



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

March 2004

1. Introduction

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

In May 2003 the ACCC published a revised version of the guide incorporating changes effected by the *Telecommunications Competition Act 2002*. In doing so, it sought submissions on the revisions, particularly in relation to the backdating of arbitration determinations and the potential deferral of arbitrations when the ACCC is considering an access undertaking that relates to the same matter.

In response, submissions were received from Telstra, Optus, AAPT, Vodafone, PowerTel and FOXTEL. These submissions were largely supportive of the changes to the guide, although a number of suggestions were made for modifications to particular areas. A copy of the submissions is available on the ACCC's website.

After considering those suggestions, the ACCC has made several changes to the guide, which it has now republished. The purpose of this document is to identify and explain the reason for those changes.

The ACCC appreciates the time and effort taken by industry in reviewing and commenting on the guide and trusts that it will continue to be a useful reference for practitioners and industry alike.

2. Guidelines on backdating of arbitration determinations

Section 152DNA of the Act provides that the final determination for an arbitration can be expressed to take effect earlier than the date on which the determination takes effect (i.e. backdating). In this regard, ss. 152DNA(7) and (8) require the ACCC to formulate guidelines about its approach to backdating and to have regard to those guidelines. The guide contains these guidelines (see section 7.4.).

One particular aspect of these guidelines concerns the award of interest on backdated amounts, which is expressly permitted by s. 152DNA(6). For instance, where the final determination sets an access price that is lower than the price previously paid by the access seeker, and also provides for the lower price to apply prior to the date on which the determination takes effect, then interest can be awarded in respect of the overpaid amounts.

In the May 2003 version of the guide, the ACCC stated that the interest rate should reflect the opportunity cost of the overpayment and that, as a general rule of thumb, this will be the rate that would have been paid to raise the overpaid amounts by means of debt financing.

2.1. Submissions

Submissions from AAPT, Optus, and Telstra noted that access agreements may contain provisions regarding the payment of interest on overpaid amounts and that the interest rate in these agreements could be used for the purposes of backdating.¹ Optus also suggested that where no rate is specified in an agreement between the parties, the ACCC should use the Reserve Bank of Australia Indicator Lending Variable Rate for Large Business.²

Two submissions considered whether the interest rate should include a punitive component to deter delay during an arbitration. PowerTel suggested that a punitive component should be included while Telstra submitted that it should not be included.³

FOXTEL noted that the guidelines on the calculation of interest for backdated amounts were only concerned with overpayments and suggested that they should be equally

¹ AAPT submission p. 2; Optus submission pp. 1-2; Telstra submission p.2.

² Optus submission p. 2.

³ PowerTel submission p. 1; Telstra submission p. 2.

applicable to the (rare) situation of an underpayment; i.e. where the final determination sets an access price higher than that previously paid by the access seeker.

Optus also noted that interest should be compounded, suggesting that it be calculated daily.⁴

2.2. Revisions to the guide

The ACCC has amended the guide to provide that where an agreement between the parties specifies an interest rate for overpayments, then the ACCC may have regard to this rate as evidence of the parties' estimate of the opportunity cost of overpayment. If no rate is specified, then the ACCC may have regard to the amount that would have been paid to raise the overpaid amount through debt financing.

In the ACCC's view, it would not be appropriate to include a punitive component in the interest rate as it is not clear that this would be within the scope of legislative power. In this regard, the ACCC notes that the explanatory memorandum states that the purpose of awarding interest is to 'compensate parties for losses incurred as a result of overpayment'.⁵

Revisions to the guide also clarify that the guidelines on the calculation of interest equally apply to the situation of an underpayment. Further, the ACCC has revised the example provided in the guidelines to provide more detail on how interest is to be calculated where there are a series of overpayments.

The ACCC considers the compounding of interest to be appropriate. The ACCC will also have regard to an agreement between the parties about interest on overpaid amounts and, in the absence of agreement, the approach which would be adopted in a debt financing agreement. It expects that, in general, the daily calculation of interest will be appropriate.

These revisions are located in section 7.4.4 of the guide.

⁴ Optus submission p. 2.

⁵ Explanatory memorandum for the Telecommunications Competition Bill 2002, p. 52

3. Guidelines on the deferral of an arbitration while considering an access undertaking

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

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

The revised guide, published in May 2003, set out the guidelines referred to in the second dot point above. In summary, these guidelines described three circumstances in which it may be appropriate to continue with an arbitration, namely where:

- matters covered by the undertaking have already been substantially considered in an arbitration
 - the arbitration concerns issues additional to those covered in the undertaking
- and/or
- consideration of the undertaking is likely to involve a long timeframe.

