunct to the arbitration process

Paragraph 3.4.4 of the draft guidelines states that:

"[the] new s. 152CLA requires the Commission to have regard to the desirability of access disputes being resolved in a timely manner (including through the use of alternative dispute resolution methods such as mediation and conciliation)".

The ACCC proposes that the case management team seek to facilitate agreement between the parties on the appropriate dispute resolution strategy at the initial case management meeting and at subsequent times throughout the arbitration process.

Telstra supports this view by the ACCC. However, Telstra notes that if one party is willing to go to mediation but the other is not, the ACCC may wish to consider encouraging the other party to consent to mediation. Telstra considers that appropriate encouragement may be in the form of explaining the benefits of ADR procedures to the non-consenting party.

7 Submissions during the course of an arbitration and use of oral hearings

7.1 The use of written submissions

“Defined length” written submissions should continue to be the primary means of the Commission informing itself of the matters relevant to the dispute

The draft guidelines[13] confirm the Commission’s view as to the appropriateness of the use of written submissions in telecommunications arbitrations. Telstra shares this view. Telstra considers that the use of written submissions should continue to be the primary means by which the Commission receives submissions from the parties. Telstra believes that the complexity of the subject matter of these arbitrations requires the use of written documentation so as to enable the Commission to properly inform itself of the issues being raised by the parties.

The Commission has raised a concern that there is a tendency for submissions to delay the process if they are voluminous or argumentative. Telstra acknowledges that there is potential for voluminous or argumentative submissions to impede rather than assist the Commission’s deliberations. Consistent with the desire for improved efficiency in the arbitration process, Telstra agrees that there is scope for the introduction of “defined length” written submissions where appropriate. Any limits to submissions are best determined on a case by case basis, depending on the nature of the issues in dispute and the type of material required to adequately address those issues. Any limits should therefore be agreed between the parties at case management meetings at a time when the issues in the dispute are fully apparent.

7.2 Use of oral submissions

Oral hearings before Commissioners should be used to clarify and supplement written submissions

Whilst Telstra considers that written submissions are preferable as the primary source to inform the Commission of the parties views, Telstra considers that that there must still be a role for oral hearings to supplement and clarify written submissions. Such a process will be similar, for example, to the appeal process adopted by the High Court and the Federal Court of Australia, where principal submissions are documentary and are supplemented by oral explanation and clarification.

Telstra does not agree that oral hearings before Commissioners ought be used to resolve issues of factual dispute, or as the principal means of providing the

[13] Draft Guidelines, paragraph 3.5.2.

views of the parties to the Commission. Telstra is concerned that the over-use of oral hearings, or the replacement of written submissions by oral hearings generally, would lead to an excessively legalistic process, with the potential for lengthy hearings and delay in overall resolution of the arbitration.

Telstra believes that an appropriately managed and streamlined process involving the use of defined length written submissions, in accordance with agreed timetables, in combination with limited oral hearings before the Commission, will be the most efficient process for the Commission to properly inform itself of the matters in dispute and to assess the parties respective arguments.

8 Experts and experts' reports

8.1 Use of experts appointed by the ACCC

Guidelines to address the use of experts and expert reports should be developed in consultation with the industry

The Commission has confirmed its view[14] that in order to better understand particular issues, or to analyse factual material, it may be useful for it or the parties to engage an expert. Telstra supports the use by the Commission of appropriately qualified experts to assist the Commission in this way. Telstra notes, however, that a number of important recommendations contained in the Phillips Fox Consultant's Report as to the manner of engagement of experts and, in particular, as to disclosure of the material with which an expert is briefed and the development of guidelines to address the use of experts, have not been adopted by in the draft guide.

