AAPT SUBMISSION TO THE PRODUCTIVITY COMMISSION'S

REVIEW OF PART IIIA OF THE TRADE PRACTICES ACT 1974

INTRODUCTION

AAPT Limited welcomes the opportunity to make submissions in the Productivity Commission ("**Commission**") Review of Clause 6 of the Competition Principles Agreement ("**CPA**") and Part IIIA of the *Trade Practices Act 1974* ("**TPA**").

AAPT has made two submissions[1] to the Commission's Review of Telecommunications-Specific Competition Regulation ("**Telecommunications Review**"), which include substantial comments on the telecommunications-specific access regime in Part XIC of the TPA. Although the current review is not as directly relevant to AAPT's own commercial activities, it considers that the review of Part IIIA is significant for the future of access regulation in Australia. AAPT's purpose in making this submission is to provide commentary on access issues that are grounded in its own experience of the declaration, arbitration and other regulatory processes in Part XIC. Part XIC –and its application over the past three and a half years – provides a useful model for reforms that could be made to Part IIIA.

Overall, AAPT is of the view that, despite some weaknesses, Part XIC provides outcomes in the telecommunications industry that are better than those that would be achieved if access issues were determined solely under Part IIIA. As discussed in this paper, Parts XIC and IIIA serve different purposes. AAPT is strongly of the view that Part IIIA in its current form would not be sufficient to address the specific nature of the telecommunications industry or the distinctive access issues which arise in it.

THE NEED FOR A GENERAL ACCESS REGIME

In keeping with AAPT's general comments on Part XIC in the Telecommunications Review, AAPT endorses the existence of legislation that allows competitor access to essential services. Such legislation is founded principally on the fact of market power belonging to one or a small number of firms. In particular, access regulation is designed to prevent the anti-competitive effects that flow from "bottleneck" control of essential facilities. Bottlenecks typically arise from extreme economies of scale – both of supply and demand, the latter being manifested in so-called "network effects". Dominant firms have the capacity to stifle competition, especially in downstream markets, because of their control of key inputs. A dominant firm that controls essential facilities will often have a commercial incentive to restrict, or deny altogether, access to essential services.

Access problems are unlikely to be effectively resolved by reliance on prohibitions on misuse of market power (contained in sections 46 and 152AJ of the TPA). In the case of section 46, there must be a proscribed anti-competitive *purpose* that accompanies a taking advantage of market power. In the case of section 152AJ, it is necessary to show an anti-competitive effect, rather than a

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[1] AAPT, Initial Submission by AAPT to Productivity Commission Review of Telecommunications-Specific Competition Regulation (hereafter "**Initial AAPT Telecoms Submission**") and Supplementary Submission by AAPT to the Productivity Commission Review of Telecommunications-Specific Competition Regulation (3 November 2000), (hereafter "**Supplementary AAPT Telecoms Submission**")

purpose, that accompanies the impugned conduct. Nonetheless, the evidentiary problems associated with a misuse of market power case make it difficult to bring an action.

Access regulation is intended to prevent, rather than cure, misuses of market power. Access regulation is intended to give preference to negotiation between commercial interests, but creates a "safety net" of arbitrated dispute resolution when negotiation fails. Effective forms of access regulation promote competition by ensuring access on reasonable terms, while also seeking to guarantee providers of essential facilities a reward for their investments in infrastructure.

For these reasons, AAPT believes that the principles which underlie Part IIIA are sound. There are, however, significant aspects of Part IIIA that could be improved. Some of these weaknesses may be addresses by an approach to access based more closely on the telecommunications access regime in Part XIC. The fact that the proposed Part XID of the TPA, which creates an access regime in the postal industry, is closely modelled on Part XIC, rather than Part IIIA, suggests that a more sophisticated regulatory approach is need in Part IIIA.[2]

