Australian Competition and

Consumer Commission

Submission to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee

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EXECUTIVE SUMMARY

In 1997 Australia adopted an unusual model for dealing with telecommunications access disputes, the so-called “negotiate, arbitrate” model. Access seekers were encouraged to resolve issues by entering into commercial negotiations with Telstra and other access providers. If this failed, private arbitration was encouraged. Finally, if this failed, arbitration was to occur under the *Trade Practices Act 1974*, with nominated ACCC Commissioners arbitrating.

In practice, this model has had many problems. These have stemmed from the refusal to negotiate meaningfully, such as by “take it or leave it” style negotiations, chiefly by Telstra. When arbitrations commenced they were slowed in numerous ways.

The Government’s proposals address some of the problems.

One key point in contention is the re-arbitration provision. The model is not correctly called ‘negotiate, arbitrate’. It is more correctly called ‘negotiate, arbitrate, re-arbitrate’. This is because, unlike in normal arbitrations, Telstra and others have a right to a full re-hearing – a full re-arbitration by the Australian Competition Tribunal (ACT). A full re-arbitration consists of a completely new, *de novo*, arbitration. Parties can raise new material, make new submissions, engage new experts. They can even withhold information from the first arbitration, saving it for the re-arbitration.

A full re-arbitration is a mechanism that maximises delay and uncertainty.

Arbitrations by the ACCC are quasi-commercial and a substitute for the parties’ negotiation processes, which could include private mediation and private commercial arbitration. It is out of character for a commercial arbitration to be completely re-heard by another body. Parties wanting to delay competitive outcomes will therefore forsake private arbitration, so they can avail themselves of two processes rather than one.

It is also unusual for regulatory pricing decisions in other domestic and international jurisdictions to be open to complete re-hearings.

Telstra lobbying succeeded in 1997 in getting what was claimed to be a ‘negotiate, arbitrate’ model. Many people had doubts about it. Few noticed it was actually a ‘negotiate, arbitrate, re-arbitrate’ model. Already, two ACCC arbitration determinations on PSTN interconnection are being re-heard by the ACT. The outcome is not expected until the second half of 2002, which is more than five years after the initial declaration of the service. Further, Telstra has indicated its intention to exercise this right in relation to several further key services, before the ACCC has even finalised its determinations.

The ACCC supports a normal right of appeal in arbitrations – an appeal on points of law. This right is a major right that protects against misinterpretation of the provisions of the law, including the economic criteria as well as against improper procedure, unreasonableness etc.

This is the normal right of appeal that parties to an arbitration have. Telstra having got a ‘negotiate, arbitrate’ model, despite many doubts about the effectiveness of the model, should not now get the benefit of a model which gives re-arbitration rights that go way beyond the normal rights of appeal in an arbitration model. Had the Parliament chosen another model, eg a more regulatory approach, the issues might be different. Telstra should not have the best of both worlds – a questionable arbitration model plus a right to full re-arbitration.

In short, the ACCC supports the Government proposal to prevent fresh evidence in appeals but considers it does not go far enough. The model will continue to work very imperfectly, even with this amendment. There is no guarantee that Telstra, which has sought to delay decision making, will not continue to do so, adding further to uncertainty, and hindering competition by access seekers.

Finally, it should be noted that under the present model Telstra has a further right of appeal against Tribunal re-arbitrations on points of law and procedure, thus giving it further capacity to delay the delivery of benefits of competition to consumers.

INTRODUCTION

The Australian Competition and Consumer Commission (the ACCC) welcomes the opportunity to make a submission to the Senate Environment, Communications, Information Technology & the Arts Committee's inquiry into the *Trade Practices Amendment (Telecommunications) Bill 2001* (the Bill).

The Bill proposes several changes to Part XIC of the *Trade Practices Act 1974* (the Act) which provides for the telecommunications-specific access regime. The ACCC believes that these amendments will, if implemented, assist in improving the efficiency and effectiveness of the arbitral process established in Part XIC of the Act.

The ACCC considers an efficient and effective access regime to be an essential element in ensuring the ongoing development of a competitive and innovative telecommunications industry in Australia. The resolution of access disputes under this regime in a thorough, effective and timely manner is in the interests of all parties involved in the telecommunications industry.

BACKGROUND

The telecommunications-specific access regime was intended, like any access regime, to overcome the barrier to competition in downstream markets which can arise when upstream input services are controlled by a single infrastructure operator which also provides services in the downstream market. The regime does not apply to all telecommunications services: only those that are 'declared' by the ACCC. Declaration can occur only if the ACCC finds that declaration is in the long term interests of end users after a public inquiry or upon recommendation by industry to the ACCC.

An active declared service (ie a declared service that is currently provided) must be made available to access seekers upon request. The parties can commercially agree to terms and conditions of access and are encouraged to do so by the ACCC. If the parties are unable to agree on the terms and conditions of access, either party can request the ACCC to arbitrate, or to otherwise assist in resolving the dispute (eg using its powers under Part XIC of the Act to mediate or to make a procedural direction that might require one party to provide information to the other).

The outcomes of these commercial negotiations, or Part XIC processes, are important because the terms and conditions of access ultimately determine how much, and for what purposes, the service will be used, and hence how successful the access regime will be in achieving its objectives.

