



Trade Practices Amendment (Telecommunications) Act 2001

No. 124, 2001



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**An Act to amend the *Trade Practices Act 1974*, and
for related purposes**

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An Act to amend the *Trade Practices Act 1974*, and for related purposes

[Assented to 27 September 2001]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Trade Practices Amendment
(Telecommunications) Act 2001*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Trade Practices Act 1974

1 After section 152AQ

Insert:

152AQA Pricing principles

Determination

- (1) The Commission must, by writing, determine principles relating to the price of access to a declared service.

Note: See subsection (6) for the effect of the determination.

- (2) The determination may also contain price-related terms and conditions relating to access to the declared service.

Timing

- (3) The Commission must make such a determination at the same time as, or as soon as practicable after:
 - (a) the Commission declares a service to be a declared service; and
 - (b) if the Commission varies a declared service—that variation.

Consultation

- (4) Before making such a determination, the Commission must:
 - (a) publish a draft of the determination and invite people to make submissions to the Commission on the draft determination; and
 - (b) consider any submissions that are received within the time limit specified by the Commission when it published the draft determination.

Publication

- (5) The Commission must publish the determination in such manner as it considers appropriate (including in electronic form).

Arbitration

- (6) The Commission must have regard to the determination if it is required to arbitrate an access dispute under Division 8 in relation to the declared service.

Ministerial pricing determinations prevail

- (7) A determination under this section has no effect to the extent that it is inconsistent with any Ministerial pricing determination.

Definition

- (8) In this section:

price-related terms and conditions means terms and conditions relating to price or a method of ascertaining price.

2 At the end of Division 3 of Part XIC

Add:

152BBD Reaching agreement on terms and conditions of access

The Commission must, in exercising its powers under sections 152BBA and 152BBC, have regard to the desirability of access providers (within the meaning of section 152AR) and access seekers agreeing on terms and conditions as mentioned in paragraph 152AY(2)(a) in a timely manner.

3 After section 152CL

Insert:

152CLA Resolution of access disputes

The Commission must, in exercising its powers under this Division, 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).

Note: The Commission must also have regard to the relevant pricing determination under section 152AQA.

4 Subsections 152CN(1) and (2)

Repeal the subsections, substitute:

Withdrawal by carrier or provider

- (1) If the carrier or provider notified the access dispute, the carrier or provider may withdraw the notification at any time before the Commission makes its final determination, but only with the consent of:
 - (a) the access seeker; or
 - (b) if the carrier or provider is unable to obtain the consent of the access seeker—the Commission.

Withdrawal by access seeker

- (2) If the access seeker notified the access dispute, the access seeker may withdraw the notification at any time before the Commission makes its final determination, but only with the consent of:
 - (a) the carrier or provider (as the case may be); or
 - (b) if the access seeker is unable to obtain the consent of the carrier or provider—the Commission.

No other withdrawal

- (2A) A notification may not be withdrawn in any other circumstances.

Note: The following heading to subsection 152CN(3) is inserted “*Consequences of withdrawal*”.

5 Subsection 152CPA(3)

Repeal the subsection.

6 Subsection 152CPA(12)

Repeal the subsection.

7 After section 152CR

Insert:

152CRA Publication of determinations

Publication

- (1) The Commission may publish, in whole or in part, a determination and the reasons for making the determination. It may do so in such manner as it considers appropriate (including in electronic form).

Consultation

- (2) Before doing so, the Commission must give each party to the determination a notice in writing:
 - (a) specifying what the Commission is proposing to publish; and
 - (b) inviting the party to make a written submission to the Commission within 14 days after the notice is given:
 - (i) identifying any part of what the Commission is proposing to publish that the party considers should not be published; and
 - (ii) setting out the party's reasons for that view.
- (3) In deciding whether to do so, the Commission must have regard to the following matters:
 - (a) any such submission received within that 14 day period;
 - (b) whether publication would be likely to promote competition in markets for listed carriage services (within the meaning of the *Telecommunications Act 1997*);
 - (c) whether publication would be likely to facilitate the operation of this Part;
 - (d) such other matters as the Commission considers relevant.

8 Subsection 152CV(1)

Omit "2 or more", substitute "1 or more".

9 Sections 152CW and 152CWA

Repeal the sections, substitute:

152CW Member of the Commission presiding at an arbitration

2 or more members—Chairperson part of arbitration

- (1) If:
-

- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is one of those members;
- then the Chairperson is to preside at the arbitration.

2 or more members—Chairperson not part of arbitration

- (2) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is not one of those members;
- then the Chairperson must nominate one of those members to preside at the arbitration.