The Phillips Fox Report[15] contains recommendations that guidelines be developed to "address the use of experts and expert reports more generally" and in order that "each party [may] ensure that the expert has all the information that the party thinks is relevant". The Commission's draft guidelines, as currently framed, do not adopt these recommendations. At paragraph 4.2.2 the draft guidelines state:

"*….the Commission may refer any matter to an expert and receive the expert's report as evidence…When considering referring a matter to an expert, <u>the Commission will generally seek comments from the parties</u> before making the referral.*" [emphasis added]

Telstra requests that the Commission consider re-drafting the guidelines to give effect to the consultant's recommendations and give a commitment to publishing draft guidelines as to the engagement of experts and the use of expert reports, with the guidelines to be settled in consultation with the

[14] Draft Guidelines, paragraph 4.2.

[15] Phillips Fox Consultants Report, paragraphs 6.41 and 6.42.

industry. This will assist in promoting the transparency of the ACCC's processes in conducting the arbitration.

8.2 Experts' conference

Telstra supports the proposed use of expert conferences[16] for discussion of relevant issues and as a means of attempting to limit or define issues of disagreement.

9 Joining parties to an arbitration

9.1 Joining parties to an arbitration

Further industry discussion on the question of when a party should be entitled to commence or join an arbitration is required

The draft guide[17] states that the Commission proposes to provide all interested persons with opportunities to comment on issues relevant to one or more of the arbitrations. The Commission refers to the "sufficient interest" test as recently discussed by the Australian Competition Tribunal, noting a requirement that there be a "direct or immediate rather than an indirect interest".

Consistent with Telstra's comments expressed above about the necessary requirements before an arbitration should be held (whether the parties are "unable to agree") Telstra has a concern that the power to join interested parties to an arbitration may be misused if the Commission introduces a low threshold as to when it considers parties are "unable to agree", particularly in the circumstance of a party with whom the access supplier is currently in contractual relationships for the provision of a service in question.

Telstra would not wish to see this provision used in a way where parties with existing agreements were invited or encouraged to participate in an arbitration involving another access seeker with the object of seeking a variation of their existing contract. For the reasons previously expressed, Telstra's view is that such an approach would encourage rather than avoid disputes, would delay their resolution, and would be contrary to the policy intent of the legislation.

Telstra requests that the Commission reconsider its previously expressed draft opinion on this issue and consider publishing guidelines for industry consultation as to the circumstances in which it would or would not regard a party as entitled to commence an join an arbitration.

[16] Draft Guidelines, paragraph 4.2.4.
[17] Draft Guidelines, paragraph 5.1.

10 Confidentiality and the use of information by the ACCC

10.1 Confidentiality between the parties

The industry would benefit from a protocol being developed dealing with the use of confidential information in arbitrations

As a general proposition Telstra's position is that the confidentiality of information and documents provided to the Commission must be respected. In the absence of specific legislative power under the Act the Commission must not itself use, disclose or permit to be used or disclosed documents or information provided to it for the purposes of arbitrations for other purposes.

The draft guide notes the extensive powers which the Commission has in relation to the production and use of documentary material for the purposes of arbitrations. These include the newly introduced power in section 152DBA as to the use of information from one arbitration in another arbitration.

The Commission has proposed[18] the continuation of its existing practice of issuing confidentiality directions so that the parties are not to use or disclose confidential information except in the course of the arbitration. Telstra agrees with and welcomes the Commission's proposal to continue the practice of issuing confidentiality directions requiring parties not to use or disclose confidential information received during an arbitration except in the course of that arbitration.[19]

Telstra also acknowledges and welcomes the Commission's endorsement of the process for withholding confidential information from a party in certain circumstances under the procedure outlined in section 152DK.

Telstra does wish to comment, however, in relation to the following two issues:

(a) the Commission's power to give parties to one arbitration information and documents provided in the course of another arbitration (section 152DBA); and

(b) the use or disclosure of information received by the Commission in contexts outside the particular arbitrations.

Telstra is aware of the policy intent of the recent amendment to the Act allowing the Commission to give parties to one arbitration information and documents provided to the Commission in the course of another arbitration if it considers that to do so will be likely to result in the arbitration being conducted in a more efficient and timely manner. Telstra invites the

[18] Draft Guidelines, paragraph 6.2.
[19] Draft Guidelines, paragraph 6.2.

