

**COMMUNICATIONS RESEARCH & STRATEGY
FORUM 2005**

21 – 22 November, 2005

Sydney

**Accessing the Foxtel/Telstra Network: an Open and Shut
Case**

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ABSTRACT

The introduction of pay television to Australia has a tortured history, colourful at times and even cloaked in intrigue, most of which is beyond the focus of this study. Mark Westfield (2000), a keen observer of events until presumably 1999, could not have foreseen the ongoing aptness of the title of his book “The Gatekeepers – The Global Media Battle to Control Australia’s Pay TV”.

Following an effectively 15-year long moratorium on subscription (or ‘pay’) television, the federal government finally gave approval for services to commence from late 1992. By 1995 this was achieved with delivery via MMDS, satellite and cable technologies. A decade later, the dominant service provider is Foxtel and the dominant cable provider is Telstra with their hybrid fibre coaxial (or HFC) network.

This paper revisits the birth of cable television and examines the attempts of third parties to seek access to this infrastructure so they may deliver their content and establish their customer relationships. It poses the questions:

- What factors were central to the Foxtel/Telstra pay television network achieving a closed access business operation?
- What political and legal avenues were of greatest value in achieving this goal?

Matters such as access to content, mergers within the industry or third line forcing are not addressed.

INTRODUCTION

Giant media conglomerates and their content providers become the “gatekeepers” who determine the conditions and terms upon which hundreds of millions of human beings secure access to one another in the coming era.
(Rifkin 2001: 11)

With the advent of ‘de-regulation’ of the telecommunications market, coupled with the increasing convergence between telecommunications, broadcasting, information technology and entertainment over the last ten years, there has been massive new investment in infrastructure to deliver the converging applications and services. The shortened horizons of competitive business plans plus the greater capabilities of digital technology have served to heighten the desire for exclusivity in controlling access to the new networks and services arising. This is a far cry from the traditional ready customer access inherent with free-to-air broadcasting services and the public telephony network. Even the more recently developed Internet was conceived to provide unfettered access to service providers, users and applications within the principles of its ‘end-to-end’ design.

Observing that convergence has now finally become a reality, with television, telephony and Internet access being delivered via DSL, cable television and satellite, Rosenthal (2003) claimed:

In this converged communications environment in which the same communications services can be delivered over a variety of platforms, the issue of open access to these platforms, in particular with regard to broadband services, is of critical importance.

In 2003, the Australian Competition & Consumer Commission (ACCC 2003a) released a report calling for a formal demarcation between the infrastructure provider Telstra and the content provider Foxtel regarding the delivery of pay television services. That bold recommendation arose from concerns over the determined action by Telstra and Foxtel to limit access by other service providers to its analogue and digital networks.

A huge amount of money and effort has been expended to either seek or prevent third party access to the Foxtel/Telstra pay television network. So far, all access attempts have been effectively thwarted. This paper examines how this situation has come about.

THE BIRTH & CLOSURE OF CABLE

Barely a year after the introduction of Optus Communications as Australia's second general telecommunications carrier, the federal government ended a 15-year long moratorium by giving approval for subscription (or 'pay') television services to commence from late 1992. Despite an economic preference for Direct Broadcast Satellite as the delivery platform and the subsequent licensing of a satellite service, alternative means of delivery such as microwave distribution (MMDS) or cable were not ruled out.

By July 1994, Telstra had filed a tariff with AUSTEL (now the Australian Communications Authority) providing for open access to its 'Videostream' pay television service. A few months later, Optus Communications announced that it also planned to install a broadband cable network for the delivery of pay television, data and telephony, but with the proviso that access to the network would be closed to other parties. This claim for exclusivity relied on two grounds:

- Analogue transmission over cable gave insufficient channel capacity for others;
- The new broadband cable system would be owned and operated by a non-carrier service provider, Optus Vision, which was not obligated to provide open access.

Under this novel organisational arrangement, the new broadband cable system would be installed and maintained by Optus Networks utilizing its rights and immunities as a licensed general carrier. However, telephony access would be provided by Optus Vision back to Optus Networks, in addition to carriage services for pay television being provided to another related entity Multicom which held the necessary licences under the Broadcasting Services Act 1992. (Kelso 1996) According to Ferguson (1996), Optus' exclusive access arrangement was a key factor in securing investment in the network rollout.

An AUSTEL assessment of the Optus proposal observed that although such an arrangement may not have been contemplated under the Telecommunications Act 1991, it would result in a competitive local telephone service for the first time to a broad base of residential customers. The pay television carriage services provided for Multicom would further extend competition and consumer choice. (AUSTEL 1994) Alert to the adverse prospects of competitive asymmetry, Telstra promptly withdrew its tariff and restructured its broadband proposal akin to that of Optus which inevitably led to a similar AUSTEL assessment of what would become the Foxtel cable television network.

Telstra had led AUSTEL to believe that the initial (pre-digital) phase of pay television services could be at least three years away, so limited capacity was considered to be a constraint to open access at least until end 1997. In other words, limited channel capacity was

seen to be an artefact only of the initial phase of pay television services; the advent of digitalisation should remove any justification for discriminatory provision of service.

Announcing acceptance of the AUSTEL report, the Minister for Communications cited the two critical issues as being duplication of cable infrastructure and access to the broadband cable network. (Lee 1994) He justified the former on the grounds of encouraging greater competition in telecommunications without the need to resort to splitting up Australia into regional monopolies. Regarding the desire of Optus Vision and Telstra Multimedia for closed access to their broadband cabling, the Minister supported the argument that greater benefit would accrue from the rollout of cable not being delayed if the builders of the cable could share revenue from both content provision as well as carriage. In addition, closed access should be tolerated during the period when the service provider has limited network capacity. Recognising that closed access could be seen as discriminatory and hence inconsistent with both the Telecommunications Act and the Government's general competition policy, Minister Lee agreed to closed access operating at least until 1 July 1997. (Kelso 1996)

The resultant Direction to AUSTEL from the Minister took the form of the Telecommunications (Service Providers Class Licence) Direction No. 1 of 1995 which was signed on 31 July 1995. The Direction created the new entity of a 'carrier associate', which has a direct or indirect interest in a carrier and a significant influence on the carrier's business activities. It required AUSTEL to issue a class licence governing the conditions under which a carrier associate is permitted to supply certain services.

In brief, where carrier associates such as Optus Vision and Telstra Multimedia are already providing a pay television service they were exempted from being required to provide access for a third party's pay television service up until 1 July 1997. Commercial cable television in Australia was born in 1995, with the launch of Optus Vision on 20 September and Foxtel on 23 October. With government blessing, both commenced as closed networks.

POTENTIAL BOTTLENECKS WITH HFC NETWORKS

The first bottleneck an access seeker must confront is whether there is sufficient transmission capacity to deliver the requested services. The initial Telstra and Optus HFC systems employed analogue signal transmission that is inherently limited to about 60 television channels, many of which were either in use or planned to be used in the near future.

A modern subscription television or information delivery business involving a centralised 'Head End' capability and distributed end user set top boxes (STBs) relies upon three functionally distinct components, each of which may constitute yet another technical bottleneck:

Conditional Access System (CAS): Comprising a subscriber management system and access control facility at the Head End, and signal decoder/unsrambler and smart card in each STB, the conditional access system is effectively a proprietary gateway that enables and disables signals (programmes or information) to be delivered to or from a subscriber.

Applications Programme Interface (API): This software, usually proprietary and often categorized as middleware, runs on the STB between the operating system and the different applications. (Galperin 2002)

Electronic Navigation Software: Evident to the subscriber as an electronic programme guide or EPG, this software enables subscribers to access information about available services and perform scheduling functions.

