

Australia's new telecommunications access regime: Part XIC, *Trade Practices Act 1974*

An important feature of the telecommunications industry is that competitors almost invariably need to make use of each others' networks. This is because many communications services (for example, telephone calls) require 'any-to-any' connectivity—the ability for any end-user of the service to contact any other end-user, regardless of who the suppliers are or on what network they are connected. This 'any-to-any' feature—and the Government's commitment to promote the diversity of carriage and content services available to end-users—requires an access regime that includes additional features to those contained in the general access regime in Part IIIA of the Trade Practices Act.

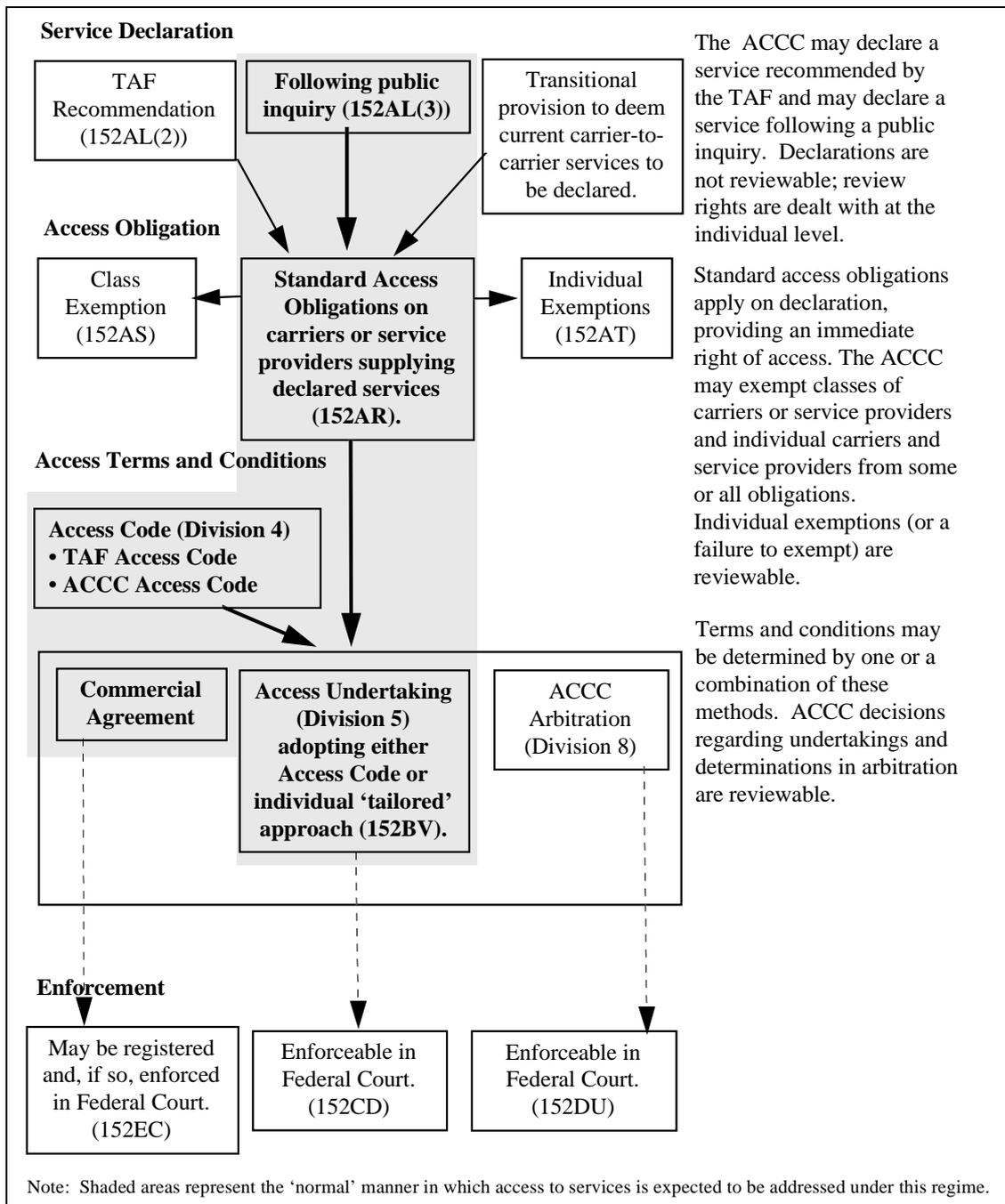
Part XIC of the *Trade Practices Act 1974* establishes an industry-specific regime for regulated access to carriage services and provides the core access arrangements for the telecommunications industry. Arrangements relating to carrier access to certain facilities and network information are contained in Parts 3 and 4 of Schedule 1 of the Act (and are discussed at the end of this document).

