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No. 63 2002-03

Telecommunication Competition Bill 2002

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Economics, Commerce and Industrial Relations and the Law and
Bills Digest Groups
12 November 2002

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Glossary¹

ACT	Australian Competition Tribunal
ACCC	Australian Competition and Consumer Commission
Carrier	The holder of a telecommunications carrier licence under the <i>Telecommunications Act 1997</i> .
Carriage service provider (CSP)	A party which uses its own or someone else's network facilities to provide basic or value-added telecommunications services.
ISDN	Integrated Services Digital Network: A form of telecommunications network capable of carrying both voice (telephone) and data traffic, including over copper wires.
Local carriage service	A service where the access provider provides the wholesale or network elements of local calls, and the access seeker provides the retail elements such as billing.
PSTN	Public switched telephone network: The switched telephone telecommunications network to which public customers can be connected. The infrastructure for basic telecommunications services (including telephones, switches, local and trunk lines, and exchanges). It enables any customer to call and communicate with any other customer.
ULL	Unconditioned local loop: The copper wire between the end user's network boundary and a local or remote switch.

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Telecommunication Competition Bill 2002

Date Introduced: 26 September 2002

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: Royal Assent

Purpose

To make amendments to Parts XIB and XIC of the *Trade Practices Act 1974* (TPA), the *Telecommunications Act 1997* and the *Telecommunications (Carrier Licence Charges) Act 1997* to increase the level of competition and investment in the telecommunications market. The amendments introduce measures to:

- facilitate access to ‘core’ telecommunications services
- facilitate investment in new telecommunications infrastructure
- provide more transparency of Telstra’s wholesale and retail operations, and
- improve the operation of the anti-competitive conduct provisions in Part XIB.

Background

Part XIB (which deals with anti-competitive conduct) and Part XIC (which deals with access to telecommunications services) of the TPA set out the telecommunications competition and access regime. The aim of the regime is to promote competition in markets for telecommunications services, to promote economically efficient use of and investment in the infrastructure used to supply these services, and to achieve any-to-any connectivity.²

Part XIB of the TPA provides telecommunications specific legislation that supplements the general anti-competitive conduct provisions contained in Part IV of the TPA by enabling the Australian Competition and Consumer Commission (ACCC) to, amongst other things, issue competition notices³ to carriers and carriage service providers for engaging in conduct with the purpose or effect of substantially lessening competition in the telecommunications market. The issuing of a competition notice is designed to stop

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the anti-competitive behaviour and provides means for substantial penalties and damages. Part XIB also enables the ACCC to impose tariff filing and record keeping requirements on carriers and carriage service providers.

Part XIC of the TPA contains provisions for access to telecommunications services. It gives the ACCC power to 'declare' services⁴ for the purposes of the telecommunications specific access regime. Carriers and carriage service providers are required to provide interconnection with, and access to, declared services. Access can be provided through commercial agreement between the parties as to the terms and conditions of access or by offering an access undertaking⁵ (which must first be accepted by the ACCC). If such commercial negotiations fail, terms and conditions of access are determined by the ACCC through arbitration.

Streamlining the telecommunications access process – response to the Productivity Commission's (PC) draft report on Telecommunications Competition Regulation

Many complaints about the level of competition and access to telecommunications services have been concerned with the timeliness of access to telecommunications infrastructure. The PC's draft report on Telecommunications Competition Regulation found that access to telecommunications services was slow and inefficient. It considered that 'gaming' tactics were being used to delay negotiations for commercial access to the telecommunications network.⁶

In August 2001 the Parliament passed the *Trade Practices Amendment (Telecommunications) Act 2001* which introduced measures (in response to the PC's draft report) to streamline the telecommunications access process. The Act amended Part XIC of the TPA to reduce delays in the arbitration process and to encourage parties to settle access arrangements and conditions by negotiation rather than arbitration. The Act introduced measures to, inter alia:

- enable the ACCC to publish pricing principles which would be used to guide the determination of access prices to declared services
- enable the ACCC to backdate final determinations to the date the parties began negotiations
- allow for multilateral arbitrations
- restrict evidence used by the Australian Competition Tribunal (ACT) to that used by, or given to, the ACCC in making a final determination, and
- remove the power of the Federal Court to stay the operation of the ACT decision pending judicial review or appeal.⁷

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Productivity Commission's Final Report on Telecommunications Competition Regulation

The PC released its final report on Telecommunications Competition Regulation on 23 December 2001. The PC noted the importance of an efficient and innovative telecommunications sector. It recommended the retention of a telecommunications-specific regulatory regime as set out in the TPA. However, it noted the current arrangements under Parts XIB and XIC have deficiencies and made some 58 recommendations.⁸

The PC found that whilst the anti-competitive provisions of Part XIB have been used cautiously Part XIB lacked procedural fairness and transparency. The PC supported retention of Part XIB pending the development of more sustainable competition in telecommunications and that the tariff filing and record keeping rules of Part XIB be continued.