In the view of Helberger (2002: 1):

The exclusive control over bottleneck facilities, or the standard embodied, gives a wide choice of possibilities to impede potential and actual competitors, particularly where exercised by powerful, vertically or horizontally integrated operators.

Digital technology greatly increases the number of channels and facilitates early forms of interactivity, but still embodies CAS, API and EPG facilities. Cowie and Marsden (1999) describe how digitisation raises the potential for a new series of bottlenecks and consequently higher barriers to entry by competitive service providers. Vertically integrated operators who control the content, bundling into channels, channel packaging, the means of delivery, conditional access, consumer reception equipment and subscriber management greatly increase the potential for market abuse of such bottlenecks. (Cowie and Marsden 1998) According to these authors, there are a number of commercial bottlenecks which can also restrict access by third parties:

- Services viewed as potentially competitive with a (vertically integrated) access provider's own offerings may be flatly denied access;
- Access providers may exert undue influence to "encourage" independent third parties to join a proprietary service package;
- Access to the facility may only be granted on discriminatory terms;
- Where access is granted on non-discriminatory terms, a monopoly access fee may be charged (which may not be economically efficient);
- Proprietary services may only be sold when bundled with non-proprietary services, thereby leveraging market power to related markets (foreclosure); and
- Access terms may contain "unreasonable" restrictions, such as platform exclusivity clauses, which reduce scope for competition.

OPENING THE DOOR TO ACCESS: DEEMING & DECLARATION

With the introduction of competition into the Australian telecommunications market commencing 1 July 1997, the ACCC gained the power to mandate access to a carriage service by 'declaring' that service¹ under a new Part XIC of the Trade Practices Act 1974 (TPA). The prime object of Part XIC is to promote the long-term interests of end-users or LTIE of what are called 'listed services', ie. carriage services or of services provided by means of carriage services. In determining what constitutes the LTIE, the ACCC must give regard to the objectives of promoting competition in markets for the listed services, achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which the listed services are supplied.

The key effect of declaration is to require the supply of declared services by an access provider to an access seeker on demand. Such supply is described in section 152AR of the TPA in terms of standard access obligations or SAOs. According to Grant (2004: 89), 'access' refers to the ability of carriers and service providers to pass and receive telecommunications

¹ Under Part XIC of the TPA, there is no general right of access. Rather, the ACCC must first 'declare' (that is, decide to regulate) a particular service.

traffic over each other's networks, in order to fulfil the imperative that all end-users of similar services be able to connect with one another, irrespective of the particular networks to which they are connected.

As a vehicle for linking the 1991 telecommunications regime to that of 1997, the ACCC was empowered under section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997 to 'deem' certain services as declared services with effect from 1 July 1997. In the case of the Foxtel/Telstra and Optus pay television networks, deeming was necessary as the 1995 'carrier associates' exemption to permit closed access would expire from 1 July 1997. One of the eleven services so deemed by the ACCC was that of a 'broadcasting access service' defined as:

An analogue service necessary for the purpose of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996. This is an access service which provides a basic carriage and distribution access function together with other functions as requested.

The specification of 'line links' clearly encompassed analogue cable television services of the type already provided by Foxtel (via Telstra) and Optus Vision (via Optus Networks) since late 1995. Furthermore, in accordance with section 152AR of the TPA and as recommended by the Telecommunications Access Forum, the resultant SAO would from then on include ancillary services such as the functions of network management access, conditional access and subscriber premises servicing. This could include any in situ set top box or STB. An access seeker could opt to 'mix and match' whichever service elements they required. (ACCC 1997) Broadly speaking, the intent was to address the full range of technical bottlenecks as previously discussed.

The flexibility of this service definition (... "together with other functions as requested") raised concerns within the industry as to the validity of the declaration, thereby purportedly discouraging access seekers. To resolve the uncertainty, the ACCC commenced a public inquiry in December 1998. (Grant 2004: 107) This led to a new declaration in August 1999 of an analogue pay television service as being subject to a range of standard access obligations, pursuant to sections 152AL(3) and 152AR of the TPA, though removing the element of access seeker choice. In brief, these standard access obligations required an access provider to:

- Supply the declared service;
- Ensure that the declared service supplied is of equivalent technical and operational quality as that which the provider supplies to itself;
- Ensure that the fault detection, handling and rectification in relation to the declared service is of equivalent technical and operational quality as that which it provides to itself;
- Permit interconnection of its facilities with those of the access seeker; and
- Provide particular billing information to the access seeker.

As before, the scope of the declared service encompassed pay television services delivered via cable, but it did not extend to digital signal transmission. The revised service description of an analogue subscription television broadcast carriage service then became: (ACCC 1999)

A service for the carriage, by means of lines, of analogue signals used for the purposes of transmitting a subscription television service from a facility owned, controlled or

operated by a carrier or carriage service provider to any point on, or in, a line link, customer cabling, or customer equipment connected to that facility.

Examples of this service are the delivery of analogue signals used for the purposes of transmitting a subscription television service to:

- (a) an end-user's television set;
- (b) conditional-access customer equipment of an end-user², or potential end user, of a subscription television service;
- (c) a wall socket at the premises of an end-user, or potential end-user, of a subscription television service;
- (d) a point on a line link from which a lead-in connection may be run to the premises of an end-user, or potential end-user, of a subscription television service.

Section 152AR(8) was of particular relevance to analogue pay television services in that it provides a legislated avenue for an access seeker to gain access to the conditional access equipment of another provider:

Conditional-access customer equipment

(8) If an access provider supplies an active declared service by means of conditional-access customer equipment, the access provider must, if requested to do so by a service provider who has made a request referred to in subsection (3), supply to the service provider any service that is necessary to enable the service provider to supply carriage services and/or content services by means of the active declared service and using the equipment.

In the event that the access seeking and access providing parties are unable to agree on the terms and conditions relating to implementing the above obligations, either the ACCC can arbitrate and make a determination or the access provider can file an access undertaking which, if accepted by the Commission, becomes a legally binding obligation. (ACCC 2004) However, the ACCC did not formally revoke the original deemed declaration and as we shall see later on, the existence of two current declarations in respect of the same service led to legal challenge. (Grant 2004: 107)

During August and September 1999, Seven Cable Television (C7) formally requested access to the broadcast carriage services of the Telstra cable television network. Likewise, in August 1999 Television & Radio Broadcasting Services Australia (TARBS) sought access to the declared services in a request to Telstra, News Corporation and Foxtel.³ All requests for access were refused by the access providers, justified on a variety of grounds. Two streams of substantially parallel activity then ensued: legal challenges and ACCC-sponsored arbitration, both extending over a number of years.

CHALLENGE & COUNTER-CHALLENGE

Section 152AR of the Trade Practices Act 1974 has been the prime focus of the resultant flurry of legal actions to both seek and deny access to the analogue pay television service

² That is, a Set Top Box.

³ *Seven Cable Television Pty Ltd v Telstra Corp Ltd* [2000] FCA 350, Federal Court of Australia, 27 March 2000.

delivered by Foxtel through Telstra's HFC network.⁴ Contention initially centred on whether the 1997 Deeming and/or 1999 Declaration by the ACCC were valid and whether section 152AR(4) negated the standard access obligations on the grounds that there was insufficient 'amount of the service' (ie. analogue channel capacity) to be able to meet the 'reasonably anticipated requirements' of Foxtel and that the provision of service by Telstra to Foxtel was subject to a 'protected contractual right'.