152CWA Exercise of procedural powers by Commission members

2 or more members—Chairperson part of arbitration

- (1) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is one of those members;
- then the procedural powers of the Commission in relation to the arbitration may be exercised by either or both of the following:
- (c) the Chairperson;
 - (d) any other of those members nominated in writing by the Chairperson for the purposes of this paragraph.

2 or more members—Chairperson not part of arbitration

- (2) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) the Chairperson is not one of those members;
- then the procedural powers of the Commission in relation to the arbitration may be exercised by either or both of the following:
- (c) the member nominated under subsection 152CW(2) to preside at the arbitration;
 - (d) any other of those members nominated in writing by the Chairperson for the purposes of this paragraph.

Procedural powers

- (3) For the purposes of this section, a ***procedural power*** of the Commission in relation to an arbitration is a power of the Commission in relation to the arbitration other than:
- (a) a power conferred by this Division to make, vary or revoke a determination; or
 - (b) a power conferred by this Division to give a draft determination to the parties.

10 Subsections 152CX(1) and (2)

Repeal the subsections, substitute:

Single member

- (1) If:
- (a) the Commission is constituted under section 152CV by one member of the Commission; and
 - (b) that member stops being a member of the Commission or for any reason is not available for the purposes of the arbitration;
- then the Chairperson must direct that the Commission is to be constituted for the purposes of finishing the arbitration by one or more members nominated by the Chairperson.

2 or more members

- (2) If:
- (a) the Commission is constituted under section 152CV by 2 or more members of the Commission; and
 - (b) one of those members stops being a member of the Commission or for any reason is not available for the purposes of the arbitration;
- then the Chairperson must either:
- (c) direct that the Commission is to be constituted for the purposes of finishing the arbitration by the remaining member or members; or
 - (d) direct that the Commission is to be constituted for that purpose by the remaining member or members together with one or more other members nominated by the Chairperson.

Note: The following heading to subsection 152CX(3) is inserted "*Previous record of proceedings*".

11 Subsection 152CX(3)

Omit “subsection (2)”, substitute “subsection (1) or (2)”.

12 At the end of subsection 152CZ(1)

Add:

Note 1: The Commission may publish a determination made in relation to the arbitration: see section 152CRA.

Note 2: Information or documents given to the Commission in the course of the arbitration hearing may be given to a person for the purposes of another arbitration: see section 152DBA.

13 At the end of subsection 152DB(1)

Add:

Note: The Commission may conduct a joint arbitration hearing in relation to more than 1 access dispute: see section 152DMA.

14 After section 152DB

Insert:

152DBA Using information from one arbitration in another arbitration

- (1) For the purposes of an arbitration (the *current arbitration*) of an access dispute, the Commission may give any of the following:
 - (a) a party to the current arbitration;
 - (b) a representative of a party to the current arbitration;
 - (c) any other person who provides advice or assistance to a party to the current arbitration or to the Commission;any information, or any document or part of a document, given to the Commission by a person (the *contributor*) in the course of any other arbitration under this Division.
- (2) The Commission may do so only if it considers this would be likely to result in the current arbitration being conducted in a more efficient and timely manner.

Consultation

- (3) Before making a decision under subsection (1) to give information or a document or part of a document to a person (the *recipient*), the Commission must give the contributor a notice in writing:

- (a) specifying what the Commission is proposing to give the recipient; and
 - (b) inviting the contributor to make a written submission to the Commission within 14 days after the notice is given:
 - (i) identifying any part of what the Commission is proposing to give the recipient that the contributor considers should not be given; and
 - (ii) setting out the contributor's reasons for that view.
- (4) In making a decision under subsection (1), the Commission must have regard to the following matters:
- (a) any such submission received within that 14 day period;
 - (b) any order or direction of the Commission under section 152DC in relation to particular information or a particular document;
 - (c) any decision of the Commission under section 152DK not to give a party to another arbitration under this Division a part of a document;
 - (d) such other matters as the Commission considers relevant.

15 After section 152DM

Insert:

152DMA Joint arbitration hearings

Joint hearing

- (1) If:
- (a) the Commission is arbitrating 2 or more access disputes at a particular time; and
 - (b) one or more matters are common to those disputes;
- the Chairperson may, by writing, determine that the Commission is to hold a joint arbitration hearing in respect of such of those disputes (the *nominated disputes*) as are specified in the determination.
- (2) The Chairperson may do so only if he or she considers this would be likely to result in the nominated disputes being resolved in a more efficient and timely manner.

