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Enhancing the effectiveness of telecommunications access regulation: Moving from a "negotiate-arbitrate" to an "up-front decision" model

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An effective telecommunications access regime is critical to the quality of product and pricing provided to consumers of telecommunications services. Pt XIC of the Competition and Consumer Act 2010 (Cth) provides a framework for network access that requires carriers and carriage service providers of declared services to provide access to competitors on agreed terms and conditions. In recent years, there has been growing industry dissatisfaction with the operation of Pt XIC, especially for the role it is perceived to have played in hindering the deployment of high speed broadband services in Australia. The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth) substantially amends Pt XIC and replaces the present "negotiate-arbitrate" model of access determinations with a new "upfront decision" model. This article analyses the effectiveness of the present law and considers the merits of the proposed reform.

<DIV>INTRODUCTION

It is widely accepted that in order to deliver cost-effective and high quality telecommunications services to consumers, it is imperative to establish a competitive and technologically progressive telecommunications sector. What is less clear is the role that telecommunications access laws play in creating such a competitive environment.1 Part XIC of the Competition and Consumer Act 2010 (Cth) (formerly the Trade Practices Act 1974 (Cth)) provides a framework for telecommunications network access that requires carriers and carriage service providers of declared services to provide access to other service providers on agreed terms and conditions. In recent years, there has been growing dissatisfaction with the role that Pt XIC is perceived to have played in hindering competition and innovation in the Australian telecommunications sector.2 In this context, it is useful to consider the substantial amendments to Pt XIC enacted by the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth). The relevance of the issue is heightened in the context of the Commonwealth Government's proposed National Broadband Network (NBN).3

The article begins by considering the theoretical framework governing the relationship between access and investment in the telecommunications sector. It then proceeds to examine the historic

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1 Siciliani P, “Access Regulation on NGA – A Financial, Market-Led Solution to Bridge the Gap Between US and European Diverging Regulatory Approaches” (2010) 34(5) Telecommunications Policy 287 at 298. Siciliani notes that the issue of how best to regulate access on next generation access (NGA) networks is probably the most pressing issue faced by telecommunications regulators today.


Australian access laws in Pt XIC (as continued on a transitional basis) which applied what was commonly known as a “negotiate-arbitrate” model of decision-making. This is then followed by a comparison and analysis of the new “upfront decision” model introduced by the 2010 Act. Finally, the article considers what other measures need to be adopted to develop a competitive and dynamic telecommunications sector in Australia.

The NBN project planned by the Federal Government seeks to deliver a wholesale-only, open access telecommunications market structure. Retail competition will be supported by ensuring that the NBN company eliminates network bottlenecks and operates at the lowest appropriate layer in the network stack. As the Implementation Study envisages that the project will take approximately six years to be fully operative, effective access laws will be critical to ensure competition during the roll-out. Moreover, given the political uncertainty surrounding the NBN, there is the possibility that it may not be implemented as outlined in the Implementation Study and that access policy may evolve during this lengthy six-year period to adopt some form of access arrangement to strengthen the financial returns on the project. The present paper will argue that, irrespective of whether or in what form the NBN proceeds, the amendments enacted by the 2010 Act have addressed an urgent and independent need for effective telecommunications access law reform.

THE RELATIONSHIP BETWEEN ACCESS REGULATION AND INVESTMENT

A variety of theoretical frameworks have been put forward to explain the nature of the relationship between access and investment. All approaches lead to the same conclusion, that effective and equitable access platforms stimulate investment.

The essential theory is that if incumbents are forced by regulation to provide access to competitors at rates that are below cost, this will retard investment. Additionally, it is argued that as investment in broadband infrastructure is in essence investment in innovation, in order for access pricing to be accurate it needs to factor in the cost of the risk of unsuccessful innovation. A failure
to accurately quantify this risk in determining access prices will also create a negative effect on investment.12 Alternatively, if the access price is set too high, it will also have the negative effect of deterring entry by competitors and result in a failure to accrue welfare and innovation benefits for the community.13 Further, systematic errors in forward-looking access pricing can occur as the sunk costs related to core network infrastructure and the costs generated by adapting to evolving technology make it difficult to accurately quantify the incumbent’s costs.14 Hence, an important element of an effective access regime is a procedure that enables accurate quantification of the costs of the access provider and the value of the access service provided by the access provider.