The PC also found that processes for determining access to telecommunications services contained in Part XIC are slow and inefficient and that while there have been many commercially negotiated arrangements, it has been the ACCC which has been obliged to determine access prices for core services through the arbitration process. The PC considered that the determination of access prices is a crucial component of an effective access regime and that:⁹

- access arrangements should only apply to those core telecommunications services where the case for intervention is strong
- the objects clause in section 152AB of Part XIC should be changed from the long term interests of end users to the 'economically efficient use of, and investment in, telecommunications services',¹⁰
- regulations should encourage commercial arrangements
- pre-selection and declaration only be applied to firms with significant market power and policy instruments should be geared to the severity of the problems
- policy interconnections should be recognised and that, as far as possible, access regulations should be consistent across industries, and
- merits review of access arbitrations should be retained.¹¹

Position of interest groups

The reaction to the Productivity Commission's report was minimal given it was released on 23 December 2001, just prior to the Christmas break. ACCC chairman Allan Fels reiterated his view on Telstra's incumbency, affirming "...there is no doubt in my mind that Telstra's incumbency and strong degree of vertical integration gives it an unparalleled advantage in the Australian market".¹² Fels called for increased powers for the ACCC to reform the appeal mechanism process and enable the ACCC to enforce 'compulsory'

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undertakings. He also stated that the streamlining amendments introduced in 2001 were only considered “a short-term step” and that further reform was needed.¹³

Telstra considered the access pricing recommendations of the PC reflected Telstra’s own concern that its genuine efficient costs were not being recognised by the ACCC in setting access prices.¹⁴ Telstra also argued that the telecommunications sector was already highly regulated and that ‘...you can’t have more regulation as well as more competition and investment’.¹⁵ The Government indicated it would consult widely on the report. It held two industry forums in March 2002 to discuss issues raised in the PC’s report.

The Government's response to the PC report

On 24 April 2002 the Government announced a range of measures (in response to the PC report) to enhance the operation of the telecommunications specific regime. In summary, the package included measures to:

- provide greater certainty and more timely access for access seekers through the provision of model terms and conditions of access to ‘core’ telecommunications services such as the fixed phone network, local call resale and the unconditioned local loop service
- facilitate timely access to basic telecommunications services by removing the right of merits review by the ACT in access arbitrations
- facilitate investment in new telecommunications infrastructure by extending the existing provisions under XIC in relation to exemptions and undertakings to include services that are not yet declared or supplied
- encourage a more transparent regulatory framework by requiring ‘accounting separation’ of Telstra’s wholesale and retail operations, and
- a number of other changes including providing additional information to the market, the abolition of the Telecommunications Access Forum, repealing the requirement for Industry Development Plans and other minor amendments.¹⁶

Why model terms and conditions?

A key tenet of the telecommunications access regime is that it encourages and promotes commercial negotiation for access to telecommunications services. Smaller carriers and service providers have been critical of Telstra using its dominant market position to leverage negotiations regarding access prices in its favour, delay the outcome of such negotiations and impose unfair non-price terms and condition of access (particularly to core services). It is argued that model terms and conditions will provide greater certainty to access providers and access seekers as to the likely outcome of access arbitrations and will promote more timely (and commercially negotiated) outcomes.

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What is merits review?

Section 152DO of the TPA allows a party to a final determination made by the ACCC, in relation to an access dispute, to apply for a review of that final determination by the ACT. Such a review is a re-arbitration of the access dispute. A key concern in the telecommunications industry has been the length of time it has taken for the ACT to consider appeals under this section.

Merits review is a safeguard against regulatory error. While judicial review¹⁷ can address the legality of a regulator's decision, it cannot address whether decision was appropriate on the facts. The Administrative Review Council (ARC) has defined merits review as the process by which a person or body:

- other than the primary decision-maker
- reconsiders the facts, law and policy aspects of the original decision, and
- determines what is the correct and preferable decision.

The ARC has issued guidelines advising the Attorney-General on the classes of administrative decisions that should and should not be subject to merits review. The ACCC has argued that its arbitration role under the telecommunications access regime falls within one class of the nominated exceptions namely that its:

- decisions involve the evaluation of complex and competing facts and policies (going beyond mere fact finding), following consultation with expert bodies or market participants.

Professor Fels has stated that it was quite unusual for regulatory pricing decisions in other domestic and international jurisdictions to be open to complete re-hearings.¹⁸ It should be noted however that ACCC arbitrations in relation to access to nationally significant infrastructure under Part IIIA of the TPA are subject to merits review by the ACT.¹⁹ The Government has not indicated any intention to restrict the availability of merits review under that regime.

What is accounting separation?

Accounting separation requires Telstra to produce accounts that distinguish its wholesale and retail operations. It is a regulatory measure designed to expose any cross-subsidisation of its retail operation from its wholesale operations or any anti-competitive pricing (ie. charging itself less than that which it charges its wholesale customers for comparable services). The proposed framework will also enable comparison of the non-price terms and conditions of access. The accounting separation requirements will be implemented by amendments to the record keeping rule powers in Part XIB to enable the Minister to direct the ACCC to introduce accounting separation of Telstra's wholesale and retail operations.

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Why is investment in new telecommunications infrastructure a problem?

Under the current access provisions of Part XIC a potential investor in a telecommunications service is unable to gain an exemption from the obligation to provide access to a 'declared' service or to lodge an access undertaking until they actually commence supplying such a service. This is a disincentive to potential investors as it creates uncertainty as to whether or not their service will be declared and on what conditions they will have to provide access. Such uncertainty may deter investors (especially where the investment is considered risky).²⁰

Is the government's response consistent with the PC recommendations?