Validity of deeming and declaration

The subscription or pay television service marketed as Foxtel is based on a number of agreements between, among other parties, Telstra and its subsidiary Telstra Multimedia, and Foxtel and its subsidiaries. In brief, Foxtel delivers pay television content to subscribers by utilising the carriage services of Telstra.

During 1999 and 2000, the relevant Foxtel and Telstra entities challenged on administrative grounds the validity of both the 1997 deeming and 1999 declaration made by the ACCC relating to access to analogue subscription television broadcasting services. If the actions of the ACCC were found to be invalid, pay television carriage would not be subject to the competition regime set out in Part XIC of the Trade Practices Act. Furthermore, it was claimed that both instruments had no application since Foxtel was neither a carrier nor a carriage service provider.

The Federal Court held the deemed service declaration was invalid in part but that the revised declaration was valid.^{5,6} Furthermore, it held that in delivering content to the public, Foxtel delivered the listed carriage service known as Foxtel subscription television via network units owned by a licensed carrier, Telstra. Accordingly, Foxtel was a carriage service provider within the meaning of section 152AC of the TPA and therefore an access provider of the services so declared by the ACCC.⁷ Appeals to the Full Court and the High Court against this decision were refused.^{8,9} (Grant 2004: 107)

Sufficient amount of service/channel capacity

The Telstra hybrid fibre-coaxial (HFC) network commences at a capital city Head End installation in the form of optical fibres radiating out to regional Nodes and local exchanges, and terminating at optical/radio frequency devices in the street called Hubs. From there, coaxial cabling continues towards the customer premises whereupon lead-in cables connect to

⁴ In contrast, the Optus HFC network has been spared equivalent legal action but nevertheless remains closed to third party access.

⁵ Foxtel Management Pty Ltd v Australian Competition & Consumer Commission [2000] FCA 589, Federal Court of Australia, 8 May 2000.

⁶ Telstra Corporation Ltd v Seven Cable Television Pty Ltd [2000] FCA 1160, Federal Court of Australia, 18 August 2000.

⁷ Foxtel Management Pty Ltd v Australian Competition & Consumer Commission [2000] FCA 589, Federal Court of Australia, 8 May 2000.

⁸ Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd [2000] FCA 1161, Federal Court of Australia, 18 August 2000.

⁹ Foxtel Management Pty Limited & Anor v Seven Cable Television Pty Limited & Ors [2001] S228/2000, High Court of Australia Transcript, 10 August 2001.

the Set Top Boxes. The forward signal band operates from 85 MHz to 750 MHz (Whittle 1995/96) and is currently designed to carry: (BTCE 1994: 7)

- 64 PAL-B analogue video channels between 85 and nominally 550 MHz, plus
- 200 MHz of digital channels (video and cable modem) between nominally 550 and 750 MHz

Prior to March 2004, only analogue video signals were carried. Even without knowing the magnitude of Foxtel's 'reasonably anticipated requirements', being a confidential figure, it can be seen from the ACCC report into emerging market structures (ACCC 2003a: Attachment A.1, plus allowance for the free-to-air stations) that the figure must be at least 40 channels. It is therefore apparent that, if spare capacity were to be shared with access seekers, the nominal analogue channel capacity of 64 is a relatively scarce resource.

However, once full conversion to digital has been effected, requiring all Set Top Boxes to be replaced by digital units, the full bandwidth from 85 to 750 MHz becomes potentially available. Assuming no other digital signals, such as Internet data, each 8 MHz of bandwidth can potentially support up to nine digital program streams which amounts to a total capacity in excess of 700 digital streams. With Internet data, this figure would be a little lower. Nevertheless, the fully digitalised capacity becomes less of a scarce resource that is more amenable for sharing with access seekers.

Protected contractual right

Telstra and News Corporation challenged the right of Seven Cable/C7 and TARBS to access on the grounds that Foxtel already had the exclusive right to provide and manage these services. As such, this amounted to a 'protected contractual right' under section 152AR(4) of the TPA being in force as at 13 September 1996 and therefore negating any standard access obligation to provide access. The significance of this date was that it was when mention of a 'protected contractual right' first appeared within the second exposure draft of the Bill that led to the new Part XIC of the TPA which eventually came into force on 30 April 1997.¹⁰

The trial judge, Justice Tamberlin, held that as at 23 October 1995 there was no legally binding agreement reached between Telstra Multimedia and Foxtel and therefore there was no contract capable of giving rise to a protected contractual right.¹¹ This was because the conditions of the exclusivity and bundling rights were not negotiated to the stage of a legally binding arrangement by 23 October 1995 and other important clauses were left also outstanding. Negotiations continued even after 13 September 1996 and no final Broadband Cooperation Agreement was reached until 14 April 1997.

Accordingly, it was held that Foxtel was not entitled to prevent Telstra granting access to TARBS for the purpose of broadcasting the services sought by it on the ground that Foxtel

¹⁰ Pay television service via cable began in September/October 1995 and the first exposure draft of changes to the TPA was tabled before Parliament on 20 December 1995, towards the end of the Keating labour government. The first Howard coalition government took office on 11 March 1996 and among other things revisited this proposed legislation. By the time of the second exposure draft tabled on 13 September 1996, section 152 was modified to include an access exemption in the event of a 'protected contractual right' and hence became the date from which such an exemption could commence.

¹¹ *Seven Cable Television Pty Ltd v Telstra Corp Ltd* [2000] FCA 350, Federal Court of Australia, 27 March 2000.

would be deprived of a protected contractual right. On similar grounds it was held that Foxtel was not entitled to prevent Telstra granting access to Seven Cable/C7 for the purpose of broadcasting the Olympic Games or for other purposes for which access was sought by Seven. In an appeal to the Full Court against this judgement, Justices Beaumont, Moore and Gyles each delivered separate reasons for upholding the decision of the trial judge and so dismissed the appeal.¹²

ARBITRATION OF ACCESS DISPUTES

On 27 September 1999, just a few weeks following declaration of cable-delivered analogue subscription television services, TARBS notified the ACCC of an access dispute with Telstra Multimedia under Part XIC of the TPA. C7 likewise gave notice of an access dispute with Telstra Multimedia, Foxtel and related entities on 7 September 2000.

The Commission resolved to settle these access disputes through arbitration, a process not on the public record due to confidentiality. Information considered dealt with issues such as service costs, prices, technical feasibility and channel capacity. Arbitration extended from 1999/2000 to 2004, whereupon it was effectively terminated following acceptance of the Telstra Multimedia and Foxtel access undertakings for analogue pay television services. However, the process suffered repeated delay over this period due to legal arguments over the validity of deeming/declaration and existence of a protected contractual right, coupled with the ACCC's assessment of the eventual undertakings. Despite legislated changes to reform the arbitration regime in 1999 and 2001, Grant (2004: 116) concludes that "an unfortunate side effect is that the regime has now become labyrinthine".

On 10 August 2001, following news of failure by Foxtel for special leave to appeal the decision validating the Commissions' pay TV service declaration, Chairman Professor Allan Fels said:¹³

The ACCC trusts this decision will bring Telstra and Foxtel's resistance to this declaration to an end. It is now time for both parties to facilitate the use by others of the Telstra cable to offer pay-TV services that are in competition with Foxtel.

The issues concerning the validity of the ACCC's declaration decision have been before the courts for almost two years as Telstra and Foxtel have challenged the ACCC's decision using every legal avenue available. This has created much uncertainty in the industry and frustrated the development of competition.

