THE AUSTRALIAN TELECOMMUNICATIONS ACCESS REGIME – TEN YEARS ON

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When open competition was introduced through the Telecommunications Act 1997 (Cth), Part XIB – The Telecommunications Industry: Anti-Competitive Conduct and Record-Keeping rules and Part XIC – Telecommunications Access Regime were added to the Trade Practices Act 1974 (Cth) to underpin open competition. In moving from the former Government owned monopoly providers to open competition, new competitors to the former monopolist Telecom (now Telstra) had to be able to interconnect to Telstra's infrastructure to be able to provide competing services. The Government's aim was that, in the first instance, interconnection arrangements would be commercially negotiated. Failing successful negotiations, however, the Access Regime provided that the bottleneck facilities could be 'declared'. Once a service is 'declared', the provider of the declared service has specific obligations to provide interconnection on specified terms, with the possibility that the ACCC can arbitrate disputes on access to 'declared' services. Ten years later, the effectiveness of the Access Regime is being questioned, by the competition regulator, by Telstra and by Telstra's competitors.

The purpose of this paper is to review the effectiveness of the Access Regime and consider whether it can be further amended to improve its effectiveness (there have been significant amendments to the Access Regime in 1999, 2002 and 2005) or whether other measures to ensure a competitive environment in telecommunications should be considered.

The research for this paper has been an examination of written material, including significant reports on competition in telecommunications by the Productivity Commission and by ACCC reports on competition in the industry. It has also examined the many ACCC inquiries into Access Regime issues, submissions to those inquiries and public statements made by industry participants.

INTRODUCTION

COMPETITION IN TELECOMMUNICATIONS

Until 1989, public telecommunications services were provided by Government-owned monopolists: the Australian Telecommunications Commission (Telecom) and the Overseas Telecommunications Commission (OTC). Competition in telecommunications was introduced with the *Telecommunications Act 1989*. AUSTEL, an independent telecommunications regulator, was created and competition was introduced in two areas: the provision of value added services and private networks. Telecom and OTC, however, retained their exclusive right to provide infrastructure and basic services nationally and internationally. (Grant 2004, 2-5)

ACCESS UNDER THE TELECOMMUNICATIONS ACT 1991

Limited facilities based competition was introduced with the *Telecommunications Act 1991*, in the context of the explicit Government policy commitment (supported by both major parties) that open facilities based competition would be introduced in 1997.

Two categories of carriers were created, and two general telecommunications carriers and three mobile carriers were granted carrier licences, giving them the right to install infrastructure. Carriers were also given the right to connect with any other carrier's network and facilities, with AUSTEL given power to arbitrate in cases where carriers could not reach agreement on interconnection arrangements.

The service monopoly was first breached in a limited way. The monopoly on service provision was also opened up. Both carriers and carriage service provides could provide domestic and international telecommunications services, although carriage service provider arrangements for interconnection to a carrier's network and/or facilities were not on as favourable terms as inter-carrier arrangements. (Grant 2004, 5–15)

THE HILMER REPORT AND RECOMMENDATIONS

The liberalisation of telecommunications, promised by Government in 1991, became part of the larger Government competition policy reform, set in train by the Hilmer Report. One of the Report's most important areas of concern was public monopolies, and their need for their structural reform. The Report identified two main policy concerns with public monopolies:

> … Monopoly returns made in the monopoly market may be used to finance otherwise unprofitable prices in the competitive market, potentially driving out or disadvantaging competitors …
>
> A second concern can arise where there is a vertical relationship between the two activities, particularly when access to the natural monopoly element is essential for effective competition in the downstream or upstream market… In this case, integration of the natural monopoly element… and a potentially competitive activity… raises concerns that control over access to the monopoly element may be misused to stifle or prevent competition in the potentially competitive sector. (Hilmer 1993, 219)

The alternatives for addressing those concerns were given as either separating the natural monopoly element from potentially competitive elements or leaving the structure intact and placing more reliance on 'intrusive regulatory controls' to 'guard against cross-subsidisation and, where a vertical relationship is involved, the potential misuse of control over access to the natural monopoly element'. (Hilmer 1993, 219)

The Report strongly supported structural reform over what it had called 'the more intensive conduct regulation'. (Hilmer 1993, 266) However, the Report did recommend the establishment of an access regime to essential facilities' but only if access to the facility would promote competition in the down stream market, and that declaration of such services would be in the public interest, having regard to the national significance of the facility and the national competitiveness such access would promote. (Hilmer 1993, 266)