Commission to consider whether guidelines ought to be established as to when such information would be disclosed for other arbitrations.

By way of example, an issue for consideration is relevance. Telstra believes there have been instances where material of marginal or no relevance has been sought by the Commission or another party. As the Commission has pointed out elsewhere, the submission of voluminous documentation for review by the Commission has the potential to delay resolution of the arbitration, and this applies to documentary material as well as submissions. Telstra requests that the Commission adopt a test for relevance which would limit rather than expand the volume of material required to be considered.

Telstra also notes that one of the recommendations in the Phillips Fox consultant's report[20] was that where information was provided in a context other than the dispute, or by a person who is not a party to the dispute, procedures be adopted to obtain person's consent prior to any disclosure. The Commission's guide[21] does not adopt this proposal, stating merely that "if the Commission wishes to use [such] information in the arbitration context, then the appropriate course of action will *usually* be to provide it to the parties. Before doing so, however, the Commission would *normally* [but not necessarily] advise the person who provided the information and seek that person's views on providing the information to the parties" [emphasis added].

Telstra suggests that rather than there being a discretionary and informal practice of seeking consent for such information this requirement should be made compulsory so that consent to use or disclose information provided by another party is always obtained.

Telstra also notes that the Commission's powers under section 152DBA do not extend to disclosure or use of information it has acquired:

- in the course of its other duties outside arbitrations; or
- from a person unless in the course of any other arbitration.

Telstra is concerned as to the implications of disclosure of information provided to the Commission for purposes other than that for which it was provided. An example of this would be information provided by Telstra to the Commission under the Record Keeping Rules being used by the Commission in the context of an arbitration rather than being disclosed through the Record Keeping Rules disclosure process. Telstra considers that as a matter of process consent to use of such information should always be sought and obtained.

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[20] Recommendation 20, paragraph 7.19.

[21] Paragraph 6.43.

Telstra suggests that to deal with the above issues the Commission publish guidelines as to use of confidential information in arbitrations for industry discussion. The issues raised could then be openly discussed by industry participants with a view to a settled protocol being put in place.

11 Determination of an arbitration

11.1 Backdating

A refined set of criteria setting out when the ACCC will or will not impose backdating should be developed in consultation with industry

The Commission has at paragraph 7.2.1 discussed the individual concepts required to be taken into account in making a final determination. While, for the purpose of this submission, Telstra does not comment on that discussion and the respective concepts involved, Telstra has asked NECG Consulting to provide a brief analysis of the Commission's approach as outlined in that subparagraph. Attached to this Submission is the NECG Report in which NECG provide some brief comments on the Commission's interpretation of the relevant statutory criteria.

Telstra does, however, wish to comment on how the Commission ought, as a matter of general practice, deal with the question of backdating.

Telstra notes the Commission's comment[22] that "in general the Commission will be inclined to backdate determinations. That said, each case must be considered on its merits".

Telstra's experience with backdating suggests that there is a need for a stronger statement from the Commission as to when it will or will not impose backdating. Telstra has found that uncertainty about how backdating may be applied has been a primary difficulty in reaching commercial settlement.

The Commission has referred to its likely consideration of matters such as the manner in which the parties have conducted themselves prior to and during the arbitration as providing grounds for not backdating the determination. Whilst Telstra does not dispute the relevance of conduct as a matter to be considered, in Telstra's experience the Commission has not in the past sought to assess the conduct of the parties in assessing whether to backdate determinations, but has paid regard to even more subjective, and arguably less relevant matters such as the financial position of the access seeker. Telstra has previously submitted that such considerations do not properly take account of all the matters required to be considered by the Commission in making a final determination.

[22] Draft Guidelines, paragraph 7.3.2.

Telstra submits that in order to provide certainty to the industry on this important issue it would be desirable for the Commission to issue stronger guidelines as to the circumstances when backdating would be applied. From Telstra's perspective, as both an access provider and an access seeker, such guidelines might 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. Such conduct might include a failure to reasonably engage in good faith commercial negotiations.

