

DETERMINATION OF SERVICES OF NATIONAL SIGNIFICANCE

INFORMATION PAPER

Background to proposed amendments

In the period since July 1997 there have been a number of disputes notified to the ACCC relating to difficulties being experienced by various carriers and carriage services providers (access seekers) in negotiating access to/supply of certain services provided by other carriers and carriage service providers (access providers). The ACCC has agreed to arbitrate most, if not all, of these disputes to determine the terms and conditions of supply of these services.

Of the disputed services, three, at least, would be regarded by most observers, as being critical to the development of robust and effective competition in the industry. These are PSTN originating and terminating access (interconnection), and mobile terminating services.

At the present time, these services (along with a number of others) have been the subject of extended arbitration and, in the case of PSTN interconnection, review by the ACT of the ACCC's final determination. These arbitrations (together with the subsequent review of the PSTN interconnect decision) have been proceeding for some years and there is little likelihood of final decisions in this calendar year, 2001.

During this period the competitive environment in the telecommunications industry has been one of considerable uncertainty. This uncertainty is still evident today mainly because no competitor of Telstra can be certain what its costs for using Telstra's interconnect service actually is or is likely to be in the future since there is provision in the legislation for backdating the date of effect of final determinations, by both the ACCC and the ACT. Depending on the ACT's final decision, the effect of any such backdating could be that many, if not all, carriers/carriage service providers (CSPs) using this Telstra service could be required to repay very large sums to Telstra as compensation.

The financial impact of this on these companies can only be speculated upon but in the current economic climate it is highly likely that many would fail, further reducing the scope and intensity of competition in the industry.

It is therefore essential in the long term interests of end users and the general health of the industry, particularly in relation to competition, that this uncertainty be removed as soon as possible.

These amendments are proposed, therefore, with this objective. They are predicated on a view that certain telecommunications services are so critical to the development of robust and effective competition in the industry that the terms and conditions of their supply should not be the subject of lengthy negotiations, arbitrations (and possibly review), but be determined by the ACCC as soon as possible after they have been declared under s.152AL of the TPA. This would also have the effect of eliminating the potential for regulatory gaming.

While PSTN interconnect and mobile termination have been used here as examples there may be other services available, either currently or in the future, that the ACCC might deem it necessary to declare to be services of national significance.

The intention of these proposed amendments to the *Trade Practices Act 1974* (TPA) is therefore to provide a means for the ACCC to declare certain telecommunications services to be “services of national significance” and, as a consequence, to determine, with expedition, the terms and conditions of their supply to access seekers.

Proposed section 152CJA

This would require the ACCC to undertake a public process before making a declaration that a service is a service of national significance.

Proposed section 152CJB

This section would require the ACCC to determine the terms and conditions (including price) with which a carrier/CSP must comply in supplying the service in question. It also details a non-exhaustive list of those matters the ACCC must take into account in determining such terms and conditions.

Proposed section 152CJC

This allows an existing determination to be varied without the need for a public inquiry if, in the opinion of the ACCC the variation is of a minor nature.

Proposed section 152CJD

This would require the ACCC to maintain a public register (which may be in electronic form) of all determinations made under this legislation. Access to the register would require payment of a fee.

Proposed section 152CJE

This section would ensure the supremacy of determinations made under these provisions, over provisions in access undertakings and the approved telecommunications access code.

Proposed section 152CJF

This section provides that the ACCC may hold a public inquiry in the declaration of a service of national significance, either at its own instigation or that of another person.

Consequential Amendments

Certain minor amendments to the *Telecommunications Act 1997* and the *Trade Practices Act 1974* will be necessary as a consequence of the adoption of the above substantive amendments to the TPA.

PROPOSED AMENDMENTS
to
TRADE PRACTICES ACT 1974

DECLARATION OF SERVICES
OF NATIONAL SIGNIFICANCE

Trade Practices Act 1974

Division 6A - Services of national significance

152CJA - Services of national significance

- 1 The Commission may, by written instrument, declare that a declared service is a service of national significance if:
- (a) the Commission has held a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make the declaration; and
 - (b) the Commission has prepared a report about the inquiry under section 505 of the *Telecommunications Act 1997*; and
 - (c) the report was published during the 90 day period ending when the declaration was made; and
 - (d) the Commission is satisfied that the making of the declaration will promote the long term interests of end users of carriage services or of services provided by means of carriage services.