The Government's response accepts a number of the PC's recommendations but rejects others. In particular, the Government's response:

- rejects the PC's recommendation that the objects clause in Part XIC be changed from the long term interests of end users to the 'economically efficient use of, and investment in, telecommunications services'²¹
- does not adopt the PC's recommendation for stringent new declaration criteria. However, the response does put more onus on the ACCC to justify its declaration decisions in a more timely manner and introduces sunset provisions for declared services and
- does not accept the PC's recommendation that merits review of final determinations be retained. The Government's response removes the right of review by the ACT but maintains the right of judicial review (eg. appeal on matters of law to the Federal Court).

Reaction to the governments proposals

Reaction to the Government's response to the PC report was mixed. Most commentary reported that Telstra had suffered a severe blow to its monopoly position through removal of its appeal rights against final pricing decisions and the requirement for accounting separation of its retail and wholesale business.²² The Government's response was also seen as being advantageous for Telstra's competitors. The Opposition welcomed moves to make Telstra more transparent but indicated that more detail was required on the plans.²³ Optus welcomed the changes saying it would stop Telstra using the review process to block access by its competitors.²⁴ In general, the proposals were considered to weaken Telstra's negotiating power and enhance the powers of the ACCC.²⁵

Telstra was highly critical of the Government's proposal, believing it was being denied due process, commercial fairness and an impartial regulatory regime.²⁶ Telstra noted that it had no outstanding disputes concerning access to its network (two long-running disputes over access to the core public switched telephone network (PSTN) were settled just prior

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to the release of the government's response). The Telstra share price also suffered a severe fall following the announcement.²⁷

Others were critical that the proposed reforms would not be sufficient to ensure the long term certainty of smaller telecommunications players such as PowerTel, Primus and Macquarie Corporate²⁸ while Senator Alston played down the issue of accounting separation saying that the Government was not implementing actual physical separation but rather an accounting separation to make pricing more transparent.²⁹

Telecommunications consultant, Henry Ergas, noted that dropping appeal rights increased the risk of regulatory error and that the importance of national telecommunications infrastructure merely heightened the importance of appeal rights.³⁰

Since announcing its response, the Government has been in consultation with Telstra, the ACCC and other carriers on how accounting separation will be implemented. Telstra's position has been that any increase in power for the ACCC would be detrimental to competition in telecommunications and that removal of merits review would result in the ACCC acting as both regulator and enforcer, with no right of review of its decisions. Telstra has also proposed that accounting separation is unnecessary as its wholesale division had struck numerous commercial deals with other retailers and that an 'imputation test'³¹ would be sufficient to determine whether there was scope for competition.

On 25 September 2002 the Bill was referred to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry. The Committee is due to report on 14 November 2002.

Main Provisions

Promoting Commercial Agreements: Model Terms For Access to Core Services

Item 2 of Schedule 2 inserts **new section 152AQB** which requires the ACCC to make a determination setting out the model terms and conditions relating to access to each 'core service'. As noted in the foregoing discussion the intent of this new determination is to assist the conclusion of commercial agreements on terms and conditions for access, or encourage carriers to submit access undertakings. Ultimately it is hoped that this might provide access seekers with more timely access to 'core' network services than arbitration by the ACCC.

Core services are defined to include PSTN, the unconditioned local loop and the local carriage service. There is scope to expand the range of 'core services' by specifying another service that has been declared by the ACCC in the regulations (**proposed paragraph 152AQB(1)(e)**).

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Proposed subsection 152AQB(3) requires the ACCC to take all reasonable steps to ensure that the determination is made within six months of this Bill receiving Royal Assent. Despite this tight timeframe, the ACCC is required to first publish a draft determination, take submissions from the public on the draft and consult with the Australian Communications Authority (**proposed subsections 152AQB(5) and (6)**).

Proposed subsection 152AQB(9) requires the ACCC to have regard to the model terms specified in the determination if it is required to arbitrate an access dispute in relation to a core service. The model terms are not binding on the ACCC either in arbitration or in assessing an access undertaking.

The model terms also have no effect to the extent that they are inconsistent with access pricing principles published by the ACCC under section 152AQA or Ministerial pricing determinations relation to standard access obligations under section 152CH.³²

While Telstra has indicated that it does support the passage of the Bill, it has criticised the model terms and conditions for core services stating that they amount to ‘a judge being required to issue a judgement prior to the conclusion of a trial’. Telstra also argues that benchmarks should only be set by the ACCC if access providers do not, within a reasonable time frame submit undertakings on the core services.³³ Telstra’s position thus reveals a concern that while the model terms may not be binding on the ACCC, the regulator will be reluctant to depart from the model terms in any subsequent arbitration.

In contrast, Optus has argued that the scope of core services is too narrow and the concept should be extended to cover other areas where it claims Telstra has monopoly supply. It nominated ISDN and Digital Data access as examples of such services.³⁴

As noted above, there is capacity in **proposed section 152AQB** for the definition of core service to be expanded by regulation if that is deemed necessary. The Government has stated that the current definition of ‘core services’ reflects the areas where access has been delayed by lengthy arbitration proceedings.³⁵

Merits Review

Currently Subdivision F of Part XIC provides a mechanism for a party that is dissatisfied with the final determination of the ACCC in an access arbitration to have the matter reviewed by the ACT. As result of amendments introduced in 2001 the ACT can only have regard to information presented in the initial arbitration by the ACCC.