The 'negotiate, arbitrate' model established by Part XIC of the Act has proved problematic in practice. The emphasis of the regime is to allow commercial negotiation in the first instance and to provide a 'safety net' of arbitration only after the failure of negotiations. However, a large number of disputes have been notified to the ACCC for arbitration, which indicates that access providers and access seekers have been unable to negotiate mutually satisfactory conditions for many services.

There appears to be limited incentive for access providers and access seekers to conclude effective agreements concerning the terms and conditions of access where there is a market power imbalance between the access provider and the access seeker and where information asymmetries may be expected. Anecdotal evidence suggests that a 'take it or leave it' approach is common when the access seeker has no countervailing market power. In such circumstances, access seekers are likely to be negotiating in a vacuum, and may seek arbitration in an attempt to identify the parameters likely to be used by the regulator.[1] As no access undertakings are in place to provide 'reference tariffs' against which to conduct negotiations, and if mediation and other processes are inappropriate or unsuccessful in resolving the dispute, arbitration is the necessary consequence.

The ACCC currently has 20 arbitrations outstanding. Many of these have not been resolved within expected time frames. This is in part due to the need to consider threshold issues (eg pricing principles) and in part due to strategic behaviour by parties involved in the arbitrations. The need to hold several, often simultaneous, bilateral arbitrations on the same issue is also a contributing factor.

These problems have increased the cost and decreased the speed of the arbitration provisions, which has moved the model away from being a 'light handed' safety net as was originally intended. It has also reduced the incentives for commercial negotiation and encouraged regulatory dependence.

The ACCC is committed to improving the manner and timeliness in which access disputes are arbitrated and to improving the transparency, efficiency and effectiveness of the arbitral process to the extent possible. To this end, the ACCC has recently engaged a consultant to conduct an independent review of the arbitral processes conducted by the ACCC with a view to providing recommendations on ways in which the ACCC might be able to improve its arbitral processes. In conjunction with this consultancy, the ACCC has also initiated discussions with industry representatives regarding the optimal use of alternative dispute resolution in access disputes prior to ACCC arbitration.

The ACCC has also made submissions on this topic to the Productivity Commission (PC) inquiry into telecommunications-specific competition regulation. In so doing, the ACCC has made several recommendations and suggestions for improving the arbitral process: some of which are reflected in the amendments proposed in the Bill.

THE PROPOSED CHANGES

The proposed amendments are welcomed by the ACCC. While not all of the amendments are in accordance with the ACCC's previously stated views they do represent a improvement on the requirements of the existing regime.

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[1] While the ACCC has powers which could be used to reduce information asymmetries without recourse to arbitration, those processes, too, are time-consuming and do not necessarily eliminate such incentives.

Rather than comment on all of the proposed amendments one by one, this submission identifies three broad issues with which the ACCC has been particularly concerned and comments on the reasons for, and the effect of, the proposed changes. The three issues discussed are:

1. the detriment caused by the possible lengthy re-hearing of arbitration determinations;
2. developing a framework which allows for the efficient and effective consideration of industry wide issues; and
3. the benefits arising from amending Part XIC to cover the use of market power exercised by an access seeker.

Delays due to re-hearing of arbitration determinations

The ACCC welcomes proposed section 152DOA, relating to the matters the Australian Competition Tribunal (ACT) may have regard to for the purposes of a review, but believes the Committee should give further consideration to the proper role of review of arbitral decisions by the ACCC.

The 1997 telecommunications industry reforms were intended to generate benefits for telecommunications users by promoting greater competition. The access regime established under Part XIC of the Act sought to encourage commercial resolution of access issues, with arbitration of terms and conditions of access by the ACCC intended as a last resort. However, these objectives are being frustrated by the length of time to finalise matters, and the corresponding uncertainty this causes for industry. The complete re-hearing of arbitral decisions is, in the ACCC's view, a major cause of this delay and undermines the intention of the regime that the regulatory agency to be approached as a matter of last resort.

At present, Telstra has sought a complete re-hearing of the ACCC's PSTN origination and termination determinations. This re-hearing before the ACT appears unlikely to be finalised before the second half of 2002, up to five years after the original service declaration. Further, Telstra has indicated its intention to exercise this right for other key services, before the ACCC has finalised its determinations. The 'light-touch' 'negotiate, arbitrate' model has effectively been turned into a cumbersome 'negotiate, arbitrate, re-arbitrate' model. Such a model, which might be reasonable when the ACCC was rarely required to arbitrate (such as under Part IIIA of the Act), is problematic with the heavy dependence placed on ACCC dispute resolution by industry.

The nature of the re-arbitration can also cause delays. The process for the PSTN origination and termination review has involved greater legal representation, and greater diversion onto issues such as legal standing. It also does not appear to be able to replicate processes undertaken by the ACCC, such as the public consultation process on pricing principles that accompanies many arbitrations.

Further, a re-arbitration can create perverse incentives for the efficient and effective operation of the access regime.

For example, under the current regime, if one of the parties has an incentive to delay (as the incumbent often does), it may seek to provide necessary information or submissions on 'drip-feed' or seek to disrupt the finalisation of an arbitration with important submissions at a late stage. Telstra's actions in the local carriage service (ie local call re-sale) arbitrations provide an example of this action.

In November last year, the ACCC finalised its pricing approach for the local carriage service. It has since set about implementing this approach, which has taken around seven months. It was only after the implementation was nearly completed (and after the Bill was introduced into Parliament) that Telstra then made a 112 page submission[2] on the principles itself – seeking to reopen the whole pricing approach. This 112 page submission by Telstra stands in stark contrast to the submissions made by Telstra when the Commission originally considered the pricing approach. Telstra made two submissions[3] of 11 pages total – even then the second submission of 8 pages was made only when the Commission was reaching finalisation of the pricing approach. Telstra has already given indications that it is seek a full re-hearing of the decision.

