Australian
Competition &
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Commission

A report on the assessment of the Analogue Pay TV Access Undertaking proffered by Telstra Multimedia Pty Limited on 23 December 2003

March 2004

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Glossary

the Agreement	TMM Analogue Access Agreement/Schedule B of TMM undertaking
the Act	Trade Practices Act 1974
analogue pay TV service	analogue subscription television broadcast service
ASM	Analogue Services Module
CAG	Conditional Access Gateway
the Commission	Australian Competition and Consumer Commission
Convergys	Convergys Solutions Limited
C/CSP	carrier or carriage service provider
C7	C7 Pty Ltd
DSM	Digital Services Module
Es and Es	Enhancements and Extensions
EC	Expert Committee
Foxtel	Foxtel Management Pty Ltd
GTC	General Terms and Conditions of TMM Analogue Access Agreement/Schedule B of TMM undertaking
HFC cable	hybrid fibre coaxial cable
LTIE	the long-term interests of end-users of carriage services or of services supplied by means of carriage services
NDS	NDS Asia Pacific Pty Ltd
SAOs	standard access obligations
Seven Network	Seven Network Limited
STU	set top unit
TMM	Telstra Multimedia Pty Ltd

1. Introduction

This report provides an assessment of the access undertaking submitted by Telstra Multimedia Pty Limited (TMM) on 23 December 2004, under s152BS of Part XIC of the *Trade Practices Act 1974* (the Act), to supply an analogue subscription television service to service providers.

The undertaking specifies the price and non-price terms and conditions on which TMM proposes to meet any applicable standard access obligations (SAOs) to supply the declared Analogue Subscription Television Broadcast Service (analogue pay TV service). Should the Commission accept the undertaking, it will govern the terms and conditions on which TMM will provide access to the analogue pay TV service to service providers, in the absence of commercial agreement to the contrary.

Contemporaneous with this assessment, the Commission has separately assessed an access undertaking submitted by Foxtel Management Pty Ltd (Foxtel) on 22 December 2003, intended to cover those elements of the analogue pay TV service supplied by Foxtel, principally, its set top units (STUs). That assessment is the subject of a separate report by the Commission which is being released at the same time as this report.

The lodgement of the TMM and Foxtel undertakings stems initially from the Commission's decision on 21 November 2002 to accept court enforceable undertakings, under section 87B of the Act, from a number of participants in the pay TV industry, including from TMM and Foxtel. These 87B undertakings included, inter alia, undertakings to lodge access undertakings under Part XIC of the Act in relation to the terms and conditions upon which access would be provided in respect of analogue pay TV services.

However, the undertakings lodged by TMM and Foxtel on 21 November 2002 were rejected by the Commission in December 2003 as the Commission was not satisfied that the terms and conditions specified in the undertakings were reasonable. More specifically, the TMM undertaking was rejected because the Commission considered certain non-price terms and conditions to be deficient and therefore in need of revision. The Foxtel undertaking was rejected because the Commission considered price, as well as certain non-price terms and conditions, to be deficient and in need of revision. The new TMM and Foxtel undertakings attempt to address the Commission's concerns through the incorporation of varied terms and conditions.

The Commission is obliged to conduct a public consultation process before deciding whether to accept or reject an access undertaking. In early February 2004, the Commission released its Preliminary View paper inviting comment on the new TMM and Foxtel undertakings. The Commission's preliminary view was that it accept both the TMM and Foxtel undertakings as it considered the amendments made to the original (rejected) undertakings had addressed the concerns of the Commission and the new (revised) undertakings could now be considered reasonable.

In stating its preliminary views, the Commission envisaged that it would proceed directly to final decisions and thus avoid the need for draft reports/decisions. The Preliminary View paper also encouraged interested parties to focus comment on the revised terms and conditions of access rather than re-canvass issues that the

Commission had previously examined in the earlier November 2002 assessment processes.

This report sets out the Commission's assessment, reasoning and conclusions on the new TMM undertaking. Pursuant to s152BU(2), the Commission's decision is to accept the TMM undertaking as it now considers the proposed terms and conditions of access are, overall, reasonable. Pursuant to s152BU(3), this report gives notice of, and also sets out the reasons for, the Commission's acceptance of the TMM undertaking.

2. The Regulatory Framework

The analogue pay TV service is a declared service under s152AL of the Act. Once a service is declared, carriers or carriage service providers (C/CSPs) supplying the declared service to themselves or others are subject to a range of SAOs.