This decision means that, subject to capacity being available, Telstra must provide access to its HFC network to access seekers for the supply of analogue pay-TV services. This will assist alternative content providers, such as Television and Radio Broadcasting Services Australia Pty Ltd (TARBS) and Seven Cable (C7), who have requested access to Telstra's cable network to obtain access either on negotiated terms, or failing agreement, on the terms and conditions determined by the ACCC in an arbitration.

¹² Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd [2000] FCA 1159, Federal Court of Australia, 18 August 2000.

¹³ Refer to ACCC Press Release MR "High Court rejects challenge to ACCC pay TV declaration" MR 183/01, issued 10 August 2001, at <http://www.accc.gov.au/content/index.phtml/itemId/87802/fromItemId/378012>

Indeed both these alternative content providers have notified the ACCC of a dispute.

Although these arbitrations have been delayed as a consequence of proceedings before the courts the ACCC has issued interim determinations requiring that both C7 and TARBS be given access and, in the absence of agreement by the parties, the ACCC will be looking to finalise its decision on access by TARBS and C7 to Telstra's cable.

Despite the substance of this interim determination remaining confidential, it would be expected to have been broadly similar to what later transpired with the analogue service undertaking.

ACCESS UNDERTAKINGS & EXEMPTIONS

By August 2001, all of the court action initiated by the access providers, Telstra and Foxtel, had come to nothing – except for the passage of further years of avoiding the need to provide access. The ACCC arbitration process, at times also delayed by the litigation, had at least produced an interim determination and was heading towards finalisation. Nevertheless, the main industry players were continuing to determine their future.

On 5 March 2002, in a major move towards industry rationalisation, Foxtel and Optus announced a proposal to share pay TV programming whereby Optus would become largely a reseller of Foxtel content. In concluding that such a deal would likely breach the Trade Practices Act through a substantial lessening of competition, the ACCC identified its four principal areas of concern as relating to:

- The acquisition of content;
- The likely dominance of the Foxtel distribution network;
- The supply of pay TV services to households; and
- The provision of channels to third parties who wish to supply pay TV to customers.

It then drew from the parties a number of court-enforceable undertakings under section 87B of the TPA. These included, inter alia, agreements to lodge access undertakings under Part XIC of the Act relating to third-party access to pay TV services – initially analogue delivered (already declared) and eventually digital (not then declared). They would apply in the absence of commercial agreement between the parties.

Draft undertakings were opened for public comment from 5 September 2002 and revised on a number of occasions. The resultant submissions to inquiries, ACCC reports and final undertakings involve a considerable amount of material which is accessible via the ACCC pay TV portal.¹⁴ Only the key aspects are highlighted here, in keeping with a broad approach of appreciating the nature of the regulatory outcomes rather than the detail of processes involved in getting there.

¹⁴ Refer to ACCC document index titled "Pay TV" at <http://www.accc.gov.au/content/index.phtml/itemId/269329/fromItemId/356715>

Undertakings of analogue access

By 25 March 2004, the ACCC had accepted revised undertakings from Telstra Multimedia and Foxtel enabling non-discriminatory access by competitors to Telstra's analogue HFC network and Foxtel's STBs.¹⁵ Under these arrangements, Telstra was thereafter required to make available ten analogue video channels to third parties according to prescribed technical, service and pricing terms deemed reasonable by the Commission. The quantity of ten channels would now appear to be above and beyond Foxtel's 'reasonably anticipated requirements' for an analogue subscription service. The costs refer, inter alia, to enhancements and extensions to the various programme Headends to facilitate signal carriage, transmission of individual channels from the Headends throughout the HFC network to subscriber premises and provision of the conditional access service.

Arrangements are also detailed to allocate analogue channels to aspirant access seekers, for an accepted access seeker to supply its own smartcards and STBs for servicing subscribers not already those of Foxtel and to facilitate the transition from an analogue to digital pay TV service. Once an access seeker has arranged carriage by Telstra, Foxtel is required to ensure non-discriminatory access to its STBs and fly cables at a price deemed reasonable by the ACCC. Matters such as procedures to deal with faults are also prescribed. Third party pay TV providers utilising the Foxtel/Telstra service are to be responsible for their own subscriber management functions, including billing, and call centre services.

From here on, if requested, third party access to the Telstra's analogue cable network and Foxtel's analogue set top boxes could be achieved under prescribed terms and conditions – a regulatory outcome sought since July 1997.¹⁶ According to ACCC Commissioner Ed Willett "The new access undertakings will have implications for the resolution of the long standing pay TV disputes between TMM and Foxtel and TARBS and C7, which the ACCC had been arbitrating".¹⁷ This was because any determination for these arbitrations would need to be consistent with the terms and conditions laid down in the new access undertakings.

Also as part of their section 87B undertakings, Telstra and Foxtel committed to: (Grant, 2004: 108)

- Digitise their pay TV network infrastructure, conditional upon legislation being passed enabling exemption from the standard access obligations;¹⁸
- Provide competitive access of at least 35 per cent of the total number of digital channels on the new digital platform.

¹⁵ Refer to ACCC document indexes titled "Analogue pay TV access undertakings - Telstra multimedia and Foxtel - 2002/03"

<http://www.accc.gov.au/content/index.phtml/itemId/338008/fromItemId/269329> and "Revised analogue pay TV access undertakings - Telstra Multimedia and Foxtel (2003/04)" at <http://www.accc.gov.au/content/index.phtml/itemId/474455/fromItemId/269329>

¹⁶ But with the undertaking for analogue access finally ratified in March 2004 and Foxtel digital services commenced in the same month, this was indeed a pyrrhic victory for any access seeker! Analogue access thereafter had no commercial or strategic value compared to that of digital.

¹⁷ Refer to ACCC Press Release "ACCC accepts the new analogue pay TV access undertakings of Foxtel/Telstra multimedia" MR 045/04, issued 25 March 2004, at

<http://www.accc.gov.au/content/index.phtml/itemId/491770/fromItemId/459302>

¹⁸ Seemingly contradicting their declaration of 'no digitisation without legislation', they also undertook to supply access to digital services once retail service delivery commenced, even if exemption had not been granted!

Telecommunications Competition Bill amendments

Only the year before, the Productivity Commission's Inquiry Report on Telecommunications Competition Regulation (PC 2001) recommended the Trade Practices Act be amended to enable the ACCC to exempt services provided by prospective investments – exactly what Telstra and Foxtel were seeking. In response, the government produced the Telecommunications Competition Bill (2002) which, following a Senate inquiry, gained assent on 19 December 2002.

Among other amendments, a new section 152ATA of the TPA was created to enable an access provider, or a potential access provider, to apply for and receive an exemption from the standard access obligations referred to in section 152AR before an investment in a telecommunications service is made or before the service becomes an active declared service – hence facilitating 'anticipatory exemption'. Prior to these amendments, exemption orders could only be sought and gained for active declared services, which was simply not the case for digital pay TV services which didn't then exist.

The declared intention of the amendments was “to provide certainty for potential investors in telecommunications infrastructure and services in relation to access to that infrastructure or service in the future” by increasing “the level of competition and investment in the telecommunications market to the benefit of consumers and business”. (2002)

In making such an exemption order, the ACCC would need to be satisfied that such an order would promote the long-term interests of end-users of the said carriage services or services provided thereby.