- (3) The Chairperson may, for the purposes of the conduct of the joint arbitration hearing, give written directions to the member of the Commission presiding at that hearing.

Constitution of Commission

- (4) Sections 152CV to 152CY apply in relation to the joint arbitration hearing in a corresponding way to the way in which they apply to a particular arbitration.

Note: For example, the Chairperson would be required to nominate in writing 1 or more members of the Commission to constitute the Commission for the purposes of the joint arbitration hearing.

Procedure of Commission

- (5) Sections 152CZ to 152DM apply in relation to the joint arbitration hearing in a corresponding way to the way in which they apply to an arbitration hearing of a particular access dispute.

Record of proceedings etc.

- (6) The Commission as constituted for the purposes of the joint arbitration hearing may, for the purposes of that hearing, have regard to any record of the proceedings of the arbitration of any nominated dispute.
- (7) The Commission as constituted for the purposes of the arbitration of each nominated dispute may, for the purposes of making a determination in relation to that arbitration:
- (a) have regard to any record of the proceedings of the joint arbitration hearing; and
 - (b) adopt any findings of fact made by the Commission as constituted for the purposes of the joint arbitration hearing.

16 Subsection 152DNA(2)

Repeal the subsection, substitute:

- (2) The specified date must not be earlier than the date on which the parties to the determination commenced negotiations with a view to agreeing on the terms and conditions as mentioned in paragraph 152AY(2)(a).

Note: See subsection 152CP(3) for the limits on a final determination.

17 Subsection 152DO(4)

Omit “For”, substitute “Subject to section 152DOA, for”.

18 Subsection 152DO(5)

Omit “The”, substitute “Subject to section 152DOA, the”.

19 After section 152DO

Insert:

152DOA Matters the Tribunal may have regard to for the purposes of the review

For the purposes of the review, the Tribunal may have regard only to:

- (a) any information given, documents produced or evidence given to the Commission in connection with the making of the final determination; and
- (b) any other information that was referred to in the Commission’s reasons for making the determination.

20 After section 152DP

Insert:

152DPA Stay of decisions

- (1) Paragraphs 15(1)(a) and (b) and 15A(1)(a) and (b) of the *Administrative Decisions (Judicial Review) Act 1977* do not apply to a decision of the Tribunal under section 152DO of this Act.
- (2) If a person applies to the Federal Court under subsection 39B(1) of the *Judiciary Act 1903* for a writ or injunction in relation to a decision of the Tribunal under section 152DO of this Act, the Court must not make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the application.

21 Section 152DR

Repeal the section, substitute:

152DR Operation and implementation of a decision that is subject to appeal

- (1) The fact that an appeal is instituted in the Federal Court from a decision of the Tribunal under section 152DO does not affect the operation of the decision or prevent action being taken to implement the decision.
- (2) If an appeal is instituted in the Federal Court from a decision of the Tribunal under section 152DO, the Federal Court or a judge of the Federal Court must not make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the appeal.

22 After section 152EA

Insert:

152EAA Commission's powers under Division 6 of Part XIB not limited

Nothing in this Division limits the Commission's powers under Division 6 of Part XIB (about record-keeping rules and disclosure directions).

23 Application of amendments

- (1) The amendment made by item 1 applies in relation to:
 - (a) services that are declared to be declared services after the commencement of this Act; and
 - (b) declared services that are varied after the commencement of this Act.
- (2) The amendments made by items 4, 5, 6 and 16 apply in relation to access disputes that are notified after the commencement of this Act.
- (3) The amendment made by item 7 applies in relation to determinations that are made after the commencement of this Act.
- (4) The amendments made by items 14 and 15 apply in relation to access disputes that are notified either before or after the commencement of this Act.

- (5) The amendments made by items 17, 18 and 19 apply in relation to applications for review that are made after the commencement of this Act.
- (6) The amendment made by item 20 applies in relation to applications for review, or applications for a writ or injunction, that are made after the commencement of this Act.
- (7) The amendment made by item 21 applies in relation to appeals that are made after the commencement of this Act.

24 Transitional—backdating final determinations

- (1) This item applies to a final determination made after the commencement of this Act in respect of an access dispute notified after the commencement of this Act.
- (2) Despite the amendment made by item 16, the final determination has no effect to the extent (if any) to which any provision of the determination is expressed to have taken effect on a date earlier than the date of commencement of this Act.
- (3) In this item:

final determination means a final determination made by the Commission under Division 8 of Part XIC of the *Trade Practices Act 1974*.

*[Minister's second reading speech made in—
House of Representatives on 9 August 2001
Senate on 19 September 2001]*

(145/01)