In developing the new arrangements, which took effect on 1 July 1997, the Government recognised that there are expectations of continuity regarding the broad rights contained in existing access arrangements in Part 8 of the *Telecommunications Act 1991*.

A smooth introduction of the new access regime depends critically on transitional arrangements. Transitional arrangements contained in the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* essentially retain existing access rights for carriers, extend those rights to service providers and fulfil the Government's election commitment to achieve open access in regard to the carriage of broadcasting services over cable networks.

The main features of the regime are summarised in the figure below.

Figure—Main features of the telecommunications access regime.



The industry-specific nature of this regime reflects the particular policy interests in:

- promoting any-to-any connectivity;
- promoting diversity and competition in the supply of carriage services, content services and other services supplied by means of carriage services;

- ensuring access to carriage services is established on reasonable terms and conditions and includes necessary ancillary services such as interconnection, billing information and access to conditional access customer equipment (such as set top boxes used in the supply of pay television).

The features of the regime and their inter-relationship have been shaped by a number of other principles, principally being:

- to identify those services for which a genuine access issue exists;
- to give industry the necessary tools and incentives to develop industry-based solutions to access issues;
- to promote reliance on commercial resolution of issues as far as possible;
- to provide speedy administrative solutions in situations where genuine access disputes exist which cannot be resolved by industry consensus or commercial means;
- to minimise direct regulatory imposts and provide commercial certainty, while also providing sufficient flexibility to deal with access issues in this rapidly converging industry; and
- subject to the above principles, to maximise consistency with other laws.

Objects

The statutory object of Part XIC is to promote the long term interests of end-users of carriage services and services supplied by means of carriage services (including content services) (s.152AB).

In determining what comprises the long term interests of end-users, the ACCC must only consider the following objectives (s.152AB):

- the promotion of competition in markets, including, but not limited to, the removal of obstacles to end-users gaining access to services;
- the achievement of any-to-any connectivity in relation to carriage services involving communication between end-users; and
- encouraging economically efficient use of, and economically efficient investment in infrastructure by which carriage services and services supplied by means of carriage services, are supplied.

In considering this last objective, the ACCC must have regard to the technical feasibility of supplying and charging for services, the legitimate commercial interests of suppliers, and the effect on investment incentives.

These criteria are intended to provide clear guidance to the ACCC as to the matters it must consider, rather than leave the matter to a broad discretion such as the ‘public interest’ test in Part IIIA of the *Trade Practices Act 1974*.

Service declaration

The foundation element of the scheme is the concept of declared services. This is because ‘access obligations’ only arise following the declaration of a service.

A service may be declared (s.152AL) by the ACCC by two mechanisms.

First, the Telecommunications Access Forum (TAF—see below) may recommend that the ACCC declare a service. The ACCC may then declare the service if it is satisfied that the TAF has consulted with potential access seekers and consumer representatives. Declaration on a TAF recommendation will not require the ACCC to undertake a public inquiry, since there are likely to be few circumstances under which the ACCC would refuse to declare a service which the TAF (being a body intended to comprise most access providers) voluntarily nominates. This also creates incentives for service providers to join the TAF and to participate constructively in its processes. If the ACCC is not satisfied that a TAF recommendation reflects industry consensus, or is otherwise unconvinced that declaration would contribute to achieving the object of Part XIC, then it may either refuse to declare the service or undertake a public inquiry to consider the issue further.

The second route for service declaration is by ACCC public inquiry. The ACCC may, on its own initiative, or on recommendation by any other person, hold a public inquiry into the declaration of a service or services and may declare that service or those services within 180 days of reporting on the inquiry if it is satisfied that the declaration would be in the long term interests of end-users (s.152AL(3)). The procedures for public inquiries are detailed in Part 25 of the Telecommunications Act.