Under the 'negotiate, arbitrate' model, the parties are encouraged to resolve disputes via private means, including private commercial arbitration or mediation. However, a private binding arbitration will not be a satisfactory substitute for ACCC arbitration, for a carrier or carriage service provider seeking to delay a final decision. As noted above, private commercial arbitrations are generally one-off, but a regulatory arbitration decision can be completely re-heard. This can undermine incentives for parties to agree to commercial arbitration and places greater demands on the ACCC (as well as leading to more delay), with corresponding impacts on the ability of the ACCC to respond to other issues in a timely manner.

This has had the effect of increasing uncertainty for all industry participants. The increased uncertainty negatively affects the investment decisions of carriers resulting in a lower (than would otherwise be the case) level of facilities based competition and may cause service providers not to pass on price decreases (ie softens pricing competition). The costs in terms of uncertainty and regulatory costs, of course, eventually borne by residential and business consumers in the form of higher charges.

Comparison of the current arbitral review provisions with other review rights

The ACCC believes that the right of review must be measured by considerations of the impact of that review on all parties, including the applicant, respondent and industry more generally. The need to balance the right of review with these considerations can be observed throughout domestic and international law. The ACCC makes the following observations in this regard.

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[2] Dated 17 August 2001.

[3] Dated 12 May 2000 and 1 September 2000.

Firstly, it is out of character for a commercial arbitration to be completely re-heard by another body. One impact of the disparity of treatment between ACCC arbitration and commercial arbitration is outlined above.

Secondly, the ACCC has undertaken some research into the review of regulatory decisions in Australia and overseas. The ACCC provides this research for the Committee's information in Attachments A and B. The ACCC believes that these tables show that it is unusual for there to be provisions providing for a full re-hearing on the merits by an appeals body of an access pricing decision.

The ACCC has noted with interest recent developments in the European Community on developing a common regulatory framework for electronic communications services and networks.

The ACCC understands that one of the more contentious points of the directive is whether to provide for the possibility of a full re-hearing of a regulatory decision. The current draft includes such a right (Article 4), although it will be the end of the year before a text is finally agreed.

Further, the ACCC believes that the draft directive should be seen in the context of Article 17, which provides that the national regulatory authority's decision must occur within two months, or four months for complex decisions. Such timeframes are considerably shorter than the time to complete most arbitrations before the ACCC. The current Part XIC provisions allow the ACCC greater time within which to fully consider all issues put before it, thereby reducing the importance of a complete *de novo* hearing, which could take at least an equal amount of time as the decision of the ACCC.

Thirdly, the Administrative Review Council's (ARC's) guidelines on what Commonwealth decisions should be subject to merits review acknowledge that certain factors may justify excluding a complete re-hearing of the matter. In particular, the guidelines provide an exception for decisions involving extensive inquiry processes. This exception covers decisions that are the product of processes that would be time consuming and costly to repeat on review. The guidelines state that if review of such decisions were undertaken, the nature of the review process would be changed from the normal adjudicative decision making process (of, say, the Administrative Appeals Tribunal), to a greatly expanded and time consuming one. The telecommunications access arbitration process appears to fall within the scope of this extension.[4]

The ACCC further notes the important rights of judicial review open to the parties that ensure accountability and good decision-making by the ACCC. Judicial review is

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[4] The ACCC is aware that Telstra has argued that the telecommunications arbitral process does not fit under then ARC's exemption because of the bilateral and private nature of the dispute. In so doing, it attempts to draw on the example provided in the ARC guidelines of the Australian Heritage Council (ie that the decision is made after an extensive consultation process and a series of public submissions and/or hearings). However, the arbitral process does involve lengthy (and costly) consideration of complex issues and commonly does, during the development of pricing principles, involve a process of lengthy public consultation.

potentially wide ranging, having regard to such issues as proper procedure, correct interpretation and application of law, procedural fairness and unreasonableness. Under such review, it would, as the ACCC understands it, be possible for someone to challenge such fundamental issues as whether the ACCC had properly interpreted the 'long term interests of end users'.

Industry wide framework

In the course of conducting arbitrations to date, it has become apparent that in many cases, a particular input service is likely to be largely homogeneous and undifferentiated in both cost and quality. Therefore a similar price (and similar terms and conditions) should be appropriate for all access seekers except where quantity discounts or other special circumstances exist. In the ACCC's view, the existing arrangements for hearing disputes of this kind are deficient in that the:

- results of arbitrations are confidential;
- information obtained from one arbitration cannot be passed to another; and
- arbitrations must be held bilaterally.

Some of the proposed amendments will assist in breaking down these deficiencies.

Publication of determinations & pricing principles

The proposed amendment (item 7) allows the ACCC to publish a determination, and the reasons behind that determination, with due regard to submissions and the commercial confidentiality of the participants. The publication of some determinations and their reasoning will assist in the future commercial negotiations between access seekers and access providers. By providing certainty with regards to the likely outcome of particular arbitrations, it is anticipated that the two parties will be more likely to reach a mutually acceptable arrangement without the need for arbitration.