PART IIIA HAS NOT BEEN AS EFFECTIVE AS IT MIGHT HAVE BEEN

Declaration

There have been few applications for declaration under Part IIIA in the five years since it was implemented.[3] Only one application has been successful under Part IIIA, namely cargo handling services at Sydney International Airport. This contrasts with a large number of declaration inquiries held under Part XIC. Most of these have resulted in declaration, but not all – the Australian Competition and Consumer Commission ("**ACCC**") has (contrary to some critics' assertions) been willing not to declare telecommunications services where it found that declaration would not promote the long-term interests of end-users ("**LTIE**").[4]

AAPT believes that the lack of declarations (and declaration applications) under Part IIIA is due to flaws in the declaration criteria and declaration processes. (AAPT discusses the Part IIIA declaration criteria in more detail below.) With regard to the declaration process, AAPT believes that simplification is the key. There should be just one body that assesses applications for declaration, and this should be the ACCC. The roles played by the National Competition Council ("**NCC**") and the designated Minister should be removed.[5]

Certification of Effectiveness Access Regimes

Part IIIA has had more success with the respect to the certification of the effectiveness of certain access regimes, such as Victorian shipping channels and the South Australian gas regime.

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[2] *Postal Services Legislation Amendment Bill* 2000, Schedule 4. Available at www.aph.gov.au.

[3] As the Commission notes, these are for cargo handling facilities at several airports, including Sydney and Melbourne; various rail services; the Austudy payroll deduction service, and a gas pipeline in Western Australia.

[4] Services which the ACCC has decided not to declare, after an inquiry, are domestic intercarrier roaming, and the long-distance mobile originating service.

[5] To the extent that constitutional restrictions would limit the ability of the ACCC to declare services, such as those provided within one state by non-corporate entities, this may require amendments to the National Competition Policy Interstate Agreements and related legislation.

Certification[6] is a useful and practical strategy for encouraging responsible Ministers to seek certification of State or Territory access regimes. It is also beneficial for access providers and access seekers in that the expense and delays of the declaration process is avoided altogether.

Provision of Undertakings

The provision of undertakings is intended to remove the need for declaration.[7] There have been only three undertakings provided to the ACCC under Part IIIA.[8] While this is positive, it is cause for concern that more have not been provided given the potentially large numbers of essential facilities that are of national significance. Undertakings, by their nature, are likely to be advantageous to access providers as they provide more certainty, and are cheaper and quicker to provide than dealing with the regulatory burden imposed by declaration.[9] In 1996, one commentator predicted that undertakings would be "extremely popular" with access providers, particularly because they would allow access providers to ensure a particular level of profits without facing the uncertainties posed by declaration. For these reasons, undertakings were likely to become a "highly pro-competitive tool".[10]

In practice the undertaking avenue under Part IIIA has been far less successful than was anticipated in 1995. It can be inferred that there is a perception among would-be access providers that, because the likelihood of declaration is low, it is unnecessary to provide undertakings. The absence of regulatory pressure – caused particularly by a convoluted and delayed declaration process – is the principal reason for the relative failure of undertakings under Part IIIA.

Part XIC permits undertakings to be made when a service is declared. If the undertaking is accepted by the ACCC, a determination in an access dispute must be consistent with the undertaking. Telstra provided two undertakings under Part XIC regarding its originating and terminating PSTN telecommunications service, both of which the ACCC rejected. The lengthy time taken by the ACCC to assess the undertakings was problematic. However, the ACCC undertook, and published, extensive economic and technical research which provided a useful indicator as to an appropriate price in commercial negotiation and in any arbitrated outcome to an access dispute.

Part IIIA should be amended to permit access providers to provide undertakings even when the service is already declared. The ACCC should, as the designated body that receives undertakings, be required to publish its findings and reasoning. This would provide a useful guide to access seekers on the appropriate price and non-price terms and conditions that they should receive, either during negotiation or during an arbitration, should an access dispute be notified under Part IIIA.