The major criterion which the ACCC will use in deciding whether to declare a service by means of a public inquiry will be whether the declaration will promote the long term interests of end-users, the definition of which is set out in the objects provision (s.152AB). In practice, this is likely to involve the ACCC weighing up the benefits of declaration flowing from the first two objectives, against the potential effects on innovation and longer term investment in the industry.

No merits review rights are envisaged for a service declaration, since access providers may seek an individual exemption from their access obligations (see below).

It is also worth noting that transitional provisions (s.39, *Telecommunications (Transitional and Consequential Amendments) Act 1997*) required the ACCC to declare from 1 July 1997 all services previously supplied under an AUSTEL-registered existing inter-carrier access agreement, unless the ACCC finds that such a declaration will not be in the long term interest of end-users. Additional obligations were to declare services necessary for the carriage of broadcasting services over cable networks, and to give particular consideration to the AMPS phaseout plan when considering the declaration of AMPS services in the transitional period. This

instrument was made by the ACCC in June 1997 and is available from them. In general, new entrants have had the rights and obligations which attached to the pre-1 July 1997 carriers, and additional rights and obligations regarding broadcasting services, from the first day of operation of the new regime.

Access providers, standard access obligations

Once a service is declared, a carrier or carriage service provider who supplies a declared service (an 'access provider') is subject to standard access obligations (s.152AR) in relation to that service. These include, subject to limitations having regard to the reasonable requirements of existing users, obligations (where requested by a service provider) to:

- supply that declared service at a technical and operational quality equivalent to that which it supplies to itself;
- permit interconnection of facilities for the purposes of enabling a service provider to be supplied with the declared service and at a technical and operational quality equivalent to that which it provides interconnection to itself;
- provide billing information associated with the declared service; and
- if the declared service is supplied by means of conditional access customer equipment, supply services necessary to enable the service provider to supply carriage or content services by means of the declared service and using the equipment;

unless there are reasonable grounds to believe that the service provider would fail to comply with the terms and conditions of access or protect network integrity or the safety of individuals.

The terms and conditions under which an access provider supplies access are discussed below.

Exemptions from standard access obligations

The ACCC may make a 'class exemption' where it is satisfied that this will promote the long term interests of end-users (s.152AS). This gives some flexibility for the ACCC to grant exemptions for persons with similar characteristics. It is also envisaged that, in the event that the TAF develops access obligations alternative to those detailed in s.152AR (for example, an alternative standard of technical and operational quality and timeliness to that required under s.152AR(3)(b)), the ACCC may provide an exemption for access providers from that aspect of the standard access obligations conditional on them complying with the TAF-developed alternative.

Individual carriers and carriage service providers may also seek an 'individual exemption' from any or all standard access obligations (s.152AT). This exemption may be granted on a conditional or unconditional basis and may specify time limits.

The ACCC must be satisfied that the giving of the exemption would promote the long term interests of end-users. A decision under this provision is subject to merits review by the ACT on application by anyone who is affected by the decision.

Terms and conditions

Access providers must comply with the standard access obligations (as they apply to the particular provider) on terms and conditions which may be determined in three ways (s.152AY):

- as commercially agreed by the access provider and access seeker;
- as detailed in an access undertaking; or
- as determined by the ACCC through arbitration.

In practice, it is likely that a combination of these routes may be used in relation to particular services.

Commercial negotiation

In the absence of a registered access undertaking and any unresolvable disputes between an access provider and access seeker, the terms and conditions on which the access provider complies with its obligations will be a matter for commercial agreement.

Once determined, however, access agreements may be registered with the ACCC. If they are registered in this way, they may be enforced as though they were a determination made by the ACCC under the arbitration provisions (Division 9).

Undertaking

An access provider (or a carrier or carriage service provider who proposes to supply a service which has been declared) may submit an access undertaking for ACCC acceptance. This is to improve certainty about the terms and conditions on which the access provider must comply with the access obligations.