3.1. Submissions

Submissions generally supported the approach set out in the guidelines. That said, a number of specific suggestions were made.

AAPT suggested that an arbitration should not be deferred where the access provider waits until alternative dispute resolution is unsuccessful and a dispute has been notified before lodging an access undertaking. In such a case, the access provider should be presumed to be lodging the undertaking for the purposes of delay.⁶ AAPT also suggested that an arbitration should not be deferred where the access provider lodges serial undertakings, which it defines as occurring where an undertaking is lodged within six months of a previous undertaking that has been rejected or withdrawn.⁷ Additionally,

⁶ AAPT submission p. 3.

⁷ AAPT supplementary submission pp. 4-5.

AAPT was concerned to ensure that the process for considering undertakings be set out in greater detail so as to minimise the scope for delay.⁸

FOXTEL suggested refinements to the first circumstance in which it may be appropriate to continue with an arbitration, namely where the matters in the undertaking have already been substantially considered in an arbitration. In FOXTEL's view, the arbitration should only be continued if the undertaking was clearly not given bona fide.⁹ Also, FOXTEL queried whether the third circumstance in which it may be appropriate to continue with an arbitration should exist. In its view, even if consideration of an undertaking may take a long time, the benefits of the undertaking outweigh the costs.¹⁰

PowerTel suggested that there should be an additional circumstance in which an arbitration should be deferred, namely where pricing principles were still to be developed for the service which is subject to the arbitration.¹¹

In addition to the three circumstances set out in the guidelines, the ACCC can have regard to such other matters which it considers relevant. FOXTEL submitted that where the ACCC considers other matters, it should disclose them.¹²

Also, FOXTEL commented on those provisions of the guide which explained how the ACCC would achieve consistency between arbitration determinations and access undertaking decisions (sections 9.3.4. and 9.3.5.). It noted that where the ACCC makes an undertaking decision which is subsequently reviewed by the Australian Competition Tribunal (the tribunal), it may be appropriate for the ACCC to continue with the arbitration in order to make an interim determination. If the ACCC accepts the undertaking, the ACCC should only make an interim determination which is consistent with the undertaking. Alternatively, if the ACCC rejects the undertaking which the tribunal later accepts, FOXTEL submitted that the final determination in the arbitration should be made consistent with the undertaking and provide for backdating to the date on which the interim determination was made so that the access provider can recover any underpayment.¹³

⁸ Ibid., pp. 7-8.

⁹ FOXTEL submission p. 3.

¹⁰ *ibid.*

¹¹ PowerTel submission p. 1.

¹² FOXTEL submission p. 3.

¹³ *Ibid.*, p. 4.

3.2. Revisions to the guide

In the ACCC's view, no changes should be made to the circumstances in which it may be appropriate to continue with an arbitration. The ACCC does not consider it appropriate to presume an absence of bona fides as suggested by AAPT when an undertaking is lodged relatively late during a dispute. Nor does the ACCC consider it appropriate to demonstrate an absence of bona fides as suggested by FOXTEL to continue with an arbitration following the lodgement of an undertaking. To do so would not only be a difficult task, it would (more importantly) divert attention away from focusing on the task of resolving the dispute/considering the undertaking.

Where consideration of an undertaking is likely to take a long time, the ACCC remains of the view that it may be appropriate to continue with the arbitration in order to make an interim determination.

To assist in speeding up the process for considering undertakings, however, the ACCC has amended the guide to state that it expects access providers to lodge a detailed submission containing all relevant material (including pricing models and data) when lodging the undertaking. The ACCC has not included timeframes for the provision of submissions as these will depend on the complexity and issues of a particular assessment process. Rather, the timeframes are likely to be set out in the discussion paper that the ACCC publishes following lodgement of the undertaking.

The ACCC notes AAPT's concerns about serial undertakings and its suggestion that serial undertakings may be used by an access provider as an attempt to delay arbitrations. While this may be a possible strategy, the ACCC also notes that a subsequent undertaking may reflect an access provider's genuine response to the ACCC's concerns regarding the earlier undertaking.

In any event, where an undertaking concerning the same subject matter is lodged following the ACCC's refusal of a previous undertaking, the ACCC considers that it may be appropriate to continue with the arbitration, at least in order to make an interim determination. That said, the ACCC has not made any changes to the guide. This is because this situation would appear to be already addressed in the guide.

