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## ***Telecommunications Competition Bill 2002***

### **TABLE OF AMENDMENTS TO SCHEDULE 2 PROPOSED BY AAPT**

Item no.	Proposed section/ subsection	Comment	Suggested amendment
		<b>Part 1: Model terms and conditions</b>	
2	152AQB	<p>This section requires the ACCC to determine model terms and conditions in relation to access to core services.</p> <p>AAPT considers that the legislation should also permit, but not oblige, the ACCC to make such determinations for other active declared services.</p> <p>The ACCC should be required to have regard to a determination relating to model terms and conditions that have been determined for both core services or other active declared services.</p>	<ul style="list-style-type: none"> <li>Insert new subsection 152AQB(2A) stating “The Commission may make a written determination setting out model terms and conditions relating to access for active declared services other than a core service.”</li> <li>Amend subsection 152AQB(9) to also refer to “other active declared services.”</li> </ul>
2	152AQB(9)	<p>This subsection requires the ACCC to have regard to its model terms and conditions when arbitrating an access dispute in relation to a core service.</p> <p>AAPT considers that the ACCC should also be required to have regard to model terms and conditions when assessing an ordinary access undertaking. Model terms and conditions will provide useful standards for access providers when formulating an undertaking and lessen opportunities to game when lodging an undertaking. This amendment will also promote consistency in the assessment of both methods of resolving terms of access issues.<sup>1</sup></p>	<ul style="list-style-type: none"> <li>Amend subsection 152AQB(9) by inserting “or to assess an access undertaking under Division 5” after “Division 8”.</li> </ul>

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<sup>1</sup> Optus shares a similar view. See Optus’ submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.2, p.1.

		<b>Part 3: Duration of model terms and conditions</b>	
<b>2</b>	152AQB(8)	<p>This subsection specifies that the duration of model terms and conditions is 5 years unless revoked sooner or a longer period is specified in the regulations.</p> <p>A standard 5 year duration for model terms and conditions is too long. Technological and commercial developments are such that renegotiation is required within a shorter timeframe. A 3 year duration would be more commercially realistic. The 3 year term should apply to all services for which model terms and condition are determined.</p>	<ul style="list-style-type: none"> <li>• Amend paragraph 152AQB(8)(a) by deleting “5” and substituting “3”.</li> <li>• Amend subsection 152AQB(8) by inserting “or active declared service” after “core service”.</li> </ul>
		<b>Part 4: Revocation of declarations of minor importance</b>	
<b>16</b>	152AO(1A)	<p>This subsection allows the ACCC to revoke declarations it considers are of “minor” importance without first holding a public inquiry.</p> <p>There is no definition of “minor” contained in the Bill or Explanatory Memorandum. AAPT considers that “minor importance” should be defined as “services that are obsolete or redundant”.<sup>2</sup></p>	<ul style="list-style-type: none"> <li>• Amend paragraph 152AO(1A)(b) by inserting “, namely a service that is obsolete or operationally redundant” after “minor importance”.</li> </ul>

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<sup>2</sup> Optus shares a similar view. See Optus’ submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.4, p.1.

		<b>Part 11: Exemptions from standard access obligations (SAOs)</b>	
<b>60</b>	152ASA(5) & (6)  152ATA(7) & (8)	<p>These subsections require the ACCC to have regard to matters specified by the Minister in a written instrument when making a decision regarding applications for anticipatory and individual class exemptions from the SAOs.</p> <p>This contrasts with section 152AS in relation to the granting of ordinary exemptions which does not provide for Ministerial involvement.</p> <p>AAPT can see no justification for Ministerial involvement. In AAPT's view, it creates the unnecessary risk of politicising the process of determining exemptions and unnecessarily involving an additional party in the decision making process.</p>	<ul style="list-style-type: none"> <li>• Delete the requirements in these subsections for the ACCC to have regard to matters specified by the Minister when making anticipatory exemption determinations.</li> </ul>