If accepted by the ACCC, an undertaking conclusively determines the terms and conditions of access to which the undertaking relates. Undertakings, however, need not address all the terms and conditions of access. Where an undertaking does not deal with a particular matter, it may be resolved by either commercial negotiation or arbitration.

An access undertaking may take two forms.

The first type (a 'Code' undertaking) adopts one or more sets of model terms and conditions detailed in an industry-developed access code (see below). It is intended that an undertaking which adopts a set of terms and conditions from a code should not

be able to vary or supplement those conditions. Such an undertaking must be accepted immediately by the ACCC without any need for public consultation. A Code undertaking continues in force until the code is revoked or varied to remove the relevant model terms and conditions, or the undertaking is withdrawn (s.152BX).

The second type (an 'individual' undertaking) allows a carrier or carriage service provider to specify individual terms and conditions applying to one or more declared services (s.152BS(3)). A wide degree of flexibility is available for access undertakings to address terms and conditions for specific declared services, or to apply specific terms and conditions across some or all declared services. The ACCC must, before accepting such an undertaking, invite public submissions and be satisfied that the undertaking:

- is consistent with the standard access obligations as they apply to the access provider;
- is consistent with any Ministerial determination regarding price (see below); and
- contains terms and conditions which are reasonable (having regard to the matters detailed in s.152AH).

An access undertaking adopting this form may stay in effect for up to three years, and may be varied at any time with the approval of the ACCC (s.152BY).

A decision regarding the acceptance of a draft undertaking or a request to vary an undertaking is reviewable by the ACT (s.152CE).

It is possible to combine up to one Code undertaking and one individual undertaking in relation to any given declared service. Thus, a set of code terms and conditions may be adopted in one undertaking and then supplemented in a separate individual undertaking (the latter of which may be accepted by the ACCC only after public consultation).

Telecommunications access code

The TAF may develop an industry-sponsored access code which sets out model terms and conditions for complying with the standard access obligations and which are capable of being adopted in an undertaking (Division 4 of Part XIC). Like individual undertakings, the code may address model terms and conditions for individual services, or address terms and conditions in a generic way across some or all services. Before approving a draft access code, the ACCC must publish it and consider any submissions received (s.152BH). The ACCC must not approve a draft access code unless it is satisfied that consultation has taken place with persons likely to be access seekers in relation to the services covered by the code and with consumer representatives; that the code is consistent with the standard access obligations and any Ministerial pricing determination; and that it is reasonable (s.152BF).

The ACCC is also empowered to make an access code, but only if:

- no code is in place, or the ACCC is satisfied that it would not have approved the existing code had it been submitted as a draft;
- it requests the TAF to submit either a new code or variation to the existing code; and
- the TAF either fails to comply with the request or the draft submitted is not approved by the ACCC (s.152BJ).

An ACCC-made code is bound by similar content requirements to a TAF developed code (s.152BK). Once made, an ACCC code is deemed to be a TAF access code for the purposes of the Part, including enabling the TAF to submit draft variations to the code or a proposal for revocation.

It is anticipated that this system will provide incentives for the industry to work constructively to develop an industry code within the TAF.

There is no review on the merits for either a decision regarding a TAF developed code or a decision by the ACCC to make a code. This is because codes do not bind an access provider unless they submit an undertaking adopting the code.

Arbitration

Parties to a dispute about the terms and conditions of access may seek ACCC arbitration under Division 8 of Part XIC. The ACCC may not, however, make a determination in relation to an access provider which is inconsistent with the provider's undertaking (s.152CQ(5)).

In arbitrating a dispute the ACCC will be guided by the matters and restrictions in ss.152CP, 152CQ and 152CR and procedural arrangements in Subdivision D. These provisions have their basis in Part IIIA of the *Trade Practices Act 1974*. Some modifications, however, have been necessary to take account of the differing nature of the two regimes. In particular, the resolution of a dispute over access may require action by the owner or controller of a facility, including where that person is not the access provider. Where the ACCC is satisfied that the resolution of a dispute may require another person to do something, it may make that other person a party to the dispute (s.152CO).

Determinations are enforceable in the Federal Court (s.152DU).

A party to a determination may apply to the ACT for a review of the determination (152DO) and decisions of the Tribunal may be appealed to the Federal Court on questions of law (152DQ).

