



**TELSTRA CORPORATION LIMITED**

**Resolution of Telecommunications Access Disputes -  
ACCC Guide - May 2003 (revised)**

**Telstra submission**

**August 2003**

## Introduction

- 1 Telstra is pleased to provide its response to the ACCC's revised Guide to the Resolution of Telecommunication Access Disputes - May 2003 ("the revised Guide"). Telstra is strongly supportive of the ACCC's attempts to further improve its dispute resolution processes. Telstra has previously (June 2002) made submissions to the ACCC in relation to the operation of the Guide generally. In this submission Telstra comments only on the specific matters introduced to the Guide in May 2003, as requested by the ACCC.
- 2 Telstra's submission includes comment on the following issues:
  - (a) Methodology to be adopted by the ACCC in calculating interest on backdated final determinations.
  - (b) Circumstances where the ACCC ought defer an access arbitration while it is considering an access undertaking that relates to the same matter.
  - (c) Requirement for the ACCC to make written determinations setting out model terms and conditions in relation to core services.

## Interest on backdated final determinations

- 3 Telstra has previously commented on the application by the ACCC of the power to backdate final determinations, and the ACCC has included in the revised Guide its views both on its approach to backdating and, now, as to the calculation of interest on backdated payments. In the revised Guide the ACCC has set out an explanation of the methodology it proposes to adopt in calculating interest on backdated payments. In short, the ACCC proposes that:
  - interest will be calculated on amounts overpaid;
  - amounts will be calculated by reference to the volume of services supplied over the backdating period; and
  - the rate of interest will be applied to those amounts from the date on which the overpayments were made.
- 4 The ACCC has stated that the rate of interest should reflect the opportunity cost of the under or over payment and that the calculation would need to take account of when payment for the services would otherwise be made, on a month by month basis.

- 5 Subject to the comments below, Telstra agrees that the "opportunity cost" methodology is a suitable general approach to the calculation of interest on backdated payments.
- 6 Telstra submits, however, that where the parties have by commercial arrangement agreed an interest rate appropriate for delayed payment or reimbursement of overpayment, the Commission should have regard to that rate in assessing the rate to be applied for backdated final determinations.
- 7 For example, where parties have by commercial agreement specified that failing agreement on price a service will continue to be supplied, with a retrospective adjustment taking place when price is finally agreed (or determined), and that interest on the adjusted amount at a specified rate is to be paid, then in Telstra's submission such agreement should be given effect to.
- 8 Telstra submits, further, that it would not generally be appropriate for interest on backdated payments to be awarded at a "penalty" rate such as would apply where there has been wilful delay in payment. To apply a penalty rate of interest would be to include a punitive element that is inconsistent with an "opportunity cost" approach.
- 9 An opportunity cost approach is preferable as a means both of reducing the incentive for delay and to provide reasonable compensation for over or under payment, consistent also with the completion of a formal dispute resolution process.

### **Access undertakings and arbitrations**

- 10 The revised Guide includes a number of comments as to the interaction and sequencing of decision-making where the ACCC is considering an access undertaking simultaneously with an access arbitration.
- 11 The ACCC has stated that the wider benefits to the whole of industry that derive from an access undertaking will usually lead it to defer the arbitration in whole or in part in such circumstances. Telstra agrees with this view and supports the ACCC's use of the deferral power in circumstances where there is both an arbitration and an access undertaking before the ACCC.
- 12 In Telstra's view it is preferable for access disputes to be resolved consistently across industry, and in most situations it will be preferable for the ACCC to defer an access arbitration when considering an access undertaking relating to the same subject matter.
- 13 Telstra notes that the revised Guide refers to several circumstances where the ACCC considers that it may be appropriate to continue with an arbitration. These include where:

- matters covered by the undertaking have already been substantively considered in the arbitration;
  - the arbitration concerns issues additional to those covered in the undertaking; and/or
  - consideration of the undertaking is likely to involve a long time frame.
- 14 Telstra accepts that it would not be appropriate for the ACCC to rigidly apply the principle of deferring arbitrations while considering an access undertaking and for this reason it is appropriate to consider circumstances where the ACCC may decide to continue with an arbitration. Telstra does not wish to make any specific comment in relation to these particular circumstances, apart from reiterating its general view that it will usually be for the benefit of the overall industry for assessment of an access undertaking to be given priority to an individual arbitration.
- 15 Telstra does not in this submission make any comment on the general procedural issues relating to assessment of access undertakings included in the revised Guide including the processes for considering undertakings, procedural fairness and confidentiality and use of arbitration information in assessment of an access undertaking.

### **Model terms and conditions for core services**

- 16 The revised Guide includes a number of comments as to the interaction between an arbitration determination and model terms and conditions of access. Where the ACCC has made a determination setting out model terms and conditions for a particular declared service, the ACCC is required to have regard to those terms and conditions in arbitrations concerning that service.
- 17 The ACCC has stated that as a general approach it will look to apply the model terms and conditions in its arbitration determinations subject to the particular circumstances of the particular dispute. The ACCC will seek to "the greatest extent possible" to set out terms and conditions of access in the final arbitration determination which are consistent with the model terms and conditions.
- 18 Telstra is presently engaged with the ACCC in relation to establishing the model price and non-price terms and conditions for a number of core services. During that process Telstra has made submissions as to the principles that should guide the ACCC in a formulation of the model terms. These submissions include Telstra's view of the need for flexibility and the appropriate level of detail that should be contained in model terms and conditions.
- 19 For example, Telstra has submitted that the ACCC should err towards being less prescriptive in the model terms and conditions and, with non-price terms, should not

attempt to address the detail in accompanying service schedules, manuals, specifications, interconnect service definitions and incidental accompanying documentation, or to seek to pre-determine terms and conditions that are more appropriately negotiated by an access provider and access seeker on an individual basis.

- 20 Telstra notes the comments made by the ACCC in the revised Guide as to the role of model terms and conditions, with their intended emphasis on assisting parties to reach commercial agreement on terms and conditions for access. This is consistent with Telstra's preferred approach for the model terms as providing a flexible and non-prescriptive formulation for the greater benefit of the industry.
- 21 Telstra does not wish to make any further comment at this stage as to the application of the model terms and conditions in a particular access dispute or the circumstances in which it may be appropriate or necessary to depart from the model terms and conditions.

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