Finally, there should be legislative scope for the provision of mandatory undertakings. Such a power already exists under the *National Third Party Access Code for Gas Pipelines*, by which the ACCC can direct a gas pipeline owner to provide it with an undertaking which specifies the terms

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[6] Sections 44M-Q

[7] Sub-section 44H(3)

[8] These undertakings were in relation to the Longford-Sydney Gas Pipeline, and services at Melbourne and Perth airports.

[9] S. King and R. Maddock, *Unlocking the Infrastructure*, (Sydney: Allen and Unwin, 1996), p. 44

[10] Ibid., p. 163

on which the pipeline owner will provide access. If the pipeline owner fails to provide an undertaking, or the undertaking is unreasonable, the ACCC can draft an undertaking of its own. This creates a stronger incentive for a service provider to submit an acceptable undertaking.

PART IIIA NEEDS AN OBJECTS CLAUSE

Clause 6 of the CPA gives detailed guidance as to the features that an access regime should have and when they should be invoked. But, like Part IIIA, the CPA does not say what ultimate end access regulation is supposed to achieve.

In contrast, Part XIC has the benefit of a clear statement of purpose. Subsection 152AB(1), the first provision of Part XIC, states:

> *"The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services."*

Subsections 152AB(2)-(8) identify the factors to which regard is to be had when assessing the LTIE: promotion of competition, any-to-any connectivity and the encouragement the economically efficient use of, and investment in, infrastructure by which listed services are supplied ("the secondary objectives").

The objects clause has also helped to ensure that industry and interested parties have had a solid understanding of the purpose of Part XIC and the way in which the ACCC will apply it.

An effective objects clause should be inserted into Part IIIA (and, if necessary, into clause 6 of the CPA). The emphasis should be on the promotion of the welfare or interests of those persons who consume the service, or services, ultimately derived from the service which is to be subject to regulation under Part IIIA. The clause could be a modified version of section 152AB.

IS PART IIIA CONCERNED ONLY WITH NATURAL MONOPOLIES?

AAPT notes that the NCC and the Australian Competition Tribunal ("**Tribunal**") have expressed a view, at least in some cases, that Part IIIA was only to apply to natural monopolies.[11] The Tribunal expressed a similar view in *Re Australian Union of Students.*[12]

The formation of an entrenched view on the part of the NCC, ACCC or the Tribunal that only natural monopolies could be made subject to Part IIIA regulation should be resisted. This is because there can be situations in which firms which are not monopolists but still hold market power are able to exercise that power to the detriment of access seekers and consumers. For example, the telecommunications industry is one in which "network effects"[13] can unfairly

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[11] *Re Australian Cargo Terminal Operations Pty* Ltd (1997) ATPR (NCC) 70-000; *Re Review of Declaration of Freight Handling Services at Sydney International Airport*, (2000) ATPR 41-754;

[12] *Re Application for Review of Decision by the Commonwealth Treasurer, ex parte Australian Union of Students* (1997) ATPR 41-573.

[13] The expression refers to the increasing value to members of a network the more users it has. Network effects are often evident in the telecommunications, postal and railway industries, to name a few. Network effects may lead to competition problems where a dominant network refuses to allow interconnection on reasonable terms. The concept is discussed in length in, for example, C. Shapiro, "Exclusivity in Network Industries" (1999) *George Mason Law Review* 1.

advantage a dominant network at the expense of rivals. In other industries, dominant firms, which do not necessarily hold monopoly power, can exercise effective control over essential inputs. An example of such an industry would be the postal services industry, where the incumbent's control over post boxes and various post handling facilities (coupled with a legislated monopoly over packages below a certain size) give it a large degree of control essential inputs that rivals may need.[14]

The ACCC itself recognised that it is possible for there to be natural duopolies or even oligopolies.[15] In such cases, there may be more than one facility, but it is simply not economic to develop yet another one.[16] Even if the two or more firms that control essential facilities are competitive with each other they may not have an incentive to provide access (or access at reasonable prices) to access seekers.

In summary, as market power can occur in a wide range of contexts, even when there is not a natural monopoly as such, there should not be a presumption that Part IIIA can only be applied where there is a natural monopoly.

