

TELSTRACLEAR

COMMERCE COMMISSION LLU & PDN CONFERENCE

BITSTREAM AND OSS REGULATION IN AUSTRALIA

1. KEY POINTS

- 1.1 Telecom has made two representations regarding the regulation of bitstream and OSS (**Operational Support Systems**) in Australia: that bitstream is not a regulated service; and that OSS is not directly regulated by the ACCC. Telecom is wrong on both counts.
- 1.2 The supply of bitstream by Telstra has been required in Australia under Part XIB of the *Trade Practices Act (TPA)*, on the basis that the ACCC concluded that Telstra's refusal to supply a DSL service other than a layer 3 resale service was anti-competitive. Although the criteria for regulation are not identical to Part XIC of the TPA, the objective of ensuring fair and reasonable terms of supply is consistent.
- 1.3 The ACCC and the Government also have increasingly recognised the importance of electronic OSS. The SAOs (**Standard Access Obligations**) have recently been substantially strengthened and clarified to reinforce access providers' (and in particular, Telstra's) obligations to provide non-discriminatory access to OSS ("tightening the non-discrimination noose"), which Telstra has concluded can only be met through wholesale electronic OSS access matching electronic retail OSS. The statutory standard access obligations (SAOs) also are not the sole basis for determining OSS terms and conditions, with the amendment of the TPA to add power for the ACCC to determine non-price terms on an ex ante basis. Industry-based and commercial initiatives to introduce electronic OSS take place within this regulatory framework, and largely explain the pace and extent of development of electronic access in Australia.

2. REGULATION OF BITSTREAM

- 2.1 Access regulation under Part XIC¹ of the TPA is not the only means by which the ACCC has intervened in relation to the supply of wholesale telecommunications. Behavioural regulation under Part XIB² has been used by the ACCC as a complement or alternative to the Part XIC access regime. The only competition notices which have been issued under Part XIB have, in fact, related to wholesale supply by Telstra, in the areas of Internet peering, commercial churn (which is an OSS process which supports local call resale) and broadband ADSL. In this way, the ACCC has used two regulatory paths as different means to a single end.
- 2.2 Prior to 2002, Telstra only made available for resale a layer 3 DSL product called Flexstream, which was essentially Telstra's retail DSL service (in much the same way

¹ Part XIC is, broadly, the equivalent of Schedule 1 of the New Zealand Telecommunications Act.

² Part XIB allows the ACCC to issue a competition notice in respect of conduct which the ACCC believes has the effect of substantially lessening competition. Substantial fines apply until the party against whom the competition notice has been issued ceases the anti-competitive conduct.

as the resale DSL service provided under the Wholesale Determination is the retail version of the Telecom Jetstream service). In early 2001, Optus complained to the ACCC that Telstra was acting anti-competitively because wholesale customers faced a price squeeze between the high wholesale price for Flexstream and Telstra's retail DSL process. In September 2001, the ACCC issued a competition notice against Telstra. Paragraph 5(d) of the competition notice states:

“...Telstra has refused, and continues to refuse, to supply its wholesale ADSL services to wholesale customers with Telstra's CMUX and ATM infrastructure Layer 2 data service.”

The Commission found that Telstra's refusal to provide a layer 2 DSL service to wholesale customers “denies competitors the ability to differentiate the performance and functionality of their services from the Telstra retail service and to compete fairly with Telstra's retail price”.

- 2.3 Further regulatory intervention was not required because Telstra changed its behaviour and began offering a layer 2 bitstream to access seekers on commercial terms. This layer 2 product now accounts for nearly half of Telstra's DSL services and grew at the rate of 400% in the last 12 months.
- 2.4 The Productivity Commission's review of telecommunications competition noted arguments that it may have been more appropriate for ADSL (and services under other competition notices) to be addressed under Part XIC of the TPA, rather than Part XIB. However, the Productivity Commission concluded that the legislative intent of the telecommunications regulatory regime was still served by issuing the broadband ADSL competition notice.³
- 2.5 Therefore, while it is the case that bitstream is not a declared service in Australia under Part XIC of the TPA, Telecom's assertion that it is not a regulated service is incorrect. Bitstream is one of the limited number of wholesale services for which the ACCC has decided that intervention on competition grounds is warranted. The ACCC's action to intervene produced the same desired result as declaration: to facilitate the fair and reasonable supply of the service.

Accordingly, Telecom has placed false emphasis on the “undeclared” status of bitstream in Australia.

3. OSS REGULATION IN AUSTRALIA

- 3.1 Telecom incorrectly asserts that electronic OSS access is purely the outcome of commercial negotiation and industry self-regulation. The ACCC and the Government, through amendment of the telecommunications legislation, have promoted non-discrimination requirements for ordering, provisioning, fault and other inter-operator systems to encourage Telstra to deploy electronic OSS access.