There was also debate whether existing industry specific regulators (such as AUSTEL) should continue to regulate competition or the regulation of competition be done by a national competition regulator. The Committee's Report came down firmly on the side of one competition regulator covering all industries. (Hilmer 1993, 325–328)

In the case of telecommunications reform, the Committee noted that the 1991 reforms did not include vertical separation 'due to a concern that AOTC (the merged Telecom and OTC), at least for the 5 years from the introduction of competition, required economies of scale and scope of an integrated business to compete effectively in global markets'. (Hilmer 1993, 221)

THE TELECOMMUNICATIONS ACCESS REGIME 1997

THE POLICY RATIONALE FOR A TELECOMMUNICATIONS SPECIFIC ACCESS REGIME

The implementation of Hilmer Report recommendations resulted in significant changes to competition law in Australia. The Federal and State/Territory governments agreed in 1995 on a National Competition Policy, including State/Territory governments' reform of monopoly areas such as the provision of electricity or gas, and significant amendments to the *Trade Practices Act 1974* (Cth), particularly the introduction of a new Part IIIA – Access to Services.

While the new competition rules extended across all industry sectors, including former monopoly areas, special competition and access rules (the new Parts XIB and XIC) were introduced specifically for telecommunications.

As the Explanatory memorandum to the amending legislation explained, the telecommunications industry is a 'complex, technically detailed network industry' and it was thought that the industry-specific nature of the Access Regime reflected the particular Government policy interests in:

- promoting any-to-any connectivity;
- promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services; and
- ensuring access to carriage services is established on reasonable terms and conditions and includes necessary ancillary services such as physical interconnection, billing information and access to conditional access customer equipment (such as set top boxes used in the supply of pay television). (Trade Practices Amendment (Telecommunications) Bill 1996)

PART XIC: ACCESS REGIME COMPONENTS

In summary, the Access Regime process begins with the ACCC's declaration of a telecommunications service. Once a service is declared, providers of that service (access providers) have obligations to other service providers (access seekers) wanting to use that service in order to provide a service. Further, if access seekers are unable to commercially negotiate with the access provider for the use of the declared service, they may notify the ACCC of an access dispute, and the ACCC then has the power to arbitrate the matter. (ACCC 1999a)

A) SERVICE DECLARATION

The ACCC may declare a service, after initiating the declaration process itself or at the request of an access seeker, and the declaration process must include a public inquiry that allows for public submissions. The Declaration must adequately describe the service, and must contain an expiry date (no longer than five years). (Divisions one and two, Part XIC, Trade Practices Act – 'TPA').

The TPA lists the objects the ACCC must consider when determining whether to declare a service, which are grouped under the phrase, the 'promotion of the long-term interests of end users' (LTIE). In promoting the LTIE, the ACCC must have regard to the promotion of competition in the markets for services, achieving any-to-any connectivity in those services, and encouraging economically efficient use of and investment in infrastructure. (TPA s. 152AB). In particular, the ACCC must look at whether the service in question should be declared to underpin competitor access to services in circumstances where access might not be readily granted. As the ACCC explained in its recent decision to continue the declaration of the line sharing service (LSS):

> Under the TPA, declaration of a service can promote competition in listed services by mandating access to those services that are supplied in monopoly-provided vertically related markets. (ACCC 2007a, 19)

B) STANDARD ACCESS OBLIGATIONS (SAOS)

Once the ACCC has declared a service, access providers of that service must:

- permit interconnection of its facilities with those of service providers;
- provide billing information in connection with the supply of the declared service; and
- take all reasonable steps to ensure that the service provider receives fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself. (s. 152AR TPA)

There is provision, however, for the ACCC to grant an exemption from the SAOs either for an individual service or class of service. (s. 152AS ff TPA)

C) TERMS AND CONDITIONS OF SERVICE PROVISION

The terms and conditions on which a declared service is provided must comply with the SAOs, unless an exemption has been granted. An access provider can also file an access undertaking with the ACCC that sets out the terms and conditions on which they will provide a declared service, providing the undertaking complies with all relevant SAOs. The undertaking may simply adopt terms and conditions set out in Model Terms and Conditions for Core services,[1] developed by the ACCC. (ACCC – core services) (ACCC 2003a). Alternatively, an access provider may develop an undertaking, compliant with SAOs, relevant to the particular declared service. In both cases, undertakings must be submitted to the ACCC that can either accept or reject the undertaking, but not modify it. (Divisions 2-3, Part XIC, TPA). It should be noted that, of the many undertakings submitted to the ACCC, the only undertaking that has been accepted and is in force is FOXTEL's undertaking for its digital set top box.