Item 8 of Schedule 2 proposes to repeal subdivision F thereby removing the right of merits review of ACCC arbitrations. Parties will still be able to seek ACT review of a decision of the ACCC concerning an application to exempt a carrier from the standard access obligations³⁶ under sections 152AS and 152AT and a decision of the ACCC to accept or reject an access undertaking under section 152BU. A party may also seek judicial review of a final determination. It should be noted that such litigation is typically

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concerned with procedural matters and does not address the key matter of dispute in most arbitrations namely, the price of access.

The approach proposed by the Bill differs from that suggested by the PC. Reflecting concerns about the potential for regulatory error, the PC recommended that merits review by the ACT of final decisions should be retained. It proposed that the ACT should have a 4 month time limit to review a determination and that if the Tribunal wished to extend a time limit in a particular case, it should be required to publish notification to that effect in a national newspaper with reasons.³⁷

Since 1997 there have only been two appeals to the ACT from an arbitration namely Primus-Telstra and AAPT-Telstra over PSTN. The ACCC was notified of these disputes in December 1998 and February 1999 and made its determination in September 2000. The matters were finally settled in March and April 2002 after the parties reached agreement and discontinued ACT proceedings.³⁸

While such delay is unfortunate it should be acknowledged that merits review is but a small part of the delay involved in the arbitration process. In its Final Report the PC stated that since the new telecommunications regime commenced in 1997, 43 disputes over terms and conditions of access to declared services had gone to arbitration before the ACCC. By August 2001 25 matters had been finalised but of these the ACCC had made only 5 final determinations. Of the 18 matters remaining, the PC reported that some matters still outstanding had been in progress for over two years. These figures would suggest that the arbitration process rather than merits review is the major source of delay in the access regime.

Status of Arbitrations Since 1997	
Final Determination by ACCC	5
Withdrawn	18
Terminated by ACCC	2
Continuing	18

*Productivity Commission as at August 2001.

As noted above, the PC favoured the retention of merits review for arbitrations. It observed that the main matter of dispute in arbitrations was the price of access to a service and commented that:

‘no area of economics is as controversial as access pricing. Mistakes in setting the level and structure of access prices can have significant adverse implications for consumers and overall economic efficiency’.

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The PC warned that in its view the ACCC's current method of determining access prices underestimated efficient long-run costs and that over time this could have adverse investment effects.³⁹

Merits Review of Undertakings

A key question that emerged in the Senate Committee hearing was whether merits review of undertakings should also be removed. Telstra has indicated that it is likely to lodge undertakings in relation to the 'core services' which will be subject to model terms and conditions under the Bill.⁴⁰ Its rival, Optus, has said such a comment indicates that Telstra will seek to delay the access process by appealing matters to ACT if undertakings are rejected by the ACCC.⁴¹ For its part Telstra says willingness to offer undertakings reflects the policy incentives in the Act for negotiated rather than arbitrated outcomes. Further, it warned that removing merits review for undertakings would mean that the ACCC would have an 'unfettered discretion to set access prices'.⁴²

Retrospectivity

There has been some debate about the retrospective nature of the proposal to abolish merits review in arbitrations. **Item 9 of Schedule 2** has the effect of preserving a party's right to seek merits review of an access arbitration *only* in cases where the ACCC made its final determination before the Bill received Royal Assent.

In evidence before the Senate Committee, the Seven Network pointed out its interests in two analog pay TV arbitrations currently before the ACCC. Seven submitted that the Bill should be amended so that the right to merits review is retained in relation to proceedings that are already on foot.⁴³ The Department of Communications, Information Technology and the Arts (DCITA) has indicated that the Government would give consideration to submissions on this issue.⁴⁴

Exemptions from Standard Access Provisions

Under section 152AR the standard access provisions apply to carriers or carriage service providers that supply 'active declared services'. That is, they supply the declared service to themselves or another party. Exemptions from the standard access provisions can be sought from the ACCC on an individual or class basis under sections 152AS and 152AT.

The Government has taken the view that the current exemption provisions limit the ACCC's flexibility and may deter investment in the telecommunications industry because the ACCC can only exempt active declared services from the operation of the access regime. People interested in investing in telecommunications services may be reluctant to invest if the new service will be declared and they consequently face regulatory uncertainty concerning access prices.

To address this issue **item 60** inserts new provisions allowing the ACCC to issue anticipatory exemptions.

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Proposed section 152ASA empowers the ACCC to make a determination exempting a class of specified or proposed services from the standard access provisions that would apply if the service became an active declared service. While the determination must specify an expiry date for the exemption, the ACCC may make a fresh determination in relation to the same service. Either House of Parliament may disallow these determinations. Similar provisions enabling the ACCC to make determinations exempting *individual* carriers or carriage service providers are set out in **proposed section 152ATA**.

The ACCC can not make either a class or individual exemption order unless it is satisfied that the determination will promote the long term interests of end users or carriage services or of services supplied by means of carriage services. The ACCC must also have regard to:

- any matters set out in a relevant ministerial instrument
- the objective of promoting competition in markets for listed services
- the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied **(proposed subsections 152ASA(5) and 152ATA(7))**.

In order to encourage the prompt assessment of applications the ACCC will be taken to have made an individual exemption order if it does not make a decision on the application within 6 months of it being received. However the decision making period may be extended by up to three months provided that the ACCC provides reasons for the delay **(proposed subsections 152ATA(12),(14))**.