Section 152AR of the Act sets out the SAOs applying to the C/CSPs supplying the declared service. The full text of SAOs under s152AR is set out in Appendix A of this decision. In summary[1], if requested by an access seeker, the C/CSP is required to:

- supply the declared service;
- ensure that the declared service supplied is of equivalent technical and operational quality as that which the C/CSP 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 the C/CSP provides to itself;
- permit interconnection of its facilities with those of the service provider; and
- provide particular billing information to the service provider.

Of particular relevance to the analogue pay TV service is s152AR(8) which covers a SAO obliging an access provider which supplies a declared service by means of conditional access equipment (STUs) to supply any service that is necessary to enable an access seeker to supply carriage or content services using such equipment.

The terms and conditions upon which a C/CSP can comply with these obligations can be agreed between the parties. In the event that they cannot agree, one of the parties can notify the Commission of an access dispute under s152CM of the Act. Once notified, the Commission can arbitrate and make a determination in respect of the dispute.

Since the Commission declared the analogue pay TV service in September 1999, the Commission has been notified of and has been arbitrating access disputes involving TMM and FOXTEL, Television and Radio Broadcast Services Pty Ltd and C7 Pty Ltd (C7). Final arbitration determinations have yet to be made.

Alternatively, the Act enables a C/CSP to resolve disputes over access to declared services outside the arbitral process by enabling a C/CSP to provide the Commission with a Part XIC ordinary access undertaking[2] which sets out the terms and conditions on which it proposes to comply with any applicable SAOs.

If accepted by the Commission, the undertaking becomes binding on the C/CSP. Hence, if the C/CSP breaches the undertaking, the Federal Court can make an order requiring compliance with the undertaking, the payment of compensation, or any other

[1]There are some exceptions to these obligations. These are set out in s152AR, and in any exemption issued under s152AS or s152AT of the Act.

[2]Access undertakings are now known as 'ordinary access undertakings' pursuant to s152BS of the Act.

order that it thinks fit.[3] Once an undertaking is in operation, the Commission must not make an arbitral determination that is inconsistent with the undertaking.[4]

2.1 The Declared Service

On 1 September 1999, the Commission, pursuant to s152AL(3), declared the analogue pay TV service. The service description is specified in Appendix B of this report.

The declared service encompasses both the carriage of analogue signals and the use of conditional access services, including STU services and limited subscriber management services (SMS), which enable a service provider to selectively supply content services to subscribers who have entitlements to those services.

TMM provides that part of the declared service involving carriage or transmission of analogue signals along the Telstra hybrid fibre coaxial cable (HFC) to STUs supplied by FOXTEL to end-users, as well as certain conditional access services. The provision of STU services and fly cables is covered by the FOXTEL undertaking which, as noted, has been separately examined by the Commission.

2.2 Summary of the Undertaking

This discussion focuses on the amendments made to the original (November 2002) TMM undertaking, as included in the new (December 2003) TMM undertaking. For a discussion of the TMM undertaking more broadly, readers are referred to the Commission's December 2003 final report on its assessment of the November 2002 TMM undertaking.

TMM has made a number of changes to its non-price terms and conditions in the TMM Analogue Access Agreement (Agreement) which forms Schedule B attached to the TMM undertaking. These changes respond to the Commission concerns expressed in relation to TMM's rejected undertaking of November 2002. Telstra's supporting submission (which appears on the Commission's website), details the changes it has made to the non-price terms and conditions of access.

Readers are also referred to chapter 6.2 of the Commission's final decision of December 2003 rejecting Telstra's undertaking for a discussion of the Commission's then concerns with certain non-price terms and conditions.

The table below summarises the main changes made by Telstra to the non-price terms and conditions in its new December 2003 undertaking.