The ACCC has previously gone some way towards responding to the multilateral aspect of arbitrations, within the constraints of the current arrangements, by developing and publishing pricing principles. These explain the ACCC's approach to pricing issues and so indicate to access providers and access seekers the likely approach of the ACCC in the course of an arbitration.

This process would have legislative support under proposed amendments (item 1). Proposed section 152AQA requires the ACCC to develop pricing principles at the time, or as soon as practicable after, a service is declared. Whilst the ACCC agrees with the amendment, it will inevitably involve the ACCC having to consider the issue of declaration and pricing at the time of the inquiry, and will therefore take more time. This may require a reconsideration of the ACCC's indicative time frames for inquiry, although there will generally be efficiencies between the two processes.

Knowledge of such parameters (previous determinations, their reasons, and pricing principles) is likely, over time, to inform the private negotiations of access providers

and access seekers and so reduce the uncertainties and/or strategic behaviour which currently result in so many disputes being notified.

Transfer of information between arbitrations

This amendment (item 14) will apply in situations where the provision of information between separate arbitrations will enable the arbitrations to be conducted in a more efficient and timely manner. Even if proposed section 152DMA is introduced (relating to joint arbitration hearings), proposed section 152DBA will be beneficial where, for example, there are multiple arbitrations concerning a particular service and other arbitrations are well advanced, or the arbitrations have been determined or terminated.

The ACCC has, in the past, used a similar process to expedite conduct of an arbitration where information was available from another process. For instance, the ACCC received certain information from its assessment of Telstra's undertakings in respect of the Domestic PSTN Originating and Terminating Access services which was relevant to the access disputes in relation to the same services. However, using information in one arbitration that was provided in the context of another arbitration is not currently possible without the consent of the relevant party or parties.

Certainty of interconnection pricing

An additional amendment that is not proposed by the current Bill, but that was suggested to the PC in the ACCC's submission of August 2000, is to allow the ACCC to impose compulsory undertakings in relation to some services.

Currently, Part XIC provides for voluntary access undertakings (under Division 5 of Part XIC) from access providers, which the ACCC must apply in a relevant arbitration. While intended to provide more flexibility to access seekers and reduce their exposure to arbitral determinations, voluntary undertakings have, in practice, provided access providers with a further ability to delay access to services. This results from the optional nature of the undertaking, which encourages access providers to submit unreasonable undertakings. This has the effect of delaying other regulatory processes, including arbitrations.

Since the introduction of Part XIC of the Act, the ACCC has received four sets of undertakings. All of the undertakings were lodged by Telstra. Each of the undertakings specified the terms and conditions on which Telstra was prepared to comply with its standard access obligations in respect of the relevant service.[5] That is, none of the undertakings simply adopted the model terms and conditions set out in the TAF telecommunications access code.[6]

A possible amendment would be to allow the ACCC, in limited cases, to require a carrier or carriage service provider to submit an access undertaking in relation to a declared service where it is in the long-term interests of end-users. In the event that

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[5] Subsection 152BS(3).
[6] Subsection 152BS(4).

the carrier or carriage service provider fails to comply with the direction, or the ACCC rejects the access undertaking proposed by the carrier or carriage service provider, the ACCC may, after conducting a public consultation process, draft and accept an access undertaking with which the carrier or carriage service provider must comply, provided that the conditions in subsection 152BV(2) are satisfied.[7]

The introduction of multilateral arbitration, information sharing and the publication of determinations assist in expediting the arbitral process, and somewhat increase the level of information available to industry. However, they still mean that bilateral arbitrations must occur for terms and conditions that are essentially multilateral. A compulsory undertaking would provide additional benefits by promoting industry self-regulation and ensuring that issues that are of general concern to industry are dealt with on a transparent basis. It would therefore not only lead to more timely outcomes, but promote greater certainty for interconnection pricing, which has been a problem raised by many industry participants with the ACCC.

The amendment would operate in a similar way to the *National Third Party Access Code for Natural Gas Pipeline Systems,* where the owner or operator of a covered transmission pipeline is required to submit an access arrangement to the ACCC. If the access arrangement does not satisfy the principles set out in the Code, the ACCC may draft and approve its own access arrangement. However, unlike the National Electricity and Gas Codes which require the ACCC to set a revenue cap or assess the reference tariffs for each access provider, a telecommunications carrier or carriage service provider would only be required to provide a compulsory undertaking in limited situations.

In the ACCC's view, such a provision would have provided an efficient mechanism for settling the access price for the Domestic PSTN Originating and Terminating Services where the ACCC has both performed an extensive assessment of two undertakings proposed by Telstra and conducted a number of bilateral arbitrations in relation to the services. It would also have resulted in more expeditious outcomes in obtaining fair and reasonable conditions for access to the Unconditioned Local Loop service.

If, however, the Committee has concerns about the ACCC's specific proposal, other models that may also promote certainty and efficiency should potentially be considered.

Overcoming market power exercised by an access seeker

The existing access regime assumes that market power will usually be held by the access provider. It is generally desirable for access seekers to be in a position to reject arbitration determinations where they perceive it would be contrary to their commercial interests, since a determination would otherwise compel such parties to acquire a particular service at specified prices which they may consider unreasonable.

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[7] Subsection 152BV(2) provides for the procedures for considering an undertaking and the matters to consider in accepting or rejecting an undertaking.