³ Productivity Commission, *Telecommunications Competition Regulation*, Final Report 21 September 2001 at page 178: see Annex 1.

3.2 The first competition notice, issued in 1998, related to the process for reassignment of local PSTN services from Telstra to competitors for resale, called commercial churn, and an important element in OSS.⁴ The central allegation related to the requirements for competitors to use an inefficient manual system for the churn process compared to the more efficient electronic based processes used by Telstra for its own retail operations. The ACCC found that Telstra had acted anti-competitively because:

“Telstra has refused and continues to refuse to process the transfer on a TDS basis [total debt severance] of end users from Telstra to another CSP [Carriage Service Provider], namely AAPT, Macquarie, Optus, Primis, Spectrum and Switch, **by means an efficient automated transfer system.**”

The competition notice forced Telstra to set out down the path of electronic OSS access as Telstra concluded that this was the only viable way to ensure compliance with the Standard Access Obligations as Telstra’s automation of its retail level functions accelerated. The ACCC claims that their regulatory intervention in relation to the commercial churn functions of OSS lead to the creation of new electronic interfaces between Telstra and other operators such as “would not have occurred in the absence of competition notices”.⁵

3.3 By July 1999, the ACCC gave deeper consideration to the relevance of OSS and whether it should form part of a declared service. The ACCC report on the *Declaration of local telecommunications services* considered whether the service descriptions for declared services should include OSS and whether OSS should be declared as a separate service. For example, the ACCC examined the status of OSS in the United States. As the Draft Report notes, the ACCC concluded that:

- OSS matters are more concerned with the manner in which an access provider complies with the SAOs; and
- OSS should be addressed through the terms and conditions of supply.

3.4 The Productivity Commission report in September 2001 concluded that non-price terms were an important part of telecommunications regulation, noting that Telstra’s first three access undertakings were rejected by the ACCC on issues other than the price of services⁶. The Productivity Commission also noted that, although in the past “the predominant matter of dispute is the price at which access will be provided”⁷, in more recent times the emphasis of regulatory activity “has shifted to determining the terms and conditions of access to declared services”.⁸

3.5 Based on the recommendations of the Productivity Commission, the TPA was amended to require the ACCC to determine model terms and conditions for a set of specified “core” telecommunications services, including LLU. The purpose of these collective model terms was to set a benchmark which the ACCC, if it was called upon

⁴ Competition Notice, 9 April 1999. See Annex 2.

⁵ ACCC Submission, p 72.

⁶ Productivity Commission *Telecommunications Competition Regulation, Final Report*, 21 September 2001, p 233.

⁷ *Ibid*, 236.

⁸ *Ibid*, 232.

to arbitrate a dispute, would apply when settling the dispute and which would guide commercial negotiations. In response to concerns that some OSS functions may not fall within the SAOs, they were amended to explicitly state that ordering and provisioning are contained in the SAOs. As the Explanatory Memorandum noted (at page 91):

“The ordering and provisioning of a service are essential components of receiving access to a declared service, in that a new service could not be provided to an end user without the order for that service being placed and acted upon and that service being provisioned, or activated”.

3.6 In parallel with these developments, the ACIF, with Telstra’s active participation, was developing codes covering OSS processes. These codes were premised on increased use of electronic systems. In November 2002, almost a full year before the ACCC made its Final Determination on Model Non-price Terms and Conditions, the ACIF issued a guideline for an electronic interface system called EInet⁹.

3.7 Following a period of public consultation, the ACCC published its *Final Determination – Model Non-Price Terms and Conditions* on 28 October 2003. The model terms set out specific principles to be applied in virtually the entire range of OSS areas, including faults, billing and collection, liability, access to information and communications with end-users. The ACCC also considered whether there should be an explicit requirement for automation of electronic access to these OSS functions. The ACCC was clearly of the opinion that such electronic interfaces were critical to the promotion of competition and noted its agreement with comments made in submissions to the preceding public inquiry. The ACCC stated:¹⁰

“a common real-time interface between wholesale parties was essential to removing discriminatory treatment and required for improving the process associated with ordering and provisioning, fault maintenance and service qualification and availability”.

3.8 However, in the final analysis, the ACCC declined to include an electronic access requirement in the Model Terms and Conditions because the ACIF was already developing and implementing electronic access systems. This is in keeping with the broad scope which the ACCC believed it should give to a co-regulatory approach when it drafted its Model Terms¹¹: under a co-regulatory approach (which the ACCC also adopted in the implementation of LLU) the ACCC sets broad guidelines and principles within which the industry is to develop the detailed implementation and if the industry cannot agree, the disputed issues are formally or informally escalated to the ACCC.

