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24 July 2001

Mr Mike Woods
Presiding Commissioner
Telecommunications Inquiry
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Mr Woods

TELECOMMUNICATIONS COMPETITION REGULATION

Please find enclosed with this letter a submission on behalf of C7 Pty Limited commenting on the draft report on Telecommunications Competition Regulation issued by the Productivity Commission.

The issues discussed in the submission relate primarily to those draft recommendations of the Commission that are relevant to the provision of subscription television services.

Seven appreciates the opportunity afforded by the Commission for making comment on these issues.

Yours faithfully

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C7

Submission to the Productivity Commission regarding Telecommunications Competition Regulation

1 Introduction

This submission is made by C7 Pty Limited ("C7") in response to the Draft Report of the Review of Telecommunications Competition Regulation issued by the Productivity Commission in March 2001.

The issues discussed in this submission relate primarily to those recommendations of the Commission that are relevant to the provision of subscription television services ("pay TV").

The submission also addresses submissions made to the Commission by Fox Sports and Telstra Corporation in May 2001.

2 The Commission's draft report

2.1 Draft recommendation 8.3

The Commission recommends that for a telecommunications service to be declared it must meet all of the following criteria:

(a) the telecommunications service is of significance to the national economy and

1) for a service used for originating and terminating calls, there are substantial entry barriers to new entrants arising from network effects or large sunk costs; or

2) for a service not used for originating and terminating calls, entry to the market of a second provider of the service would not be economically feasible;

(b) no substitute service is available under reasonable conditions that could be used by an access seeker;

(c) competition in downstream markets is insufficient to prevent the provider of the service from exercising substantial market power;

(d) addressing the denial of access, or the terms and conditions of access, to the service concerned is likely to improve economic efficiency significantly; and

(e) access (or increased access) to the service would not be contrary to the public interest. [chapter 8, page 8.24]

C7 disagrees with this recommendation.

Regulator flexibility

The Commission states that it considers that existing declaration criteria in Part XIC of the *Trade Practices Act 1974* (TPA) allow too much flexibility for the regulator in deciding when to declare a service (p.8.23).

However, the making of a declaration is more in the nature of the exercise of a subordinate legislative power. As such, it is appropriate that there be some policy guidance in the TPA for the ACCC in considering its decision. But, because of the fast moving nature of the telecommunications industry, it is entirely appropriate that the ACCC have the necessary flexibility to enable it to respond appropriately to industry/market developments. Typically this industry is at the forefront of the development of new technologies and services. As such, it is not possible to impose highly prescriptive and narrow controls on the ACCC which take account of those new developments. Nor is it desirable to limit the ACCC's ability to respond to these developments by restricting it to what amounts to a 'fact finding' exercise. The regulator must be allowed to exercise its expertise in assessing market conditions, and then reach a decision taking all relevant factors into account. The decision is a subjective judgement which is appropriate and makes it less susceptible to challenge.

Setting a high bar – a lawyers' feast

The Commission's proposal would require that each and every criteria be met before a service may be declared – this sets the bar extremely high and would make it very difficult to satisfy the test.

It would also make the test very complicated and would likely benefit only the dominant incumbents and everyone's lawyers.

The test for declaration should be clear and simple. This should be accomplished by:

- specifying the relevant goals or criteria;
- requiring the ACCC to be satisfied that, having regard to the specified criteria, it is desirable for the service to be declared.

    e.g. "The ACCC may, if, in its opinion, having regard to the criteria specified in [the relevant sub-paragraphs], it considers it is desirable to declare a specified eligible service, declare, by written instrument, that service as a **declared service**."

This approach differs from the currently proposed strict objective test which requires every criteria to be met. The current proposal would invite litigation as to nearly every new declaration, encouraging a Court to substitute its opinion for that of the ACCC.

The Commission's draft proposal would encourage game playing (usually by the dominant incumbents) and would invite protracted review processes/litigation. In the meantime, services would not be declared and competitors and potential competitors would be effectively prevented from competing to provide more efficient and valuable services to end-users.