Under **proposed section 152AW** the ACT may review decisions of the ACCC in relation to individual exemption determinations. In conducting its review, the ACT may only have regard to information, documents or evidence given to the ACCC in connection with the original decision or other information referred to in the ACCC's reasons. The ACT will be taken to have made a decision in favour of the applicant for review if it has not made a decision within 6 months. The ACT's decision-making period may be extended by up to three months provided that it provides a written explanation of the reason for the delay.

Implications for the Foxtel-Optus Deal

In March 2002, FOXTEL entered into a content supply agreement with its main competitor Optus. The agreement is conditional on the ACCC agreeing that it will not raise objections to the deal under the TPA. In June 2002 the ACCC stated that the agreement was likely to contravene Part IV of the TPA.⁴⁵

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Seeking to address the ACCC's concerns FOXTEL has given undertakings pursuant to section 87B of the TPA.⁴⁶ Most significantly for present purposes, undertaking 5.1 states:

FOXTEL commits to supply a digital service no later than 12 months after a Final Order is made in relation to a decision by the ACCC to exempt FOXTEL's subscription television services from the application of Part XIC pursuant to proposed changes to Part XIC announced by the Minister. However, FOXTEL will not supply a digital cable service prior to 23 October 2003. This undertaking is conditional on the Revised Legislation commencing by 31 December 2003 and there being no specific adverse relevant regulatory change prior to such commencement.

In other words FOXTEL will digitise its Pay TV service only if it is granted an exemption from the access regime.

In evidence before the Senate Committee, the Seven Network expressed concern that digital pay television services would be exempted from the access framework. According to Seven, Telstra and FOXTEL could secure a permanent advantage over the 'digital gateway to the home'.⁴⁷

In response, DCITA has pointed out that these amendments were not designed specifically for FOXTEL and did not guarantee that it would get an exemption.⁴⁸ The question of whether an exemption should be granted is a matter for the ACCC to determine. As pointed out above, the ACCC must not make a determination unless it will promote the long-term interests of end users of carriage services.

It has been reported that a decision by the Parliament to prevent the ACCC from granting an anticipatory exemption for digital Pay TV may result in the collapse of the FOXTEL/Optus deal.⁴⁹

Access Undertakings

Part 12 of the Bill aims to enhance the certainty for new entrants by providing an access undertaking stream in relation to services which are not 'active declared services'.

Division 5 of Part XIC will recognise two types of access undertakings – ordinary and special (**item 71**).

A special access undertaking is defined as a written undertaking given to the ACCC by a person who is or expects to be a carrier or carriage service provider supplying: a listed carriage service or, a service that facilitates the supply of such a service. It must state that if the person does supply the service they agree to be bound by the standard access provisions or other terms and conditions specified in the undertaking (**proposed section 152CBA**).

Proposed section 152CBC requires the ACCC to consider the undertaking. If the Commission fails to accept or reject the undertaking within 6 months of receiving it will be deemed to have accepted the undertaking (**proposed subsection 152CBC(5)**). Proposed

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subsection **152CBC(7)** does provide the ACCC with the power to extend the decision making period by up to 3 months so long as it makes a statement explaining why a longer period is necessary.

Proposed section 152CBD sets out the criteria for the ACCC in considering special access undertakings. The ACCC can only accept an undertaking if its is satisfied that the terms and conditions are:

- consistent with the standard access obligations
- reasonable (section 152AH specifies matters that are relevant to the determination of whether terms and conditions are reasonable)⁵⁰,and
- consistent with any Ministerial pricing determination.

In addition, the ACCC must publish the undertaking, invite submissions from the public and consider those submissions.

Item 102 inserts a **new section 152CF** dealing with the capacity of the ACT to review the decisions of the Commission in relation to access undertakings. The new section is intended to speed up the decision making process and prevent undue delay by dumping evidence on the ACT. Consistent with other amendments to the merits review process discussed above, the ACT will only be able to review evidence that was before the ACCC. Furthermore, if the ACT has not made a decision within six months it will be deemed to have made a decision in favour of the applicant for review. The decision-making period may be extended by a further three months if reasons are provided.

Accounting Separation

Division 6 of Part XIB provides that the ACCC may make record keeping rules. These rules are designed to make conduct in telecommunications markets more transparent. Reports filed under these rules by carriers can be made available to the public.

The amendments in **Part 16** of the Bill give effect the Government's announced intention of accounting separation. Under **proposed section 151BUAA** the Minister is given a power to direct the ACCC to make record keeping rules. These directions are disallowable instruments.

Under **proposed section 151 BUDA** the ACCC may make copies of Ministerially-directed reports available to the public subject to such terms and conditions that the ACCC considers appropriate. The ACCC may only disclose information contained in a Ministerially-directed report if required to do so by a Ministerial direction **under proposed section 151BUAA**.

Proposed sections 151BUDB and **151BUDC** permit the ACCC to direct carriers or providers to make copies of Ministerially-directed reports or extracts available to the

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public. Again the ACCC may only issue such a direction if required to do so by a Ministerial direction under **proposed section 151BUAA**.