From an industry perspective Telstra submits a stronger statement on this issue would be beneficial in achieving greater certainty as to what could be expected from the Commission at the conclusion of an arbitration – thereby assisting the long term interests of end-users.

11.2 Interest

Telstra notes the Commission's proposal that backdated payments should include an interest component.[23] The Commission has stated that it considers the awarding of interest would be within the scope of section 152CP(2), which provides that the determination can deal with "any matter" relating to access. The Commission relies on the context of the backdating provisions at section 152DNA to support its view.

Telstra does not agree that the Commission does have such a power, and makes the following points in the interests of furthering discussion on this point.

First, the Commission does not have any express statutory power to award interest as component of a backdated payment.[24] Furthermore, there does not appear to be any legislative intent, as evidenced by relevant Explanatory Memoranda, to give the Commission the power to award an interest component to backdated determinations.

Telstra notes the absence of an express power to award interest under other sections of the *Trade Practices Act 1974*. For example, the Federal Court does not have the power to award interest under section 82 of the *Trade Practices Act*. The Court itself is only empowered to award interest on damages by virtue of section 51A of the *Federal Court of Australia Act 1976* (Cth).[25]

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[23] Draft Guidelines, paragraph 7.3.4.

[24] Compare this situation to that of arbitrators under sections 22 and 25 of the *International Arbitration Act 1974* (Cth) and section 31(1) of the various State and Territories' *Commercial Arbitration Acts* (note that in these Acts, the power to award interest is subject to contrary provision in an arbitration agreement).

[25] See also the various State and Territory *Supreme Court Acts* where there is express statutory power for courts to award interest between the date when a dispute arose and judgment.

Second, Telstra does not consider that it is appropriate to infer the power to award interest given the detailed provisions in section 152CP(2). Furthermore, given the recent amendments to section 152DNA which provide only for the backdating of determinations, Telstra submits that there is no basis for inferring an additional power to include an interest component in any backdated award. Telstra submits that if Parliament intended the Commission should have the power to award an interest component when backdating, it would have expressly given such power.

Therefore, Telstra considers that if the Commission did attempt to award an interest component to any backdated payment, there would be strong grounds for challenging such a decision.

Telstra repeats comments made in relation to the circumstances in which the Commission would backdate determinations, and suggests that as part of the guidelines the Commission may issue on backdating determinations, it also include comment on the circumstances in which a backdated payment should include an interest component (assuming, of course, that the Commission in fact does have the power to make such an award, which is doubted).

Finally, even if the ACCC did have the power to award an interest component, Telstra notes that parties will often have concluded a contractual agreement between themselves as to whether, and to what extent, interest is payable by one or more of the parties in relation to a dispute. In this regard, Telstra repeats the comments made above in relation to pre-existing contractual arrangements noting that the Commission should defer in favour of allowing the existing contractual arrangement to govern the parties' relationship.

12 Conclusions

12.1 Telstra's welcomes the ACCC's reform initiatives for telecommunications arbitrations. Telstra believes that adoption of the reform recommendations will assist in achieving the benchmarks of arbitrations being fair, effective, efficient and fast. In particular, and so long as case management timetabling also applies to the Commission itself, Telstra believes that the adoption of case management principles in particular will be beneficial.

12.2 Telstra also strongly supports the Commission's proposal for the greater use of ADR processes as a means of reducing disputation and in order to achieve earlier resolution of disputes consistent with this proposal. Telstra requests that the Commission also give consideration as to how its revised guidelines could encourage greater use of ADR before, as well as during the arbitration process, for example the by Commission enforcing agreed dispute resolution clauses and by respecting commercially negotiated contracts.

12.3 Telstra has invited the Commission to re-consider a number of issues and to publish more detailed guidelines for industry consultation in a number of

areas. Telstra believes that the publication of such guidelines will assist in developing greater certainty for all industry participants and a reduced level of disputation.

12.4 Telstra appreciates the opportunity afforded by the comment to comment on its draft guidelines and looks forward to continuing discussions with the Commission on these issues.