D) PRICING

The cost charged by an access provider has been one of the most contentious issues over the past ten years of the Access Regime. The TPA allows the Minister to determine pricing principles on which access costs will be determined, (s. 152CH TPA) but as yet, the Minister has not determined such principles. The ACCC also can determine principles relating to the price of access to a declared service (s. 152 AQA TPA) and has done so for a range of declared services, including for the 'core services'.

PART XIC: SUPPORT FOR PART XIB

In dealing with access disputes, the ACCC considers whether the terms and conditions on which the service is offered are reasonable. Under s. 152AH TPA, determining the reasonableness of the terms and conditions involves consideration of the costs of providing access and any relevant operational and technical issues, Under Part XIB, the ACCC has the power to set record keeping rules – information they must provide to the ACCC – on carriers and carriage service providers. Such information assists the ACCC in determining the reasonableness of the terms and conditions being offered.

PART XIC: A REPORT CARD

Since its inception in 1997, the Access Regime has been amended in significant ways in 1999, 2002 and 2005. Those changes reflect concerns with the operation of the Access Regime and regulator/industry views on how the Regime could be made more effective.

1999 LEGISLATIVE CHANGES TO THE REGIME

The ACCC announced an inquiry into the declaration of local services (including the PSTN O/T, ULLS and LCS) in March 1998. (ACCC 1999a). The ACCC's Final Declaration from this Inquiry raised all of the issues that are typically in contention by industry participants in later inquiries: will a service declaration promote competition, should the service be further unbundled, how should the service be described for the purposes of declaration, and are there technical matters that impinge on service declaration.

Telstra's predominant position in the market is also documented. For example, when discussing declaration of the ULLS, the ACCC observed:

> The customer access market is characterised by high barriers to entry. Telstra is the main supplier of services in this market, currently supplying around 98–99 per cent of services. Limited roll out of alternative customer access infrastructure has occurred in discrete areas, particularly the central business districts of Sydney and Melbourne. While additional roll out will gradually erode Telstra's share of this market, Telstra is likely to hold the major part of this market for the foreseeable future.
>
> The customer access services supplied in this market are used as inputs for the supply of services in downstream fixed telephony and high bandwidth carriage services markets. Telstra also operates in these markets and is thus in a position where it controls access to the majority of inputs necessary for downstream competition. (ACCC 1999a, 57)

Yet, at that stage, at least, the efficacy of Access Regime itself was not being questioned. All that was felt necessary by Government was 'fine tuning' to Parts XIB and XIC. The 1999 amendments to Part XIB included giving the ACCC power to disclose or require the disclosure of information provided to the ACCC under the Record Keeping Rules regime. The amendments to the Access Regime provided the following:

a. enabling the ACCC to give procedural directions to parties to negotiations under the Part XIC telecommunications access regime before a dispute has been notified;
b. enabling the ACCC to attend or mediate negotiations under the Part XIC telecommunications access regime; and
c. establishing as a standing obligation that access providers not use information supplied to them by competitors for purposes other than which it was supplied. (Telecommunications Legislation Amendment Bill (1998)

THE PRODUCTIVITY COMMISSION REPORT AND SUBSEQUENT AMENDMENTS TO THE REGIME

In 2001, the Productivity Commission was asked by Government to inquire into telecommunications specific competition regulation – specifically Parts XIB and XIC of the TPA and relevant parts of the Telecommunications Act.

The Report concluded that the Access Regime was still necessary to maintain 'efficient competition over the medium term'. Nevertheless, the Report acknowledged that the current processes under the Access Regime were

> … slow, uncertain and inefficient – with adverse consequences for parties seeking access. There are potential pitfalls in the criteria that determine services that are subject to access and in determining access prices. Associated with this there is a risk of reduced investment in core telecommunications infrastructure – with long-run consequences for consumers and for Australia's overall economic efficiency. (Productivity Commission 2001, xxii and Chapter 9 for fuller discussion)

Some of the Report's recommendations were about clarification of the objects of the Access Regime and its processes. The objects should recognise the need for certainty for investment decisions, and processes should be streamlined. (Productivity Commission 2001, Chapter 9)

The Report also highlighted more serious issues with the Regime. As the Report noted, the Access Regime was originally intended to be 'light-handed'. In practice, however, the intention had not been met.