For an access or potential access provider, gaining exemption from the standard access obligations of section 152AR of the Trade Practices Act had the advantage of avoiding (or conversely, disadvantage for the access seeker in not having the benefit of):

- The application of any future ministerial pricing determination made pursuant to section 152CH;
- Any access seeker rights including arbitration, enforcement and remedial rights, in accordance with Sections 152AY, 152AYA, 152AZ, 152BB, 152BBA, 152BBB, 152BBC, 152CM, 152CO – 152EB, 152EF and 152EG of the TPA.

Exemptions leading to digital access

Two days after the Telecommunications Competition Act gained assent, Telstra and Foxtel lodged anticipatory individual exemption order applications with the ACCC relevant to the proposed provision of digital pay TV services. Following an inquiry, the Commission concluded that granting an exemption should provide for greater certainty for access than leaving the issue open to potential declaration, as well as resulting in a more timely investment decision. Greater access would also potentially improve the efficiency in use of the Foxtel/Telstra network and enhance the build/buy decision by access seekers for subscription television services.¹⁹

¹⁹ Refer to document index “Anticipatory exemptions: Foxtel and Telstra - digital pay TV services” at <http://www.accc.gov.au/content/index.phtml/itemId/337987/fromItemId/269329>

The ACCC announced its final decision to accept the revised undertakings of Telstra and Foxtel on 12 December 2003. These were the first anticipatory exemption orders made as a consequence of the TPA amendments introduced 12 months earlier. Under the Telstra and Foxtel Digital Access Agreement, the services to be supplied include distribution over the Telstra HFC network and access to Foxtel's Set Top Boxes, conditional access and Smart Card authorisation services. Most importantly, any digital STB had to be “actually in use by a subscriber for reception of Foxtel’s digital subscription television services” and “as a total package and not as one or more component parts”.²⁰ Other key features of Digital Access Agreement included:

- An annually published rate card, calculated in accordance with a publicly available methodology and independently audited;
- Access to an active customer smart card database designed to support at least 25 access seekers;
- Access to the digital network once 100,000 digital cable STBs are rolled out as part of a commercial digital cable service or 6 months after Foxtel's digital launch whichever date is sooner;
- A fixed percentage of capacity allocated on the Telstra HFC network and Foxtel's STB network available to access seekers, namely:
 - 15% during the dual transmission of both analogue and digital services (likely to be 24 channels); and
 - 35% once Foxtel is only supplying digital services (likely to be up to 192 channels).
- Foxtel to use all reasonable endeavours to obtain the consent of the lessor of the digital STBs, understood to be ABN AMRO and the Commonwealth Bank of Australia, to use those STBs for the supply of services to each access seeker.

No undertaking was given by Telstra for third-party access to its cable modem-delivered Internet service and nor was this sought by the ACCC. The ACCC also acquiesced with Foxtel and Telstra’s insistence that their undertakings should exclude “return path or interactivity functionality” from the digital set top box services provided by Foxtel, in addition to exclusion of, among other items:

- Call centre services;
- Subscriber management and related services, including billing;
- Electronic Program Guide services;
- Any digital STB functionality, other than decryption of the access seeker’s digital subscription television services;
- Dedicated access to any second or subsequent tuner and/or hard drive in the Digital Set Top Unit²¹; and
- Magazine and program guide listings.

The Foxtel digital pay television services commenced in March 2004 and over the subsequent two years or so, analogue STBs are to be progressively replaced by digital STBs. On 21 February 2005, Foxtel launched its Personal Digital Recorder, iQ, with Chief Executive Kim Williams declaring “The three-way combination of the FOXTEL iQ set-top-box, the vast

²⁰ In other words, any access seeker’s channel(s) can only serve as a complement to the basic Foxtel package of channels and never as a substitute for it, with the effect that the access seekers offering would have to be purchased as a premium tier once a subscriber had already purchased Foxtel’s basic package.

²¹ This effectively excludes access to the Foxtel iQ personal digital recorder.

pallet of FOXTEL Digital channels, and the FOXTEL Digital Guide that binds it all together, delivers the ultimate television experience”.²²

Tribunal invalidation of exemption

Seven Network Limited and its cable television arm, C7 (collectively “Seven Network”) first requested access to the Telstra network and Foxtel pay television service in August 1999 and since then had not shied away from the ongoing process of legal challenge and regulatory inquiry. The only other access seeker, TARBS, went bankrupt late 2003.

On 30 December 2003, the Seven Network filed an application with the Australian Competition Tribunal for a review of the decision by the ACCC made on 12 December whereby Telstra and Foxtel were granted anticipatory exemption from the standard access obligations set out in section 152AR of the Trade Practices Act with respect to their digital subscription cable television service. In a stunning reversal of fortunes, the Tribunal set aside the ACCC decision and invalidated the anticipatory exemption. Dated 30 September 2004, the judges’ reasons for decision were published on 23 December 2004 and make illuminating reading.²³

The highlights are:

- The exemption order sought by Telstra and Foxtel would not promote the long-term interests of end-users and the exemption would not be likely to achieve the objectives of:
 - a. promoting competition in markets for listed service having regard to the extent to which the making of the exemption orders will remove obstacles to end-users of listed services gaining access to listed services; and
 - b. encouraging the economically efficient investment and use of the digital infrastructure.
- Digitisation by Foxtel and Telstra was going to occur by the end of March 2004 at the earliest and by October 2005 at the latest, regardless of whether an exemption (in the form of a Final Order as defined in the section 87B undertakings) was granted to each of Foxtel and Telstra;
- Refusal to make the exemption order on the grounds that digitisation is going to occur in any case will not deter future investors;
- The exclusion of interactivity from the exemption orders granted by the Commission, thereby requiring potential entrants to obtain access under multiple parallel regimes would place them at an unjustified competitive disadvantage, and may discourage entry;
- The tie of the Basic Package to access to Foxtel's services as contained in the digital access agreement is a significant deterrent to entry, as it makes a prospective access seeker vulnerable to potential manipulation by Foxtel of the Basic Package to prevent or to preclude competitive conduct;
- The period of the undertakings and the length of the exemption period which may, at Foxtel's or Telstra's option, extend until the end of 2015 provides no certainty to potential access seekers - in contrast, these undertakings appear to have been structured to give Telstra and Foxtel ‘an each way bet’ such that they can exit their self-

²² Refer to Foxtel Press Release “Foxtel iQ - Foxtel’s Personal Digital Recorder Unveiled“, issued 21 February 2005, at http://www.foxtel.com/209_3229.htm

²³ Seven Network Limited (No 4) [2004] ACompT 11 (23 December 2004)

constructed access regime if it does not meet their interests or, conversely, they can elect to extend it for a further eight years;

- While accepting the pricing methodologies underlying the Telstra and Foxtel access price, more rigorous verification of the inputs would have been appropriate. One key element not adequately addressed in the decision by the ACCC was that of quantifying the value of Telstra's 'telephony defence' strategy in deploying a HFC network.

The sequel

The decision by the Australian Competition Tribunal (ACT) meant that Telstra and Foxtel no longer has the benefit of an exemption from Part XIC of the Trade Practices Act if the ACCC ever decided to declare a digital cable pay television service in the future. If that eventuated, presumably following notification of a new access dispute, the ACCC would have the power to set its own terms and conditions for digital access. At least in theory, access seekers would then be more likely to become beneficiaries.

According to Foxtel chief executive Kim Williams "The ACT's decision renders Foxtel vulnerable to a declaration by the ACCC which could result in terms and conditions we see as commercially unacceptable". (Sainsbury and Schulze 2005)

Notwithstanding this regulatory setback, Foxtel announced that from 24 February 2005 it was broadcasting the services of the first third party to utilise Foxtel's digital open access regime. TVN, a thoroughbred racing channel operating independently of Foxtel, would be responsible for marketing its channel and the management and billing of its own subscriber base.