Significance to the national economy

The Commission's proposed criterion that a service be "of significance to the national economy" cannot be sensibly applied to subscription broadcasting services or pay TV. It may be difficult to establish that pay TV is "of significance to the national economy". But this does not mean that the provision of pay TV does not constitute significant commercial activity. Indeed, Parliament indicated how important it considered pay TV services are in Australia by passing the legislation deeming analogue pay TV services to be declared services. Also, it is widely recognised that pay TV is seen as a driver of new services, such as broadband and interactive services, into the market.

Reversal of assumption on public interest

The Commission's proposed criterion requiring proof that access would not be against the public interest is a reversal of onus which does not make sense. Competition law and policy is predicated on the assumption that access is very positively in the public interest. But the Commission's recommendation would have the effect that access in relation to the relevant service under consideration would be against the public interest, unless proved to the contrary. There is no adequate justification for this reversal.

2.2 Access holidays

The Commission considers that there are grounds for modifying Part XIC to allow the ACCC to grant immunity from subsequent declaration to new telecommunications investments that would not occur if there was a threat of declaration (an access holiday). However, the Commission seeks feedback on how such an access holiday could be implemented, and particularly:

- ***the appropriate length of any access holiday;***
- ***how to distinguish investments that are marginal from those that would still occur if they were declared; and***
- ***any other guidelines that would simplify the implementation of access holidays. [chapter 8, page 8.27]***

C7 disagrees with the Commission's views on access holidays.

Investment in infrastructure

There is no evidence that the existence of the declaration powers under Part XIC has acted as a disincentive to investment in new infrastructure, or the upgrading or modification of existing infrastructure.

In its submissions to the Commission, Telstra has argued against Part XIC in its current form, claiming that it is having the effect of preventing investment in infrastructure. Yet Telstra also states that it is rolling out significant investments such as the CDMA mobile network and the ADSL service. Surely this is concrete evidence that even the most vocal critic of the current access regime has, in practice, not been dissuaded from continuing to invest in the establishment of significant infrastructure.

Assessment of competition/market

The state of competition in a market must be assessed as the market develops. Because of the pace of development in the telecommunications market, it is highly likely that a service that is quarantined from the access regime today, could in six or 12 months, be critical to the progress of competition in a particular market sector or in relation to a range of new or developing services. This stifling of competition would be exacerbated the longer the 'holiday'. The holiday period of 3 years suggested by Telstra is completely unrealistic in the context of today's telecommunications industry.

Access to pay TV services

The intent of the deemed declaration of analogue pay TV services was to introduce competition – this has not yet happened.

It is now claimed that the capacity of the HFC cable has now been fully committed to a small number of users, thereby 'justifying' refusal to grant access to the cable other than in respect of a limited number of operators. When the HFC cable is converted to digital transmission mode, its capacity will exceed 400 channels, which would allow as many competitive users as the market could bear. This is very significant competition 'waiting to happen'. There can be no justification for further delaying competition that will benefit the community, by the granting of an 'access holiday'.

The bulk of the current bandwidth of the HFC cable is allocated to analogue pay TV. As a result, granting an access holiday to digital pay TV services while maintaining access for analogue pay TV services would encourage the continued use of analogue spectrum by access seekers, rather than the use of digital spectrum. As the capacity of the HFC cable is finite, the continued use of analogue spectrum by access seekers may prevent the full range of digital services being utilised. That would be contrary to the aim of encouraging efficient use of the infrastructure. The objectives of the legislation are best served by permitting access seekers to use the most efficient technology available, rather than effectively mandating the use of old technology by granting an "access holiday" in respect of more efficient technology.

Distinguishing between investments

The Commission seeks comments on how to distinguish between investments that are marginal from those that would still occur if they were declared.

As previously stated, pay TV is a driver of other new and emerging services into the market. This type of relationship between services is not unique. The interrelationship of services would make it very difficult to distinguish between investments that are marginal from those that would have occurred even if declared.

It would be very easy for an owner of infrastructure to argue that the infrastructure was, or is to be installed for a narrow purpose of providing only one or two services, whereas the infrastructure could be used to deliver a wide range of services. It would be virtually impossible for an outsider to prove that the infrastructure owner has no wider purpose than the claimed narrow one.