> The ACCC has rejected Telstra's four undertakings, and Telstra has said it will not be proposing any more. The TAF^2 has been ineffective – and the Commission recommends its removal for that reason. While there have been many commercially negotiated arrangements, for many major players and key services the ACCC has been obliged to determine access prices in arbitrations. These have involved protracted processes that, when appeal processes are considered, are not yet complete in most cases.
>
> The Commission considers that the aspiration for 'light-handed' regulation – while commendable – is not realistic at present. This is because the key to an effective access regime is the determination of access prices. Such price regulation, whether implicit or explicit, is not light-handed. The key to reform, however, is to ensure that the regulations are well designed by following six strategies. (Productivity Commission 2001, xxix)

The Productivity Commission's recommendations for change included the appropriate scope of regulation, encouragement of commercial arrangements, regulations to be applied only where there are problems, and only to the extent necessary to address those problems and, where possible, consistency with industry wide competition policy. (Productivity Commission 2001, xxix)

The Report acknowledged that a significant number of commercial negotiations had been successful and a number of competitors and competitive services were on offer. However, such negotiations were, in many cases, protracted and difficult. Larger firms were able to use the ACCC's powers of arbitration to reach agreements with access providers (largely Telstra), but the smaller firms simply could not afford the legal costs. Most often, commercial settlements were reached where there were a number of access providers or competitor had the possibility of investment bypass of Telstra. (Productivity Commission 2001, 225ff).

The Report also questioned the value of undertakings as part of the Regime: up to the time of the Report, Telstra had submitted four undertakings – all of which had been rejected by the ACCC. Three of the undertakings had given Telstra too much discretion on when and to whom services would be provided, and the fourth undertaking set an access price that was 'unreasonable' based on ACCC calculations of the costs involved in providing the service. (Productivity Commission 2001, 231)

Another difficulty with the Regime was the significant delay in dispute resolution, due in part to the interaction of the ACCC's consideration of undertakings and access disputes. In practice, the Report noted that the settlement of an arbitration would be delayed until consideration of an undertaking is finalised. The outcome is illustrated in the example given: in November 1997, Telstra lodged a PSTN undertaking with the ACCC. A year later, AAPT notified the ACCC of an access dispute with Telstra over access to the PSTN. Almost a year later, the ACCC issued an 'interim' determination for the ACCC on access prices – revised in June 2000. The ACCC had, at that time, yet to accept a Telstra undertaking on the PSTN. (Productivity Commission 2001, 235). As the Report observed:

> Only five final determinations have been made. Of these, three were made over eighteen months after the disputes had been notified to the ACCC, another took eleven months, while the remaining dispute only took four months to finalise. The ACCC has terminated two disputes and 18 disputes have been withdrawn. The remaining 18 disputes have not been finalised – and have been active ranging from two months to over two years. Only five final determinations have been made. Of these, three were made over eighteen months after the disputes had been notified to the ACCC, another took eleven months, while the remaining dispute only took four months to finalise. The ACCC has terminated two disputes and 18 disputes have been withdrawn. The remaining 18 disputes have not been finalised – and have been active ranging from two months to over two years. (Productivity Commission 2001, 239)

The Report recognised that the process of bilateral negotiations and determinations could be improved if the ACCC could hold a class arbitration for bilateral disputes 'that have a sufficient degree of commonality'. (Productivity Commission 2001, p. 329 Recommendation 10.6)

A related submission was that the ACCC be empowered to set benchmark prices for declared services – a 'ceiling and floor rate'. This would allow access seekers to negotiated commercially within a set price range, based on their individual service needs. This would reduce existing uncertainty faced by access seekers on the access prices they are charged, and facilitate more successful commercial negotiations. The idea was accepted by the Commission in its recommendation that the ACCC be given the power to publish 'an indicative price range' that 'reflects the outcomes of an interim or final determination'. (Productivity Commission 2001, 338 Recommendation 10.11)

Perhaps the most vexed issues in the Access Regime revolve around access pricing. The Report devoted a whole chapter to Access Pricing (Productivity Commission 2001, Chapter 11), but did not suggest major change. While there were some issues with the methodologies used to determine whether an access price was 'reasonable' within the meaning of the TPA, its recommendations were mainly of process – the objectives to be used, the clarity of the principles and other issues. (Productivity Commission 2001, Chapter 11. For a complete list of Inquiry recommendations, see p xxxvii)

Since the Productivity Commission's discussion on access pricing, the ACCC has used its powers to suggest pricing principles and indicative pricing for 'core services'. As the ACCC explained:

> The ACCC is currently arbitrating a number of access disputes relating to the ULLS. Given the extensive consultation process being undertaken in those disputes, the ACCC considers that it is in a position to determine indicative prices for the ULLS. The ACCC also considers it beneficial to provide access providers and access seekers with the ACCC's approach to ULLS prices in order to assist the parties in commercial negotiations by narrowing the boundaries for those negotiations and by providing tools in alternative dispute resolution processes. (ACCC 2008b, 1)

In the end, however, not all of the Report's recommendations were accepted by Government. There were important amendments to the Access Regime made by the Telecommunications Competition Bill 2002, including a requirement that the ACCC determine non-binding model terms and conditions for 'core services', and addressing some of the contentious issues on non-price terms and conditions to the SAOs. (see Henderson and Rowland (2002) for a discussion of the Government's response to the Report and resulting amendments to Part XIC of the TPA). However, many of the issues identified by the report remained.