Hoffler postulates that not only will inappropriate access regulation undermine investment but that appropriate forms of unbundling and the provision of effective access facilitates an increased level of competition.15 The well known Cave and Vogelsang model, known in the United States as the “stepping stone” theory and in Europe as the “investment ladder” theory, suggests that unbundling will lead competitors to initially enter the market using wholesale access but then over time broaden their activities and expand into the unbundled local loop. Hence whilst competitors initially enter through the path of wholesale access they will over time create and use their own facilities and be independent of the incumbent. The Berkman Study notes that the stepping stone theory is supported by some empirical experiences.16 In Japan, Softbank’s move from use of open facilities to investment in fibre, and in France, Illiad’s move from small investments to substantial fibre investment and Neuf and Cegetel’s recent substantial investment in fibre in the core of the network are cited as supporting the theory.17 Further, the trend of broadband operators to transition from the use of bitstream to unbundled lines provides qualified support for the model. Whilst bitstream allows entrants to enter the market with a lower level of initial investment, data generated by ECTA indicates that operators are choosing to invest more and move to unbundling which offers greater flexibility to innovate and differentiate service.18 The importance of the ability to differentiate is developed in the Chang, Koski and Mujamadar theory on the relationship between low costs and increased offerings of differentiated services to end users.19

More recently, a theory has been put forward by Bauer.20 It postulates that the investment decisions of both regulated and non-regulated entities are influenced by regulation. Bauer states that the optimum market structure for long-term dynamic investment is one where a small number of moderate to large sized firms operate with a set of smaller sized firms actively contesting for market

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13 Gayle and Weisman, n 12.
16 Harvard University Berkman Centre for Internet and Society, n 9, p 92.
17 Fevrier P and Sraer D, A Structural Model of Local Loop Unbundling (CREST Papers, Paris 2007); Harvard University Berkman Centre for Internet and Society, n 9, p 92. Further, the entering of bordering territories by neighbouring incumbents by combining with unbundling providers and purchasing cable facilities in Nordic countries also support the model.
18 Harvard University Berkman Centre for Internet and Society, n 9, p 92.
share and providing competition. This optimum market structure requires an ongoing process of regulation review and refinement. Berkman notes that this neo-Shumpeterian model is consistent with the experiences of a variety of nations such as Japan, France and the Nordic countries where there has been a trend for smaller operators to consolidate. Telenor in Sweden, Carphone Warehouse in the United Kingdom and SFR in France are cited as recent examples. An interesting adjunct to the Bauer proposition is provided by the empirical findings of Jung which conclude that the positive effects on incumbent investment is influenced mainly by the extent of the market share gained by entrants and not the number of new entrants.

However, the cases examined by the Berkman Study also suggest that whilst the investment ladder theory has been useful in the past, a new trend is emerging in access regulation around the globe. Policy-makers are increasingly recognising the inherent limitations of the investment ladder theory in circumstances of natural monopoly (where it is only ever optimal for a single firm to deploy the relevant infrastructure). The Berkman Study case studies suggest that competition is less and less being generated by replicating infrastructure such as trenches, ducts, holes and poles. Instead, effective competition is increasingly being generated by sharing a single, non-redundant high capacity base physical infrastructure which facilitates the further investment in electronics or optics and allows for innovation and differentiation of processes and services. Hence, there is an increasing separation of portions of the infrastructure. High cost infrastructure, trenches, ducts, holes in wall, are either a monopoly or duopoly at most. In contrast, strong competition exists in electronics, optics and services which operate on the top level of the shared core. In Australia, the focus to date has been on the sharing of such passive infrastructure (under the inter-carrier facilities access regime in the Telecommunications Act 1997 (Cth) rather than encouraging its replication.