MINISTERIAL INVOLVEMENT

When declaration or certification is the proposed method of making a service subject to Part IIIA, the decision rests with the designated Minister. Where the infrastructure is owned by a state or territory, the designated Minister is the Premier or Chief Minister. In all other cases, the relevant Minister is the Commonwealth Treasurer. The NCC provides the designated Minister with a recommendation on whether to declare or not to declare a service or certify an access regime.

The treatment of undertakings is different. The decision to accept or reject an undertaking is made solely by the ACCC, without any involvement by a designated Minister or the NCC.

Given that declaration is only supposed to be available for services that are of "national significance" (among other things), it is perhaps understandable that a federal Government minister should make such a decision. On the other hand, the granting of such powers to a Minister is inconsistent with the regime for declaration under Part XIC. Such powers should be granted to the ACCC. Any ACCC decision should be made subject to Tribunal review, as is the case under Part XIC.[17]

The requirement that a Minister make a decision after a recommendation by the NCC seems to make the declaration or certification process convoluted and unpredictable. There could be

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[14] Other firms can and do provide courier and DX services, but they have no control over postal boxes and other postal facilities that constitute essential inputs for a truly competitive and comprehensive postal service. AAPT notes that the proposed Part XID of the TPA will attempt to deal with these issues.

[15] ACCC, *Access Regime*, (November 1995), p. 5

[16] Ibid.

[17] Under section 152CE, a person whose interests are affected by a decision to accept or reject an undertaking (or variation to an undertaking) can seek review in the Tribunal. Final (but not interim) determinations in the Part XIC arbitral process can be reviewed in the Tribunal by application of a party (section 152DO) Declarations are not subject to Tribunal review, but aggrieved parties could appeal to the Federal Court on AD(JR) Act grounds or common law administrative grounds.

situations in which a Minister decides not to declare or certify for political reasons. Conversely, a Minister may be motivated to declare a service even when the NCC recommends to the contrary. An aggrieved person may appeal against a Minister's decision, but Ministerial involvement adds to the complexity and uncertainty of declaration and/or certification.[18]

COMPLEXITY OF DECISION-MAKING PROCESSES

Aside from AAPT's concerns regarding the involvement of Ministers in the declaration and certification process, AAPT believes it is problematic for several bodies to be involved in the decision-making process under Part IIIA. The NCC and the designated Minister are involved in all declaration or certification applications under Part IIIA. There is also a strong chance that the Tribunal will be asked to review any decision made by the Minister. Only in the assessment of undertakings does the ACCC have involvement – and in such matters, there is no right of appeal against the ACCC's decision. The different decision-making processes are inexplicable.

The involvement of up to three entities in declaration and certification matters will increase complexity and the risk of inconsistency – whether between the entities responsible, or between declaration or certification inquiries. AAPT's experience under Part XIC shows that it is practicable, and indeed preferable, for one body to assess all declaration applications and assessments. There are advantages in efficiency and predicability in the designation of one body as the "expert" regulator in access matters. For these reasons, AAPT suggests that the declaration and certification application processes be transferred from the NCC and the Minister to the ACCC. The right to appeal to the Tribunal from the ACCC's decision should be guaranteed in all cases under Part IIIA.

EFFECTIVENESS OF DECLARATION CRITERIA

AAPT has already identified the surprisingly small number of declarations under Part IIIA. Only one declaration application has been successful.[19] Three other applications were either withdrawn or unsuccessful.

Part IIIA contains a large number of criteria which must be considered by the NCC in its assessment of an application for declaration under Part IIIA. Section 44G(1) provides as follows:

> *The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:*
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> *(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;*
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> *(b) that it would be uneconomical for anyone to develop another facility to provide the service;*
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> *(c) that the facility is of national significance, having regard to:*
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> *(i) the size of the facility; or*

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[18] For example, the time that elapsed from the Minister's decision to declare services at Sydney Airport to the Tribunal's decision upholding the declaration was 2 years and 9 months.