THE ACCC'S EMERGING MARKET STRUCTURES REPORT

In March 2002, the then Minister for Communications, Information Technology and the Arts, Senator Alston asked the ACCC to provide advice on '… the extent to which emerging market structures are likely to affect competition across the communications sector, including through the provision of bundled pay TV, telephony and broadband services'. (ACCC 2003a, xiv) While the ACCC's resulting report focussed primarily on competition issues raised by the FOXTEL, Telstra and Optus arrangements for pay television, the Report did make comments about competition in the wider telecommunications markets.There were increasing benefits from competition

in telecommunications, but they were flowing primarily from the retail level and not from infrastructure competition. As the ACCC observed:

> Importantly, Telstra owns two of the three major local access networks outside the CBDs of major cities. In addition to owning the copper (PSTN) network that connects virtually every household in Australia, Telstra owns the largest cable (HFC) network, which passes 2.5 million homes. The second largest carrier in Australia, Optus, owns the other HFC network. This network passes approximately 2.2 million homes. The extent of Telstra's dominance of the sector is demonstrated by the fact it receives almost 60 per cent of total industry revenue, which is almost four times the revenue that its closest rival, Optus, receives. It is reported to receive over 90 per cent of total industry profits. (ACCC 2003a, xv)

For the ACCC. the consequence was its recommendation that Telstra should divest itself of the HFC network. (ACCC 2003a, xvii) and Chapter 4) The ACCC also acknowledged what it saw as the limitations of the Access Regime in promoting competition. One of the main deficiencies in the Regime was that it does not 'change the underlying incentives of a firm not to provide fair, timely and non-discriminatory access to its upstream inputs when the firm also competes in downstream markets that rely on those inputs'. The consequence was that the Regime does not provide 'timely outcomes, may be open to gaming (from both access providers and access seekers) and may cause a high level of uncertainty'. (ACCC 2003a, 23)

THE ACCC'S REPORTS ON COMPETITION IN TELECOMMUNICATIONS

The ACCC must report annually to the Minister on competition safeguards, and changes in prices paid by consumers in telecommunications (ss 151CL and 151CM TPA) In 2000/2001, the ACCC combined the requirements into one report: *Telecommunications Competitive Safeguards*. The latest report, for 2005/6, includes significant discussion on the Access Regime. (ACCC 2007b).

The report noted the benefits on increased facilities competition, with a number of carriers offering high speed broadband using the declared services of the ULLS and LSS. As a consequence, the number of ULLS and LSS in operation grew by seven per cent in the nine months to December 2006.

As the ACCC observed, however:

> While there has been improvements in service quality and price competition resulting from these substantial and rapid increases in infrastructure investment, competition for the delivery of services to end users remains fragile. Access seekers remain reliant on Telstra's ULLS and LSS. They are therefore exposed to substantial risk from unforeseen changes to the price and non-price terms and conditions of access. This may inhibit their access to Telstra's network. (ACCC 2007b, 1-2)

It is arguable that the number of access disputes should not be used to indicate the successful operation (or otherwise) or the Access Regime. It could be argued that the use of the Regime,

with the possibility of ACCC determinations, demonstrates that the Regime is an important tool in competitors gaining access to an access provider's network/facilities. It could also be argued, however, that because there are no undertakings in force for the telecommunications network, and because the ACCC model terms, conditions and prices are not binding on access providers, the number of access disputes points to difficulties with the overall Regime. In any case, the Report noted:

> Twenty-eight new telecommunications access disputes were brought before the ACCC in 2006 for arbitration under Part XIC of the TPA. This is the highest number of disputes notified in a single year, compared to a low of zero disputes notifi ed in 2002 and 2003. By the end of 2006, 92 access disputes had been notified ed to the ACCC since the legislation was introduced in 1997. Telstra has been a participant in 74 of the disputes, mainly as an access provider, while Optus has been in 31. (ACCC 2007b, 55)

