existing customers and attract new ones.[8]

The Telecommunications Industry Ombudsman has, however, warned consumers to be aware that while mobile numbers may now be ported, consumers may still be bound by contract to their existing CSP or MC and may need to complete those contracts before porting.

INDUSTRY BENEFITS/COSTS

It is hoped that through the introduction of the Code, industry participants also benefit from the increased competition MNP may invoke.

As the Code envisages automated interfaces between MCs and CSPs to support MNP it is hoped that considerable costs will be saved through the implementation of only one set of porting arrangements rather than multiple implementations which might otherwise occur at a far greater cost. Whilst the savings of a common implementation system have not been fully quantified, ACIF has indicated the saving to be somewhere in the realm of $50 million to $200 million.

Notwithstanding, MCs and CSPs will need to ensure that appropriate changes are made in their internal operating systems and networks to support MNP. New entrants will also need to build these interfaces. There will therefore be significant set up costs for most if not all industry participants.

CONCLUSION

It is strongly arguable that MNP is a requirement for effective competition in the provision of telecommunication services, because it removes one of the major barriers to penetration of markets by new telecommunications competitors – that is the a reluctance of residential and business customers to change their telephone numbers.

Additional qualitative benefits are likely to flow from the implementation of MNP. These include benefits such as providing an emphasis on quality of service, and introducing innovative new services to meet market needs. The primary effect of this new found competition however will no doubt be seen in lower prices of mobile telecommunications services in the marketplace, as MCs and CSPs compete for a market of consumers the majority of which, prior to 25 September 2001 simply did not exist.

11 Section 458 of the Act.

2 This was as a result of the ACCC's direction to the ACA on Number Portability in September 1997.

3 TNPA Schedule 1 [8]

4 TNPA Schedule 1 [9]

5 Clause 4.1 of ACIF C570 Mobile Number Portability

6Clause 4.2 of ACIF C570 Mobile Number Portability

7 Clause 4.3 of ACIF C570 Mobile Number Portability

8 www.accc.gov.au/media/mr-186-99.htm

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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DISPUTE RESOLUTION UNDER PART XIC OF THE TRADE PRACTICES ACT – THE PROBLEMS AND THE CURE

Michael Bray analyses these controversial provisions and gets to the bottom of current issues being confronted by industry participants, the ACCC and the Federal Government.

The Telecommunications Access Regime found in Part XIC of the *Trade Practices Act 1974* (Act) was intended to provide foundation access and interconnection rights to all operators within the telecommunications industry and to establish a framework within which the industry can develop additional arrangements to improve the efficiency with which access and interconnection are supplied.[1] Just how effective this has been is a matter of debate. In this article we look at the dispute resolution process established by Part XIC and identify problems which have arisen in its application. We then look at the amendments proposed in the *Trade Practices Amendment (Telecommunications) Bill 2001* and ask whether those amendments go far enough towards curing these problems.

OBJECTS OF PART XIC

The dispute resolution provisions contained in Part XIC are intended to give effect to the objects of the Part.

The object of this Part, which is found in section 152AB of the Act, is to promote the *"long-term interests of end-users of carriage services or of services provided by means of carriage services"*. The focus should, therefore, be on the end-users rather than on the market participants.

In determining whether something promotes the long term interests of end-users, regard must be had to the extent to which the thing is likely to result in the achievement of the objectives of:

- promoting competition in markets for listed services (as to which see section 152AB(4) of the Act);
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users (as to which see section 152AB(8) of the Act); and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied (as to which see section 152AB(6) of the Act).[2]