2.3 Pricing principles

The Commission's draft recommendations include the recommendation in section 10 that specific pricing principles be legislated for telecommunications.

C7 supports the proposition that pricing principles should be broadly identified; however it considers that the existing regime sufficiently identifies matters to which the ACCC must have regard.

It is difficult to fix *a priori* pricing principles of a more detailed nature which do not contain within them assumptions that may not be appropriate to particular technology or infrastructure. There is a need for flexibility so it can be ensured that the access price appropriately reflects the particular circumstances of the infrastructure.

By way of example, most pricing models allocate common costs and capital costs on the assumption of a replication of the infrastructure by best in use technology. While that may be an appropriate assumption in the case for many telecommunications services, it is inappropriate in the case of the HFC cable. The cable was not laid upon the basis that there would be a recoupment from pay TV – even though that is currently the principal use of the broadband cable networks. Telstra laid the HFC cable largely to defend its telephony market by ensuring there was viable competition to Optus in the pay TV arena, thereby limiting Optus' penetration of homes with its HFC cable and, hence, the ability of Optus to compete with Telstra's fixed line telephony market. In fact, the assumptions underlying the pay TV rollout have not been met, making the HFC cable even more uneconomic. There has been extensive analysis of this issue previously by the Bureau of Transport and Communications in its *Communications Futures – Final Report.*[1]

This means that it would not be economically rational for any person to replicate a HFC cable network using best in use technology (even assuming there were no other HFC cable network in existence). Accordingly, to pass such costs onto access seekers by the imposition of pricing principles which contained such an underlying assumption would necessarily result in the situation where the access price is uneconomic.

Accordingly, to embed within the TPA pricing principles that contain underlying assumptions which may not be applicable is inappropriate.

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[1] See Bureau of Transport and Communications Economics *Communications Futures – Final Report*, Australian Government Publishing Service, Canberra, 1995.

Amongst other matters, the report concluded that a HFC network was not likely to be economic, even in high-density urban areas, if based on Pay TV revenue alone. The report noted that in the case of Telstra, the costs of laying the cable were justified if it would preserve 2-3% of its telephony revenue as opposed to the situation if it did not lay the cable. Indeed the net present value of the HFC cable in the monopoly scenario modelled by the Commission still resulted for a net present value of a HFC cable of negative 449 million in inner urban areas and negative 775 million in outer urban areas: see table 3.4.

2.4 Difficulties of current Part XIC regime

C7 supports the proposals made by the ACCC for the streamline of the process for arbitrations under Part XIC. C7 also supports the draft recommendations by the Commission for indicative non-binding time limits for arbitrations.

In addition, C7 makes the following observations on some further difficulties with Part XIC that are not dealt with in the Commission's draft report:

(a) **Date for determination of reasonably anticipated requirements**

There is an apparent conflict between the date at which the reasonably anticipated requirements of the access provider or existing users are to be measured.

Section 152AR(4) imposes certain limits on the standard access obligations. The consequence is that the access regime does not impose an obligation to provide a declared service to the extent the obligation would have the effect of preventing the access provider from obtaining a sufficient amount of declared service to meet the access provider's reasonably anticipated requirements. A similar exception applies in respect of existing service providers who have access to the declared service. Section 152AR(4) provides that the reasonably anticipated requirements are to be "measured at the time when the [access] request was made".

In contrast, section 152CQ, which deals with limitations on the ACCC's ability to make its determination, imposes a separate date, namely that the reasonably anticipated requirements are to be "measured at the time when the [access] dispute was notified": see 152CQ(1)(a) and 152CQ(1)(b).

This inconsistency creates uncertainty in the regime, with the consequence that access seekers and access providers are less likely to be able to resolve disputes. Furthermore, in the event that the inconsistency is resolved by holding the requirements are cumulative then that creates a situation where it is in an access seeker's interest to notify an access dispute as soon as possible after making an access request, so not to be placed in the situation where the access provider's or another user's reasonably anticipated requirements increase in the period following the making of an access request but prior to the notification of an access dispute. This is contrary to the aim of the legislation to encourage negotiation between access seekers and access providers, rather than the imposition of terms and conditions by the regulator.