ACCESS TEN YEARS ON: INDUSTRY VIEWS

A) ACCESS PROVIDERS' VIEWS

Clearly, Telstra is not the only access provider. This is particularly true for mobile telecommunications, where there are three infrastructure providers (SingTel Optus and Vodafone as well as Telstra). There are two obvious consequences for access provider views on the Regime. The first is that other infrastructure providers are more equivocal about the Access Regime since it both supports their claims for access, but also supports other service provider claims for access to their infrastructure. The second is that they are also the subject of access disputes and ACCC determinations. Indeed of the ACCC's published access determinations, in only one case was Telstra the subject of the dispute. In four cases, the access provider in question was Optus and in three others, Vodafone was the subject access provider.

As the ACCC has stated, and is quoted earlier in this paper, in the Telstra is still the provider of over 98 per cent of the fixed line access to customer premises (the CAN). And it is Telstra's continued ownership of almost all of the CAN that gives rise to the access disputes over the 'core services'. Therefore, while other access providers, particularly those with significant infrastructure, share some of Telstra's views on the Access Regime, Telstra's views are most uniformly critical of the Regime from an access provider viewpoint.

Telstra's submission to the Productivity Commission summarises its criticisms of the Access Regime. In Telstra's view, there was 'intense competition' in the telecommunications markets, and the regulatory regime, including the Access Regime, had as its aim, the 'promotion of Telstra's competitors rather than the promotion of competition. (Telstra 2000, 5) The Regime's arrangements were 'highly intrusive' with a significant cost impost (Telstra 2000 – see particularly Chapter 1 for Telstra's arguments why the access process for Telstra declared services were below Telstra's costs). The outcome of what Telstra called 'regulated access on uneconomic terms' has lessened its incentives to investment outside of the CBD and its 'continued investment in the core network'. (Telstra 2000, 28) And Telstra cited the number and length of ACCC arbitrations to underscore its view that the Regime was 'a regulatory mechanism that was simply not working. (Telstra 2000, 2)

Telstra also argued that some of its declared services were competitively provided and there was, therefore, no need for service declaration. Further, the ACCC had declared services where substitutable services had already been declared – the example was that both local carriage service, and PSTN O/A had been declared. In Telstra's view, the Access Regime was regulatory 'overreach' and, while it was appropriate to have an access regime in telecommunications, the industry wide access regime under Part IIIA was more appropriate. (Telstra 2000, chapter 4)

Telstra's views have not changed in its subsequent submissions to ACCC inquiries. For example, it its submission to the ACCC's Review of the Regulation of Fixed Services, Telstra called the ACCC's policy of encouraging 'stepping stone'[3] regulation under Part XIC a 'failed policy and said the ACCC should only be regulating the 'bottleneck' hotspots – and in those hotspots, only regulating the bottleneck service. (Telstra 2006, 6)

B) ACCESS SEEKERS' VIEWS

Not surprisingly, Telstra's criticisms of the Access Regime were (and are) not those of its competitors. While the views of individual access seekers vary as between providers, and between the issues being considered, there are some common themes amongst them, particularly as set out by the Competitive Carriers' Coalition (CCC).

In their submission to a review of Parts XIB and XIC, the CCC's conclusion was that the philosophy underpinning the regulation – the negotiate/ arbitrate – is 'fundamentally flawed'.

> The model assumes that there are incentives on both sides to reach commercial agreement, and that there is some bargaining power on both sides of the negotiation. In reality, Telstra is an unwilling seller of wholesale services, and its market power is such that it feels no compulsion to enter into commercial agreements unless it is forced to do so. (Competitive Carriers' Coalition 2005a, 2)

The CCC rejected arguments made that the number of undertakings submitted and recent changes in legislation meant no further change to the Access Regime was necessary. Instead, the CCC argued that there had been 'systematic gaming' of the undertakings regime, and that the 'rash of arbitrations' only demonstrated that genuine negotiations between access seekers and providers remains 'as elusive as ever. (Competitive Carriers' Coalition 2005a, 2-3). All that the 2002 amendments had achieved was a 'shift in tactics' from a 'gaming of the arbitration process' to a 'gaming of the undertakings process'. (Competitive Carriers' Coalition 2005b, 3)

There are other views.