Only time will tell what the next moves will be by the ACCC and/or the Seven Network. In the meantime, the Seven Network is relentlessly pursuing PBL, News Limited and Telstra (the three partners in Foxtel), as well as a raft of other media companies and sporting bodies in the courts, accusing them of illegally conspiring to force the closure of its pay television sports channel C7 in 2002. (Schulze 2004)

DISCUSSION

At this point, we address the two revealing questions:

- What factors were central to the Foxtel/Telstra pay television network achieving a closed access business operation?
- What political and legal avenues were of greatest value in achieving this goal?

What factors were central to the Foxtel/Telstra pay television network achieving a closed access business operation?

A series of deliberate strategic moves by Telstra and Foxtel since the mid 1990s have played a crucial role in ensuring the continued operation of the Foxtel network and conversely the demise of aspirant players in the Australian pay television business who desired to utilise cable as the delivery medium. Not surprisingly, advantage was taken of opportunities presented by the evolving regulatory and commercial environments in telecommunications and the media over that period. The key factors were to take advantage of the absence of any prohibition on Telstra to enter the pay television business, to do whatever was necessary to

counter any competitive threat arising, to delay any access attempts as much as possible and to dictate the terms of any access agreements arising.

Unrestricted business entry

Australian telecommunications and broadcasting has long followed developments in the United States and Britain, although not in the matter of carriers being initially excluded from providing cable television services.

Thorne (1995: 487, 489) records that from the late 1960s in the USA, the FCC feared the infant cable industry would simply be swallowed by telephone companies. Given a free hand in the content end of things, it was argued that local telephone companies would quickly cross-subsidize or discriminate their way to dominance. Accordingly, the 1970 FCC Rules and the 1984 Cable Act explicitly forbade telephone companies from offering cable television services to the public, although they could use their infrastructure to supply video distribution channels to unaffiliated providers of a cable service. By the time of the 1996 Telecommunications Act permitting telephone companies to provide video services and cable operators to provide telephony, the United States had gained massive competing sets of broadband infrastructure as a result of this initial prohibition against carriers. (Huber 1997)

In the UK, once British Telecom was split from the Post Office and duopoly competition allowed from 1983, the Telecommunications Act ensured that the substantial telecommunications but nascent cable television markets would be kept segregated. The 1991 White Paper into telecommunications policy for the 1990s set in train legislative changes to commence open competition in telecommunications and for the first time allowed cable television companies to provide telecommunication services. However the prohibition against carriers providing cable television services was extended for another decade. (DTI 1991) The ban on broadcasting by UK carriers was finally lifted in January 2001.

In comparison, the closest Australia had come to a similar regulatory situation was a recommendation from the 1989 House of Representatives Committee that Telecom Australia be made the common carrier for cable pay television but be prohibited from being a pay television operator and from influencing or determining the program content of such television.

By the time of Optus being awarded the second telecommunications carrier licence in 1992, the government had already decided that the first national pay television service would be delivered via the ex-AUSSAT satellite only recently sold to Optus. Although Telecom Australia's intentions to at least provide carriage services for pay television and other information services had been well publicised since at least 1975, by 1992 this was being marketed as not being 'a threat to satellite delivery but rather as a complementary service'. The government of the day had simply not anticipated that cable delivery could occur so quickly, let alone soon become the foundation for the dominant business in Australian pay television. As a result, Telstra Corporation was totally unfettered to enter into a joint venture that ultimately became Foxtel, with 50 per cent ownership as at 2005.

Minimal competitive threat

When Telstra entered the pay television business in late 1995 in the form of Foxtel, it did so primarily as a ‘telephony defence’ strategy to counter Optus. With cable rollouts duplicated in some 80 per cent of streets, the duopoly competitors had effectively neutralised one another’s strategic advantage. After antagonising local communities with aerial cabling, regulations were introduced end 1997 that effectively killed off any further rollout by either party. As each company wrote off billions of dollars of HFC network investment, the prospect of any other cable competitor operating in the same territory vanished.

Neither Telstra nor Optus could afford to heavily discount thereafter so the final competitive advantage could only be in the realm of content. In March 2002, an agreement was reached to share pay television programming whereby Optus would become largely a reseller of Foxtel content. Foxtel had now effectively neutralised any competitive threat from Optus Vision in the business of pay television. Telstra’s ‘telephony defence’ had finally become effective, but at a huge cost of written down investment.

The final realm for competitive threat was posed by the Seven Network and TARBS who sought access to Telstra’s HFC network and Foxtel’s pay television distribution service. Their story of repeated attempts to gain access has already been told. TARBS is now bankrupt. The Seven Network defeated the anticipatory exemption order granted by the ACCC for the digital service offered by Foxtel and Telstra from March 2004. By late 2005, the Seven Network was relentlessly pursuing PBL, News Limited and Telstra (the three partners in Foxtel), as well as a raft of other media companies and sporting bodies in the courts, accusing them of illegally conspiring to force the closure of its pay television sports channel C7 in 2002.

Delayed access

The former ACCC Chairman stated that Telstra and Foxtel had engaged in ‘a lengthy campaign to prevent access to competing pay TV providers and slow down the processes’ by devoting considerable energy and resources to legal challenges for some nine years. Access delayed was access denied, according to the Seven Network, in that delay stripped access seekers of the intended benefits of access by making it difficult, if not impossible, to generate competition at a later date.

On the other hand, Telstra and Foxtel were resolute in their conviction that continued legal and regulatory delays would enable them to further entrench their market position, particularly by growing subscriber numbers in the final years of analogue provision, before the digital network arrived and removed capacity as the prime argument against additional service providers.

Terms of access dictated

Although losing all legal challenges, Telstra and Foxtel availed themselves of the regulatory labyrinth to sufficiently prolong arbitration until they were ready to provide access undertakings to the ACCC. Crafted by their own lawyers, these undertakings were then subject to the processes of public inquiry which entailed critical examination by the Commission and the few other parties interested in the matter of access. The ACCC did extract a number of concessions from the access providers but in reality Telstra and Foxtel

were privy to the greater amount of information and had already dictated the prime grounds for undertakings of analogue and digital access they would consider commercially acceptable.

Given the advent of digitisation in March 2004, the analogue undertaking settled in the same month was immediately of little value to any serious access seeker. It is more instructive to examine what happened in establishing the terms of the digital access agreement. Telstra and Foxtel proposed and the ACCC ultimately concurred with key terms for third party access such as mandatory inclusion of Foxtel's basic package and exclusion of interactivity. These and other terms of the agreement were subsequently found by the Australian Competition Tribunal as placing an access seeker at an unjustified competitive disadvantage. Although the Tribunal invalidated the Commission's granting of anticipatory exemption from the standard access obligations, the example demonstrated that prior to this legal setback the incumbent had succeeded in setting the agenda.

What political and legal avenues were of greatest value to Foxtel and Telstra in achieving their goal of a closed access pay television network?

Despite many years of government inquiries and reports all concluding that any pay television cable should be operated under a common carrier arrangement, and despite Part XIC of the Trade Practices Act creating the mechanisms to facilitate an (open) access regime, there have been three most timely instances of government-sponsored incentives that have worked in the contrary direction, the first clearly overt, by fostering the deployment of pay television cable infrastructure and systems for operation under a closed access regime. They were the Carrier Associates Direction of 1995, the Protected Contractual Right defence of 1997 and the Anticipatory Exemption vehicle of 2002.