- If, for instance, following consideration of the initial undertaking, the ACCC has used its undertaking decision to progress the arbitration, the situation would involve lodgement of a (subsequent) undertaking once matters in the arbitration have been substantially considered. The guide provides that in such a situation it may be appropriate to continue with the arbitration.
- On the other hand, even if this has not occurred, it may be nevertheless appropriate to continue with the arbitration because of the time involved in consideration of the subsequent undertaking. This is also set out in the guide.

With respect to PowerTel’s suggestion for the deferral of arbitrations when pricing principles are still to be developed, the ACCC has not made any changes to the guide as this is unlikely to occur in future arbitrations. This is because the Act now requires the ACCC to publish pricing principles at the time of declaration or shortly afterwards.

The ACCC has amended the guidelines in response to FOXTEL’s suggestion about the ACCC providing the parties with explanation about any ‘other matters’ it considers when deciding whether to defer an arbitration. The guide now provides that, in accordance with the requirements of procedural fairness, these matters will generally be raised with the parties to the arbitration where appropriate prior to deciding whether to defer the arbitration.

The ACCC has also amended the guidelines in response to FOXTEL’s comments regarding consistency between arbitration determinations and access undertakings when the ACCC makes an undertaking decision that is subsequently reviewed by the tribunal. That said, the point raised by FOXTEL is more general than the situations which FOXTEL discussed in its submission.¹⁴ Accordingly, the guide has been amended to provide that where the ACCC makes an interim determination, this will not be inconsistent with its decision in respect of the undertaking. Moreover, where backdating is considered appropriate, the backdating provisions also will not be inconsistent with the decision in respect of the undertaking.

These revisions are located in chapter 9 of the guide—see sections 9.2.2., 9.3.1., 9.3.4. and 9.3.5.

¹⁴ In this regard, FOXTEL did not address all the possible scenarios involving review of an ACCC decision concerning an access undertaking. For instance, it did not address the situation of both the ACCC and tribunal rejecting the undertaking, but where the reasoning of the tribunal differs from that of the ACCC in relation to (say) the appropriate access price.

4. Other revisions to the guide

4.1. Arbitration determinations and model terms and conditions

The ACCC has made one other revision to the guide, which concerns the publication of a final arbitration determination which implements model terms and conditions previously published by the ACCC pursuant to s. 152AQB. AAPT requested clarification of the interaction between these publication requirements.¹⁵

The guide has been amended to recognise there may be less benefit from publishing a determination which adopts model terms and conditions previously published by the ACCC. However, it may be still beneficial to publish at least part of the determination in these circumstances, sufficient to indicate that the ACCC has adopted the model terms and conditions in the arbitration.

This revision is located in section 6.4.5. of the guide.

4.2. Other submissions

Vodafone submitted that the ACCC should state that commercially negotiated outcomes are preferable to outcomes imposed by the ACCC in the context of arbitration. Consequently, the ACCC should raise the threshold for notification or terminate an arbitration where there is an existing contract. Particularly, Vodafone suggests termination of an arbitration should occur:

- where a contract has been concluded specifically about the issue [no] more than x months prior to notification
- where the contract does not specifically address the issue but contains a dispute resolution process that has not been exercised prior to notification.¹⁶

The guide, while encouraging commercial resolution of disputes, specifically restrains from endorsing commercial solutions as superior to those imposed in arbitration. This is because commercial arrangements may reflect the imbalance of market power between the access provider and access seeker. Where the parties have failed to use dispute resolution processes to which they have previously agreed, the guide already states that the ACCC will consider whether to terminate the dispute or give a direction to the parties

¹⁵ AAPT submission p. 4.

¹⁶ Vodafone submission p. 4.

to use these processes where they would appear to be a more expeditious means for resolving the dispute (see section 2.6.).

FOXTEL requested that the ACCC provide guidance on how it would interpret the phrase ‘unreasonable amount’ used in s. 152CQ(1)(f) of the Act. In this regard, amendments made by the *Telecommunications Competition Act 2002* provide that the ACCC cannot make a determination that would have the effect of requiring a party (other than the access seeker) to bear an unreasonable amount of the costs of extending/enhancing the facility, or maintaining those extensions/enhancements. However, because the ACCC has not had sufficient experience in determining what would be an unreasonable amount, the ACCC did not believe it was appropriate to set out any views in the guide at this stage. Once the ACCC develops a body of experience in this regard, the guide can be updated accordingly.