However, the existence of the need for connectivity between networks (sometimes called 'two way access') can create monopsony power due to the importance of interconnection with major networks to provide competing services.[8] It would also compromise any-to-any connectivity, a critical requirement in telecommunications networks.[9]

Under the existing regime, either party (ie the access seeker or the access provider) can notify a dispute. However, only an access seeker can withdraw a notice of dispute, irrespective of who notified the dispute. If the access seeker has monopsony power, it could therefore reject any proposed determination by the ACCC, which that same carrier could not do if it was the access provider. Therefore, a carrier with market power or which otherwise controls bottleneck facilities can undermine access arrangements and any-to-any connectivity in its role as an 'access seeker'.

The immediate answer to this complaint is to refer the provider to the Competition Rule in Part XIB and section 46. However, proving a breach of section 46 is usually very difficult. The fact that Parliaments have seen the need to enact numerous access regimes (both in the TPA and elsewhere) suggests that section 46 is not, by itself, a sufficient measure to ensure that access to significant infrastructure facilities is available on commercial terms.

Item 4 provides that a party which has notified a dispute may withdraw the dispute, but only with the consent of the other party or, where such consent cannot be obtained, the ACCC. This item also removes the ability of an access seeker to withdraw a dispute notified by an access provider. These steps are considered to be the least burdensome option for advancing any-to-any connectivity and competition objectives. For example, it is considered less burdensome than empowering the ACCC to reinstate an arbitration that has been terminated by the access seeker.

That said, the solution to this problem may not be as simple as removing the ability of an access seeker to terminate an arbitration notified by an access provider. In most cases this will be a desirable outcome and the ACCC supports this amendment. However, the ACCC believes that a further amendment should be considered to address a potential limitation in the definition of 'access seeker' in section 152AG of the Act. It has been argued that a carrier cannot be characterised as an 'access seeker' where it has not sought, and does not want, access to a network, and that it would therefore fall outside the definition of 'access seeker' in section 152AG. If this interpretation is correct, a carrier may still be able to exploit the provisions of the Act to do, in effect, what it could not do in the reverse situation as an access provider (ie refuse to deal with another carrier or carriage service provider).

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[8] For example, if Telstra (as a potential access seeker) refused to terminate calls onto a new network, it creates a barrier to entry for that new network, as its customers will be unable to receive calls from end users on the Telstra network.

[9] Connectivity can potentially be achieved in a number of other ways, such as by acquiring a different service from a carrier or by entering into transit arrangements with other carriers who have already established access arrangements with the carrier. However, this may be on more onerous terms or involve more cumbersome inter-carrier arrangements which can impact on the quality of service, and efficient use of infrastructure.

CONCLUSION

It is the view of the ACCC that the amendments to Part XIC of the Act currently proposed by the *Trade Practices Amendment (Telecommunications) Bill 2001* will assist in the expedition of arbitral processes under the access regime.

Moreover, it is the view of the ACCC that the Committee should give careful consideration to allowing for compulsory undertakings on access providers in certain circumstances to promote greater certainty about interconnection pricing, providing some sensible limits on the right of review to restrict the opportunities for a lengthy re-hearing of arbitrations, and to further protect against the problem of monopsony power. It is the ACCC's view that these further amendments would expedite the decision-making process and improve the effectiveness of the regime to achieve its objectives, leading to benefits for the industry and consumers.

Australian Competition and Consumer Commission
6 September 2001

ATTACHMENT A

Merits review of regulatory decisions in Australia

1 LEGISLATION	2 MERITS REVIEW	3 COMMENT
Trade Practices Act 1974 *Part XIC (Telecommunications Access Provisions)*		
Div 2 – ACCC may declare services.	No merits review of ACCC decision to declare/ not to declare a service.	
Div 3 – standard access obligations.	Persons whose interests are affected may apply for review of ACCC decision on individual exemptions from the standard access obligations: ss, 152AT, 152AV.	
Div 4 – TAF and ACCC access codes	No merits review of ACCC decision to approve/ not approve or make a telecommunications access code.	
Div 5 – ACCC may accept/ reject access undertakings in relation to declared services.	A person whose interests are affected may apply for review of ACCC decision to accept/ reject an access undertaking, or variation to an access undertaking: ss 152BU(2), 152CE, 152BY.	
Div 8 – ACCC arbitration of access disputes.	A party to an ACCC final determination may apply for a full *de novo* re-arbitration by the Australian Competition Tribunal: ss, 152CP, 152DO. No full *de novo* re-arbitration of ACCC interim determination.	Review by the Australian Competition Tribunal is a complete *de novo* re-arbitration of the access dispute: s 152DO(3).

TPA Part IIIA (General Access Regime)		
Division 2 – declaration of services.	Decision by designated Minister to declare/ not to declare a service: s 44H Provider of the service or the person who applied for the declaration recommendation may apply for review: s 44K Decision by Commonwealth Minister on whether a State or Territory access regime is an effective access regime: s 44N. State or Territory Minister who applied for a recommendation that the access regime is an effective access regime may apply for review: s 44O.	
Div 3 – ACCC arbitrates access disputes in relation to declared services.	A party to an ACCC arbitration determination may apply for review to by the Australian Competition Tribunal: ss 44V, 44ZP.	
Div 4 – ACCC may register contracts for access to declared services.	A party to a contract that the ACCC decided not to register may apply for review: ss 44ZW, 44ZX.	
Div 6 – ACCC may accept or reject access undertakings for non-declared services, and may accept/ reject access codes prepared by industry bodies.	No re-hearing of ACCC decision to accept/ reject an access undertaking or ACCC decision to accept/ reject an industry code	

