REVIEW OF TELECOMMUNICATIONS-SPECIFIC COMPETITION REGULATION

SUBMISSION TO PRODUCTIVITY COMMISSION ON MATTERS RELATING TO INTERIM AND FINAL DETERMINATIONS MADE UNDER PART XIC OF *TRADE PRACTICES ACT 1974.*

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Introduction

In July 1999, the Government amended Part XIC of the *Trade Practices Act 1974* (TPA) to provide, inter alia, the Australian Competition and Consumer Commission (ACCC) with the powers both to make an interim determination (ID) in relation to an arbitration in progress (s. 152CPA) and to backdate the date of effect of a final determination (FD) (s. 152DNA).

This submission addresses three aspect of these changes to the TPA mainly from a commercial perspective.

1. The first is the impact on an Access Seeker (AS) of delay by the ACCC in making an ID

2. The second is the right of an AS to object to the making of an ID, and

3. The third is the impact on an AS of the restriction placed on the ACCC's ability to backdate an FD to have effect from the date of notification of the dispute in question, or the date of effect of the amendment, that is, 5 July 1999, whichever is the later.

The impact of delay in making an ID

Experience has shown that while disputes between Access Providers (APs) and ASs may cover a range of terms and conditions of access to a specific declared service, the cost of supply is, almost always, the dominant issue, if not the sole issue.

As a consequence of the Standard Access Obligations (SAO) relating to declared services, an AP MUST supply a declared service to an AS (unless certain very restricted conditions apply[1]). However, the terms and conditions of such supply are to be negotiated between the parties or, failing successful negotiation, the ACCC may be asked to arbitrate the dispute. During the period of negotiation/arbitration the AS will, in most cases, continue to take the service from the AP, albeit on terms and conditions set, unilaterally, by the AP.

Recognising that the price being disputed by an AS is likely, in many if not most cases, to be higher than that which results from an arbitration, the Government enacted the ID amendment (s. 152CPA) to the TPA in July 1999.

[1] Subsection 152AR(4)

The purpose of an ID is to give an AS some degree of financial relief, through a reduction in the cost of the service in question, during the process of arbitration which, characteristically, will take many months if not some years to be completed. This financial relief should, in most cases, enable the AS to improve its competitiveness and thus, in the broad, increase the level of competition in the market.

The intention of the Government was clearly that the ACCC should move as quickly as possible to issue an ID to alleviate, to a reasonable extent, the impact of adverse pricing on the AS's competitiveness.

It was seen that if the ACCC were not to issue an ID quickly it could well result in;

1. the market could be distorted to such an extent that competition would be significantly reduced and/or,

2. the AS being unable to continue to compete in that particular market segment and, as a possible consequence, be unable to continue in business.

In order to expedite the issuance of an ID and, as a consequence, its effect on the market, the Government did not provide for appeal of an ID. Furthermore, the ACCC cannot be obliged to provide reasons for, or the methodology used in, setting the ID. Clearly, the Government did not envisage the ACCC being required or even finding it necessary to finalise relevant pricing principles before making an ID. The ACCC's emphasis should, therefore, <u>not be</u> on getting the ID 'right' but on getting it 'in the right ballpark', that is, on making an 'educated guessestimate' of the right price. Experience to date has shown that the ACCC has generally set IDs on the high side of the final price.

While accepting that such a commercial approach to setting IDs may not appeal to theoreticians and purists, nevertheless it is entirely consistent with the approach to decision making in businesses all over the world. [Executives who operate successful businesses do not suffer from 'analysis paralysis' - those who do are not often successful.]

Nevertheless, for the purists et al, the lengthy, careful FD process will satisfy their need for logical decision-making and will correct errors, if any, made in 'commercially' setting the ID.

While it may be argued that the ACCC in making an ID could set the interim price so low that the market was distorted in the reverse direction, the possibility of this occurring must be rated as being so low as to be negligible and the risk, therefore, acceptable.

Furthermore, the risk of market distortion due to this must be weighed against the risk of market failure in either unduly delaying an ID or even not issuing one at all.

There can be little doubt as to the Government's intentions in respect of the ACCC's responsibility to expedite the issuance of an ID.

Despite this, the ACCC has been reluctant to move quickly to issue IDs in any of the arbitrations it has undertaken. Delays of many months (in the case of AAPT/Telstra PSTN interconnect, 9 months), rather than the few weeks (around 6-8) expected (and needed) by complainants, have been the norm not the exception. The ACCC has not given reasons for this.

There has certainly not been any evidence of regulatory over-reach in relation to setting IDs.

AS objection to the making of an ID

In the event of the FD being higher than the ID, the AS will be required to repay the AP the difference from the date of effect of the ID to the date of effect of the FD. Because of the often considerable time between these dates an AS carries a significant financial risk during this period. Furthermore, since the AS has no way of knowing what the FD is likely to be so, in accepting an ID, it accepts a contingent liability of unknown size.

For this reason, an AS must make a considered business decision as to whether it can afford to take the risk of accepting an ID.

It is therefore essential that an AS have the right to object to the making of an ID if it believes it to be contrary to its business interests.

This rationale also means that the risk of market distortion from the ACCC setting an unreasonably low ID, is even further reduced.

Backdating of final determinations

As mentioned above, an AS will generally take a service from an AP even though it considers the terms and conditions at the time of first supply to be unreasonable and unacceptable.

Prior to July 1999, the ACCC had no power to backdate FDs and as a result, ASs were under commercial pressure to notify disputes as soon as possible so as to initiate the arbitration process leading (hopefully) to a more favourable price.

The effect of the July 1999 amendment to the TPA (s. 152DNA) was to provide the ACCC with the discretion to backdate an FD to the date of notification of the dispute in question or to 5 July 1999 whichever was the later.

While this was a definite improvement on the previous situation it still did not lead to optimisation of the access negotiate/arbitrate process because it did not adequately address the problem of early dispute notification. The reason for this is that an AS was, and still is, under commercial pressure to notify a dispute as quickly as possible after obtaining supply of a service from an AP, since it knows it cannot obtain any financial relief from the ACCC for the period between the date of first supply and the date of notification of a dispute.

Furthermore, even under the July 1999 amended regime there remains an incentive for the AP to try to slow down negotiations in an attempt to delay for as long as possible, the notification of a dispute.

Clearly, the only way of ensuring that commercial negotiations have the maximum chance of being successful and regarded by both parties as the preferred manner of reaching agreement, is to remove the commercial pressure from the AS to notify a dispute as soon as possible.

The ACCC should therefore be given the discretion to backdate an FD to the date of first supply of the service in question rather than to the date of notification of the dispute.