⁹ ACIF G608 EIE Infrastructure Common Network Specification Guideline, 20 November 2002.

¹⁰ ACCC *Final Determination – Model Non-Price Terms and Conditions*, October 2003, p 47.

¹¹ “... where an ACIF code covers a particular matter... the Commission will treat that particular aspect of the ACIF code as representing the standard for the model term and condition....where, however, an ACIF code only partly deals with a particular issue, the Commission may be minded to establish an express model term that complements the ACIF Code provisions... Further, where a particular issue is dealt with by an ACIF Code, but which the Commission believes should be further developed and better reflected in the ACIF code to fully address the issue raised, it will highlight the need for industry, through the ACIF, to undertake the necessary work.” Ibid, 12.

3.9 Consistent with this co-regulatory approach, the ACCC also commented that it “recommends and expects that the development and implementation of a common system interface, whether it be through the [ACIF Guidelines] EEnet project or some other means, occur as a priority so that the concerns of access seekers in relation to timeframes and other areas of concern are addressed”¹². Further, the ACCC cautioned that if electronic access was not implemented, the model terms and conditions would be amended to require electronic interfaces:

“The Commission recommends that this project [to develop a common electronic systems interface] continues under the auspices of ACIF and any agreed outcome or standard be reflected in an ACIF code/guideline. At this point, the Commission will not mandate a model term and condition requiring the development and implementation of a common system interface, **however, it will consider such model terms and conditions should there be any unreasonable delay in the development and implementation of such a system.**”¹³ [Emphasis is author’s own]

3.10 Accordingly:

- the Australian regulatory regime’s regulatory requirements for non-discriminatory OSS have strengthened over time;
- the Standard Access Obligations are not the sole source of power over OSS. The ACCC can now address OSS issues under its model terms and conditions powers;
- while there is currently no express requirement for electronic OSS, the increasing regulatory attention on OSS has provided impetus to industry efforts to develop electronic processes;
- the ACCC has foreshadowed that it considers electronic OSS suitable for regulatory specification and that the ACCC will take action if agreement is not reached by the industry soon; and
- the shift in Telstra’s own “mindset” about wholesale as a result of regulatory requirements for unbundling also lead to Telstra taking its own initiatives, often in advance of the industry, to automate its processes to support an expanded wholesale business.

3.11 Therefore, Telecom’s assertion that the Australian approach to OSS is purely commercial, is misleading. TelstraClear agrees with Telecom that the Australian approach is to be preferred to the US approach, which has been complex, expensive and contentious. The Australian co-regulatory approach ensures that operators have the incentive to develop electronic access but allows the industry itself to work out the technical specifications of the OSS model to be used.

¹² Ibid, 48 (emphasis in the original).

¹³ Ibid, 48.

4. AAPT's POSITION

4.1 The Commission asked about AAPT's view of electronic OSS in Australia.

4.2 AAPT was an active participant in the ACIF Committee which developed the ULLS Code. That Code provides that automated interfaces should be progressively developed for ULLS. The Code sets out the following stages:

Phase one – ULLS Implementation

Inclusions:

- (i) Automated File Transfers to and from the Access Provider.
- (ii) Managing Customer requests for ULLS and cancellation of existing Service Number.
- (iii) Provision of ULLS Call Diversion post cancellation.
- (iv) Ability to Port Service Numbers on ULLS Call Diversion (category D Porting).
- (v) Services which can be obtained using automated processes. (The provision of services where such provision involves some degree of manual processing will be agreed bilaterally).
- (vi) Provision of Call Diversion post cancellation is also required of AS by AP.
- (vii) In-Use ULLS – Simple Telephone Services only.

Exclusions:

- (i) Services that are prime numbers (e.g., directory number of a line hunt group).
- (ii) Alternate Deployment Classes in a single notification.
- (iii) Complex Service (eg PSTN services that are prime numbers).

Note: Exclusions from Phase 1 may be applicable to Phases 2 and 3. Exclusions from Phase 1 will be subject to industry review upon commencement of subsequent phases.

Phase two – Process Automation

- (i) Automated File Transfers between all industry participants.
- (ii) Process automation with respect to Phase 1 manual processes.

Phase three – Maximum Automation of Processes

Proposed Inclusions (but not limited to):

- (i) Combining of ULLS and Porting requests in a single transaction.
- (ii) Further automation from Phase two.
- (iii) Third party Porting.

General Exclusions (all phases)

- (i) Requests associated with working Service Numbers where those numbers are exchange or network based associated with the AP's network.