[19] *Re Review of Declaration of Freight Handling at Sydney International Airport* (2000) ATPR para 41-754.

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

In contrast, the ACCC is required to consider just three criteria when assessing a Part XIC declaration, which together underlie the overall objective, namely the promotion of the long-term interests of end-users). Section 152AB relevantly provides:

(2) For the purposes of this Part, in determining whether a particular thing promotes the long-term interests of end-users of either of the following services (the listed services):

(a) carriage services;

(b) services supplied by means of carriage services;

regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

(c) the objective of promoting competition in markets for listed services;

(d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.

The three secondary objectives in section 152AB are exhaustive. The ACCC is not required to consider such ill-defined factors as the "public interest". Accordingly, the ACCC can focus on three relative specific criteria when considering a declaration application. This has the benefit of simplicity and improved transparency. The Part IIIA declaration criteria are generally logical and explicable, but could benefit from being worded in greater detail and more precise language.

Comments on the existing Part IIIA criteria follow.

A reference to consumer welfare in the declaration criteria?

The Commission asks whether there should be a requirement to demonstrate results in benefits for end-users in the declaration criteria.[20] AAPT reiterates its view that Part IIIA should have an over-riding objective that states that it is directed at the welfare of end-users of the services in question, whether those end-users be within or outside Australia. This objective should be supported by the declaration criteria.

[20] Commission, *Issues Paper*, p. 26

Promoting competition in related markets

AAPT believes that this criterion is justified. There would be little point in declaring services where the only promotion of competition would occur in the market for the supply of the service. If declaration were to be allowed in such situations there is no guarantee that anyone other than the access seeker would receive benefits flowing from improved competition. It must be remembered that Part IIIA is intended to ensure that control of essential inputs into services does not hinder the development of competitive downstream (or upstream) services.

Uneconomic to develop alternative facilities to provide the service

This is discussed above in AAPT's comments on monopoly services. AAPT believes that, although Part IIIA will generally be targeted at natural monopolies, it should not be assumed that natural monopolies are the only proper subjects of regulation under Part IIIA.

National significance

AAPT realises that there needs to be some kind of assessment as to whether the service involved is of importance to the national economy or the overall well-being of Australian consumers. Paragraph 44G(1)(c) lists alternative criteria that can be used to determine whether a service is of "national significance". AAPT does, however, have concerns that the emphasis on "national significance" could result in facilities or services which are still important but on a regional, rather than national, level being ignored by the appropriate regulator or Minister.

There is also a risk that important intra-state services (such as railways or gas pipelines) will be ignored. There is a risk, as the regime is currently expressed, that regionally important (as opposed to "nationally significant") services will not be regulated. There should not be an assumption that important regional facilities will always be covered by effective state or territory based regimes.

In summary, AAPT supports the retention of the national significance criterion but suggests that the meaning of this expression needs to be drafted more clearly to ensure that important services that may not be national in their scope are still covered by Part IIIA.

Undue Risk to Human Health or Safety

It is important that there be some kind of assessment of risks to health or safety, but their assessment could probably be considered under the public interest criterion.

Service Already Subject to Effective Access Regime

This criterion is a pragmatic and sensible one. It gives governments an incentive to create and maintain access regimes, that comply with the CPA. The availability of certification should encourage states and territories to seek recognition of their access regimes and ensure that they are compatible with Part IIIA. States and territories should be further encouraged to seek such recognition.

Public Interest Criterion

The Commission also seeks comment on the criterion that declaration not be contrary to the public interest. The meaning of the phrase "public interest" is not defined in Part IIIA (or elsewhere in the TPA) but the NCC has said that the impact of access on economic efficiency is an important consideration. While AAPT understands and supports the presence of this criterion, there needs to be more legislative guidance as to its application.

AAPT would suggest that certain sub-issues be included under the public interest criterion that would clarify its application. For example, health and safety, the creation of employment, the encouragement of export industries, and other similar issues could be listed to guide the decision-making processes of the relevant regulatory body.

