SUPPLEMENTARY SUBMISSION: ACCESS SEEKER'S POWER TO TERMINATE AN ARBITRATION NOTIFIED BY AN ACCESS PROVIDER

Background

This paper raises an issue about the operation of section 152CN of the *Trade Practices Act 1974* ("TPA") which provides for an access seeker to withdraw an arbitration notification under a variety of circumstances. This section is modelled on section 44T of Part IIIA of the TPA and in most cases would be seen as quite innocuous. 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. It is not the usual intention of access regimes to compel access seekers to *acquire* services. Instead access regimes are primarily designed to force access providers which control certain specified facilities to *sell* services.

The legislation seeks to address the exercise of market power only in the provision of telecommunications services rather than in the acquisition of services. It presumes that it will be in the interests of all network operators to seek to terminate all traffic on their networks.

It is possible, however, for this provision to be used by telecommunications carriers with market power or who otherwise control bottleneck facilities to undermine access arrangements and possibly also make it more difficult to achieve any to any connectivity – a tenet of the long term interests of end users objective of the access provisions. The ACCC considers the Productivity Commission should review the operation of section 152CN as part of its current review of the telecommunications-specific provisions of the TPA and makes some suggestions about how this provision could be modified to ensure it is consistent with the primary objects of Part XIC. The purpose of this paper is therefore to identify the relevant provisions of the TPA and to canvass the possibility that amendments to the legislation may be necessary.

This issue is related to the amendment proposed in the Attachment to the ACCC's submission of August 2000 in relation to "Access seeker interconnection obligations". In that submission, the ACCC proposed amendments to s 152AR to require access seekers to do all that is necessary to interconnect their facilities with those of an access provider. This was suggested to ensure that a service provider cannot limit the provision of its network with the effect that its own customers have difficulty connecting to customers of the access provider. The issue raised in this paper is similar, in that the ACCC believes there may be a need to amend s 152CN to ensure that an access seeker cannot misuse its ability to terminate an arbitration notified by a carrier or provider so as to limit the ability of its own customers to connect to customers of the carrier or provider.

The issue of the operation of section 152CN arose in two arbitrations currently before the ACCC. While the issues raised in arbitrations are confidential, a brief synopsis of the particular circumstances which gave rise to the issue in question will suffice.

The ACCC was separately notified of two access disputes under s 152CM(1) of the TPA by two providers of a declared service, seeking determinations from the ACCC requiring an access seeker to acquire the service at a price to be determined by the ACCC.

In one of these arbitrations, the access seeker expressed an intention to object any interim determination under s 152CPA(3) and to withdraw the provider's notification under s 152CN(1)(a)(ii) once the ACCC issues a draft final determination.

The access seeker's intention means that it may be impossible for the ACCC to provide any remedy for the provider under the arbitration process. It may therefore have been futile for the ACCC to continue to deal with the access dispute. Because of the inability of the ACCC to make a determination, the ACCC may be in a position where it has no choice but to terminate the arbitration under s 152CS(1)(b) on the basis that it is misconceived.

While the ACCC believes that such a decision would be consistent with both the letter and the underlying intention of the relevant provisions of Part XIC of the TPA, the ACCC also believes that these provisions may, in some circumstances, have an effect that is contrary to the objectives of Part XIC as a whole.

The relevant provisions of Part XIC

It is clear from s 152CM(1)(e) that the provider of a declared service can notify the ACCC of a dispute with an access seeker if the conditions in s 152CM(1)(a), (b) and (c) are satisfied. In particular, s 152CM(1)(b) requires that one or more of the SAOs apply or will apply to the provider of the service. While the SAOs in s 152AR are expressed as obligations owed by the provider of a service to an access seeker, this does not, in the ACCC's opinion, stop the provider from notifying a dispute. While the SAOs are a set of minimum obligations requiring a provider to supply a service to an access seeker, the ACCC has the power under s 152CP to make a determination setting out further terms and conditions upon which the provider must comply with these minimum obligations. This power does not exist solely for the benefit of an access seeker. For example, if, consistent with the SAOs, an access seeker demands access to a service at a price that is unreasonably low, the ACCC can be asked to determine the price at which the provider will supply access to the service. The ACCC can also make a determination requiring the access seeker to accept and pay for access.

However, there are limitations on the ability of the ACCC to issue a determination at the behest of the provider of a service. Under s 152CPA(3), the access seeker can object to the making of an interim determination by the ACCC. The access seeker has this power regardless of whether the dispute was notified by the access seeker or the provider.