As the purpose of the carve out is to protect legitimate commercial expectations (and expenditure made upon those expectations) by existing users or the access provider, the logical date to determine the reasonably anticipated requirements is the date the access provider receives the access request.

Section 152CQ(1) should be amended to reflect this and make it consistent with section 152AR(4).

(b) **Costs of extension or enhancing the capability of a facility**

The current regime is designed to ensure that the access provider does not have to bear additional costs – such as those which would be incurred by maintaining or extending facilities, which arguably include software and building premises. C7 supports this in principle.

However, the implementation of the clause is problematic. In particular, the stipulation that the determination may not require the access provider "to bear *some* or all of the costs" leads to numerous problems. Where an extension is required (e.g. to software) that requires a modification to be made which will benefit numerous access seekers, the

current regime effectively requires the first access seeker who receives a determination to pay all the costs. Furthermore, the calculation of a cost can be problematic. For example, if a particular access seeker seeks access for a specified period (e.g. to broadcast pay television during the Olympics) and new equipment or enhancements are required (e.g. head-end equipment) that can be either used by the access provider at the conclusion of that period or by other access seekers, under the current access regime the access provider can require the whole new purchase cost of the equipment be paid – rather than on a lease or some other arrangement that spreads the cost across the life of the equipment and, hence, the future users of the equipment or enhancement. A vertically integrated access provider has an incentive to artificially increase the cost by requiring a "Rolls Royce" approach to enhancements or new equipment with the effect of passing a higher cost structure onto its competitors than it faces itself.

Currently, if the ACCC takes a hard line on such matters, but it misjudges the matter slightly, so that there is *some* cost (even a very slight cost) that is borne by the access provider, the whole determination can be set aside.

The ACCC should have the flexibility to make appropriate orders in such circumstances including an ability to require enhancements to be made even if it has the effect that the access provider bears some cost, at least in the short term.

Accordingly, section 152CQ(1)(f) should be amended so that:

> "The ACCC must not make a determination that has the effect which in its opinion, is likely to result in a party (other than an access seeker) to bear an unreasonable amount of the costs of: ... (etc)"

(c) **Hindering access**

The legislation prohibits a person engaging "in conduct for the purpose of preventing or hindering access": section 152EF. This is accompanied by an access seeker's right to apply to the court for orders to enforce the prohibition on hindering section 152EG. These measures indicate the seriousness with which Parliament viewed such conduct.

The provisions also reflect the practicality of the situation in the rapidly moving telecommunications industry, where a delay can often deliver a substantial commercial advantage to the incumbent operators. Accordingly, a claim for damages down the track by an access seeker who has been obstructed by a carrier is often little recompense.

A difficulty has arisen with the operation of the provisions. Due to the manner in which section 152AY qualifies the standard access obligation imposed by section 152AR, it is arguable that a carrier is not under a standard access obligation until such time as either the access seeker and the carrier agree upon the terms or conditions or, failing agreement, on the terms and conditions imposed by the ACCC in a determination (see 152AY(2)(b)(iii)). That means that until such time as the ACCC makes a determination, it is arguable that the prohibition on hindering does not apply.

A carrier is therefore presently entitled to engage in conduct for the purpose of hindering access prior to the ACCC making a determination. For example, by raising spurious arguments, deliberately refusing to provide access in order to force an access seeker through a lengthy arbitration process, making factual assertions it knows are not sustainable or other conduct for the purpose of delaying the arbitration or the access seeker obtaining access.

Accordingly, the provisions should be amended to provide that a person must not engage in conduct for the purpose of preventing or hindering access to a declared service.

(d) **Compliance as a condition of a carrier licence**

Compliance with a standard access obligation is made a condition of a carrier licence, pursuant to section 152AZ of the TPA. Where a carrier contravenes a condition of the carrier licence, namely the standard access obligation, the ACCC may issue a formal warning to the carrier: s 70(5)(c) *Telecommunications Act 1997.*

Where a carrier breaches the standard access obligation, thereby breaching a condition of the carrier licence, the carrier is also exposed to civil penalty provisions.