Telecommunications Act 1997/ Telecommunications (Arbitration) Regulations 1997		
Decisions of the Australian Communications Authority relating to a range of matters including: • carrier licensing • nominated carrier declarations • registering codes • connection permits • cable licensing • facility installation permits	These decisions are reviewable by the Administrative Appeals Tribunal following a process of internal reconsideration by the ACA (s 562; Part 1 of Schedule 4 Telecommunications Act). Persons whose interests are affected by the decision may apply for review (s 27(1) AAT Act)	These are not access pricing decisions.
ACCC arbitrates disputes pursuant to: • s 335 – requirement to supply carriage services for defence purposes or for the management of natural disasters • s 351 – requirement to provide pre-selection • s 462 – compliance with the numbering plan • cl 18 of Schedule 1 – access to supplementary facilities • cl 27 & cl 29 of Schedule 1 – access to network information • cl 36 of Schedule 1 – access to telecommunications transmission towers and to underground facilities • cl 5 of Schedule 2 –operator services • cl 8 of Schedule 2 – directory assistance services	No merits review of ACCC arbitration determinations made under the Telecommunications Act.	

Telecommunications Act 1991 (Previous telecommunications regulatory regime)		
Under Part 8 of the Telecommunications Act 1991 a carrier had basic access rights in relation to: • connecting its facilities to the network of any carrier; and • matters such as customer information, billing and directory services and prices at which carriers used each others' networks. Division 5 of Part 8 provided for Austel to arbitrate on the terms and conditions of access agreements where the carriers could not agree. The Act set out procedures governing the conduct of such arbitrations, including provision for Austel to conduct a public inquiry on a matter involved in an arbitration (where the matter was likely to have a significant and direct effect on consumers of telecommunications services).	The determination made by Austel under these provisions was not subject to merits review under the Telecommunications Act 1991.	It appears that, at that stage of emerging competition in the telecommunications sector, it was considered that merits review could have delayed the process of promoting competition and could have operated to the incumbent's advantage.

Prices Surveillance Act 1983		
ACCC functions to consider pricing notifications/ hold inquiries into matters relating to prices/ monitor prices, costs and profits as directed by Minister.	No merits review (to either Australian Competition Tribunal or Administrative Appeals Tribunal) under the PSA.	
National Gas Code		
Under the National Third Party Access Code for Natural Gas Pipeline Systems, service providers are required to establish access arrangements to the satisfaction of the relevant regulator (ACCC or relevant state/ territory regulator). An access arrangement is a statement of the policies and the basic terms and conditions that apply to third party access. An access arrangement must include one or more reference tariffs, which operates as a benchmark tariff. The Gas Pipelines Access Law provides for access disputes to be referred to arbitration by the relevant regulator (Part 4 GPA Law; Part 6 Code). A dispute may only be notified if an access arrangement has been accepted by the relevant regulator.	There is no merits review of arbitration determinations. The Code and Law provide for merits review in respect of certain other decisions of the ACCC or relevant state/ territory regulator. Section 38 of the GPA Law provides for merits review in relation to: • decisions on whether a pipeline is a Code pipeline; • decisions to add to or waive the requirement that a service provider be a body corporate, not be a producer or seller of natural gas, or relating to the separation of certain activities; • decision not to approve an arrangement between a service provider and an associate of a service provider; • other decisions to which that section applies. Decisions in relation to arbitrations and approval of access arrangements (except as noted above) are not decisions to which s 38 applies. The appeals body may make an order affirming, setting aside or varying the decision under review. The GPA Law and the Code provide for review, only certain grounds, of a decision by the relevant regulator to impose an	Reference tariffs are set under the process of considering and approving access arrangements. Thus, the main price setting function occurs outside the arbitration process. There is limited merits review, only on specified grounds, of a decision by the relevant regulator to impose an access arrangement.

The main price setting function, therefore, occurs in the consideration of access arrangements, and an arbitration determination would apply a reference tariff.	access arrangement. ie under s 39, if the decision of the relevant regulator is to draft and approve an access arrangement in place of an access arrangement submitted by a service provider an application for review by the relevant appeals body can be made by: • the service provider; or • a person who made a submission to the regulator and whose interests are adversely affected by the decision. An application for review under s 39 may only be made on the following grounds: • an error in the regulator's finding of facts; • that the exercise of the regulator's discretion was incorrect or unreasonable having regard to all the circumstances; or • that the occasion for exercising the discretion did not arise. An application for review may not raise any matter that was not raised in submissions to the regulator. The appeals body is limited to considering information that was before the regulator.	

National Electricity Code		
ACCC regulates transmission revenues. While the Code includes a dispute resolution process, the ACCC does not act as arbitrator. An arbitration determination may be made a dispute resolution panel.	There is no merits review of ACCC decisions. There is no provision for merits review in the Code of a determination by the Dispute Resolution Panel.	
Independent Pricing and Regulatory Tribunal Act 1992 (NSW)		
Part 4A of the IPART Act provides for resolution of certain access disputes by IPART (or other appointed arbitrator) including in relation to the NSW Rail Access Regime. In the case of a dispute involving a third party wanting, but not having, access to a service, the arbitrator must give public notice of the dispute and invite submissions from the public regarding the dispute: s 24B(2). eg a dispute between the Rail Access Corporation and the National Rail Corporation referred to IPART for arbitration was resolved in 1997 when a consent award was made by IPART.	An access arbitration determination made by IPART under these provisions is not subject to merits review under the IPART Act. The Commercial Arbitration Act 1984 (NSW) applies to access arbitrations under the IPART Act (subject to the IPART Act). Commercial Arbitration Act provides for judicial review of awards on questions of law, but not merits review. There is no provision for merits review of other pricing determinations made by IPART under the IPART Act.	Potentially, legislation in relation to an access regime providing for application of the arbitration provisions of the IPART Act could possibly provide for merits review.