Further, and arguably more significantly, in relation to a final determination, s 152CN provides that:

> "(1) A notification may be withdrawn as follows (and not otherwise):
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> (a) if the carrier or provider notified the dispute:
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> (i) the carrier or provider may withdraw the notification at any time before the Commission makes its determination;
>
> (ii) the access seeker may withdraw the carrier's notification or provider's notification, as the case may be, at any time after the Commission issues a draft determination, but before it makes its determination;
>
> (b) if the access seeker notified the dispute - the access seeker may withdraw the notification at any time before the Commission makes its determination.

(2) Despite subparagraph (1)(a)(ii), if the carrier or provider notified a dispute over variation of a determination, the access seeker may not withdraw the carrier's notification or provider's notification.

(3) If the notification is withdrawn:

(a) the Commission must not make a final determination in relation to the access dispute; and

(b) if the Commission has not already made an interim determination in relation to the access dispute - the Commission must not make an interim determination in relation to the access dispute."

In a case where the dispute is notified by the provider of a service, the effect of s 152CN(1)(a)(ii) is that once the ACCC publishes its draft final determination (as required under s 152CP(4)), the access seeker can withdraw the provider's notification, ie. the access seeker can terminate the arbitration and prevent the ACCC making a final determination.

This provision is a severe constraint on the ability of an access provider to take advantage of the arbitration process in Part XIC. Yet this appears to be precisely what Parliament intended when it enacted this legislation. The Explanatory Memorandum in relation to this provision states that:

"Proposed s. 152CN is based on s. 44T of the TPA.

Proposed s. 152CN provides for the withdrawal of notifications of disputes. Notification may be withdrawn by the access seeker or the carrier or provider, where they were the person who originally notified the ACCC of the dispute, at any time before the ACCC makes a determination.

The access seeker may also withdraw the carrier or service provider's notification at any time after the ACCC issues a draft determination but prior to the issuing of a final determination. This will enable, for example, an access seeker who is unwilling to be bound by the terms and conditions included in a draft determination to withdraw the notification and avoid the possibility of being bound by those access terms." [1]

As noted in the Explanatory Memorandum, s 152CN is based on s 44T of the TPA. Section 44T states that:

"(1) A notification may be withdrawn as follows (and not otherwise):

(a) if the provider notified the dispute:

(i) the provider may withdraw the notification at any time before the Commission makes its determination;

(ii) the third party may withdraw the provider's notification at any time after the Commission issues a draft determination, but before it makes its determination;

(b) if the third party notified the dispute, the third party may withdraw the notification at any time before the Commission makes its determination.

[1] Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum, p 66-67. Also see the Explanatory Memorandum to the Telecommunications Legislation Amendment Bill 1998, p 26.

(2) Despite subparagraph (1)(a)(ii), if the provider notified a dispute over variation of a determination, the third party may not withdraw the provider's notification.

(3) If the notification is withdrawn, it is taken for the purposes of this Part never to have been given."

The Explanatory Memorandum in relation to s 44T states that:

> "The party who notified the dispute may terminate the arbitration by withdrawing the notification any time before the Commission makes its determination on the dispute. Further, where the provider notified the dispute, the third party can terminate the arbitration by withdrawing the provider's notification any time after the Commission issues a draft determination, but before the Commission makes a final determination. For example, if the access price set out in the draft determination is not acceptable to the third party, the third party could terminate the arbitration before the Commission makes a determination requiring the third party to pay those charges."[2]

Access issues

The fact that an access seeker can withdraw an access provider's notification under s 152CN(1)(a)(ii) exposes a potentially significant policy issue. Division 8 of Part XIC makes it clear that both an access seeker and an access provider can notify an access dispute. Yet what Part XIC gives with one hand it takes away with the other. While, at first glance, the legislation operates for the benefit of both parties to the transaction, in reality the ability of an access seeker to object to an interim determination and withdraw the provider's notification reveals a legislative bias in favour of access seekers. [3] An access provider will only be able to obtain a remedy from the ACCC where the ACCC's determination is acceptable to the access seeker. Such a bias is usually seen as both sensible and desirable as access seekers typically will be at a relative disadvantage in negotiating terms and conditions of access to a service over which the access provider has effective bottleneck control.

This bias is therefore not the result of any misinterpretation of the relevant legislation. The Explanatory Memorandum for s 152CN makes it clear that Parliament intended that an access seeker can reject a determination that it does not accept. However, it is possible that there are some cases where this is not a desirable outcome.

The need for legislative intervention to require the owners of essential infrastructure facilities to supply access on commercial terms is well established. However, the argument that a business should be compelled to *acquire* a product is not as strong. It is harder to justify a policy that compels a business to acquire a product or service that it does not want.