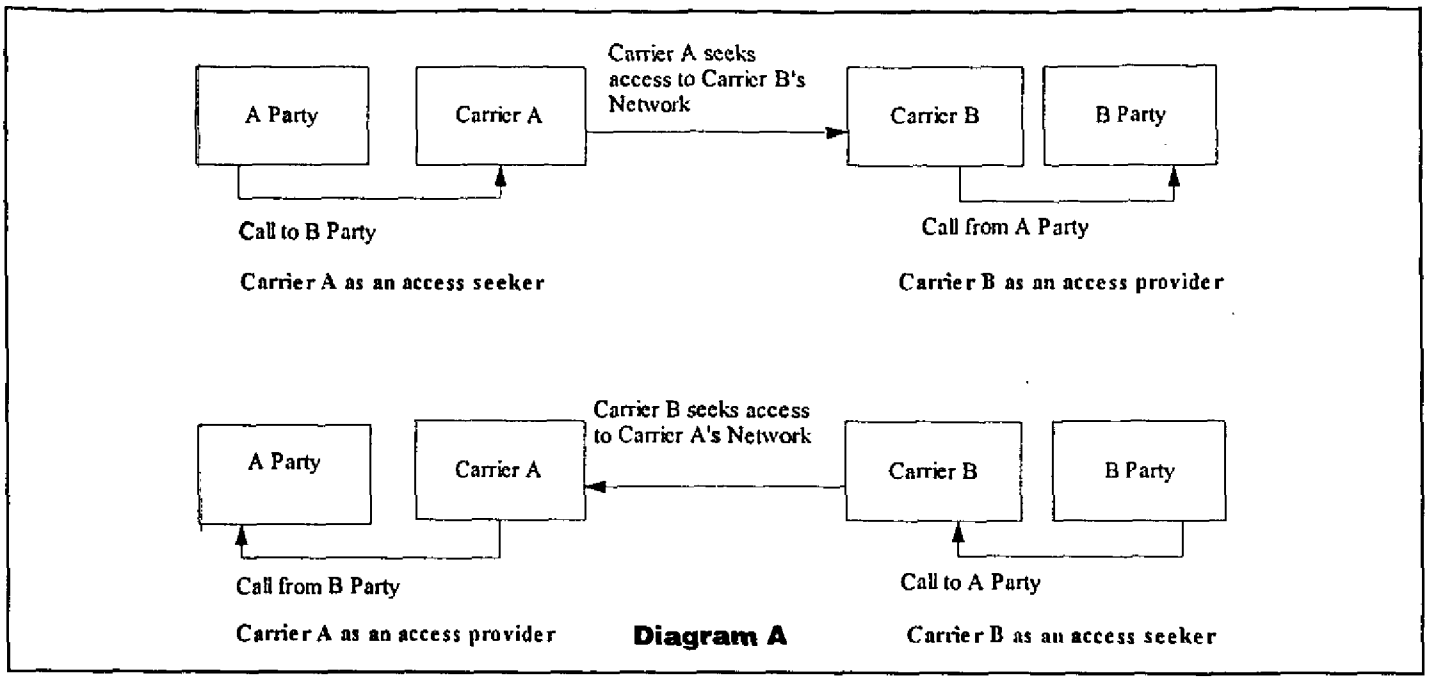

Diagram A

PRE-CONDITIONS FOR ACCESS UNDER PART XIC

There is no general right of access by participants in a telecommunications market to telecommunications services.

Before a participant can gain access to telecommunications services, the ACCC must first declare an "eligible service" to be a "declared service".[3] The ACCC can either make such a declaration on the recommendation of the Telecommunications Access Forum or as the result of a public inquiry held by it. To date there are approximately 13 declared services. For the purposes of this article, we will look at one of the declared services, domestic PSTN originating and terminating access.

STANDARD ACCESS OBLIGATIONS

Once a service is declared, an access provider (which is defined in section 152AR of the Act) must give access to declared services. In particular, an access provider must, if requested to do so, permit the interconnection of facilities it owns or controls (or is a nominated carrier for) with an access seeker's facilities for the purpose of enabling the access seeker to be supplied with a declared service, in order that the access seeker can provide carriage or content services.[4] There are various other obligations set out in section 152AR with which an access provider must comply. These are known as Standard Access Obligations.

ACCESS SEEKERS AND PROVIDERS – A DUAL EXISTENCE

Part XIC (and, in particular, the dispute resolution provisions) places significance on a distinction between access seekers and access providers. It is useful, therefore, to consider whether such a distinction is warranted.

A likely and unavoidable consequence of any agreement in respect of access to a declared service between an access provider and an access seeker, is that the access provider will frequently also be an access seeker at some stage. This is best demonstrated in Diagram A above.

As can be seen, when a customer of Carrier A calls a customer of Carrier B, Carrier A is the access seeker to Carrier B's network. However, if Carrier B's customer was to call Carrier A's customer, Carrier B would then become the access seeker and Carrier A would become the access provider. This is an unavoidable, but essential element of the way that calls, whether voice or data, are made. Without the ability to perform this two way service, a participant in the telecommunications market would not be able to provide its customers with an adequate service. This need to have access to each other's network was recognised by the government at the time the amendments that introduced Part XIC were debated in Parliament.[5]

With this in mind, we will now turn to the dispute resolution provisions found in Part XIC.

THE DISPUTE RESOLUTION MECHANISM

Division 8 of Part XIC of the Act deals with the resolution of disputes about access.