The findings of the Berkman Study seem to provide some support for the present direction of broadband regulation in Australia, the NBN and the legislative package accompanying its implementation. The rationale for investment in duplication of such infrastructure is the worry by access seekers that the regulator will fail to protect against anticompetitive behaviour by the owner and operator of the infrastructure. In Australia, the duplication of cable by Optus in competition with Telstra would seem to support this hypothesis. The Berkman Study notes that there is nothing intrinsic in the physical properties of a trench or fibre optic cable that would make duplication of such a structure a precondition of effective competition. In such a context, effective access laws are critical to ensuring both an efficient and competitive telecommunications market. The critical issue will be the extent to which the NBN infrastructure should be unbundled. One option would be to unbundle to a Layer 2 bitstream level as presently proposed in Australia. An alternative option would be to unbundle to a greater extent to include dark fibre as presently in operation in the United Kingdom. The argument against extensive bundle is essentially premised on technical considerations. Specifically, greater unbundling is not feasible in a GPON environment as a single dark fibre is not capable of being individually supplied. Finally, it is relevant to note that unbundling of the infrastructure, where technically feasible, of major suppliers is a requirement of international trade law pursuant to the WTO GATS.

<DIV>HISTORIC REGULATORY FRAMEWORK GOVERNING ACCESS
Prior to considering the 2010 amendments to the telecommunications access regime, it is useful to outline key sections of the former law. Formerly, Pt XIC provided for what was commonly known as the negotiate-arbitrate model. That is, if parties were unable to negotiate and agree on the terms of

21 Harvard University Berkman Centre for Internet and Society, n 9, p 93. Whilst the literature to date provides a strong case for the benefits of effective access platforms, the critical issue that remains to be addressed is how many competitors are required to sustain dynamic investment and optimum services for consumers. As the Berkman Study notes, there is a lack of conclusive findings on this issue.

22 Harvard University Berkman Centre for Internet and Society, n 9, p 94.

23 Harvard University Berkman Centre for Internet and Society, n 9, p 94. It is unclear whether this risk justifies the massive cost of duplicating infrastructure. Although interesting, that issue is outside the ambit of the present discussion which focuses on the design of effective access regulation.
access to a declared service, then any of the parties could notify the Australian Competition and Consumer Commission (ACCC) of an access dispute and seek arbitration.

### Declaration of services

Pursuant to Pt XIC, s 152AL(1) of the *Competition and Consumer Act*, an “eligible service” is defined to be either: (a) a listed carriage service (within the meaning of the *Telecommunications Act*); or (b) a service that facilitates the supply of a listed carriage service (within the meaning of the *Telecommunications Act*) where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons).

After a public inquiry under Pt 25 of the *Telecommunications Act*, the preparation of a report about the inquiry under s 505 of the *Telecommunications Act* and the publication of the report, the ACCC may, pursuant to s 152AL(3) of the *Competition and Consumer Act*, declare an “eligible service” to be a “declared service”. The ACCC can make such a declaration if it is satisfied that the making of the declaration would promote the “long-term interests of end-users of carriage services or of services provided by means of carriage services”.24

The Productivity Commission, in its *Telecommunications Competition Regulation Report* of 200125 recommended that the objects clause in s 152AB(1) of Pt XIC be changed from the promotion of “the long-term interests of end-users” to the promotion of the “economically efficient use of, and investment in, telecommunications services”.

In the subsequent *Government Response to Productivity Commission Report on the Review of Telecommunications Competition Regulation*,26 the government noted that it did not agree with this recommendation. It reaffirmed that the relevant objective was to promote the long-term interests of end users by promoting competition, achieving any-to-any connectivity as well as encouraging economically efficient use of and investment in infrastructure. The government was of the opinion that the adoption of such a proposal could shift the focus to the interests of the carriers, rather than business and residential consumers and deletion of any-to-any connectivity and that this may impact on impending transition from voice to data networks.