NEGOTIATE/ARBITRATE ISSUES

The process by which a service is made subject to access regulation is governmental. The seeking of access is essentially a commercial process between private parties. Declaration creates a right of access, but does not ensure that access is granted. Access providers and seekers need to negotiate on commercial terms of access before access can be granted.

AAPT's experience under Part XIC is that declaration, as important as it is, does not foster competitive markets as such. An access provider will often take steps to delay the granting of access. This can take the form of unnecessary delays in access negotiations, or offers being made which are commercially unreasonable. Even when access is granted, an access seeker needs to be alert that the service it receives continues to be in accordance with the standard access obligations.

Part XIC provides for a dispute-resolution mechanism that comes into effect when one of the parties notifies the ACCC that commercial negotiation has failed. The ACCC has extensive powers to direct the parties to do, or refrain from doing, something in the course of arbitration. This right also applies to negotiations which are not yet subject to an ACCC arbitration.

Broader powers needed for arbitrator under Part IIIA

The ACCC's exercise of its powers during Part XIC arbitrations has not been perfect. The ACCC seems reluctant to use, for example, the procedural directions powers under section 152CT to overcome obstacles imposed by the access provider. One of the major problems confronting an access seeker is "information asymmetry". The access provider will always have a significant advantage in negotiation and arbitrations by virtue of the fact that it understands the technical operation and the costing structure of the service far better than an access seeker ever could.

The ACCC has, on occasion, used its procedural directions power to require disclosure of important information from the access provider to the access seeker. However, access providers often claim confidentiality over a wide range of material it regards as "commercially sensitive".[21] The effect of such confidentiality claims is sometimes to defeat the purpose for which procedural directions powers were created.

[21] The right to claim confidentiality is under section 152DK.

Procedural directions and confidentiality

AAPT has previously recognised that access providers, during Part XIC arbitrations, often have no incentive to provide a service to an access seeker on reasonable terms. This reluctance to supply is compounded by the fact that access seekers seldom have countervailing market power.[22] The procedural directions powers (in sections 152BBA and 152CT) are theoretically useful but their application during the practical conduct of an arbitration can be difficult and time-consuming.

It is with concern that AAPT notes that there is an absence of directions powers available to the ACCC during arbitrations (or negotiations) under Part IIIA. An important power would be the ability to compel a party to disclose certain information, to make an offer, or to cease engaging in conduct that may be counter-productive to the resolution of the dispute.

Furthermore, any right to claim confidentiality should be treated with caution. AAPT has encountered claims by other parties during Part XIC arbitrations in which they will claim confidentiality over material that does not warrant such a claim. This includes costing information that the access seeker needs in order to make or assess an offer. Given that an arbitration is, by its nature, confidential, any disclosure to third parties is prohibited. In cases where there is genuine confidential information, the disclosure of which could damage the party making the disclosure, then the information should still be disclosed to designated representatives of the other party, subject to confidentiality undertakings.

The need for public and/or multilateral arbitrations

AAPT believes that the inherently private nature of arbitrations reduces the efficiency and effectiveness of the arbitration process generally. Arbitrations are normally conducted on a bilateral basis. This often means that issues of general concern to access seekers (or indeed providers) are considered afresh with every arbitration. This was a particular problem in the various PSTN arbitrations between Telstra and a range of access seekers. There would have been a significantly more efficient and timely arbitral process had the arbitrations been combined and, subject to the parties' consent, made public, at least with respect to issues of principle. The arbitrations would have concluded more quickly and the industry would have gained a useful understanding of the appropriate prices to be used in negotiations for PSTN services.

The need for expedition

One of the major problems with the negotiate/arbitrate regime under Part XIC has been regulatory delay. In many instances, it is one of parties which has engaged in delaying tactics or "regulatory gaming". For example, during PSTN arbitrations with Telstra, the ACCC gave priority to assessing Telstra's PSTN Undertakings before making final determinations in the arbitrations. AAPT suggests that Part IIIA adopt a clear rule that arbitrated dispute resolution takes priority over other regulatory processes.