The effect of this regime will depend on the nature of requirements specified in the proposed Ministerial directions. While these matters are not set out in the legislation, the Government has indicated in the Explanatory Memorandum that the determinations will ensure that:

- Telstra prepares current (replacement) cost accounts (as well as existing historic cost accounts) to provide more transparency to the ACCC about Telstra's ongoing and sustainable wholesale and retail costs
- Telstra publishes current cost and historic cost key financial statements in respect of 'core' interconnect services but not underlying detailed financial and traffic data which is regarded as commercially sensitive
- the ACCC prepares and publishes an 'imputation' analysis (based on Telstra purchasing the 'core' interconnect services at the price that it charges external access seekers) which will demonstrate whether there is any systemic price squeeze behaviour, and
- Telstra publishes information comparing its performance in supplying 'core' services to itself and to external access seekers in relation to key non-price terms and conditions. (These will include faults/maintenance, ordering, provisioning, availability, performance, billing and notifications).⁵¹

Telstra's share price dropped sharply on the Government's announcement that it would enforce accounting separation. Since then Telstra and the Government seem to have reached an understanding on the level of detail that will be required to be disclosed⁵² (see Telstra submission). Optus has been critical of the level of disclosure that will be required. In particular it has stated that the proposed carve out for 'commercially sensitive material' from the disclosure regime will render the change ineffective. Optus argues that:

The underlying cost data is commercially sensitive because it is the very data that can inform a third party whether the price offered for a service is reasonable or not. Publication of the high-level accounts is largely a cosmetic change to the current arrangements and, in Optus' experience, will not materially advance commercial outcomes.⁵³

Telstra says that accounting separation is unnecessary. It argues that current regulatory arrangements already prevent it from cross subsidising its retail operations. Under Part XIC access prices can and have been set by the ACCC and Part XIB prohibits the misuse of market power to damage competitors.

Telstra has questioned the motives of competitors who have argued that disclosure needs to be more detailed:

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In hard fought tender battles in particular, it would be very useful for Telstra's competitors to know its costs and margins. It would aid Telstra's competitors in winning particular bids, while helping them avoid bidding more aggressively than necessary. This is undoubtedly good for the largely foreign shareholders of Telstra's major competitors, but it is far from good for Telstra or for Australian consumers.⁵⁴

Other Matters

Competition Notices

Under Part XIB where the ACCC has reason to believe that a carrier or carriage service provider has engaged, or is engaging, in anti-competitive conduct⁵⁵ it may issue a Part A notice.

Once a Part A competition notice has been issued, the ACCC may issue an advisory notice advising how the firm can change its conduct to avoid contravening the Act. Such an advisory notice is not legally binding. Other than for an injunction, court proceedings under Part XIB can only be instituted where the ACCC has issued a Part A competition notice.

Item 116 amends section 151AKA which deals with Part A competition notices. It provides that before the ACCC issues a Part A notice it must give the carrier or carriage service provider a written notice of its intention and describe the anti-competitive conduct and invite the carrier to make submissions.

Item 117 inserts **proposed subsection 151AQB(1)** which breaks the link between Part A notices and advisory notices. As a pre-emptive measure the ACCC will be able to issue an advisory notice prior to issuing a Part A competition notice. The ACCC may publicise the fact that it has issued an advisory notice if it is satisfied that the benefit to the public outweighs any substantial prejudice to the commercial interests of a person (**proposed subsection 151AQB(8)**). It is possible that some might suggest that the ACCC should take care to ensure that such publicity does not lead to a 'trial by media'. In submissions to the Dawson Review of the TPA the ACCC has been subject to criticism over its aggressive use of the media in publicising its enforcement of the TPA.

Declared Services

Under section 152AL the ACCC may by written instrument declare carriage services and related services. Providers of declared services are required to comply with the standard access obligations set out under section 152AR. The ACCC has power to arbitrate access disputes in relation to declared services.

In its current form, Part XIC has specified expiry dates for undertakings, but not for declarations. In contrast, the general access regime in Part IIIA of the TPA (section 44I) requires expiry dates for declarations. The PC recommended that this discrepancy should be addressed.⁵⁶

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Item 10 inserts **proposed section 152ALA** which provides generally that declarations may last up to five years. The ACCC may extend the application of the declaration for another period of up to 5 years so long as it has held a public inquiry under the *Telecommunications Act 1997* concerning the proposal.

Under the transitional provisions set out in **item 15**, existing declarations will not be subject to expiry under proposed section 152ALA unless the ACCC makes a determination to the contrary.

Item 14 inserts **proposed section 152DNC** to ensure the continuation of declarations in so far as they relate to a final determination. It provides that despite the expiry of a declaration, it continues in force for the purpose of:

- ascertaining whether the determination remains in force
- ascertaining whether a party to the determination has any obligations under section 152AR to any other party to the determination while the determination remains in force, and
- exercising the ACCC's power to vary the determination under section 152DT.

Access Determinations

Presently the ACCC is prevented by paragraph 152CQ(1)(f) from making a determination in an access arbitration that would have the effect of requiring an access provider to bear 'some or all of the costs' of extending or enhancing the capability of a facility or maintaining extensions to or enhancements of the capability of the facility.

Item 20 amends paragraph 152CQ(1)(f) so that the ACCC may require the access provider to bear some costs, so long as it is not 'an unreasonable amount'. This change is consistent with the recommendation of the PC.⁵⁷

Backdating Final Determinations

Section 152DNA of the Act enables the ACCC to specify that an access determination or provisions of it apply from any date after the parties to the access dispute commenced negotiations.