Carrier Associates Direction

The Telecommunications (Service Providers Class Licence) Direction No. 1 of 1995 was issued to grant the new entities of Carrier Associates exemption from being required to provide access for another person's pay television service until 1 July 1997. The Direction was conceived in response to an Optus subterfuge for avoiding the common carrier requirements of the Telecommunications Act 1991, by claiming that the part of a cable supplying pay television services was covered by the Broadcasting Services Act 1992 which didn't require open access. Optus Vision would own and operate the new broadband cable system, with installation and maintenance undertaken by Optus Networks as the licensed general carrier. Telstra immediately adopted a roughly similar arrangement.

Optus, the prime beneficiary of the Direction, was alert to the government's change of heart from late 1994 and soon after commenced roll-out of its cable television network which began commercial service in September 1995. Telstra's roll-out substantially mirrored that of Optus by adopting a defensive strategy. As a consequence, Australia witnessed the almost parallel deployment of substantially identical HFC networks. The investments in both networks were later substantially written off – a clear sign that this duplication of infrastructure, where just one network could service all market needs, was plainly uneconomic. Each network was monopolized by its owner and eschewed third party access for alternative programming and services.

In hindsight, the demise of common carriage for cable delivered pay television services commenced with the aggressive stance adopted by Telecom Australia in defending its market position from the advances of Optus through 1992 and 1993. With the government unwilling to restrain Telecom Australia from the discriminatory supply of services to corporate customers, Optus quickly developed a deep distrust of Telecom – especially in the areas of access to and interconnection with national telecommunications infrastructure established when Telecom Australia had been the monopoly provider.

The period 1993/94 witnessed a corporate feeding frenzy of business deals, content aggregation and infrastructure deployment as the United States communications and entertainment industries grappled with ‘technological convergence’ – the supposed melding of televisions, telephones, computers and content into one technology, one industry! Optus was in regular discussion with the number three cable television operator in the United States, Continental Cablevision, who was on the threshold of a technological breakthrough to pass both telephone and pay television signals down the same optical fibre and coaxial cables. With Telecom Australia openly declaring its intention of being a key player in any future pay television industry, not just by deploying cable infrastructure but also through discussions with News Corporation regarding service delivery, Optus was fast becoming convinced that pay television could act as a carrot to attract subscribers for telephony and online services - if only it created its own HFC network and could also garner revenue from the content so carried!

By August 1994, Telecom Australia had filed a tariff with AUSTEL for common carriage of pay television services whilst at the same time joining with the PMT consortium to spoil the moves of other industry aspirants intending to adopt satellite and MMDS delivery platforms. With such a stance backed by Telecom’s huge resources, surely Optus would not seriously file any similar tariff for common carriage? Lawyers and business analysts retained by Optus responded with a clever subterfuge for avoiding the common carrier requirements of the Telecommunications Act 1991 and declared to the government its intention to create a new broadband cable network for the delivery of pay television, data and telephony – on the proviso that both infrastructure and service access would be closed to parties not part of its business model.

Despite alarm over the prospect of duplicated cable infrastructure and closed access for consumers and excluded service providers, the government faced collapse of its policy aim of encouraging facilities-based (ie. infrastructure) competition during the 1992 - 1997 telecommunications duopoly phase. The government was attracted to the creation of an alternative telephony network,²⁴ and supported the Optus argument for closed access through garnering greater investment from sharing both content and carriage revenues. Closed access was also justified to remain until at least 1997 whereafter digitisation would remove channel capacity constraints on further service providers posed by analogue technology.²⁵ Telecom Australia had previously demonstrated trouble in allocating channels under its open access model.

One can only speculate on the outcome had there been no Carrier Associates Direction, but if the statements and plans of Optus and Telstra at that time are to be taken at face value, Optus

²⁴ The Optus telephony service did commence in June 1996 but, due to the limited capital city coverage and unwillingness by Optus to become a price leader compared to Telstra’s PSTN service, this totally independent telephone network has proved of little competitive benefit to consumers.

²⁵ In any case, the Carrier Associates Direction ceased to be an effective instrument after 1997.

would most likely not have invested in any HFC network and within a year Telstra would have commenced to roll-out a common carriage network delivering, among other services, those of the surviving satellite and MDS pay television operators.

Protected Contractual Right

The new Part XIC provisions of the Trade Practices Act 1974, codifying the first access regime for the telecommunications industry, were enacted on 30 April 1997. Section 152AR(4) absolved an access provider of any standard access obligation if there would otherwise be an insufficient amount of the service available to meet the reasonably anticipated requirements of the access provider or an existing service provider. The obligation was also negated where its imposition would deprive any person of a right under a contract in force at the beginning of 13 September 1996, such a right being described as a ‘protected contractual right’.

On being requested by Seven Cable (and separately, TARBS) for access to its analogue cable broadcast carriage service, Telstra Multimedia claimed that Foxtel Management had the exclusive right to provide and manage pay television services delivered via Telstra’s HFC network. The request was refused on the grounds that provision of the service would deprive Foxtel of its protected contractual right, the basis of which was said to be an agreement between Telstra Multimedia and Foxtel Management signed on 23 October 1995. Taking legal action, Seven and TARBS submitted to Justice Tamberlin that this agreement was not a binding contract. The judge concurred and that decision was upheld on appeal by Foxtel and Telstra.

Pay television service via cable began in September/October 1995 and the first exposure draft of changes to the Trade Practices Act was tabled before Parliament on 20 December 1995, towards the end of the Keating labour government. In keeping with the statement of Telecommunications Policy Principles post-1997 released on 1 August 1995, Principle 20 stated that “a carrier would be able to deny a request for interconnection or carriage on reasonable grounds, including connection not being technically feasible or insufficient capacity being available”.²⁶ There was no mention then of any ‘protected contractual right’. Dismayed at the prospect of having to provide access, Telstra and Foxtel lobbied the new Howard coalition government for protection from third-party access - insisting that Telstra had already contracted all cable capacity to Foxtel. Accordingly, by the time of the second exposure draft was tabled on 13 September 1996, section 152 had been modified to include an access exemption in the event of a ‘protected contractual right’. Hence that became the date from which such an exemption commenced. Telstra and Foxtel must have been satisfied as they had signed their Broadband Cooperation Agreement on 12 July that year.

It remains a moot point as to what may have happened had there been no ‘protected contractual right’ defence absolving Telstra and Foxtel from their standard access obligation. The remaining obstacle to access was the claim by Telstra and Foxtel of there being insufficient analogue channel capacity to meet their ‘reasonably anticipated requirements’ – a matter already the subject of drawn out arbitration during 1999/2000. Once the ACCC had

²⁶ Refer to “Statement & Press Release by the (Previous) Government – August 1995” at http://www.csse.monash.edu.au/~jwb/subjects/cse5806/pol_doc.html. Also refer to paragraph 64 of *Seven Cable Television Pty Ltd v Telstra Corp Ltd* [2000] FCA 350, Federal Court of Australia, 27 March 2000.

declared cable-delivered analogue subscription television services in early September 1999 and assuming early resolution of the dispute over channel capacity, Seven Cable could have had up to twelve months lead time to provide pay television coverage of the Olympic Games to be held in Sydney between 15 September and 1 October 2000. The most favourable outcome could have been the ongoing commercial survival of Seven Cable, as well as TARBS, resulting in a more competitive pay television industry.²⁷

With the sunset date now passed and the claims of Telstra and Foxtel rejected by the courts, the defence of ‘protected contractual right’ is now no longer applicable.