### The nature of access obligations

Carriers and carriage service providers who provide declared services are required to comply with standard access obligations in relation to those services. The standard access obligations facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services. Part XIC, Div 3 outlines the standard access obligations. Section 152AR set out the access obligations of access providers.

Section 152AR(3) provides that an access provider must, if requested to do so by a service provider: (a) supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and (b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and (c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

### Agreeing on terms and conditions of access

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24 *Competition and Consumer Act 2010* (Cth), s 152AL(3)(d); See Stewart, n 2 for discussion of the long-term interests of end-users test.

25 Productivity Commission, *Telecommunications Competition Regulation Report*, Report No 16 (2001), Recommendation 9.1. It was additionally recommended that the relevant sections of the Act be changed to reflect this new object.

26 *Australian Government, Government Response to Productivity Commission Report on the Review of Telecommunications Competition Regulation* (2001). However, the government recognised that there is scope to amend the regime to promote investment and the *Telecommunications Competition Act 2002* contains measures to encourage investment in telecommunications infrastructure, such as enabling the ACCC to grant ex-ante exemptions and undertakings.
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In circumstances where a carrier or carriage service provider were required to comply with any or all of the standard access obligations, s 152AY(2)(a) formerly provided that the carrier or carriage service provider must comply with the obligations on such “terms and conditions” as are “agreed” between the carrier or carriage service provider and the access seeker.

Failing agreement under s 152AY(2)(a), subsection (b) outlined three different regulatory scenarios. First, if an access undertaking given by the carrier or carriage service provider was in operation and specified terms and conditions about a particular matter, the carrier or carriage service provider were required to comply with the obligations on such terms and conditions relating to that matter as were set out in the undertaking.

Alternatively, if an access undertaking given by the carrier or carriage service provider was in operation, but the undertaking did not specify terms and conditions about a particular matter, carrier or carriage service provider were required to comply with the obligations on such terms and conditions relating to that matter as were determined by the ACCC under Div 8 which dealt with arbitration of disputes about access.

Finally, if there was no such undertaking, the carrier or carriage service provider were required to comply with the obligations on such terms and conditions as were determined by the Commission under Div 8.

Therefore, if agreement could not be reached, but the carrier or carriage service provider had given an access undertaking, the terms and conditions were as set out in the access undertaking. Alternatively, if agreement could not be reached, but no access undertaking was in operation, the terms and conditions had to be determined by the ACCC acting as an arbitrator.

**Resolution of access disputes**

Matters on which an access seeker and a carrier or provider might “disagree” included:

a) the price, or the method of ascertaining the price, at which access is to be provided; and

b) whether a previous determination ought to be varied.

If the negotiate limb of the “negotiate-arbitrate” model failed, and agreement could not be reached on terms and conditions of access, either the access seeker or the carrier or provider could notify the ACCC in writing that an “access dispute” existed. Upon notification of a dispute, the ACCC was empowered to conduct an arbitration of a dispute about access to declared services.

**Comparing the former “negotiate-arbitrate” model with the new “up-front” model**

The nature of the dissatisfaction with the former negotiate-arbitrate model

There has been widespread industry dissatisfaction with the negotiate-arbitrate model. In the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 it is noted:

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27 Trade Practices Act 1974 (Cth), Div 3, s 152CM(5).
28 Trade Practices Act 1974 (Cth), Div 3, s 152CM(1) and s 152CM(2).
29 Part XIC, Div 8, sets out a detailed framework for the resolution of access disputes. Under s 152DNB, if a party applies to the Federal Court under s 39B(1) of the Judiciary Act 1903 (Cth) for a writ or injunction in relation to a decision of the ACCC to make a determination under Div 3, the court must not make any orders staying or otherwise affecting the operation or implementation of the decision pending the finalisation of the application. Under the transitional provisions, the right to notify of an access dispute for a declared service exists until the commencement date of the first final access determination for that declared service.
31 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth).
The negotiate-arbitrate model within the telecommunications access regime has been extensively criticised by a range of stakeholders across the industry. Stakeholders’ main areas of concern have been that the negotiate-arbitrate model is very slow, cumbersome and open to gaming (if not outright obstruction) and that Part XIC [in its former form] does not provide sufficient regulatory certainty for investment.