		<b>Various parts: Time limits for ACCC and Australian Competition Tribunal (“Tribunal”) decisions on exemptions and undertakings</b>	
<b>61</b> <b>62</b> <b>66</b> <b>85</b> <b>90</b> <b>95</b> <b>95</b> <b>102</b>	152AT(10), 152ATA(12), 152AW(5), 152BU(5), 152BY(7), 152CBC(5), 152CBG(7) & 152CF(5)	<p>These subsections place an obligation on the ACCC and the Tribunal to make decisions regarding all types of exemption and undertaking applications (including variation applications) within 6 months, otherwise the application is deemed to be accepted. There is provision for the ACCC or Tribunal to extend the decision making period by less than 3 months.</p> <p>AAPT considers that there should not be deemed acceptance of these applications. Rather, there should be deemed non-acceptance of the applications in all cases where a time limit is placed on the ACCC or the Tribunal. An application should be taken to be rejected if the ACCC or the Tribunal fail to make a decision within the time frame. The onus should remain on the applicant to prove that an undertaking should be accepted.</p> <p>The risks of a service not being exempted or an undertaking not being accepted is not as great as the reverse. If the default position is the rejection of an undertaking or exemption application, the fall back is arbitration by the ACCC (assuming no commercial agreements). If the default position is acceptance, there will be no fall back position and a deemed (rather than a considered) decision will dictate the outcome.</p> <p>Reversing the presumption or onus also has the advantage of giving the access provider an incentive to provide relevant information to the regulator and to do so quickly.</p>	<ul style="list-style-type: none"> <li>• Amend these subsection to provide that if a decision has not been made within the specified time, the ACCC or the Tribunal is deemed <b>not</b> to have granted the application.</li> </ul>

		<b>Part 11: Exemptions from standard access obligations</b>	
<b>65</b>	152AV(1)	<p>The amendment to this subsection entitles a person whose interests are affected by the ACCC's decision on an individual anticipatory exemption or individual exemption to apply to the Tribunal for review of that decision.</p> <p>This section should be amended to also allow persons whose rights will be affected, or are likely to be affected, to apply for Tribunal review of the ACCC's decision.<sup>3</sup></p> <p>This ensures both affected and potential affected persons have a right to request a review.</p>	<ul style="list-style-type: none"> <li>• Delete this subsection and replace it with “A person whose interests are affected by a decision of the Commission under section 152AT, will be affected, or are likely to be affected, by a decision of the Commission under section 152ATA, may apply in writing to the Tribunal for a review of the decision.”</li> </ul>
		<b>Part 12: Special access undertakings</b>	
<b>74</b>	152AL(7)	<p>This subsection provides that if the ACCC accepts a special access undertaking then the service supplied by the person is a “declared service”. However, it should provide that the relevant service is an active declared service.<sup>4</sup> The Explanatory Memorandum should also be revised to reflect this.</p>	<ul style="list-style-type: none"> <li>• Amend this subsection by inserting “an active” after “other person is” and deleting “a” in the second last line.</li> </ul>
<b>95</b>	152CBA(3)(a)	<p>This subsection provides that a special access undertaking must state that in the event that the person supplies the service the person agrees to be bound by the SAOs.</p> <p>AAPT considers that words in this subsection “to the extent that those obligations would apply to the person in relation to the service if the service were treated as an active declared service” are unnecessary and wrongly suggest that the SAOs may not apply in some circumstances.<sup>5</sup></p>	<ul style="list-style-type: none"> <li>• Delete the following from the subsection “, to the extent that those obligations would apply to the person in relation to the service if the service were treated as an active declared service”.</li> </ul>

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<sup>3</sup> Optus shares a similar view. See Optus' submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.8, p.2.

<sup>4</sup> Optus shares a similar view. See Optus' submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.9, p.2.

<sup>5</sup> Optus shares a similar view. See Optus' submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.11, p.3.