IPART also has pricing review and price setting functions in relation to certain government monopoly services, including water and transport services.		

Queensland Competition Authority Act 1997 (Qld)		
Part 5 of the QCA Act establishes a State based third party access regime. The QCA arbitrates access disputes: Part 5, Division 5; Part 7. Amongst the other functions of the QCA, it also considers access undertakings (Part 5, Division 7). eg the Authority assessed a draft undertaking submitted by Queensland Rail under these provisions. The QCA has a prices oversight function in respect of government monopoly business activities, but does not set the prices.	An arbitration determination made by the QCA under these provisions is not subject to merits review under the QCA Act. There is also no provision for merits review of decisions in relation to access undertakings.	
South Australian Independent Industry Regulator Act 1999 (SA)		
The SAIIR Act confers various functions on the SAIIR, including regulating prices under relevant industry regulation Acts (ss 5, 20).	A pricing determination made by the SAIIR is subject to review by the SAIRR and then appeal to the Administrative and Disciplinary Division of the District Court: ss 26, 27. For merits review, the Court must sit with industry experts. On an appeal, the Court is only to consider the information on which the SAIIR based its determination and any information put before the SAIIR on review.	The SAIIR Act does not establish a general third party access regime or provide for SAIIR to arbitrate disputes. However, the SAIIR relevant industry regulation Acts could provide for SAIIR to resolve disputes. eg the Maritime Services (Access) Act 2000 provides for disputes to be referred for conciliation by SAIIR; if not resolved the dispute can then be referred to an arbitrator; this Act provides for appeals on questions of law, but not merits review.

Office of the Regulator-General Act 1994 (Vic)		
Functions of the ORG are conferred by the relevant legislation under which a regulated industry operates. eg The Rail Corporations Act 1996 (Vic) sets up an access regime (effective 1 July 2001) for rail services based on a negotiate-arbitrate model (Part 2A of that Act). In the event of a dispute, the ORG may make a determination relating to access, including the terms and conditions of access, to a declared rail transport service (which is a determination under the ORG Act).	ORG Act provides for limited appeal rights in respect of a determination by the ORG under the ORG Act or any other act on the ground that: • there has been bias; or • the determination is based wholly or partly on an error of fact in a material respect. The appeal is heard by an appeal panel. The appeal panel may, *inter alia*, affirm the determination of the office or vary the determination to correct an error. There is no further provision for merits review under the Rail Corporations Act.	These appeal rights appear to be more akin to judicial review grounds rather than full merits review.
Independent Competition and Regulatory Commission Act 1997 (ACT)		
If a dispute exists with respect to a public infrastructure access regime that provides for the application of the ICRC Act, any party to the dispute may refer the dispute to arbitration by the ICRC: s 24A. ICRC also has the power to make pricing directions for regulated services under this Act.	There is no provision for merits review of an arbitration determination by the ICRC under the ICRC Act. There is provision for merits review by an 'Industry Panel' of a pricing direction made by the ICRC. The review body must not consider any matter that was not raised in original submissions to ICRC.	

ATTACHMENT B

OVERVIEW OF REGULATORY REVIEW PROCESS IN SELECTED MEMBER STATES AND NORTH AMERICAN JURISDICTIONS

Issue	EU	UK	The Netherlands	Germany	France	US Federal	US - State (New York)	Canada
Provision for Review on the Merits	The amended ONP Framework Directive requires Member States to ensure that suitable mechanisms exist at national level under which a party affected by a decision of the NRA has a right to appeal to a body independent of the parties involved.	Sections 18 & 46B of the Telecommunications Act set out the only circumstances in which the validity of a final or provisional order may be the subject of legal proceedings. The decisions that may be challenged include refusal to grant a licence, inclusion of particular terms in a licence, modification of a licence, exercise of the power to give a direction/consent /make any determination. Persons aggrieved by a decision may	The OPTA Act vests in OPTA the power to supervise, investigate and enforce the Telecommunications Act. The General Administrative Law Act regulates the appeal procedures against decisions of any administrative authority (including OPTA) both on the facts and on the law.	Section 80(1) of the Telecommunications Act (the "TKG") provides that the Procedural Rules for Administrative Proceedings (which require a merit- based review before judicial proceedings can be commenced) do not apply to the telecommunications sector. Accordingly, there is no merit-based review of telecommunications regulatory decisions. Decisions by the RegTP in disputes relating to Special Network Access	Art L.36-8 of the Code of Post and Telecommunications (the "Code") vests the ART with authority over: • Interconnection disputes • Disputes relating to the provision of telecoms services over cable networks • Shared use of existing installations. ART decisions on these matters may be appealed to the Paris Appeal Court. A judgment of the Paris Appeal Court may be appealed to the Court of Cassation on points of law.	Parties may petition the FCC to reconsider an order. Such a petition is only a condition precedent to judicial review when the party seeking review was not a party to the original proceedings or relies on fact or law that was not before the FCC. The Federal court of appeals has exclusive jurisdiction to enjoin, set aside, suspend or determine the validity of all final orders of the FCC. Orders may be set aside if they are arbitrary, capricious, an abuse of	Parties may apply for rehearing before a PUC within 30 days of service of an order. The State courts have authority to review PUC regulations and determination, including declaratory rulings. They may only be set aside in an "Article 78 proceeding", in which the issue raised must have been raised before the PUC (or justification is offered for the failure to raise the issue) and if the PUC's exercise of judgment is shown to violate lawful	The CRTC may reconsider its decisions in response to an application or on its own motion. An applicant must demonstrate an error of law or fact, a fundamental change in facts/circumstances, a failure to consider a basic principle raised or a new principle raised by the decision. The CRTC has broad powers to make any order (in review) that is could make at first instance. It may review its decisions at any time. Appeals to the