However, the *Telecommunications Act* does not provide for forfeiture or suspension of a carrier licence for non-compliance with a condition. That means a carrier can deliberately breach the standard access obligations without risk of losing the carrier licence. Some carriers may be prepared to pay the civil penalty knowing that the competitive advantage it gains by denying or delaying access exceeds the amount of the penalty (particularly as in accordance with the usual principles that apply to penalty provisions, the carrier will know that on the first few occasions it is subject to civil penalty proceedings it is unlikely to receive the full penalty). The only basis on which a carrier licence can be cancelled is for a failure to pay the annual charge or levy (see section 72 *Telecommunications Act*). It is illogical to create a situation where a carrier can breach licence conditions with impunity.

Section 72 of the *Telecommunications Act* should be amended to permit the cancellation of a carrier licence where the carrier breaches a licence condition (including the standard access obligation). The carrier should first be given written notice and given the opportunity to make any submission (as is currently provided for by s 72(6) of the *Telecommunications Act*).

3 Telstra's submission

This part of C7's submission addresses submissions made before the Commission by Telstra in May 2001.

3.1 Focus of Commission's review

Telstra argues that the focus of the Commission's review has been somehow misdirected. Telstra rightly observes that most of the arguments put before, and considered by, the Commission concern issues relating to gaining access to existing infrastructure. Telstra argues that the most important factor in ensuring that Australia reaps the benefits of the digital age is investment in efficient new telecommunications infrastructure.

It is hardly surprising that access to existing facilities dominates the debate concerning regulation of telecommunications competition, which is the subject of the Commission's inquiry. Of course the establishment of new, and upgrading of existing infrastructure is important to Australia. But if existing and potential competitors are not able to gain access to that infrastructure, the benefits will be small.

Access to infrastructure has been made the focus of this inquiry because of Telstra's consistent record of resisting and blocking access through whatever means are available to it. The bitter battle for access to pay TV – where access seekers, such as TARBS and C7, have still not obtained access after 33 months

and 21 months respectively – illustrates this point. It is hardly surprising that many submissions are pitched at minimising Telstra's arsenal of delaying tactics.

3.2 Review of declarations

Telstra submits that merits appeal rights should be extended to decisions to declare services and decisions to refuse to revoke declarations. Telstra argues that such review would act as an "effective constraint on regulatory over-reach" (page 4 of?).

Apart from the fact that Telstra has not established that there has indeed been any regulatory over-reach, it is quite clear that the real reason Telstra wants merits review of declaration decisions is to provide it with more opportunities to delay the granting of access to its services and facilities. The record shows that Telstra's main tactical response to requests for access is to resist and delay the whole process, C7's experience in attempting to gain access to Telstra's HFC cable being a classic example. One of the main elements in Telstra's delaying strategy is to exercise each and every opportunity for review available to it (and even some that are not). Delay can kill a project in the telecommunications industry through lost opportunity and by draining the resources of the proposed competitor through responding to review processes.

C7 submits that rather than introducing more avenues for review, the legislation should not provide for any merits review, or review under the *Administrative Decisions (Judicial Review) Act 1977*, of access decisions.

In some European countries eg Germany, immediate access was mandated with interim regulated access prices, and review rights were delayed for a period of 12 months. This enabled competitors to get immediate access to establish new competitive services without delay. Experience showed that once the 12 month period expired, the incumbent did not bother to exercise review rights because there was nothing to be gained, and usually the interim access prices were advantageous to the incumbent because of movements in prices. Such a system should be provided here in the Australian regime.

3.3 Safe harbour proposal

Possibly the most self-serving of Telstra's submissions is its suggested 'safe harbour' scheme. Nowhere in Telstra's scheme is there provision for public inquiry into the proposed granting of a safe harbour opinion - Telstra wants to make its arguments behind closed doors. The ACCC would be asked to make a decision based on the view of one industry participant. Such a 'hobbled' ACCC would then be estopped from reconsidering the matter even if circumstances change, as they inevitably do in the fast-moving telecommunications industry.