95	152CBE & 152CBG	<p>These amendments allow the ACCC to extend or vary a special access undertaking. Special access undertakings can be provided by potential access providers of proposed services and services which may exist but are not yet declared.</p> <p>AAPT considers that the legislation should require the ACCC to conduct public consultation in relation to extension and variation decisions in respect of special access undertakings.<sup>6</sup> Proposed subsection 152CBD(2)(d) requires public consultation in respect of ACCC decisions on the grant or refusal of special undertakings. Such public consultation should be extended to extensions and variations.</p> <p>This would ensure consistency and ensure that the ACCC makes informed decisions.</p>	<ul style="list-style-type: none"> <li>• Insert new subsections 152CBE(6A) and 152CBG(6A) requiring the ACCC to conduct a public inquiry in relation to extending or varying a special access undertaking.</li> </ul>
95	152CBE	<p>This section allows a person whose special access undertaking has been accepted to apply to the ACCC for an extension of time for the operation of that undertaking.</p> <p>AAPT considers that extensions of special access undertakings should not be permitted if a service becomes declared. Undertakings for declared services should then be dealt with under the provisions for ordinary access undertakings.<sup>7</sup></p>	<ul style="list-style-type: none"> <li>• Insert new section 152CBE(5A) stating “The Commission must not approve the extension if the service to which the undertaking relates has been declared.”</li> <li>• Amend subsection 152CBE(5) to make approval subject to subsection (5A).</li> </ul>
95	152CBI	<p>This section allows an access provider to withdraw a special access undertaking if the relevant service becomes declared.</p> <p>AAPT considers that the legislation should allow for a 12 month time period for the withdrawal of an access undertaking regardless of whether the service is declared.</p>	<ul style="list-style-type: none"> <li>• Delete paragraph 152CBI(2)(b)(i).</li> </ul>

<sup>6</sup> Optus shares a similar view. See Optus' submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.12, p.3.

<sup>7</sup> Optus shares a similar view. See Optus' submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.13, p.3.

95	152CBD(3)(a), (4), (5) & (6)	<p>This paragraph and these subsections permit the Minister to specify matters to which the ACCC must have regard in making a decision to accept or reject a special access undertaking.</p> <p>The section contrasts with the position in section 152BU for the granting of ordinary undertakings which does not provide for Ministerial involvement.</p> <p>AAPT can see no justification for such Ministerial involvement. In AAPT's view, it creates the unnecessary risk of politicising the process of determining undertakings and unnecessarily involving an additional party in the decision making process. Such involvement was not recommended by the Productivity Commission in its review of telecommunications regulation in relation to measures designed to enhance new investment.</p>	<ul style="list-style-type: none"> <li>• Delete this paragraph and these subsections.</li> </ul>
101	152CE(1)	<p>The amendments to this subsection allow persons whose interests are affected by a decision of the ACCC to reject or accept a special access undertaking or a variation to a special access undertaking, to apply to the Tribunal for a review of this decision.</p> <p>The subsection should be amended to also allow persons whose rights will be affected or are likely to be affected to apply for Tribunal review of the ACCC's decision.</p> <p>This will ensure that affected and potentially affected persons have the right to request a review as well as those who are presently affected.</p>	<ul style="list-style-type: none"> <li>• Delete this subsection and replace with "A person whose interests are affected by a decision of the Commission under subsection 152BY(3), will be affected, or is likely to be affected, by a decision of the Commission under subsections 152CBC(2) or 152CBG(3) may apply in writing to the Tribunal for a review of the decision."</li> </ul>

		<b>Part 12: Undertakings and arbitrations</b>	
<b>104</b>	152CGB	<p>This section provides that a final determination made by the ACCC in relation to an access dispute has no effect to the extent to which it is inconsistent with an access undertaking that is in operation.</p> <p>AAPT considers that this would promote unwarranted uniformity in access prices and terms, and lessen the scope and incentives for meaningful negotiation between parties so as to arrive at outcomes tailored to their particular relationship, this being the essence of the negotiate-arbitrate model under Part XIC.</p>	<ul style="list-style-type: none"> <li>• Delete the proposed section.</li> <li>• Repeal existing subsection 152CQ(5).</li> </ul>
<b>108</b>	152CLA(2)	<p>This subsection permits the ACCC to defer arbitrations whilst access undertakings are being assessed.</p> <p>AAPT strongly opposes this amendment. Whilst the ACCC's power to defer arbitrations is discretionary, the Explanatory Memorandum suggests that there be a presumption in favour of deferral. This will have the effect of encouraging access providers to lodge undertakings, regardless of whether they are likely to be accepted by the ACCC and then pointing to the Explanatory Memorandum in support of the ACCC deferring an arbitration. It will enable the access provider to control and delay the access process, rather than the ACCC being able to make an interim or final arbitral decision in respect of an access dispute by which the parties will be bound.</p> <p>A requirement should be included for parties to an access dispute to consent to the deferral of an arbitration while an undertaking is being assessed.</p>	<ul style="list-style-type: none"> <li>• Amend the subsection by inserting “, with the consent of the parties to the access dispute” after “the Commission” in the fourth last line of the subsection.</li> </ul>