AAPT's submission to the Productivity Commission contained criticisms of competition in telecommunications under Parts XIB and XIC, but was perhaps less pessimistic, particularly about the efficacy of the Access Regime. Competition had developed in telecommunications markets, but not uniformly, and competition 'is yet to broaden and deepen'; Part XIB had been important 'both as a means of addressing anti-competitive conduct and as a deterrent against such conduct'; the Access Regime encouraged investment because 'access-based competition leads to infrastructure-based competition' and, although there are weaknesses in the Regime (notably delay and information asymmetry), the 'effectiveness and administrative costs' of the regime are 'low as a proportion of industry revenue, less than costs under alternative regimes and more

fairly distributed'; and finally, looking forward, competition protections should be made stronger not weaker. (AAPT November 2000 p. 2 – summary of original submission)

In other submissions to the Productivity Commission, Hutchison said that it 'uses commercial negotiation or other private arrangements to resolve access matters', but that 'delays have been considerable'. (Productivity Commission 2001, 224, quoting submission by Hutchison on pp 6-7). The Service Provider Industry Association also stated that commercial negotiation on access as 'desirable' but that, in many instances, proved to be 'difficult, protracted, even impossible' (Productivity Commission 2001, 224, quoting from the Service Provider Industry Association submission, p. 1).

POSSIBLE REFORMS

As discussed above, the Access Regime has been amended since 1997 as a consequence of both the recommendations by the Productivity Commission and Government views on how to make the regime more effective.

Some Access Seekers, however, believe that further reform of the Access Regime is necessary. Again, while the number of access disputes may not be indicative of the failure of the Regime, they do indicate that commercial negotiations alone do not result in agreement on access. As at 7 April 2008, there were 22 access disputes registered with the ACCC, covering seven declared services. All of them involved Telstra, with a range of access seekers also involved. The other fact worth noting that, also as at April 2008, only one undertaking had been accepted by the ACCC, as mentioned above in the terms and conditions of service provision as follows: 'It should be noted that, of the many undertakings submitted to the ACCC, the only undertaking that has been accepted and is in force is FOXTEL's undertaking for its digital set top box.' and that relates to the FOXTEL digital equipment; there are no undertakings accepted by the ACCC that relate to declared services – particularly the 'core services'.

The reforms that have been proposed have been directed towards strengthening ACCC powers, and what AAPT has called 'incentive regulation' – providing a framework in which, when commercial negotiations are not successful, the dispute can quickly be resolved.

The most contentious issue for access seekers has been price. As discussed above, the ACCC has exercised its powers to not only set pricing principles, but indicative pricing for core services. Indeed, in its submission to the Productivity Commission, one of the proposals AAPT made for reform was the introduction of 'reference prices' at least for 'core services' (AAPT 2000, 20)

In the CCC's view, however, the introduction of indicative prices has not worked as intended, and 'a more formal price setting regime' should be introduced. (Competitive Carriers' Coalition 2005a, 8). In that scenario, prices for core services would be predetermined by the ACCC after an appropriate inquiry process.

Another area for reform concerns undertakings. One suggestion is that they must be provided by access providers within set timeframes, generally after a public inquiry process. (AAPT 2000, 16) In addition to the requirement for mandatory undertakings, a further proposal would be to give the ACCC power to amend the undertakings if found unacceptable (Competitive Carriers' Coalition 2005a, 17)

> If not completely removed from the regime, undertakings must be varied so they deliver against their original intention. The CCC understands that the

> ACCC has such an ability to require and amend undertakings in the gas and electricity industries. (Competitive Carriers' Coalition 2005a, 8)

A more radical proposal is that, if the ACCC is given power to predetermine access prices for core services, undertakings be abolished. (Competitive Carriers' Coalition 2005a, 8)

There have also been proposals for further procedural reform. These include giving the ACCC power to deal with arbitrations concurrently, if the issues under consideration are similar. Another is to create an information presumptions by the ACCC on factual matters. That is, the ACCC should be able to presume facts at issue based on facta available to it at the time. The proposal is to counter the information asymmetry between information known to access providers versus information available to the ACCC and access seekers. The hope is that the ability of the ACCC to presume information based on known facts would provide an incentive for access providers to provide information they hold but have not made public. (AAPT 2000, 20)

Increasingly, however, it is being suggested that a better response is some form of operational or structural separation of Telstra such that the wholesale and infrastructure areas are separated from its retail activities. This, it is argued, will counter the incentives in the vertically integrated Telstra to favour itself over other access seekers in providing access to its infrastructure. (Competitive Carriers' Coalition 2005b)

