Axes of access: The new access arrangements for telecommunications

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Shooting up on access — highs and lows

The recently released initial exposure drafts of the Telecommunications Bill 1996 (TB) and the Trade Practices Amendment (Telecommunications) Bill 1996 (TPA Bill) largely give effect to the Government's Telecommunications Policy Principles — Post 1997 (TPPs), released in August. "This policy," in the Minister's view, "sets the framework for a new era of telecommunications reform which will take Australia beyond the current limited competition to a fully fledged and open regime."[1] Four key areas of reform are addressed: carrier licensing; industry codes of practice; control of anti-competitive conduct; and access. This article considers the proposed reforms in respect of access. Because the terms of access are of crucial importance to competition between carriers and service providers, the successful regulation of access is vital to the pro-competitive aspirations of telecommunications regulation. It is therefore worth further exploring the concerns about the access provisions voiced in the leading article in this issue.[2]

The new access regime is to be inserted as Part XIC of the Trade Practices Act 1974 (Cth.) (TPA) by the TPA Bill. Proposed Part XIC is an access regime specific to telecommunications. As such, it represents a departure from the policy of economy-wide competition regulation advocated by the Hilmer Committee.[3] The Government has apparently been influenced to some extent by industry submissions on the need for industry-specific regulation in respect of telecommunications. It has compromised by aligning the telecommunications access regime closely with the generally-applicable access regime under new Part IIIA of the TPA.

Into the vortex — access under Part XIC

The Part XIC regime would provide for several levels of access regulation. A Telecommunications Access Forum (TAF) of carriers and carrier groups will be charged with responsibility for drafting a "telecommunications access code".[4] If the ACCC did not receive a satisfactory access code it could make a "telecommunications access standard".[5] Licensed carriers and carrier groups would be required to give the ACCC "access undertakings",[6] which would provide "details of the non-price terms and conditions of access" and which could include "other ancillary and price-related matters."[7] Access undertakings must be consistent with an approved telecommunications access code or standard in order to be accepted by the ACCC.[8] Contracts in respect of access to carriage services, networks or components that are covered by an access undertaking could be registered with the ACCC.[9] Disputes concerning access to such carriage services, networks or components could be the subject of arbitration by the ACCC.[10] The proposed reforms would also ban anyone from engaging in conduct for the purpose of preventing or hindering access by a service provider to a carriage service, network or component where access is in accordance with an access undertaking, a determination or a registered contract.[11]

The proposed telecommunications access regime differs from the general TPA Part IIIA regime in several significant ways. First, the Part IIIA service declaration process is omitted. The access code or standard will determine what network components are to be subject to access requirements. Second, it would be compulsory for carriers to file access undertakings, which are voluntary under Part IIIA. This change in the character of undertakings may be reflected in their terms and the process of their development. That access undertakings must be consistent with the approved telecommunications access code or standard might induce carriers and service providers to place considerable emphasis on the code development process, in light of the vague criteria governing the ACCC's decision whether to approve a draft code. Third, private negotiated access agreements will have a different role under the proposed regime. Under Part IIIA, parties are free to negotiate between themselves for access to services and (voluntary) undertakings or declaration may be relied on if negotiation fails. Services subject to private access agreement might still be declared but only if increased access would promote competition in at least one other market.[12] Under Part XIC by contrast, the (compulsory) access undertakings will typically be the starting point for parties seeking access. Private negotiation of access is likely to operate in a supplementary role. For example, a service provider might possibly agree to pay a higher rate than is required by the undertaking to obtain interconnection at a higher level or better quality than that required by the undertaking. Similarly, a newly-developed service that is not covered by an existing undertaking might become the subject of a private access agreement.

Into the blender — the new carrier/service provider cocktail

The Bills do not draw any distinction between "carriers" and "service providers" as to rights of access to "network components" of carriers, the terms of such access or the criteria to be taken into account in determining whether and on what terms access is to be granted.