Further, it has been suggested that this negotiate-arbitrate model “was chosen over more direct methods of setting access terms in order to encourage market-based outcomes” but that “in practice determining terms and conditions under Pt XIC has proven to be time-consuming and litigious”. It has been suggested that Pt XIC failed to constrain the incentive of the vertically integrated Telstra to provide access to its network on terms that are not as favourable as those it supplies to its retail business. However, Telstra would disagree with this conclusion, pointing to the fact the majority of access disputes have been over the issue of the determination of access price.

Significantly, as of June 2008, competitors had only installed facilities at approximately 10% (521 out of 5,069) of Telstra-owned exchanges.

The Australian telecommunications sector is a particularly litigious sector. As of March 2009, the ACCC was considering 51 access disputes. Nearly all these disputes involved Telstra. Significantly, 42 out of these 51 disputes related to broadband input services. Since the commencement of the access regime in 1997 to May 2009, 157 telecommunications access disputes had been notified.

Further, judicial review has been sought for nearly all the final determinations made by ACCC, most being by Telstra. Hence, in the context of such a litigious sector, it is particularly imperative that effective laws be in place to support timely decision-making.

The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010

In 2010, the Commonwealth Government enacted the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act. The Act introduces three distinct packages of legislative reform and seeks to:

a) address Telstra’s vertical and horizontal integration;
b) reform the telecommunications access regime;
c) reform the telecommunications anticompetitive regimes;


33 Ibid; The 2009 Bill also contains provisions relating to the structural and functional separation of Telstra. However, the latter issue is outside the scope of the present discussion; See further Havyatt D, “Why Vertical Structural Separation is in the Interests of Incumbent Telcos, and Why They Don’t See It” (2008) 58(1) Telecommunications Journal of Australia 10.

34 Ibid; See also Australian Competition and Consumer Commission, Declaration of Local Telecommunications Services (July 1999) for guidelines on the declaration of an unconditional local loop service under Pt XIC. The report also covers the declaration process for a local PSTN originating and terminating service, and a local carriage service; See also Farrell and Weiser, n 5.

35 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth).

36 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth).

37 Disputes were in relation to a gas pipeline, the Sydney International Airport, and a sewerage service.

38 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), Sch 1, Pt 1, Amendments relating to Telstra.

39 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), Sch 1, Pt 2, Telecommunications Access Regime.
d) strengthen consumer safeguard measures including the Universal Service Obligation (USO), the Customer Service Guarantee (CSG), and priority assistance.

Only the second of the above areas is of relevance to the present discussion. In this regard, the Act amends Pt XIC by replacing the current-negotiate arbitrate model with one where the ACCC has the ability to make upfront determinations on price and non-price terms of access.

**The operation of access determinations**

Section 112 of the Act repeals the former s 152AY, and substitutes a new section. Section 152AY applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

Section 152AY(2) outlines four distinct scenarios. First, if an access agreement between the carrier or carriage service provider and the access seeker is in operation and specifies the terms and conditions about a particular matter, the carrier or carriage service provider must comply with the obligations on such terms and conditions relating to that matter as are set out in the agreement.

However, if s 152AY(2)(a) does not apply in relation to terms and conditions about a particular matter, and a special access undertaking given by the carrier or carriage service provider is in operation, and the undertaking specifies terms and conditions about that matter, the carrier or carriage service provider must comply with the obligations on such terms and conditions as are set out in the undertaking.