Target Timeframes

Phase 1 benchmark September 2000

Code publication date – June 2001

Phase 1 review – October 2001

Agree Phase 2 deliverables – September 2001

Phase 2 build, implement and test – April 2002

4.3 As a separate initiative, the Service Provider's Industry Association (**SPAN**), with the support of the Department of Communications, began a project in 1998 to bring inter-operator processes on-line.¹⁴ The SPAN initiative, in which Telstra joined, arose out of the service providers' concerns with the churn process which had led to the ACCC's competition notice on commercial churn. The Telecommunications On Line (**TOLI**) project was subsumed into the ACIF. In 2002, ACIF released an industry guideline on implementation of an Electronic Information Exchange Programme (**EIE**).¹⁵ AAPT was a key driver of the TOLI initiative and the EIE Reference Panel includes an AAPT representative. The original TOLI objectives, adopted by the EIE Reference Panel are:

- the telecommunications industry should be characterised by on-line electronic processes as opposed to paper based processes;
- wherever possible and appropriate for the particular transaction, electronic processes should allow more than the electronic transmission of data; and
- establishing on-line processes should be to facilitate competition and remove artificial barriers to entry. Accordingly, requirements for on-line interfacing should not themselves become barriers to entry.

4.4 The shape of wholesale OSS, and hence electronic access, depends on the interpretation which is given to the non-discrimination standards.

¹⁴ EIE Infrastructure Common Network Specification, ACIF G608: 2002.

¹⁵ AAPT (prior to TCAZ's acquisition of AAPT) was a prime mover behind the TOLI initiative. AAPT has continued its strong support for electronic OSS since TCNZ acquired it.

4.5 TNZ Australia's Regulatory Counsel, Ms Jenny Fox, submitted to the ACCC's inquiry into Model Terms and Conditions that the non-discrimination principle required Telstra to provide wholesale service providers with a level of service that ensured they were "no worse off than Telstra's retail business...in terms of the levels of service received from Telstra".¹⁶ Under this submission, Telstra would also be required to match any "over-performance" of its own service standards against the service it provides to wholesalers. This means that Telstra would be required to provide wholesalers a level of service equivalent to its own "over-performance" of the standards it sets for itself. In that submission it was argued that this was "essential for ensuring non-discriminatory performance by Telstra".¹⁷

4.6 This is in pointed contrast to the position Telecom has adopted in New Zealand. In New Zealand, Telecom has argued that non-discrimination principles only require it to provide the same level of service to wholesalers as Telecom supplies to its own customers:¹⁸

"In regard to service levels, Telecom provides a variety of service levels to retail customers with a corresponding range of prices. Telecom notes that the basic service level provided to TelstraClear corresponds with the service level generally provided at retail – there can be no suggestion that TelstraClear is receiving a lower standard of service. For example, when TelstraClear reports a fault, the report is channelled to the same group in Telecom that handles business faults, and reaches Telecom via the same queue as business customers. Accordingly, TelstraClear receives exactly the same level of service as that provided to Telecom's business customers. Should TelstraClear require an enhanced service level to be applied in relation to certain services, Telecom would be justified in seeking compensation for the extra costs it would incur in providing this."

4.7 TelstraClear submits that non-discriminatory access principles necessarily entail that the new entrant be permitted access to the same level of service as the incumbent provides to its own retail division. Inter-operator OSS interfaces at the same level as that given to Telecom's retail customers would give the Telecom's retail division ("Telecom Retail") a substantial market advantage over its competitors in both the timelines and the levels of service. Telecom Retail of course both acquires and makes service arrangements from the divisions within Telecom itself that perform the actual functions required ("Telecom Wholesale") and uses electronic systems directly connected to Telecom Wholesale. Inter-operator OSS interfaces at the retail level would mean that the competing operator is:

- (i) purchasing services from Telecom Wholesale; but
- (ii) arranging for ordering, provisioning, fault rectification etc through Telecom Retail.

¹⁶ AAPT Limited *Draft Determination for model non-price terms and conditions for PSTN, ULLS and LCS Services: Submission to the Australian Competition and Consumer Commission*, 31 July 2003, p 12, see attached.

¹⁷ *ibid.*

¹⁸ Telecom's public comments dated 14 February 2003 in respect of TelstraClear's determination for an application for residential resale services.

- 4.8 TelstraClear submits that the non-discrimination principle requires that any operator purchasing services from Telecom Wholesale in the same way as Telecom Retail be permitted the same level of electronic access to Telecom's operating systems. Without such an inter-operator electronic interface, Telecom Wholesale is giving a higher level of service to Telecom Retail than it provides to other operators who acquire services from Telecom Wholesale.