Although there is a significant difference as between carriers and service providers in relation to the obligation to provide third parties with access, there is no corresponding advantage or preference conferred on carriers in relation to their right to access a third party's network. Indeed, relevant provisions of the TPA Bill refer generically to "service providers" seeking access, adopting the definition of "service provider" in TB s 114 as "a person who supplies or proposes to supply, a carriage service", or "a person who uses or proposes to use a carriage service to supply a content service". As this definition does not exclude a carrier (in terms of TB cl 202), a carrier is treated just like any other service provider seeking access. The Government has taken the view that the present legislative distinction between service providers and carriers may inhibit the development of competition by constraining service providers in the infrastructure they may install and the features and pricing of services they can acquire from carriers.[13]

However, application of the "public interest" criteria under TPA Bill cl 206 might lead to more extensive access rights being granted to carriers and might permit carriers to obtain more favourable interconnection pricing than other service providers.[14] It is in the public interest to encourage investment in telecommunications infrastructure. Differential pricing in favour of carriers, which make greater infrastructure investment, would preserve carriers' investment incentives. Differential pricing may also be required by market efficiency: under competition, higher-volume users will generally be offered lower prices.

These issues are the commercial life-blood of carriers and service providers but the new access regimes introduce uncertainty rather than clarity.

The genie of access

The term "access" is not defined in detail in either Bill, although comment on this point is solicited by the Department of Communications and the Arts.[15] The Commentary on the TB points out, "...the concept of a component covers a diverse range of things..." and "access" may acquire different meanings in relation to different kinds of access to those different things.[16]

It would seem necessary, at least to clarify that access is intended to cover not only matters or things in existence at the time that access is sought, or first provided, but also other matters or things which may be brought into existence by the access provider. This approach would make it clear that the access arrangements apply to database reports and other facilities or services that might need to be developed by the access provider.

The proposed access rights are far-reaching in relation to facilities but major limitations apply in respect of services:

- The proposed access rights would effectively allow for network or service unbundling to a low level. For example, "component" includes "any part of the infrastructure of a telecommunications network".[17] It is not clear how this will be weighed with infrastructure incentives, assuming those remain a relevant consideration.
- Access could be sought in relation to any aspect of a carrier's higher level services or service functionality that could be brought within cl 111.
- "Content services" would not be subject to unbundling and access obligations.
- The Commentary notes that a provision yet to be drafted will "continue the condition in the broadband cable direction relating to the general exemption for 'pay television' services from the full force of the post-1997 access policy until 30 June 1999, if warranted following review in 1997... ."[18]

Any-to-any connectivity — a minimalist notion

Clause 116 of the TB would introduce the statutory objective of "any-to-any connectivity", an objective to which the ACCC must have regard, under proposed Part XIC, when considering whether to approve a draft telecommunications access code or to accept an access undertaking.[19] "Any-to-any connectivity" would be achieved "...if, and only if, ... for each eligible carriage service that is supplied to an end user ... [t]he outcome is that the end-user who is supplied with a particular eligible carriage service is able to communicate, by means of the service, with each other end-user who is supplied with the same service, whether or not the end-users are connected to the same telecommunications network."[20]

Any-to-any connectivity is a minimalist interconnection requirement and is much less favourable than the "equal access" interconnection standards imposed under the current regime. Clause 3 of the Telecommunications (General Telecommunications) Licences Declaration (No 1) of 1991 provides for technical and operational equivalence or comparably efficient interconnection between carriers and does so as a licence condition.

The new age of discretions, ACCC style

There is a fuzzy look about the broad discretions given to the ACCC under the proposed legislation. How they will work out in practice is difficult to predict, but there is no doubt that the ACCC will be a powerful player in the regulatory process and the right to review its decisions will often be more theoretical than real.

The ACCC would not be guided by specific criteria in determining whether to accept a code or undertaking. The matters to which the ACCC must have regard are only general.[21] The ACCC would have the power to have regard to other factors.[22] Similarly, the ACCC is not specifically directed to determine an access dispute in accordance with the terms of the relevant access undertaking. It would appear that the ACCC might make a determination which goes outside the terms of an access code or standard or undertaking. The ACCC's power as arbitrator is to make a decision which is just and fair as between the parties, subject only to the ACCC taking account of the criteria listed in TPA Bill cl 260 and such additional matters as it thinks are relevant. Clearly the terms of any code, standard or undertaking would be a relevant matter to be taken into consideration but those terms would not of themselves limit the scope of the arbitrator's power to achieve a fair outcome.