> The Operational Separation requirements have been significantly enlarged by Ministerial Determination (Determination 2005). The Plan requires Telstra to maintain wholesale, retail and network business units. The Determination goes further. Under the Determination, the wholesale, retail and network business units must operate in a manner that is 'substantially separate' from the other types of business units, and employees in one type of business unit must undertake work 'principally' for that type of business unit. (Determination 2005, Clauses 5 & 6). Further, the person(s) with direct responsibility for management of the wholesale business unit(s) must be equivalent to the person(s) with direct responsibility for the retail business unit(s), and the premises for retail and wholesale business units must be different, with appropriate security arrangements against access by non-business unit employees (although the requirement does not require the premises to be in separate buildings. (Determination 2005, Clause 7)
>
> In addition, Telstra is required to develop strategies for service quality, information equivalence, information security and customer responsiveness, with specific requirements for each strategy set out. Telstra must then provide both the Minister and the ACCC with a copy of each strategy and have it available on its Internet site.
>
> Perhaps the most significant requirements relate to ensuring the equivalence of services (Determination 2005, Part14). Under these requirements, Telstra must develop, in consultation with the ACCC and the Department, a Price Equivalence Framework by 30 June 2006.

The irony is that the Hilmer Report, with its blueprint for competition reform, predicted the difficulties now being experienced over a decade later. As that Report forewarned:

> where there is a vertical relationship between the two activities [wholesale and retail], particularly when access to the natural monopoly element is essential for effective competition in the downstream or upstream market… In this case, integration of the natural monopoly element… and a potentially competitive activity… raises concerns that control over access to the monopoly element may be misused to stifle or prevent competition in the potentially competitive sector. (Hilmer 1993, 219)

GLOSSARY

ADSL ***Asymmetric Digital Subscriber Line:*** A compression technology that supports high-speed digital services over conventional copper telephone lines. It has significantly greater capacity in one direction than the other.

CAN ***Customer access network*** (also referred to as the local loop): The portion of the PSTN which comprises the transmission system connecting customers to the local switch.

CCC ***Competitive Carriers' Coalition:*** Members are Hutchison Telecoms, Macquarie Telecom, Verizon Business Strategy, PowerTel, Primus, TransACT, and iiNet, Agile Communications.

CORE Services: The domestic originating and terminating PSTN (PSTN O/T) access, the unbundled local loop service (ULLS) and the local carriage service (LCS).

DSLAM ***Digital subscriber line access multiplexers:*** DSLAMs are installed in a local exchange, allowing a competitor access to part or all of the fixed line service between the local exchange and the customer's premises.

LCS ***Local carriage service:*** This is where the access provide provides the wholesale or network elements of local calls, and the access seeker provides the retail elements such as billing.

LSS ***Line sharing Service:*** the non-voiceband frequency spectrum of unconditioned communications wire.

PSTN ***Public switched telephone network:*** The switched telephone telecommunications network to which public customers can be connected.

SAOs ***Standard access obligations:*** under the Access Regime

ULL ***Unconditioned local loop:*** The copper wire between the end user's network boundary and a local or remote switch

ULLS: ***Unconditioned local loop service***

XDSL: A generic term for digital subscriber line technologies (see ADSL), which enable broadband services over copper wires.

ACKNOWLEDGEMENTS

This paper is an outcome of the Macquarie University Research Innovation Fund (MURIF) 2007–08.

The MURIF team would like to acknowledge the efforts of Ms Holly Raiche, Executive director Internet society of Australia for the vast contribution of her experience and knowledge to this research.

ENDNOTES

1 The 'core services' are the: domestic originating and terminating PSTN (PSTN O/T) access, the unbundled local loop service (ULLS) and the local carriage service (LCS).

2 The Australian Communications Access Forum was established in 1997 and was declared to be the Telecommunications Access Forum (TAF) as provided for under Division Four of Part XIC of the TPA. Its function was to recommend services to the ACCC for declaration. While the TAF did develop a model telecommunications access code, which was accepted by the ACCC (but later lapsed) it was never able to agree on recommending services to the ACCC, and was abolished in 2002.

3 The ACCC's 'stepping stone' approach is that telecommunications competition can happen in three stages, beginning with service-based (resale) competition, based on access to wholesale services, moving to quasi facilities based competition where firms provide a range of services using a combination of their own infrastructure and access to wholesale/network services provided through another party's network, then to full facilities-based competition, consisting of competing forms of standalone infrastructure that can directly serve customers and provide a range of end-to-end telecommunications services that are substitutable (ACCC 2006: 11).

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Cite this article as: Chavan, Meena; Raiche, Holly. 2008. 'The Australian Telecommunications Access Regime – ten years on'. *Telecommunications Journal of Australia* 58 (2-3): pp. 20.1 to 20.16. DOI: 10.2104/tja08020.