Telstra and other infrastructure participants will almost inevitably claim that each new investment will not proceed unless they obtain the benefit of a "safe harbour". This will involve time consuming enquires and divert the valuable resources of the ACCC. In the meantime, Telstra would be able to use its dominance of the market to enhance its network, the most extensive in the country (built with public money) without being subjected to competitive forces.

The present regime permits the ACCC to consider the impact on investment, and the need for an appropriate commercial return, at the time of the declaration process. The ACCC has already declined to declare numerous services (see table

7.1 of the Commission's draft report). There is no evidence that the existing process, as compared with a safe harbour regime, acts as a real disincentive to investment.

The proposed safe harbour scheme would be disastrous for the development of competition in telecommunications services in Australia.

3.4 Evidentiary notes and regulatory contracts

Telstra supplements its 'safe harbour' proposal by suggesting an 'evidentiary note' scheme whereby the ACCC would be locked into accepting Telstra's word on its expenditure on infrastructure installation and upgrading. What mischief is Telstra attempting to address here? Surely, it is not unreasonable for a regulator to require that it be provided with the actual costs of infrastructure investment rather than an *ex ante* estimate.

With its proposed regulatory contract scheme, Telstra is seeking the sort of certainty that exists in no other market or industry. There will always be an element of risk in any infrastructure investment and it is unjustifiable for Telstra to attempt to protect itself from such risks by eliminating such fundamental market elements as the market price of services at any given time.

3.5 Safe harbours for digital pay TV

Telstra argued in its oral presentation to the Commission that unless it was granted a "safe harbour" it would not undertake the digitisation of pay TV. Telstra made this claim to support its assertion that the legislation should be amended to provide a "safe harbour" mechanism to encourage investment. Telstra has not provided any evidence to support its self-serving claim that a "safe harbour" is needed in order for it to undertake the digitisation of pay TV.

Intention to digitise

At the time the Telstra HFC cable was laid it was the common policy of both the government and opposition parties to provide an open access regime to the cable after a limited exclusive period for the builders of the cable.

Each of Optus and Telstra made their investment decisions on that basis.

Indeed, Telstra's CEO has acknowledged that Telstra's "*strategic planning has been* and is predicated *on that assumption*", namely, of open competition from 1997. Furthermore, both the government and opposition parties have at all stages indicated they would adopt a technology neutral approach to pay television services. The cost of digitising the HFC cable is relatively small compared to the original investment – which was made on the assumption that the HFC cables would be used for digital technology in the medium term. Accordingly, the bulk of the investment has already been made on the assumption by Telstra and Optus that the HFC cable would be subject to open access for digital pay TV.

What Telstra and Foxtel are asking the Productivity Commission to do now is to review the prior framework on which they made their investment decisions, in order to increase their revenue by protecting them from competition from other content providers, thereby further extending their monopoly as the content aggregator on their HFC cables.

Telstra's reasons for advocating a safe harbour for digital pay television in its presentation to the Commission seemed to be more concerned with protecting its retail associated pay TV arm, Foxtel, from competition rather than on the impact that open access would have upon Telstra as a wholesaler of digital transmission services.

Comparison with overseas

Telstra's assertion that an access holiday is essential for investment in digitisation is contrary to overseas experience. For example, in Canada, the Canadian Radio-television and Telecommunications Commission (CRTC) has mandated an open access regime to content providers on the cable systems. This has not acted as a disincentive to the industry participants to digitise the HFC cables.

As in Australia, pay television in Canada is a relatively new industry and it was only in 1990 that Rogers Cablesystems deployed its HFC network. It is only in the past few years that the Canadian cable industry has embarked on digitisation efforts. Specifically, in the last 5 years the Canadian cable industry has invested more than $5 billion in infrastructure, and more than 7.5 million Canadian homes will have access to digital cable services. Bell Express Vu has been delivering digital television services throughout Canada since September 1997.[2] Since 1999, Canada's three other largest cable operators have been aggressively deploying digital television services within their systems.[3] Although the CCTA[4] predicted that by the end of 1999 there would be 190,000 cable digital set-top boxes in the field, cable operators exceeded those estimates by approximately 70,000 units. By July 2000, there were approximately 350,000 digital cable customers across Canada.[5] All of this has been accomplished without providing any safe harbours or exclusivity entitlements to particular industry participants.