		appeal on the ground that a material error as to the facts has been made. Leave of the High Court must be obtained to appeal.		negotiations may be reviewed on the merits in the civil courts, if the parties have not declared the RegTP's decision to be final prior to the RegTP's involvement in the dispute.	Art L.36-11 of the Code gives the ART the power to adopt decisions imposing sanctions on telecoms operators and service providers for breach of regulatory obligations.	discretion or otherwise not in accordance with law. The Telecommunications Act (the "Act") gives State Public Utility Commissions the power to arbitrate in relation to interconnection (including pricing, resale and access). Such arbitration decisions may be reviewed in the Federal district court (where the court determines whether the interconnection agreement meets the requirements of s251 of the Act.	procedure, be affected by error of law or to be arbitrary and capricious or amount to an abuse of discretion.	Federal Court of Appeal, with leave of the court, is permitted on any question of law or jurisdiction arising out of a CRTC decision. The CRTC's determinations on matters of fact may not be challenged in an appeal. In addition, decisions may not be challenged solely on the ground that there was no evidence to support a finding of fact. The Governor in Council has a discretion to vary, rescind or refer all/part back an order of the CRTC or refer it back for reconsideration, at any time. The Governor may take any relevant matter into account and may review or vary

								the same decision multiple times.
Procedure for Merit Review of Telecoms Regulatory Decisions	N/A.	The procedural rules of the High Court govern the appeal process.	Before any decision can be appealed a notice of objection must be filed against the decision. The decision can then be appealed to the District Court of Rotterdam (within six weeks of the filing of the notice of objection). Decisions of the District Court can be appealed to the Court of Appeal of Trade & Industry.		Appeals against decisions under Art L.36-8 must be filed within one month (seeking modification or annulment); interim measures must be sought within ten days.	Review of an FCC order takes 12-18 months; petitions for review must be filed within 60 days of entry of the FCC order. Briefing & oral argument is complete in 6-9 months. Reviews of PUC interconnection arbitrations take between 1-3 years; further appeals can extend the period.	Article 78 proceedings (plus an appeal) will take 18-24 months.	N/A.
Reviews Requested to date	N/A.	No judgments reviewing alleged material errors as to the facts have been delivered.	During 2000: • 142 Notice of objections submitted • 129 Notice of objections determined • 4 higher appeals lodged.	N/A.	There have been numerous appeals under all three Art L.36-8 heads of power.	There have been many such reviews.	There have been many such review.	

Merit-based Review of Competition Authority Decisions	Appeal under the EC Treaty or the Merger Regulation, as appropriate.	Reviews on the merits of decisions under the Competition Act are available in relation to the following questions: • whether the Chapter I or II prohibitions have been infringed • whether an exemption (or conditions) should be granted • whether to extend or cancel (or extend the term of) an individual exemption • a penalty. There is no merits review for interconnect pricing decisions, as these do not amend a licence.	The General Administrative Law Act also permits appeals against decisions of the NMa.	Decisions may be appealed on the merits by parties to proceedings. Further appeals may be made to the Federal Supreme Court on points of law, if there is an issue of fundamental importance to be decided or a decision is necessary to develop the law or ensure uniform practice, with leave from Higher Regional Court.	The Competition Council may adopt decisions regarding anti-competitive agreements and abuses of a dominant position or economic dependence or for abusively low pricing. The Competition Council's decisions may be appeal to the Paris Court of Appeal for annulment or reversal. Decisions of the Paris Court of Appeal may be appealed on points of law to the Court of Cassation.	The DoJ and FTC are the closest federal bodies to "competition authorities". Their actions in the telecoms sector involve filing complaints in the federal courts; there are no internal decisions *per se* to review.	N/A.	Appeal against any decision or order (whether final, interlocutory or interim) lies to the Federal Court of Appeal. Appeals on questions of fact lie only with leave of the Court.

Procedure for Merit Review of Competition Decisions	Varies, in accordance with the instrument under which the decision was taken.	Appeals against Commission decisions must be made by sending a notice of appeal to the Commission setting out the provision under which the appeal is brought, the extent to which the appellant contends that the decision was based on an error of fact. The tribunal must determine the appeal on the merits by reference to the grounds set out in the notice.	Before any decision can be appealed a notice of objection must be filed against the decision. The decision can then be appealed to the District Court of Rotterdam (within six weeks of the filing of the notice of objection). Decisions of the District Court can be appealed to the Court of Appeal of Trade & Industry.	Rules of the Higher Regional Courts govern.	Appeals against the Competition Council must be filed within one month of notification. Appeals from the Paris Court of Appeal must be filed within one month of judgment.	N/A.	N/A.	Rules of Federal Court of Appeal govern.