

## Time to review the ACCC's role as access regulator

***Giving oversight of the telecommunications access regime to the general economy-wide regulator, the Australian Competition and Consumer Commission is a unique feature of the Australian regulatory changes made in 1997. It may be time to reconsider whether the ACCC is up to the task.***

The recent final decision on ULLS arbitrations triggers this thought, as does the whole history of resolving access disputes. The concern is not to do with the final prices; it is with the setting of prices that are backdated for nearly two years.

The consideration has to be as much about the legislative settings as it does about the Commission's own processes. The ACCC certainly needs to consider how to truncate gaming; their procedural rules powers may be the way.

### **The decision**

The ACCC announced on 21 January its final determination in a ULLS access dispute between Primus and Telstra made on 20 December last year. The decision is backdated to 3 February 2006, and specifies the charges to apply in three financial years.

While some, including this journal's Economuse, find the story in the final Band 2 price being just under half Telstra's ongoing claim for a \$30 access charge, there are some other interesting features.

The first is that the decision provides different prices for each of the three years, and these prices are increasing. This is something one presumes Telstra's Tony Warren knew when he told CommsDay on 11 January "the ACCC seems to just pluck these numbers out of thin air. How can anyone really believe that ULL costs on the ACCC's own numbers have fallen by a third over the last year, when copper, labour and fuel costs have gone through the roof?"

The decline he is trying to draw attention to is prices being so much lower than the ACCC's model price of \$22 per month for Band 2. The fact that the final prices are below this level is a consequence of the ACCC's lack of any real power to make that price "stick", and Telstra's own gaming behaviour.

Last week Exchange's Economuse column included the historic timeline, but missed one crucial point. After the ACCC had published its model price terms and conditions for the ULL, Telstra not only submitted an undertaking at \$22 but included all the same arguments that it had previously used for the higher price.

Under s152AQB the ACCC had to make the model price determination, and to have regard to it in arbitrations. The only benefit to Telstra of lodging a new undertaking was either to lock-in the price or to create an acceptance of the reasoning in its

undertaking. What's more, the ACCC was left with no option but to undertake the whole process of detailed analysis again.

It was in this re-analysis that the ACCC listened to reason on the correct allocation of "ULL specific costs" and averaged them over a wider class of copper pairs. These lower prices made access seekers fancy their chances in arbitration, and the more combative approach from Telstra resulted in a long drawn out arbitration.

### **The problem**

The process has now ended with decided access prices, and some might think that's a good outcome. But that ignores the supposed purpose of the access regime.

The regime imposes *ex ante* regulation because of the perceived weaknesses of relying on litigation after the fact. But in the end, except for the ability to acquire the service, that is what access seekers have received – no more nor less than the equivalent of a damages action initiated under s46 or PartXIB for the access price of \$30 being anti-competitive.

The access regime is better than litigation in the sense that both the Courts and the ACCC have so reduced the operation of the anti-competitive conduct provisions that the action mightn't have been successful, but the remedy is no different.

Economy wide impact of the delayed decision is to distort the investment decisions of both access seekers and Telstra. In this case Primus has estimated the amount of backdated benefit to be \$7.5M.

All this could have been different. If the legislation on model terms had linked them to the consideration of undertakings, then the revised undertaking could have been accepted merely on that basis. If Telstra had put in a one line justification for the \$22 charge – "this is what you said it is" – the ACCC would have accepted it immediately. If Telstra had submitted no further undertaking but simply charged the model price, the \$22 would have been the accepted charge.

### **The future**

But aside from these hypothetical paths, the question is whether the ACCC understands its task. As Richard Dammary former GM Infrastructure at AAPT put it, the ACCC applies generic competition regulation principles to the task of creating, rather than preserving, competition through an industry specific regime. The solution may well be to change that institutional structure.