Alternatively, if neither s 152AY(2)(a) nor s 152AY(2)(b) applies in relation to terms and conditions about a particular matter, and binding rules of conduct specify terms and conditions about that matter, the carrier or carriage service provider must comply with the obligations on such terms and conditions as are set out in the binding rules of conduct.

Finally, if none of the above applies, and an access determination specifies terms and conditions about that matter, the carrier or carriage service provider must comply with the obligations on such terms and conditions as are set out in that access determination.

Section 116 of the Act repeals the entire Pt XIC, Div 4 of the *Competition and Consumer Act* and substitutes a new Div 4 entitled “Access Determinations”. The new s 152BC(3) stipulates that an access determination may:

a) specify the terms and conditions on which a carrier or carriage service provider is to comply with any or all of the standard access obligations applicable to the carrier or provider; or

b) specify any other terms and conditions of an access seeker’s access to the declared service; or

c) require a carrier or carriage service provider to comply with any or all of the standard access obligations applicable to the carrier or provider in a manner specified in the determination; or

d) require a carrier or carriage service provider to extend or enhance the capability of a facility by means of which the declared service is supplied; or

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40 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), Sch 1, Pt 3, Anti-competitive Conduct.

41 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), Sch 1, Pt 4, Universal Service Regime.

42 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), Sch 1, Pt 5, Customer Service Guarantee.

43 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), Sch 1, Pt 6, Priority Assistance.

44 Competition and Consumer Act 2010 (Cth), s 152AY(2)(a).

45 Competition and Consumer Act 2010 (Cth), s 152AY(2)(b).

46 Competition and Consumer Act 2010 (Cth), s 152AY(2)(c).

47 Competition and Consumer Act 2010 (Cth), s 152AY(2)(d).
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- impose other requirements on a carrier or carriage service provider in relation to access to the declared service; or
- specify the terms and conditions on which a carrier or carriage service provider is to comply with any or all of those other requirements; or
- require access seekers to accept, and pay for, access to the declared service; or
- provide that any or all of the obligations referred to in s 152AR are not applicable to a carrier or carriage service provider, either unconditionally or subject to such conditions or limitations as are specified in the determination; or
- restrict or limit the application to a carrier or carriage service provider of any or all of the obligations referred to in s 152AR.

Therefore, if agreement cannot be reached between parties and no access undertaking is in operation but the ACCC has made binding rules of conduct, the terms and conditions are as specified in the binding rules of conduct. Alternatively, if no agreement can be reached and no access undertaking is in operation and no binding rules of conduct have been made, the terms and conditions are as specified in an access determination made by the ACCC.

The merits of up-front pricing and determination of non-price terms

A critical element of the new access regulatory framework is that it enables the ACCC to determine up-front prices as well as non-price terms governing access to the declared service. Importantly, s 152BC(8) stipulates that:

> Terms and conditions specified in an access determination as mentioned in paragraph (3)(a), (b) or (f) must include terms and conditions relating to price or a method of ascertaining price. (emphasis added)

Hence, the ACCC is able to determine up-front fixed principles in relation to matters such as the treatment of depreciation for the declared service. If parties fail to arrive at consensus as to the specific terms and conditions that should govern their particular access relationship, the parties are able to fall back on the pre-set terms. Such access determinations would usually be operative for three to five years.

This is in stark contrast to the former regulatory framework where the ACCC was unable to set legally binding terms of access up-front and had to wait until a dispute was referred to it for arbitration. When such a dispute was referred, due to the multiple stages at which a party (usually Telstra the access provider) could challenge procedural matters and seek judicial review, the arbitration process could take an extremely long time, and it was not infrequently years before a final determination is made.

Another significant advantage is that the access undertaking can apply to any party seeking access to the declared service. This is, in contrast to the former system operating under the negotiate-arbitrate model, where each access dispute had to be separately determined, even in circumstances where a similar dispute had been previously arbitrated. Under the new law, the ACCC is be able to determine terms and conditions collectively for all access seekers and access providers to a particular eligible service.