Term and condition	Clause(s)	Comment
Third party consents	Clause 2.4	Amendment to strengthen obligation on Telstra to assist access seekers to obtain third party consents
Enhancements and Extensions (Es and Es)	New clauses 3 and 4 of Attachment D of the Analogue Services Module (ASM)	New clauses disclosing indicative costs of headend equipment and Conditional

[3] s152CD

[4] s152CQ(5)

		Access Gateway (CAG)/SMS modifications
Es and Es	"Headend" at Annex One, Dictionary of Definitions	Amended to reflect closure of the Gold Coast headend
Timeliness of Es and Es	Clause 1.10(c) of the ASM; clause 1.25(c) of the Digital Service Module (DSM)	Amendment to provide for Telstra to be responsible for delays in the provision of Es and Es
Consultative and dispute resolution arrangements	Clause 1.6 of ASM	Amendment to oblige Telstra to consult with access seekers over Es and Es
Ownership of Es and Es	Clause 1.9 of the ASM and clause 1.24 of the DSM	Amendment to provide for access seekers to own Es and Es in certain circumstances
Termination of service modules	Clause 1.22(c) of the ASM; clause 1.41(c) of the DSM	Amendments to allow for access seeker to extend the provision of a service module beyond 2 years for up to a further 12 months
Creditworthiness	Clause 5.1(i) of Attachment B of Annexe Five	Amendment to prevent Telstra from rejecting an AS's application by forming a view that an access seeker was not creditworthy because it did not have a credit history
Dispute resolution	Clause 12.10	Amendments to Expert Committee process
Supply of STUs and fly cables	Clause 6.7(a) and Clause 6.5(a)(i)	Amendments to exempt access seeker from certain obligations in the event that equipment is Foxtel owned

3. Legislative Requirements

Form of the undertaking

Section 152BS provides that,

- the text of the terms and conditions may be specified in the undertaking;
- alternatively, the terms and conditions may be specified by adopting a set of model terms and conditions set out in the telecommunications access code, as in force from time to time.[5]

Criteria for acceptance of the undertaking

Section 152BV sets out the matters which the Commission must be satisfied of before it can accept the undertaking. Section 152BV applies where an ordinary access undertaking is given to the Commission and the undertaking does not adopt a set of model terms and conditions set out in the telecommunications access code.

TMM's undertaking is an ordinary access undertaking that does not adopt model terms and conditions of the telecommunications access code. Accordingly, s152BV is applicable to TMM's undertaking.

The requirements of s152BV are set out and considered below.

Public process

Sub-section 152BV(2)(a) of the Act provides that the Commission must not accept an undertaking unless:

- the Commission has published the undertaking and invited people to make submissions on the undertaking; and
- considered any submissions that were received within the time limit specified by the Commission when it published the undertaking.[6]

The TMM undertaking was lodged with the Commission on 23 December 2003. On 11 February 2004, the Commission issued a Preliminary View Paper on both the access undertaking and the public consultation process it intended to conduct in relation to the undertaking[7]. A TMM submission in support of its undertaking was posted on the Commission's website alongside the TMM undertaking.

Through the Preliminary View paper, the Commission invited submissions from interested parties which were required to be provided by 24 February 2004. The relatively short consultation period reflected the fact that most of the content of the undertakings had been exhaustively examined in the previous assessment processes relating to the November 2002 undertakings and that the Commission was especially seeking comment on the relatively small number of amendments/variations which had been made to form the new TMM and Foxtel undertakings. To this end, on its website, the Commission provided "marked-up" versions of the undertakings, clearly displaying

[5] s152BS(3) and (4)

[6] s152BV

[7] This paper was placed on the Commission's web site and announced via a media release.

the amendments made to the November 2002 undertakings, as well as a "clean" versions of the December 2003 undertakings.

Only one submission was received in response to the Preliminary View Paper. A joint submission from C7 Pty Limited (C7) and Seven Network Limited (Seven Network), dated 24 February 2004, contended that the TMM (and Foxtel) undertakings be rejected. In support of this contention, C7 and the Seven Network referred to and relied upon their prior submissions to the Commission, as listed in Appendix C of the Commission's December 2003 final reports. Relevantly, no new material was submitted to the Commission.

Consistency with the SAOs

Section 152BV(2)(b) provides that the Commission must not accept an undertaking unless the Commission is satisfied that the undertaking is consistent with the SAOs that are applicable to the carrier or provider.

The question of whether TMM's November 2002 undertaking was consistent with any applicable SAOs was considered at length in Chapter 5 of the Commission's December 2003 decision. The Commission concluded that the previous undertaking was consistent with all applicable SAOs and therefore complied with section 152BV(2)(b).

In its Preliminary View paper, the Commission expressed the view that the new TMM undertaking was also consistent with its applicable SAOs. This was because the new undertaking was unchanged with respect to the provisions relevant to the question of consistency with the SAOs. A similar view was expressed with respect to the new Foxtel undertaking.