The need for backdating powers

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[22] AAPT, *Supplementary Telecoms Submission*, p. 18

The ACCC is able to backdate a final determination under Part XIC, but only to the date that the dispute was notified. The ability to backdate provides an incentive for parties to continue to negotiate, however, it is blunted by its limitation to backdating to the date of notification of dispute. AAPT believes that backdating should be available from the date of first supply of the service in question.

APPEAL PROCESSES

AAPT notes that Part IIIA, like Part XIC, provides for an avenues of appeal for parties aggrieved by a decision under Part IIIA. The various rights differ between the two parts. Under Part IIIA, a party which is aggrieved by a decision to declare a service (or not to declare a service) can appeal to the Tribunal. On the other hand, Part IIIA offers no avenue of appeal in the even that a party is aggrieved by a decision to reject or to accept an undertaking.[23] The only avenue of redress would be under the Administrative Decisions (Judicial Review) Act, which is an inherently more narrow appeals avenue.

AAPT suggests that all the current appeal rights in Part IIIA be retained, but that a right of review before the Tribunal be introduced for decisions regarding undertakings (or variations to undertakings). Such an amendment would tend to encourage access providers to give undertakings, as they would know that, in the event that the ACCC made a decision unfavourable to them, they would be able to seek a review. Would-be access seekers would similarly have the opportunity to seek the rejection of undertakings that they believed to be unreasonable.

With respect to declarations, AAPT adopts a more cautious approach. The Sydney Airports case was a clear example of the problems associated with appeals against declarations under Part IIIA. The time taken from the declaration to the Tribunal's decision was nearly three years. The Tribunal decision affirmed the decision to declare. AAPT regards the opportunities for access providers to hinder the implementation of declarations as contrary to the promotion of access to essential facilities that Part IIIA is supposed to provide. Accordingly, AAPT proposes an amendment to merits review of declarations.

All interested parties (including the prospective access provider) have a right to participate in the declaration inquiry and make submissions. Parties with a sufficient interest in a declaration decision should be able to appeal to the Federal Court on administrative law grounds. With respect to merits review, AAPT does not oppose it, but suggests that Part IIIA be changed to prevent the implementation of a declaration being delayed by an appeal. In other words, the legislation should state that a declaration comes into effect 21 days after it is made, and that this is not affected by any review proceedings that may be commenced. This would safeguard interested parties' rights to seek review, while also ensuring potential access seekers are able to exercise their rights to negotiate for access.

PRICING PRINCIPLES

Part IIIA has no guidance as to the pricing principles which should be applied when there is a dispute over access to essential facilities. The only guidance available is in clause 6(4)(i) of the CPA. This clause says that when arbitrating a dispute the regulator should take into account "the costs to the owner of providing access, including any costs of extending the facility but not costs

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[23] Section 152CE allows a person to seek review in the Tribunal of an ACCC decision to accept or to reject an undertaking under Part XIC, or an ACCC decision to accept or to reject a variation to an undertaking.

associated with losses arising from increased competition in upstream or downstream markets." AAPT agrees with the Commission that this approach implies that any arbitrated price must be below the price at which the facility owner would voluntarily provide access.[24]

In contrast, Part XIC contains some guidance as to the pricing principles to be adopted during arbitrations under Part XIC. Sub-section 152AH(1)(d) provides that the reasonableness of terms and conditions must be determined from, among other things, "the direct costs of providing access to the declared service concerned". The ACCC has interpreted this phrase to mean that, in most circumstances, total service long run incremental cost ("**TSLRIC**") is the appropriate pricing principle.[25] The ACCC has applied TSLRIC in the assessment of undertakings and the making of determinations.