However, this may not be the case where the access seeker has market power. For example, if a non-dominant carriage service provider is the supplier of a PSTN terminating service and a carrier such as Telstra refused to acquire the terminating access from the carriage service provider on what may be seen reasonable terms, the latter's existence as a carriage service

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[2] Competition Policy Reform Bill 1995, Explanatory Memorandum, paragraph 218

[3] This is despite the fact that declaration of services are not carrier specific, such as would apply if only the access provider was subject to access obligations.

provider could be threatened since any to any connectivity, a critical requirement in telecommunications networks, would, at the very least, be more difficult to achieve.[4]

It is certainly arguable that even where an access seeker has market power, they should not be automatically obligated to acquire a product or service they do not want or have any intention of acquiring. However, what appears to set this issue apart in telecommunications is that Telstra, as an access seeker, has market power as a monopsonist, and the need for any-to-any connectivity. Telstra is in a position where it could conceivably take advantage of its monopsony power to undermine a competitor by pushing down the charges it pays to a smaller network when Telstra's customers make calls to the customers of the smaller network. This is the reverse of the more typical access problem faced by the smaller carrier who wishes to have access to Telstra's network in order to enable their customers to call Telstra's customers, but who is faced with what they see as an unreasonably high charge.

If Telstra attempted to misuse its *monopoly* power, the arbitration process in Part XIC would provide recourse for access seekers. However the same legislation is unlikely to provide a remedy for any misuse of *monopsony* power as Telstra would have the ability to reject any proposed determination made by the ACCC at the behest of the supplier of a declared service.

The immediate answer to this complaint is to refer the provider to the Competition Rule in Part XIB and s 46. However, proving a breach of s 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 s 46 is not, by itself, a sufficient measure to ensure that access to significant infrastructure facilities is available on commercial terms.

The solution to this problem is not as simple as removing the ability of an access seeker to terminate an arbitration notified by an access provider. In most cases this may be a desirable outcome. Put another way, some legislative bias in favour of access seekers is necessary. However, under Part XIC this bias may go too far, and put an access seeker with monopsony power in a position where it can misuse its position to undermine a potential competitor. It may be preferable to qualify an access seeker's right to terminate an arbitration in certain limited circumstances rather than removing that right entirely.

Implications for Part IIIA

The ACCC's concerns in relation to s 152CN may impact upon s 44T in Part IIIA. While the ACCC has not yet been required to deal with any issue under s 44T it is conceivable (although less likely) that the same problem could arise.

For example, an enterprise constructing a new rail network may wish to interconnect with a larger rail network in order to operate rolling stock from its own rail network onto the larger network. To this end the enterprise constructing the new network would need to negotiate terms and conditions for access to the larger network and to that extent would be an access seeker. However, the owner of the larger network may also operate its own rolling stock and

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

yet refuse to operate its rolling stock over the new network. In this case the enterprise building the new network may wish to notify an access dispute under Part IIIA as a provider of a service.[5]

This scenario is not likely to occur in reality. Even if it did, the exercise of the power under s 44T by the "access seeker" would not necessarily be a bad thing. It may only be an undesirable outcome if the size of the access seeker's network and rolling stock was so large that its refusal to acquire access to the new network effectively made the new network unviable.

Another issue that distinguishes Part IIIA from Part XIC is that it appears that the power of an access seeker with monopsony power derives in large part from the need for any-to-any connectivity. This may not be as significant in other network industries. Again, using the rail analogy, even if the "access seeker" does not wish to operate its rolling stock over the new network, other operators of rolling stock can do so, and presumably will if they have a commercial need. Competition would not appear to be unduly constrained by the access seeker's refusal to acquire access to the new network.

Suggested amendment

The ACCC suggests that s 152CN(1) be amended to provide that, where the carrier or provider notifies a dispute, the access seeker may only withdraw the dispute under s 152CN(1)(a)(ii) with the permission of the ACCC. Section 152CN should further provide that the ACCC may only refuse permission where it is satisfied that the withdrawal of the carrier's or provider's notification by the access seeker would not be in the long-term interests of end users. An access seeker's current rights to terminate a dispute that it itself notifies would not be affected by this amendment.

The ACCC believes that this suggested amendment balances the legitimate rights of an access seeker to terminate an arbitration notified by a carrier or provider with the public interest in ensuring that a carrier or provider with monopsony power cannot undermine competition and any-to-any connectivity by terminating the arbitration. The requirement that the access seeker request permission from the ACCC before it withdraws the notification adds an additional step to the arbitration process. However, this step is 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.
In addition, the use the long-term interests of end users test as the decision-making criteria regarding this clause, is not only consistent with other provisions of Part XIC, but it also enables the ACCC to have adequate regard to competition, connectivity and economic efficiency objectives. It also avoids the need to specify separate or pre-determined monopoly or monopoly power thresholds.

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[5] This obviously assumes that the other requirements of Part IIIA (in particular that the service is declared) are satisfied.