Item 25 proposes to strengthen the incentive for parties to settle disputes before arbitration by permitting the ACCC to require a party ordered to pay money under a determination to also pay interest at a specified rate backdated to the commencement of negotiations (**proposed subsection 152DNA(6)**).

The PC noted that at present the ACCC has extensive discretion in deciding the extent to which it will backdate a determination.

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The Act does not specify the criteria on which these discretionary decisions should be made. This increases uncertainty for all parties. It also exposes the ACCC to a greater risk of favouring those with few resources. For example, say that the price under an interim determination is actually lower than the final price, and that the entrant is exposed to insolvency if it is obliged to pay the incumbent the shortfall. The ACCC may be reluctant to make the discretionary choice that led to a business failure — although on competitive neutrality grounds this would be appropriate.⁵⁸

The PC recommended clear guidelines. The Bill picks up this recommendation inserting **proposed subsections 152DNA (7-10)** requiring the ACCC to formulate guidelines on the use of its backdating powers within six months of the commencement of this Bill. The guidelines must be published on the Internet.

Telecommunications Access Codes

The Telecommunications Access Forum (TAF) is an industry body that is open to all carriers and carriage service providers. When it was introduced in 1996 it was intended to provide an alternative path to access. Under section 152AL the ACCC may ‘declare’ a service in accordance with a recommendation from the TAF. Under section 152BE the ACCC may also approve ‘access codes’ developed by the TAF.

The TAF was intended to represent the interests of the industry generally, it was supposed to give the ACCC the flexibility to accept a recommendation from the TAF without itself making an inquiry in to the service’s declaration.⁵⁹

As the PC noted however, before an access code or request for declaration can be put to the ACCC it must have the unanimous support of TAF members. The PC noted that ‘the TAF has not recommended any services for declaration, reflecting the difficulty of achieving the required unanimity among participants’. The PC recommended its abolition stating ‘the TAF has not been an effective decision making body’.⁶⁰ **Part 10** of the Bill gives effect to this recommendation by deleting references to TAF related matters in Part XIC.

Concluding Comments

Requiring the ACCC to determine benchmark terms and conditions for access to core services should assist commercial negotiations. It is arguable that the proposal has already encouraged Telstra to begin developing a range of undertakings in relation to these services. There is a considered view that this requirement should also be extended to non-core services.

Extending the existing provisions under Part XIC of the TPA relating to exemptions and undertakings to include services that are not yet declared will go some way to providing investment certainty for investors in telecommunications infrastructure. Industry players

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and policy makers will need to closely examine the ACCC's approach to exercising this exemption power.

Removal of merits review should encourage commercial negotiation and reduce the instance of regulatory gaming. However the removal of merits review comes with an increased risk of regulatory error which could adversely effect investment in telecommunications over the long term.

Issuing advisory notices prior to issuing a competition notice should provide better communications between the regulator and the carriers and service providers and enable a more timely resolution of anti-competitive behaviour. It should provide carriers with increased certainty as to the appropriateness of their conduct.

Accounting separation of Telstra's wholesale and resale businesses should provide more transparency and greater information to the market. However, not requiring Telstra to publish underlying financial and traffic data (particular in regards to those services that are in dispute) weakens the proposal. Limiting accounting separation to core services may be insufficient when addressing issues involving bundled services. Appropriate Ministerial direction will be critical to the success of the proposed accounting separation framework.

Endnotes

- 1 This glossary is drawn from Productivity Commission, *Telecommunications Competition Regulation Final Inquiry Report*, September 2001. (PC Report). The PC report can be found at the following link:
<http://www.pc.gov.au/inquiry/telecommunications/finalreport/index.html>
- 2 Any-to-any connectivity is considered essential to the access regime enabling any person to connect to any other person, even if that person is using a different network (for example, from an Optus mobile to a Telstra fixed phone). It is also considered to be essential for the efficient operation of the telecommunications network.
- 3 The ACCC may issue a Part A competition notice when it has reason to believe that a carrier or carriage service provider has engaged, or is engaging, in an instance of anti-competitive conduct. A Part B competition notice states that a specified carrier or CSP has contravened, or is contravening, the competition rule and sets out particulars of the contravention.
- 4 A declared service is one that has been considered an essential component of the telecommunications network and has been brought within the regulatory framework of Part XIC of the TPA to enable access by competing service providers.
- 5 An access undertaking sets out the terms and conditions on which a carrier or carriage service provider proposes to comply with particular standard access obligations to enable access to a declared service.