152 CJB - Commission must determine terms and conditions of access

- 1 The Commission must in a report prepared pursuant to paragraph 152CJA(1)(a) determine the terms and conditions upon which a carrier or provider is to comply with the applicable standard access obligations for that service should the Commission declare that service to be a service of national significance.
- 2 The Commission must take the following matters into account in making a determination pursuant to subsection 152CJB(1):
- (a) whether the determination will promote the long term interests of end-users of carriage services or of services supplied by means of carriage services;
 - (b) the legitimate business interests of the carrier or provider, and the carrier's or provider's investment in facilities used to supply the declared service;
 - (c) the interests of all persons who have rights to use the declared service;
 - (d) the direct costs of providing access to the declared service;
 - (e) the value to a party of extensions, or enhancement of capability, whose costs is borne by someone else;

- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility;
- (h) charges for comparable services in other jurisdictions.

- 3 The Commission may take into account any other matters that it thinks are relevant in making a determination pursuant to subsection 152CJB(1).
- 4 A determination under this section has effect accordingly.
- 5 A copy of a determination under this section is to be published in the *Gazette*.
- 6 The Commission must give the ACA and the TAF a copy of the report about the inquiry prepared in accordance with section 505 of the *Telecommunications Act 1997*.

152CJC - Variation of determination

- 1 If a variation of a determination under subsection 152CJB(1) is of a minor nature, the Commission is not required to hold a public inquiry under Part 25 of the *Telecommunications Act 1997* about the proposed variation.

152CJD - Register of determinations

- 1 The Commission must keep a Register in relation to determinations under section 152CJB.
- 2 The Register must include the following:
 - (a) particulars of all such determinations (including determinations that have been revoked);
 - (b) particulars of variations and revocations of such determinations;
 - (c) copies of reports prepared in accordance with section 505 of the *Telecommunications Act 1997* in relation to inquiries mentioned in this Division.
- 3 The Register may be maintained by electronic means.
- 4 A person may, on payment of the fee (if any) specified in the regulations:
 - (a) inspect the Register; and
 - (b) make a copy of, or take extracts from, the Register.

- 5 For the purposes of this section, if the Register is maintained by electronic means, a person is taken to have made a copy of, or taken an extract from, the Register if the Commission gives the person a printout of, or of the relevant parts of, the Register.
- 6 If a person requests that a copy be provided in an electronic form, the Commission may provide the relevant information:
- (a) on a data processing device; or
 - (b) by way of electronic transmission.

152CJE - Undertakings and codes that are inconsistent with determinations relating to services of national significance

- 1 If a provision of an access undertaking is inconsistent with any determination relating to a service of national significance, the provision has no effect to the extent of the inconsistency.
- 2 If a provision of the approved telecommunications access code is inconsistent with any determination relating to a service of national significance, the provision has no effect to the extent of the inconsistency.

152 CJF - Inquiries about proposals to declare a declared service a service of national significance

- 1 This section applies to a public inquiry of a kind mentioned in paragraph 152CJA(1)(a).
- 2 The Commission may hold the inquiry:
- (a) on its own initiative; or
 - (b) if requested in writing to do so by a person.
- 3 If the Commission decides not to hold a public inquiry that a person has requested under paragraph (2)(b), the Commission must notify the person in writing of the decision and of the reasons for the decision.
- 4 The Commission must give the ACA and the TAF a copy of the report about the inquiry prepared in accordance with section 505 of the Telecommunications Act 1997.
- 5 If the inquiry is held at the request of a person, the Commission must give the person a copy of the report about the inquiry prepared under section 505 of the Telecommunications Act 1997.

CONSEQUENTIAL AMENDMENTS

Telecommunications Act 1997

Section 505(3)

After “section 496” insert “unless the direction was made pursuant to a determination made under section 152CJA(1)”.

Trade Practices Act 1974

Section 152AC - Definitions

Price -related terms and conditions has the meaning given by section 152CH.

Service of national significance has the meaning given by section 152 CJA(1).

Section 152AY

Insert new paragraph 152AY(2)(b)(i):

“if the service is a service of national significance, on terms and conditions not inconsistent with those determined by the Commission pursuant to section 152CJB(2).”

Re-number the following sub-sections accordingly

Section 152AY(2)(b)(ii)

After “disputes about access”, insert “or under Division 6A (which deals with services of national significance)”.

Section 152BK

Insert a new subsection (3)9C) as follows:

“if any part of the code deals with terms and conditions of access determined by the Commission following an inquiry into a service of national significance - the code is consistent with the determination; and”.

Renumber existing subsection (3)(c) accordingly.

Section 152BV(2)(d)

Insert a new subsection as follows:

“if the undertaking deals with terms and conditions of access determined by the Commission following an inquiry into a service of national significance - the Commission is satisfied that the undertaking is consistent with the determination; and”.

Renumber following subsections accordingly.

Section 152CQ

Insert sub-section 152CQ(5A)

“The Commission must not make a determination that is inconsistent with a determination made pursuant to section 152CJB”