The CRTC's recent Digital Licensing Framework has opened the content gate and digital providers are preparing to launch new digital services beginning in September 2001. At its recent conference in Toronto, the CCTA announced that cable companies in Canada continue to be strongly committed to rolling out digital services as demonstrated by significant investments and efforts to roll out digital services, packages, and digital terminals. Far from acting as a disincentive, the open access framework has spurred investment and diversity of content providers.

3.6 Open access is essential for the pay TV sector

At the time Telstra embarked upon rolling out its HFC cable, it was anticipated that the competition between the cable infrastructure owners would encourage content and create a competitive environment that would provide an outlet for niche programmers or channel providers. The ascendancy of the Foxtel pay TV service over Optus has resulted in a situation where there is one dominant pay TV operator within metropolitan areas. That operator is vertically integrated with the

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[2] *DTH in Canada: Bell Express Vu's Perspective*, www.crtc.gc.ca.

[3] CCTA *Long Range Digital Forecast for Cable Distribution Undertakings* (Statistics and Research 2000-2001)

[4] The Canadian Cable Television Association, which is the representative of the cable television industry, whose primary role is in communicating the industry's views to regulatory bodies, governments and other stakeholders.

[5] CCTA News and Information: Press Release July 7, 2000 (Ottawa).

infrastructure provider, Telstra Multimedia, and with many content providers, such as Fox Sports, by reason of overlapping shareholdings and interests. The absence of effective competition from Optus, with the consequential effect that relatively few homes are connected to the Optus broadband network, means the expectation that Telstra's behaviour would be disciplined by Optus has not eventuated.

The resultant situation is that Foxtel operates as a monopolistic aggregator on the HFC cable, effectively depriving access to niche channel program suppliers or channel suppliers, such as C7, other than on draconian commercial terms. The vertical integration with the infrastructure provider, Telstra Multimedia, means that there is a commercial incentive for the infrastructure provider to delay or to be obstructionist in terms of providing access.

As a result, the competition between pay TV providers that was envisaged in the pay TV industry at the time the HFC cable was rolled out has not materialised. C7 has been constantly thwarted in its attempts to make its programming available on the Foxtel network on acceptable commercial terms. That coupled with Foxtel's gradual acquisition of all of the premium sporting contents in Australia (often in conjunction with News, Telstra and PBL and the Nine Network) means that it will be very difficult for any new operator to establish a generic pay television platform to compete head-to-head with Foxtel.

Accordingly, without a mandatory access regime that permits alternative programming suppliers to use a small number of channels on the existing pay television infrastructure, end-users will be denied diversity of content from small niche programmers.

3.7 Separation of policy from regulatory process

Telstra submits that declaration decisions should be made by the National Competition Council, not the ACCC. The reason advanced for this is the assertion that institutionalising the distinction between the policy decision (of whether to regulate or not, ie to declare or not) and the regulatory process (on what terms and conditions access should be applied) is an important additional constraint on regulatory over-reach. Telstra argues that the ACCC should not be invested with "judge and jury" powers, which, it argues, is leading to "regulatory creep".

However, there are plenty of precedents for a regulatory agency being invested with subordinate regulatory powers the exercise of which define the scope, entities and matters that are to come within the regulatory powers of the agency, for instance the ACA and ABA. Such regulatory arrangements have been adopted for various reasons including the fact that such agencies possess particular expertise in relation to the matters/industry they are established to regulate.

3.8 Sunsetting of declarations

Telstra submits that declarations should be sunsetted by automatically expiring after 3 years.

C7 opposes the sunsetting of declarations. Once the ACCC has decided that conditions justify the declaration of a service, the making of that decision establishes the presumption that declaration is warranted. The only justifiable mechanism for causing a declaration to cease to have effect is to follow the same procedure that led to the declaration in the first place. It should be incumbent on any party wishing to eliminate the declaration to establish that conditions no longer warrant the declaration.