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- 6 Productivity Commission, *Telecommunications Competition Regulation Draft Inquiry Report*, March 2001, p. xxviii.
- 7 For further background on the 2001 Bill see Katrine Del Villar, *Bills Digest No.39 2001-2002*, Department of the Parliamentary Library: <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd039.pdf>.
- 8 Productivity Commission, *Telecommunications Competition Regulation Final Inquiry Report*, September 2001, p. xxviii. (PC Report).
- 9 A list of recommendations can be found in the PC report, p. xxxii - xlvi.
- 10 PC report p. xxx.
- 11 PC report p. xxxi.
- 12 Paul Cleary and Christine Lacy, 'ACCC push to curb Telstra power', *Australian Financial Review*, 14 January 2002.
- 13 Ibid.
- 14 Aaron Patrick, 'Tight controls required for Telstra, review finds', *Australian Financial Review*, 28 December 2001.
- 15 Ziggy Switkowski, 'Beware logic of wily telcos', *Australian Financial Review*, 23 January 2002.
- 16 Senator, the Hon Richard Alston, 'Telecommunications regime to be made more competitive', *Media Release*, 24 April 2002.
- 17 The *Administrative Decisions (Judicial Review) Act 1975* authorises the Federal Court to review 'decisions of an administrative character' on grounds such as denial of natural justice, failure to take into account relevant considerations, taking into account irrelevant considerations, improper purpose and error of law.
- 18 Professor Fels, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 12 September 2001, p. 52
- 19 See section 44ZP.
- 20 See discussion in PC Report pp. 285–294.
- 21 PC report p. 260.
- 22 Aaron Patrick and Christine Lacey, 'Telstra faces new competition rules', *Australian Financial Review*, 24 April 2002.
- 23 Katherine Murphy and Rachael Osman, 'Labor backs telco legislation', *Australian Financial Review*, 26 April 2002.
- 24 Scott Hannaford, 'New deal boon for carriers: Alston', *Canberra Times*, 25 April 2002.
- 25 Aaron Patrick, 'Aspiring telcos laud Alston's blueprint', *Australian Financial Review*, 26 April 2002.
- 26 Ibid.

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- 27 Eli Greenblat and Sophie Douez, 'Alston hurts Telstra price', *The Age*, 30 April 2002.
- 28 Geoff Elliot, 'Third-tier telcos will still struggle', *The Australian*, 26 April 2002.
- 29 Aaron Patrick, 'Alston says split won't hurt Telstra' *Australian Financial Review*, 30 April 2002.
- 30 Henry Ergas, 'Dropping appeal rights bad move', *Australian Financial Review*, Thursday 2 May 2002
- 31 An imputation test determines whether a firm that had to pay the access price faced by non-integrated firms, and had to meet the reasonable downstream costs of the integrated firm, could compete given the price set by the integrated firm in the downstream market. See Stephen King and Rodney Maddock 'Imputation rules and a vertical price squeeze' (available at: http://www.econs.ecel.uwa.edu.au/economics/econs/ecom_conf/maddock.pdf).
- 32 The minister has not made any pricing determination under this provision. The PC recommended its abolition as it is not subject to appropriate scrutiny. See PC Report p. 311–312).
- 33 Telstra, Submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee Inquiry, October 2002, p. 9. A copy of the submission may be found here:
http://www.aph.gov.au/Senate/committee/ecita_ctte/tele_comp/submissions/sublist.htm
- 34 Optus, Submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee Inquiry, October 2002, p. 10. A copy of the submission may be found here:
http://www.aph.gov.au/Senate/committee/ecita_ctte/tele_comp/submissions/sublist.htm
- 35 Mr Lyons, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 22 October 2002, p. 48.
- 36 The standard access obligations are set out in section 152AR of the TPA. They provide an immediate right of access to declared services by access seekers. The terms and conditions on which carriers and carriage service providers are required to comply with the standard access obligations are subject to agreement.
- 37 PC Report, Recommendation 10.9, p. xli
- 38 For more detail on these disputes see Katrine Del Villar, *Bills Digest No.39 2001-2002*, Department of the Parliamentary Library:
<http://www.aph.gov.au/library/pubs/bd/2001-02/02bd039.pdf>
- 39 PC Report, p. xxxiii-iv.
- 40 Dr Patterson, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 15 October 2002, p. 7.
- 41 Optus, Submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee Inquiry, October 2002, p. 4.

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- 42 Telstra, Supplementary Submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee Inquiry, October 2002, p. 2.
http://www.aph.gov.au/Senate/committee/ecita_ctte/tele_comp/submissions/sublist.htm
- 43 Mr Chalmers, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 22 October 2002, p.34.
- 44 Mr Cheah, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 22 October 2002, p. 45.
- 45 ACCC, 'Foxtel/Optus Proposal 'Likely To Breach Trade Practices Act', *Media Release*, 21 June 2002.
- 46 These undertakings may be viewed at the following link:
<http://www.telstra.com.au/investor/docs/foxtelsummary.pdf>
- 47 Mr Wise, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 22 October 2002, p. 28.
- 48 Mr Lyons, Evidence to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee, 22 October 2002, p. 47.
- 49 See Laura Tingle, 'Push to block rivals' access under pay TV Plan' and 'Telstra Poser for the Senate', *Australian Financial Review*, 4 November 2002.
- 50 Relevant factors include:
- whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services
 - the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned
 - the interests of persons who have rights to use the declared service concerned
 - the direct costs of providing access to the declared service concerned
 - the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and
 - the economically efficient operation of a carriage service, a telecommunications network or a facility.
- 51 Explanatory Memorandum, p. 95/96.
- 52 Telstra, Submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee Inquiry, October 2002, p. 6.
- 53 Optus, Submission to the Senate Environment, Communication, Information Technology and the Arts Legislation Committee Inquiry, October 2002, p. 7.
- 54 Op. cit n.52.
- 55 This is defined (in section 151AJ) as:

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- taking advantage of market power with the effect or likely effect of substantially lessening competition, or
- contravening specified sections of Part IV of the Act.

56 PC Report, p. 299.

57 PC Report, Recommendation 10.15, p. xlii

58 PC Report, p. 355.

59 Explanatory Memorandum, Telecommunications Bill 1996, p. 46.

60 PC Report, p. 314.

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