The main advantage of the new regulatory framework is that it enhances business certainty and confidence, vital prerequisite for investment. As discussed, under the negotiate-arbitrate model, after

48 The operation of the transitional provisions are outlined in the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth), Sch 1, Pt 2, Div 2.
49 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth).
50 Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth), s 116, inserting a new s 152BC(7).
51 Under the negotiate-arbitrate model, the ACCC had the power to consolidate access disputes in joint proceedings.
declaring a service, the ACCC could only issue non-binding “pricing principles” for the declared service.52 The benefits accruing from an increase in business certainty and confidence and timely decision-making are especially critical to achieving effective competitive outcomes within the telecommunications sector.53 As the literature on the relationship between access and competition reveals, regulatory certainty is critical to investment in the telecommunications sector.54 It is significant to note that whilst it has been over a decade since the telecommunications access regime was introduced, the incumbent Telstra remains dominant in nearly all sectors of the telecommunications market and is one of the most profitable operators in the world. It has been suggested that the Pt XIC regime has not reduced Telstra’s market power to the extent that those in government initially anticipated. In response, Telstra would argue that the failure of the negotiate-arbitrate system has been due to the ACCC setting access prices too low and hence actually dissuading competitive infrastructure competition. Either way, under the new Pt XIC system of up-front access determinations, access seekers are likely to experience a significantly expedited decision-making process with limited avenues for appeal by the access provider.55

<subdiv>Exemptions from access obligations</subdiv>
The 2010 amendments limit the extent to which carriers and carriage service providers have the option to apply for exemption from access obligations. The only exception is a limited one in relation to new services which are deemed to require regulatory relief in order to stimulate investment and innovation in the market.

<subdiv>Review of determinations</subdiv>
A welcome reform is the removal of judicial review on the merits in relation to ACCC exemption decisions. Commentators have noted that under the former access regime, protracted applications for judicial review were successfully employed by Telstra as a strategic tactic to delay compliance.56 Therefore, by limiting judicial review to matters involving questions of law, the new regulatory framework will promote regulatory certainty and timely decision-making.57

<subdiv>Variations to access undertakings</subdiv>
Formerly, even minor changes to special access undertakings, required a fresh access application to be submitted to the ACCC. The 2010 Act amends this process and enables the ACCC to intervene and suggest amendments to undertakings during the continuance of the assessment process. The amendment significantly enhances the flexibility of the decision-making process in this area, and takes away the option for parties to use variations to undertaking applications as a further strategy to delay a final determination by the ACCC. Furthermore, the accept-reject approach under the former negotiate-arbitrate model was a huge inconvenience to all parties, especially in the context of the fact that the ACCC had limited flexibility to negotiate undertaking terms.

<DIV>ISSUES REMAINING TO BE ADDRESSED</DIV>
Whilst the introduction of the up-front model will significantly reduce the level of business uncertainty in the telecommunications market, it remains to be seen what the nature and extent of the

52 Competition and Consumer Act 2010 (Cth), s 152AQA.
53 Under the negotiate-arbitrate model, the ACCC had the ability to issue interim declarations, hence partially mitigating the adverse effects of delays.
55 The time-consuming nature of the negotiate-arbitrate process is illustrated by the time taken to determine arbitration relating to one of the most vital declared services in Australia, the unbundled local loop (ULLS). Although the ACCC had made a large number of non-binding statements on ULLS pricing, the arbitration stretched from early 2005 to December 2007.
56 Healy, n 2.
57 Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (Cth).
benefit will be, and whether it will be sufficient to address the problems identified by stakeholders and academics to date.  

It also remains to be seen whether and to what extent the industry will be comfortable with dealing with a regulator with such extensive powers in relation to the setting of terms and conditions of access. An alternative path, put forward by the ACCC but not pursued by the legislature to date, is to segment the market depending on the degree of vertical integration and allow some declared services to be subject to the negotiate-arbitrate model with others being subject to the up-front model. Yet another alternative is to provide ACCC with the power to choose whether to apply an up-front access price process or a negotiate-arbitrate model. However, both these options would serve to add another layer of complexity to what is already a complex regulatory regime.