Many business decisions that rely on their being a declaration in place also rely on the declaration continuing to have effect, at least until the relevant business enterprise is established in the market. The automatic expiry of a declaration would stifle business and investment decisions in the period in the lead up to the expiry – this would have a dampening effect on industry activity and would be anti-competitive. Also, any enterprise that relied on the continuation of a declaration may be subject to a prohibitive rise in the price for access to the declared service following the expiry of the declaration such that its viability may be threatened.

If, however, there was to be a change to the regime such that declarations were made to be impermanent, automatic expiry is not a useful option. Instead of a declaration expiring automatically, provision should be made to require the ACCC to review the need for retention of a declaration after it has been in operation for, say 5 years.

3.9 Repeal of Part XIB

Not surprisingly Telstra supports the proposed repeal of Part XIB of the TPA.

One of Telstra's reasons for this position is that Part XIB has been unnecessary because it has hardly been used. It is universally accepted that the very existence of regulatory controls and sanctions is, in many cases, enough to check conduct the subject of that regulation. The fact that certain provision have not been exercised does not mean they have been ineffective, and in most cases it is quite the opposite. This is even more so when the potential penalties are high as they are in the telecommunications regime.

Telstra argues that Part XIB has introduced asymmetric regulation into the telecommunications specific competition regime, contrasted with Part XIC. Each Part was introduced by Parliament for different reasons. Obviously, Part XIB was introduced to regulate anti-competitive conduct by parties with substantial market power, ie the parties most able to engage in such conduct, with the greatest harmful consequences. By its conduct, Telstra has demonstrated that such regulation was warranted, and indeed needs to be strengthened. Part XIC was to ensure that access would be provided to the participants in the industry to ensure the introduction of more competitors while avoiding unnecessary duplication in infrastructure.

4 Fox Sports submission

4.1 General

In its submission, Fox Sports:

- does not agree with the ACCC's submissions that a special pay TV programming access regime should be introduced in Australia;
- considers that the existing competition law provisions in the TPA are more than adequate to procure and maintain competition in relation to pay TV programming;
- does not agree that the rights to broadcast the three channels produced by Fox Sports are heavily influenced by the ownership links and/or exclusive supply agreements that exist between Fox Sports and the pay TV operators; and
- rejects the claim by Optus that pay TV content is being locked up - saying that the reason is simply because Fox Sports and Optus "have been unable to strike a deal for the supply of these channels on commercial terms which will benefit both parties' long term strategic business interests and objective".

4.2 Proposed regime

Further, Fox Sports considers that the ACCC's proposed access regime fails to consider:

- that the pay TV industry is still relatively new and is not fully developed;
- that the onus should be on the regulator to prove that exclusive pay TV arrangements are anti-competitive;
- that a regulated access regime could substantially reduce the likelihood of continued investment decisions being made in regional areas; and
- that as a result, "increased regulation may stifle growth and competition rather than fostering progress".

Essentially, Fox Sports is advancing the same 'stifling of infrastructure investment' argument as Telstra. This significantly undermines Fox Sports' strong rejection of claims that vertical integration, extensive cross-ownership of facilities and programming and exclusive licensing arrangements have had a significant effect on industry structure and competition in Australia. As a provider of sports programming for the pay TV industry, Fox Sports has no role in investment in infrastructure, ie the delivery platforms for pay TV. And yet it is expressing a view that such investment would be stifled by an access regime applying to content.

The main reason the pay TV is relatively under-developed is because new players have been refused access to services and infrastructure. Telstra and Foxtel, with which Fox Sports is closely associated, are the parties who have led the resistance to competition.

4.3 Overseas experience

Fox Sports submits that there is considerable risk in the ACCC applying principles from the United States access regime in Australia, as in Australia the regulatory history and social factors are quite different. However, Fox Sports fails to provide any explanation of exactly what the risks are and how they would manifest. It seems the Commission is being asked to jump at shadows, to reject a proposed regime because it is derived from a different country. But if the proposal works in the US, there are no reasons advanced as to why it would not work in Australia.

4.4 Anti-Siphoning

C7 adopts the submissions previously made by Seven Network Limited in relation to the retention of anti-siphoning provisions, in the prior broadcasting inquiry by the Commission.