The dispute resolution provisions are triggered if:

- there is a declared service to which one or more Standard Access Obligations apply, or will apply; and
- an access seeker is unable to agree with the carrier or provider about the terms and conditions on which the carrier or provider is to comply with those obligations.

If those conditions occur, pursuant to section 152CM, the access seeker or carrier or provider may notify the ACCC in writing that an access dispute exists. Once notified, the arbitration process begins.

Once a dispute has been notified to the ACCC, the ACCC must make a written determination on access by the access seeker to the declared service[6], unless the ACCC terminates the arbitration pursuant to section 152CS (as to which see below). Sounds simple in theory, but in application the process is more complicated.

As part of its functions under Part XIC, the ACCC can give directions to the parties, if it is of the view that it will be likely to facilitate negotiations relating to that dispute.[7] The types of directions that the ACCC can give include, a direction requiring a party to give relevant information to one or more of the parties, a direction requiring a party to respond in writing to another party's proposal or request in relation to the time and place of a meeting, a direction requiring a party, or a representative of a party, to attend a mediation conference and a direction requiring a party, or representative of a party, to attend a conciliation conference[8]. The ACCC is empowered to seek penalties in the Federal Court, not exceeding $125,000, for each and every contravention of one of its directions made under section 152CT.[9]

DETERMINATIONS BY THE ACCC PURSUANT TO PART XIC

The ACCC may make either interim or final determinations. An interim determination must be for a stated period that is no longer than 12 months.[10]

In making a final determination, the ACCC may take into account any matters it sees fit[11] but is required by section 152CR to take the following matters into account:

- Whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;
- the legitimate business interests of the carrier or provider, and the carrier's or provider's investment in facilities used to supply the declared service;
- The interests of all persons who have rights to use the declared service;
- The direct costs of providing access to the declared service;
- The value to a party of extensions, or enhancement of capability, whose costs is borne by someone else;
- The operational and technical requirements necessary for the safe and reliable operation of a carriage service, the telecommunications network or a facility; and
- The economically efficient operation of a carriage service, telecommunications network or a facility.

In its determination, the ACCC may[12]:

- require the carrier or provider to provide access to the declared service to the access seeker,
- require the access seeker to accept and pay for access to the declared service,
- specify the terms and conditions on which the carrier or provider is obliged to comply with any or all of the Standard Access Obligations applicable to the carrier or provider,
- specify any other terms and conditions of the access seeker's access to the declared service,
- require a party to extend or enhance the capability of the facility by means of which the declared service is supplied, or
- specify the extent to which the determination overrides an earlier determination relating to access to the declared service by the access seeker. Before making any such determination however, the ACCC must first give a draft determination to the parties.

A final determination will take effect 21 days after the determination is made,[13] unless it is expressed to have taken effect on an earlier date. That earlier date cannot be earlier than the date of notification of the access dispute.[14]

RIGHTS OF APPEAL

Section 152DO of the Act permits any party to the arbitration to apply to have that determination reviewed by the Australian Competition Tribunal within that 21 day period. If any such application is made, the Tribunal may stay the effect of the determination. There is also provision for review in the Federal Court of any decision made by the Tribunal.[15]

TERMINATION OF PART XIC ARBITRATIONS

By section 152CS of the Act, the ACCC may at any time terminate an arbitration (without having made a determination) if it is of the view that, amongst other things:

- the notification of the dispute was vexatious,
- the subject matter of the dispute is trivial, misconceived or lacking in substance,
- a party to the arbitration of the dispute does not engage in negotiations in good faith, and
- in certain cases, that the arbitration is not likely to make a significant contribution to competition in a market or the access seekers' carriage service or content service is not of significant social and/or economic importance.

DOES THE PART XIC ARBITRATION PROCEDURE WORK? - THE PROBLEMS

The most significant problem with Part XIC arbitrations arises from a necessary incident of providing telecommunication services to customers, which is the dual nature of access seekers and providers. The legislation's failure to recognise this dual nature, as seen in sections 152CPA and 152CN, can have the effect of rendering Part XIC's dispute resolution process largely ineffective.

Section 152CPA provides, relevantly that an access seeker can prevent the ACCC from making an interim determination, simply by objecting in writing to the making of that interim determination. When it is the access provider seeking resolution of a dispute, this puts a powerful weapon in the access seeker's hands.

Similarly, section 152CN allows an access seeker to withdraw a carrier's or access provider's notification at any time, after a draft final determination is made and before that final determination is made.