It is also questionable whether the present timeframe for the application of access undertakings is sufficient. Perhaps it would be useful to confer upon the ACCC the discretion to extend the operation of the terms of access in circumstances where greater certainty is required.

Interestingly, the 2010 reforms do not substantially amend the criteria for declaring a service. It could be argued that the regulation should be amended to stipulate that only services that are supplied by operators with significant market power should be eligible to be deemed a declared service under Pt XIC. This would further strengthen the position of new and emerging entrants and promote investment by what Bauer describes as the parties critical to competitive telecommunications markets, the combination of moderate and smaller sized firms. However, in practical terms, if there were to be a significant number of alternative suppliers of the declared service, the service may lose its declared status. Hence, an alternative proposition is that the immediate enactment of access regulation may create a disincentive for the competitive rollout of infrastructure.

Finally, due to the substitutable nature of cable broadband internet and wireless broadband internet in the eyes of the consumers, it would be useful for access reforms to have been accompanied by a review of the management of the radiofrequency spectrum under the Radiocommunications Act 1992 (Cth). In a recent 2010 article, Cave explains the importance of effective spectrum regulation in ensuring connectivity and service in telecommunications markets. It is important for spectrum regulation to ensure that operators, singly or jointly, do not have the opportunity to foreclose entry into downstream markets by accumulating unneeded spectrum holdings. Cave considers how this issue should be treated under spectrum regulation, and examines the degree of substitutability of frequencies with or without regulatory constraints, and concludes that the latter are a major source of limitations on substitutability that reduces competition. To ensure effective spectrum markets, Cave considers the merits of a variety of forms of regulation including caps on spectrum holdings or on the acquisition of spectrum at any award.

Accordingly, it would be useful for the access reform to have been accompanied by a review of radiofrequency spectrum regulation, especially as it relates to the parts of the spectrum that are most suitable for the transmission of high speed wireless broadband services. The Implementation Study notes that fibre will be deployed to 93%, fixed wireless from the 94th to 97th percentile with satellite being used for the final 3% of premises. Hence the reform of access to fibre networks under Pt XIC of the Competition and Consumer Act should ideally be integrated with reform of spectrum regulation under the Radiocommunications Act to ensure that Australia has a comprehensive and effective

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60 Bauer, n 20.
regulatory framework that encompasses both wireless and fibre transmission and supports the deployment of future high speed broadband internet services.

**<div>Conclusion**

As a consequence of the interest generated by the government's National Broadband Network, telecommunications policy is very much at the forefront of public discussion. This has created a favourable environment for law reform. As Hanser notes of the United States experience: 63

> Without the public’s attention, the principal aim of key legislators was to find a compromise that balanced the short-term interests of all parties to the reform. ... The debate was hampered by the absence of input from the public interest community, the research community ... all of which might have counterbalanced the role played by private interests.

Therefore, the transition from what was essentially an ex post model to an ex ante determination of price and non-price terms and conditions of access is in the interests of the Australian telecommunications industry as it is likely to increase business certainty and help stimulate investment by telecommunications service providers, including importantly high speed broadband providers. Further, the limitation of the basis for seeking exemption and appeal will serve to facilitate more timely and efficient decision-making. Finally, now that commercial contracts can override ACCC determinations, a critical feature of the new system is the restoration of the sanctity of the contract to the telecommunications sector. The remaining area of uncertainty relates to the relationship of the access arrangement to the unfolding policy and plans for the deployment of the NBN. However, irrespective of whether and in what form the NBN proceeds, for the reasons outlined above, it is submitted that the reforms enacted by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act*, and the movement from a “negotiate-arbitrate” model to an “up-front decision” model of access regulation serves to enhance the effectiveness of telecommunications access regulation in Australia.

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