Anticipatory Exemption

Commencing 19 December 2002, actual or potential access providers gained the right to apply to the ACCC for exemption from the standard access obligations detailed in section 152AR, prior to a telecommunications service becoming an active declared service or even prior to an investment being made in a telecommunications service, i.e. they could seek ‘anticipatory exemption’.

The origins of anticipatory exemption hark back at least to the 2001 inquiry by the Productivity Commission under the direction of the government to ‘review the state of competition in the telecommunications market, and the impact of new technologies and delivery platforms’. Telstra and Foxtel exploited this additional opportunity to bolster their case for restricting third party access to their pay television network and convinced the Productivity Commission that the telecommunications access regime was deficient as long as it allowed the ACCC to declare services only if they were ‘active’, i.e. in existence. Keen to facilitate investment in new telecommunications infrastructure by reducing regulatory uncertainty for services not yet declared or services not even in existence, the government proposed a new ‘anticipatory exemption’ vehicle that could be used to bypass standard access obligations. A subsequent Senate inquiry into the Telecommunications Competition Bill attracted submissions strongly supporting the new vehicle from Telstra and Foxtel, with the Seven Network strongly opposed: (Seven Network 2002: 9)

In relation to digital pay television services/carriage services, there is no place for exemptions from standard access requirements. These services are of such importance and provide such scope for market dominance in pay television, telecommunications, broadcasting and related industries and to control the digital gateway to the home that they should never be exempted from the access regime.

Such counter claims were ignored and the Bill was passed unamended.

Barely two days after the Telecommunications Competition Act gained assent, Telstra and Foxtel applied to the ACCC for anticipatory exemption from the standard access obligation that would otherwise apply to their proposed digital pay television services. Twelve months later, the Commission made the first anticipatory exemption orders and commercial digital

²⁷ In reality, Seven Cable was unable to create a brand name in the nascent pay television industry which, amplified by its subsequent inability to wrestle broadcasting rights to certain other sports events from News Corporation, led to its eventual demise. TARBS ultimately met a similar fate, though for more complex reasons. Given that Seven Cable and TARBS were the only original access seekers, their departure from the market significantly enhanced the opportunity for Foxtel to dominate Australian pay television content and delivery.

service delivery commenced three months thereafter, in March 2004. The Seven Network immediately challenged the Commission's orders by appealing to the Australian Competition Tribunal. In setting aside the orders, the Tribunal revealed flaws in the ACCC decision making process granting exemption and saw through a series of disingenuous claims by Foxtel and Telstra. Even though this judgement meant that the anticipatory exemption application by Telstra and Foxtel had been wasted, they nevertheless gained a huge strategic advantage by having commenced digital service operation on their own terms – and without third party access. However, the generic right to seek 'anticipatory exemption' remains unaffected as a vehicle available for access providers to call upon in the future.

If the vehicle of 'anticipatory exemption' had not been written into the Trade Practices Act in December 2002, competitive service provision would feasibly have entered the Australian pay television industry within the following two to three year period. Even if the labyrinthine regulatory process had still unfolded at the same pace regarding the settlement of undertakings for third-party access to both analogue and digital services, we now know from the September – December 2004 judgement by the Australian Competition Tribunal that Foxtel was increasingly unable to source analogue set top boxes and that digitisation by Foxtel and Telstra was going to occur regardless, at the earliest end March 2004 and at the latest by October 2005. With the advent of digitisation, the much increased channel capacity would remove the final obstacle to access – being that of meeting the 'reasonably anticipated requirements' of the access provider. In any case, the tactics of Telstra and Foxtel to delay access may have changed to be less obstructive, had their confidence not been buoyed by the exemption right drafted into the Telecommunications Competition Bill in late 2002.

CONCLUSION

The process of gaining access to Australia's dominant cable television network has been tortuous and time consuming – and yet to be fulfilled in any meaningful way. For the first two years from 1995 to 1997, a government mandate denied open access on the promise of competition which was never effective and is now basically stymied. Between 1997 and 1999, deeming and declaration by the regulator made open access legally possible but impractical due to regulatory uncertainty. That period was followed by yet another two years of public legal challenges involving the access providers, access seekers and the regulator, running in parallel with private arbitration of the access disputes by the regulator. The end result of these political, regulatory and commercial processes has been nine years of delay in the provision of access to competitive parties.

The then ACCC Chairman Professor Alan Fels expressed his clear frustration with such processes in a speech on 26 March 2001:²⁸

.... potential suppliers of retail programming need to have access to the networks if competition is to develop in digital service provision and diverse service choices are to be made available to consumers.

It is clearly in the interests of both suppliers of retail services and customers for broadband networks to be open rather than closed. This means that access to the network should be available to suppliers on non-discriminatory terms and conditions.

²⁸ Refer to ACCC Press Release "Cable owners put on notice" MR 064/01, issued 26 March 2001, at <http://www.accc.gov.au/content/index.phtml/itemId/87682>

An open access environment ensures the competitive provision of services and can also mean a more efficient and effective use of broadband networks.

Professor Fels said that the question was whether this would occur through competition among network owners.

Regulation of digital platforms will only need to be considered where commercial forces are being deliberately undermined and where the objective of an open access environment is being stifled. Legitimate market drivers should be given the opportunity to do their job.

Professor Fels then pointed to the experience of pay TV suppliers attempting to gain access to cables controlled by Telstra and Foxtel.

Telstra and Foxtel have frustrated every effort to open up access to competitors. They have engaged in a lengthy campaign to prevent access to competing pay TV providers and slow down the processes. They are clearly both able and willing to devote considerable energy and resources to such activities.

Digital platform owners therefore have a choice. They can take the early initiative in opening up their networks for digital services, and create significant opportunities and benefits for themselves and their customers. Alternatively, they can take the regressive step of maintaining closed shops - and then face the inevitable demands from potential retail competitors, governments and customers for regulatory intervention.

Threatening not to upgrade to digital working (and thereby perpetuating an inherent shortage of analogue channel capacity) but with the backing of new provisions of the Trade Practices Act aimed at promoting investment in telecommunications infrastructure, Foxtel and Telstra gained regulatory approval via agreed undertakings that have since permitted third party access to their digital service infrastructure from 12 December 2003 and analogue service infrastructure from 25 March 2004. With digital Foxtel services having commenced in March 2004, it is highly unlikely that any third party would now contemplate seeking analogue access. And as the Australian Competition Tribunal revealed in its 30 September 2004 decision, it is also highly unlikely that Foxtel and Telstra would not have digitalised in the absence of regulatory certainty.

Since 2002, the supply of pay TV content within Australia has consolidated to the extent that other incumbent operators are now effectively drawing upon the same pool as that of the dominant provider. (ACCC 2003a) Any third party aspiring to gain access to digital capacity faces the challenge of having to offer content sufficiently enticing to carve out a new share of a market that has been the sole province of monopoly providers since 1995. The prospects of the now dominant access providers, Foxtel and Telstra are now even more greatly enhanced whilst the prospects of any third parties to gain worthwhile access to the Foxtel/Telstra network have become greatly diminished. The Seven Network foresaw such an outcome in its submission to the Senate inquiry into the Telecommunications Competition Bill 2002: (Seven Network Supp 2002: 17)

..... in the telecommunications and pay TV industries time is of the essence. Access delayed is access denied. Delays in obtaining access entrench the position of incumbents, thereby defeating the purpose of the regime by stripping access-seekers of the intended benefits of access and making it difficult, if not impossible, to generate competition from access-seekers at a later date.

In the meantime, Foxtel continues to deliver the 'ultimate television experience'!

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