For new entrants to successfully enter the market they will necessarily need access to existing carriage service providers'

networks. If a dispute arises in respect of that access, the new entrants will be able to lodge a notification of a dispute as an access seeker.

However, by virtue of the fact that that access seeker will also be an access provider, the existing dominant carriage service provider will be able to take advantage of these two sections and its own status as an "access seeker" to frustrate and ultimately terminate any arbitration. This is because the dominant carrier, as an "access seeker" could exercise its rights under section 152CPA(3) to object to any interim determination proposed to be made by ACCC. This would preclude the ACCC from the making of any such interim determination.

Likewise, upon receipt of the ACCC's draft final determination, that same "access seeker" could exercise its rights under section 152CN(1)(ii) to withdraw the new entrant's notification thereby bringing the arbitration to an end and with it, frustrating the new entrants attempts to obtain an outcome (and access) under Part XIC. The only remedy available to the frustrated new entrant in those circumstances lies in either Part IV or Part XIB of the Act, for breach of the anti-competitive conduct provisions. Such a course is also fraught with difficulties, particularly when the dominant carrier can point to an argument that it was simply exercising a legitimate, statutory right.

Yet another problem with the existing legislation is found in the Standard Access Obligations set out in section 152AR. Usefully, there is an obligation on access providers to provide access to access seekers. Unfortunately, there is no corresponding obligation on access providers to also acquire access from an access seeker.

Because of the dual nature of an access provider's and seeker's existence, a participant in the telecommunications market cannot compete and offer an effective service unless it can carry calls to another carrier's customers and also have that carrier return calls from its customers to it. As stated, there is no obligation on an access provider to acquire access. It follows that that access provider can refuse to acquire access without breaching its Standard Access Obligations. The effect of that is to allow an existing carrier or carriage service provider to "legally" prevent the new entrant from offering a complete service and effectively competing in a telecommunications market.

Clearly this result is contrary to objects of Part XIC in that it cannot be in the long-term interests of end-users to stifle competition in a market.

PROPOSED SOLUTION – THE CURE?

The anomaly in the legislation in respect of the ability to object to interim determinations and to terminate an arbitration, has been recognised by both the ACCC and the Commonwealth Government.

In the second reading speech[16] for the *Trade Practices Amendment (Telecommunications) Bill 2001* on 9 August 2001, Senator McGauran stated that in streamlining the telecommunications access regime under Part XIC of the *Trade Practices Act*, the ACCC will now be able to make interim determinations over the objections of an access seeker. The ACCC will also be able to prevent the unilateral withdrawal from arbitrations, thereby minimising the potential for delay and procedural abuse of the arbitration process. This will be achieved by requiring the consent of both parties to a dispute, or the notifying party and the ACCC, to withdraw a notification of dispute, and by removing the right of an access seeker to object to the making of an interim determination. These proposed amendments are the product of the recommendations of the Productivity Commission in its "Telecommunications Competition Regulation Draft Report", released in March 2001.

If enacted, these amendments will protect the integrity of the dispute resolution process under Part XIC, in that it will no longer be possible for an "access seeker" to stifle the ACCC's ability to make a determination.

Unfortunately however, the *Trade Practices Amendment (Telecommunications) Bill 2001* does not propose to amend the Standard Access Obligations under section 152AR and does not go far enough to provide for an obligation to acquire access under the Act. It does not remove the arbitrary distinction between access seeker and access provider. It follows that, while an access seeker will no longer have the ability to frustrate the arbitration by either objecting to interim determinations or by withdrawing the notification prior to the final determination being made, the entire arbitration process may ultimately be an exercise in futility. That is because, in circumstances where there is no obligation under the *Trade Practices Act* to do so, the ACCC will not be able to order an access provider to acquire access. Whilst this aspect remains unamended the calls of the frustrated access seeker will remain unconnected.

1 Hansard, Senator Cook, 25 February 1997, Page 895

2 S 152AB(2) of the Act

3 S 152AR of the Act

4 S 152AL(5)(c) of the Act

5 Hansard, Senator Cook, 25 February 1997, Page 694

6 S 152CP(1) of the Act

7 S 152CT of the Act

8 S 152CT(2) of the Act

9 S 152CU of the Act

10 S 152CPA(5) of the Act

11 S 152CR(2) of the Act

12 S 152CP(2) of the Act

13 S 152DN of the Trade Practices Act

14 S 152DNA of the Trade Practices Act

15 S 152DQ of the Act

16 Hansard, Senator McGauran, 9 August 2001, page 29555

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