The ACCC's use of a published and well-recognised pricing principle has had benefits for parties to access disputes as well as the industry at large. Access providers and seekers alike know in advance how the ACCC will calculate the appropriate interconnection charge in the event that final determination is made (although they may disagree on the appropriate input values.) This itself produces savings in cost, time and effort for the parties, by ensuring that they do not negotiate "in the dark".

Given this experience under Part XIC, AAPT believes that Part IIIA should adopt some kind of reference to a pricing principle or range of pricing principles. AAPT does not think it appropriate, however, for a specific pricing principle to be legislated in Part IIIA as the appropriate pricing principle(s) would inevitably depend on the nature of the service and the industry. The ACCC should be required by legislation to publish a pricing guide for Part IIIA and to apply it. (Such a requirement already exists in Part XIC.)

ACCESS HOLIDAYS

The Commission asked whether access holidays were an appropriate option for addressing some of the adverse impacts of mandated access on investment in infrastructure assets.[26] Part IIIA does not currently provide for "access holidays". Under Part XIC, a access provider which is bound by a declaration may seek an exemption from that declaration (which can be seen as an access holiday).[27] The ACCC can only grant an exemption if to do so would be in the LTIE. AAPT acknowledges that there may be a need for an exemption (including an access holiday) to be granted in some instances, such as where an access provider proposes to engage in a risky investment.

However, AAPT notes that applications for exemption under Part XIC create the potential for "regulatory gaming". Telstra recently applied for two exemptions from the Local Call Services ("**LCS**") declaration in most major capital cities, even though that service was declared only some 12 months previously and there was little scope in that time for competition to increase sufficiently for the declaration to become unnecessary.[28] AAPT would argue that, although Part IIIA should

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[24] Commission, *Issues Paper,* p. 33

[25] See generally – ACCC, *Access Pricing Principles* (July 1997). However, the ACCC has held that there are instances in which TSLRIC is not appropriate, such as Telstra's provision of the Local Carriage Service.

[26] Commission, *Issues Paper*, p. 35

[27] Section 152AT

[28] ACCC, Media releases dated 29 June 2000 and 13 November 2000

allow access holidays and exemptions from declarations, the access provider should be required to show that such a protection would be in the interests or welfare of consumers of the ultimate services to be provided to end-consumers. In addition, an application for exemption should not take precedence in consideration over any arbitration for access that may have already commenced.

RELATIONSHIP BETWEEN PART IIIA AND OTHER LEGISLATION

It is important that Part IIIA not exclude the operation of those enforcement provisions of the TPA, such as Part IV and Part XIB of the Act. (AAPT notes, and agrees with, the legislative prevention of overlap between Parts IIIA and XIC.[29]) It is sometimes claimed that an effective access regime will effectively prevent a monopolist or firm with market power from engaging in certain kinds of anti-competitive conduct. For example, it is sometimes said that the guarantee of provision of essential services on fair and reasonable terms will prevent a firm with market power engaging in a refusal to supply or predatory pricing.

AAPT's view is that an access regime alone will not always prevent misuse of market power. This is for both legal reasons, namely that misuse of market power is defined in different terms from a guaranteed right of access, and for practical ones in that it is very difficult to obtain evidence to show a breach of section 46. Therefore, AAPT would support the retention of section 152AK which guarantees that Part IIIA does not affect the operation of Part IV and VII. AAPT would go further and suggest that provision should be modified to ensure that Part XIB and XIC are not affected by the presence of Part IIIA.

CONCLUSION

AAPT supports the retention of Part IIIA. However, AAPT believes that Part IIIA would benefit from significant revision and amendment. AAPT has argued in its submission to the Commission's inquiry into Telecommunications Review that Parts XIB and XIC should be retained and, if anything, strengthened. Part XIC is a well-developed and well-understood statutory regime which generally works well, subject to the difficulties outlined above. AAPT believes that a reformed Part XIC would be a good model for amendments to Part IIIA. Part IIIA does not, however, provide a useful example for amendments to Part XIC.

AAPT Limited

22 January 2001

[29] Section 152CK