The ACCC may terminate an arbitration, including if it thinks the matter is trivial, that parties have failed to negotiate in good faith or that existing contractual agreements between the seeker and provider should continue to operate (s.152CS). If it suspects parties have not negotiated in good faith it may also issue directions to those parties it

considers appropriate to assist in the resumption of negotiations (s.152CT). Guidelines may be issued in regard to this directions power.

These provisions can work alongside an industry-established alternative dispute resolution mechanism. The establishment of such a mechanism would not, however, remove the ultimate rights, established under this Part, of parties to seek arbitration from the ACCC.

Telecommunications Access Forum

The ACCC can designate a body or association to be the TAF (s.152AI). The TAF has two main functions under the regime: to recommend the declaration of services; and to submit a draft access code for approval by the ACCC (the only body which can do so). The TAF must have membership open to all carriers and carriage service providers, be capable of generating recommendations regarding the declaration of services and preparing draft access codes and have a written constitution. The ACCC designated a TAF in May 1997.

Ministerial pricing principles

The Minister may make a determination about the principles to be applied in determining price-related terms and conditions (s.152CH). Access undertakings, access codes and determinations made under the arbitration provisions must be consistent with any such determination. Any access undertaking in force at the time of the making of such a determination has no effect to the extent that it is inconsistent with a Ministerial pricing determination (s.152CI).

Transitional arrangements

Some connection obligations under the *Telecommunications Act 1991* continue in force during the transitional period. Under these arrangements (s.41 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*), the ACCC must make a determination before 1 July 1997 specifying terms and conditions for certain connection obligations that are reasonable. This instrument was made by the ACCC on 25 June 1997.

The transitional period for this scheme is from 1 July 1997 to 31 December 1997, or such later date as the ACCC determines.

Where there is a dispute about the charges that existing service providers pay for 6 months from 1 July 1997, the charges determined by the ACCC will apply from the time the relevant declared service was being supplied. This provision only applies to a person who was supplying an eligible carriage service within the meaning of s.18 of the *Telecommunications Act 1991* before 19 February 1997 ie. pre-existing service providers. If a person decides to notify the ACCC under s.43 of the T(TPCA) Act 1997 reserving their right to make a request under s.41, then a person cannot also take advantage of the backdating of charges under s.46 of that Act.

Relationship with Part IIIA

The Part XIC access regime is the primary mechanism by which service providers gain regulated access to carriage services and services which facilitate the supply of carriage services. It does not, however, prevent non-service providers from seeking the declaration of these services under the economy-wide access regime contained in Part IIIA of the Trade Practices Act. If a service is declared under both regimes, service providers will be limited to using Part XIC.

An access undertaking submitted under Part IIIA in relation to a service already declared under Part XIC may only set terms and conditions for access by non-service providers.

Facilities-related access rights

In addition to the services based access regime in Part XIC, certain facilities-related access rights apply to carriers and are established by means of carrier licence conditions in Schedule 1 of the *Telecommunications Act 1997*. These rights continue provisions made under the *Telecommunications Act 1991*.

Where requested to do so by another carrier, carriers must provide access to facilities (for the purposes of the requesting carrier providing competing facilities or services), where the facilities were in place before 30 June 1991 or installed after that date by means other than commercial negotiation. As these principally relate to infrastructure, it is appropriate that they are restricted to carriers, who are the primary infrastructure providers under this legislative scheme.

Further, carriers are required to co-locate mobile facilities on radiocommunications towers and radiocommunications sites and facilities in ducts unless it is not technically feasible to do so. The ACA will determine technical feasibility. The ACCC will arbitrate on any disputes between carriers over the terms and conditions on which co-location is to occur.

In addition, a number of specific obligations relating to the provision of network information by carriers to each other are established. Again, as this information is intended to be used to assist with network planning and management, it is appropriate to limit the obligation and the benefit to carriers.

A carrier must supply these supplementary services whenever 'reasonably requested' to do so. In addition:

- the terms and conditions of access are largely a matter for commercial negotiation, or failing those processes, arbitration (by the ACCC); and
- the Minister may make a determination setting out pricing principles governing such access.