Review rights for decisions under either Bill have yet to be drafted. Unless the TPA Bill made specific provision to the contrary, an interested party could challenge by judicial review[23] (but not appeal on the merits) a decision by the ACCC to approve or not to approve an access code, to make or not to make a telecommunications access standard, or to register or not to register an access undertaking. Merits review of those decisions would not be available unless specifically legislated. It is intended, however, that the ACCC's decision whether or not to issue a competition direction will be subject to review on the merits by the Australian Competition Tribunal and subject to judicial review.[24] The availability of review on the merits would tend to favour the dominant industry participants, which might exploit that avenue to impose delay and expense on smaller rivals. As to rights of appeal by a party to an access determination, TPA Bill cl 279 allows for appeal to a single judge of the Federal Court. It is not clear whether this is intended to be a quasi-judicial review or potentially to allow a full rehearing on the merits.

Big bang or damp squib?

The "big bang" telecommunications reforms proposed by the Government to date provide only a general and incomplete framework in the key area of access and interconnection. Unlike the current Act, the draft legislation does not set down rules that are as clear about the nature of access but rather focuses on establishing the procedures for resolving access issues. The key practical problems, including pricing and other conditions for carriers and service providers, remain unresolved. The real fireworks will come when the affected parties start drilling for oil on whatever they see as their legitimate territory.

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1 "Exposure Drafts Released for Public Comment" Media Release by Minister Michael Lee, 20 December 1995.
2 Waters, P. "Kiss Goodbye to the Duopoly" *** (1996) 28 Computers & Law Journal 1
3 *Report by the Independent Committee of Inquiry on National Competition Policy* Canberra: AGPS, 1993 pp 13-15, 248-249
4 Exposure draft of *Trade Practices Amendment (Telecommunications) Bill* cl 210.
5 Exposure draft of *Trade Practices Amendment (Telecommunications) Bill* 1996 cl 223.
6 *Trade Practices Amendment (Telecommunications) Bill* 1996 cll 234, 235.
7 Commentary on Exposure draft of *Trade Practices Amendment (Telecommunications) Bill* 1996.
8 *Trade Practices Amendment (Telecommunications) Bill* subcl 240(2).
9 *Trade Practices Amendment (Telecommunications) Bill* cl 291.
10 *Trade Practices Amendment (Telecommunications) Bill* cll 254, 258, 292
11 *Trade Practices Amendment (Telecommunications) Bill* cl 293.
12 *Trade Practices Act* ss 44G(2)(a), 44H(4)(a).
13 See, AUSTEL *Service Provider Industry Study: Final Report* (March 1995).
14 *Trade Practices Amendment (Telecommunications) Bill* paras 206(1)(d), (e), (i).
15 Commentary on the *Telecommunications Bill* and the *Trade Practices Amendment (Telecommunications) Bill* pp 9, 33.
16 Commentary on the *Telecommunications Bill* and the *Trade Practices Amendment (Telecommunications) Bill* pp 9-10.
17 *Trade Practices Amendment (Telecommunications) Bill* cl 202; *Telecommunications Bill* cl 111.
18 Commentary on the *Telecommunications Bill* and the *Trade Practices Amendment (Telecommunications) Bill* pp p 27.
19 *Trade Practices Amendment (Telecommunications) Bill* para 213(1)(c), subcl 240(2).
20 *Telecommunications Bill* cl 116.
21 *Trade Practices Amendment (Telecommunications) Bill* cll 213, 240.
22 *Trade Practices Amendment (Telecommunications) Bill* paras 213(2)(g), 240(3)(g).
23 Under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth.).
24 Commentary on the *Telecommunications Bill* and the *Trade Practices Amendment (Telecommunications) Bill* p 29.