		<b>Part 13: Ordering and provisioning</b>	
<b>112</b>	152AR(4)	<p>This subsection clarifies what is included in the definition of “ordering and provisioning” for the purpose of the SAOs.</p> <p>AAPT supports the view that the SAOs should make it explicit that the handling of customer churn, number portability and billing are taken to be aspects of technical and operational quality. AAPT also considers that the ACCC should be empowered to expand on this non-exhaustive list.<sup>8</sup></p>	<ul style="list-style-type: none"> <li>• Amend subsection 152AR(4A) by inserting “, which includes but is not limited to the handling of customer churn, number portability and billing,” after “ordering and provisioning”.</li> <li>• Amend subsection 152AR(4B) by inserting “Commission and/or” before “regulations”.</li> </ul>
		<b>Part 14: Competition notices</b>	
<b>116</b>	151AKA(9) & (10)	<p>These proposed amendments require the ACCC to consult with the proposed recipient of a Part A competition notice before the notice is issued.</p> <p>This is currently the ACCC’s practice. The ACCC’s <i>Competition Notice Guidelines</i> state that if the ACCC has a reason to suspect that a contravention of the competition notice is occurring that, in most circumstances, the ACCC will notify the subject of the an investigation, and other persons who may be able to provide relevant information.</p> <p>The danger in elevating administrative practices to legislation is that it provides more opportunities for recipients of a competition notice to game the process, as there is possibly another level of legal challenge. Further, the requirement that the notices be in summary form may also provide opportunities for the recipient to game the process, as there may be an argument that the notice does not provide enough information.<sup>9</sup></p>	<ul style="list-style-type: none"> <li>• Delete the subsections.</li> </ul>

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<sup>8</sup> Optus shares a similar view. See Optus’ submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.17, p.4.

<sup>9</sup> Optus shares a similar view. See Optus’ submission to the Senate Inquiry into the Telecommunications Competition Bill 2002, schedule 2, no.18, p.4.

		<b>Part 16: Record-keeping rules and disclosure directions</b>	
<b>Part 16</b>		<p>The Explanatory Memorandum indicates that the amendments in this Part are aimed at the introduction of accounting separation for Telstra's wholesale and retail operations. However, nothing in the Bill makes this explicit.</p> <p>AAPT supports the introduction of accounting separation measures and imputation analysis by the ACCC in respect of Telstra's retail and wholesale operations. However, AAPT is concerned that there is nothing in the Bill that will require the Minister to direct the ACCC to introduce accounting separation. Further, there is nothing in the Bill to ensure that appropriate accounting separation measures are introduced.</p> <p>The legislation should require the Minister to direct the ACCC to require Telstra to prepare separate accounts and should specify the timeframe within such measures must be implemented. AAPT considers that it is feasible for separate accounts to be produced commencing for the 2002-2003 financial year.</p> <p>The legislation should also make it clear that the accounting separation measures will apply to the totality of Telstra's retail and wholesale operations.</p> <p>AAPT understands that the Minister is considering whether to make a draft determination available for public consultation. AAPT supports this being done and also supports a requirement for the ACCC to consult with interested parties in respect of the appropriate accounting separation framework.</p> <p>AAPT is not proposing that the detail of the proposed accounting separation model needs be included in the legislation.</p>	<ul style="list-style-type: none"> <li>• Insert new subsection 151BUAA(5) stating "On or before 1 May 2003, the Minister must direct the Commission under this section to require Telstra Corporation Limited to prepare separate accounts for all of it and its related entities' retail and wholesale operations on an ongoing basis, commencing with the 2002-2003 financial year. Such separate accounts must conform with an accounting separation framework formulated by the Commission which will have the aim of being able to determine whether Telstra Corporation Limited or its related entities have, or are engaging in, anti-competitive conduct in breach of Part IV or Part XIC."</li> <li>• Insert new subsection 151BUAA(6) stating "Before the Commission requires Telstra Corporation Limited to prepare separate accounts under subsection (5) for 2002-2003, the Commission must invite interested parties to make submissions on the appropriate accounting separation framework that should be adopted for the purposes of that subsection. The Commission is required to take those submissions into account when formulating the accounting separation framework."</li> </ul>