Consistency with Ministerial pricing determination

Division 6 of Part XIC of the Act provides that the Minister may make a written determination setting out the principles dealing with price-related terms and conditions relating to the standard access obligations.[8]

Section 152BV(2)(c) provides that the Commission must not accept an undertaking dealing with price or a method of ascertaining price unless the undertaking is consistent with any Ministerial pricing determination.

To date, a Ministerial pricing determination has not been made. Accordingly, the Commission is not required to assess the undertaking against this criterion.

Whether terms and conditions are reasonable

Section 152BV(2)(d) provides that the Commission must not accept an undertaking unless the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable.

The Commission's assessment of whether the terms and conditions of TMM's undertaking are reasonable is considered in Chapter 6 of this decision.

[8] Section 152CH of the Act. 'Price-related terms and conditions' means terms and conditions relating to price or a method of ascertaining price.

Expiry date

Section 152BS(7) requires that the undertaking specify an expiry time and s152BV(e) provides that the expiry time of the undertaking must occur within 3 years after the date on which the undertaking comes into operation.

The Commission notes that clause 1.1 of TMM's undertaking provides that the undertaking term means the period from the undertaking commencement date until the date three years after that date.

4. Procedural Matters

Information relied upon

In making this decision, the Commission has had regard to the supporting submission of TMM and the submissions of C7 and the Seven Network, as made in the previous assessment process.

Decision-making period

The Commission has a 6 month statutory time frame by which it to make a decision to accept or reject the TMM undertaking. The undertaking was lodged with the Commission on 23 December 2003. Accordingly, the Commission has met its obligation in terms of the statutory timeframe for making a decision.

5. Consistency with the SAOs

Under s152BV(2)(b), the Commission must not accept TMM's access undertaking unless it is satisfied that the undertaking is consistent with the SAOs that are applicable to TMM.

The question of whether TMM's November 2002 undertaking was consistent with any applicable SAOs was considered at length in Chapter 5 of the Commission's December 2003 decision. The Commission formed the view that the proposed undertaking was consistent with TMM's SAOs.

The new undertaking is unchanged from the previous undertaking with respect to the question of consistency with the SAOs. Accordingly, the Commission considers the new undertaking to also be consistent with any SAOs applicable to TMM.

It is not necessary for this report to reproduce or re-argue the points and issues and analysis presented in the December 2003 final report. Readers are referred to that report for a comprehensive discussion and explanation of the Commission's position on this matter.

6. Reasonableness of terms and conditions

Section 152BV(2)(d) provides that the Commission cannot accept an undertaking unless it is satisfied that the terms and conditions are reasonable. In forming a view about whether particular terms and conditions are reasonable, the Commission must have regard to the range of matters set out in s152AH(1). These are:

- whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services (the LTIE);
- the legitimate business interests of the access provider, and its investment in facilities used to supply the declared service;
- the interests of all persons who have rights to use the declared service;
- the direct costs of providing access to the declared service;
- the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

In addition, the Commission may consider any other relevant matter.[9]

The Commission, in its final report rejecting the November 2002 TMM undertaking, applied what it considered to be some the relevant benchmarks associated with the term "reasonable" in the context of non-price terms and conditions of access. These included such concepts as certainty of access, timeliness and fairness and balance between the legitimate business interests of the C/CSP and those who have the right to use the declared service.

6.1 Assessment of Price terms and conditions

The price terms and conditions in TMM's original November 2002 undertaking were considered reasonable by the Commission in its December 2003 final report on that undertaking.

As TMM's new undertaking contains no changes to the price terms and conditions of access, the Commission's assessment of the price terms and conditions for TMM's new undertaking is that these terms and conditions continue to be reasonable.

Section 6.1 of the Commission's December 2003 final report provides a comprehensive analysis of the price term and conditions. It is not necessary for this report to reproduce the arguments and analysis presented in the December 2003 final report. Readers are referred to that report for a comprehensive discussion and explanation of the Commission's position on the price terms and conditions of TMM's undertaking.

9 Section 152AH(2) states that the matters listed in s. 152AH(1) do not limit the matters to which the Commission may have regard. Thus, the Commission may consider any other relevant matter.

6.2 Assessment of Non-price terms and conditions

In this section, the Commission's assessment of the non-price terms and conditions is discussed. However, the discussion focuses on those non-price terms and conditions in the new undertaking which comprise amendments or variations made by TMM following the Commission's decision on TMM's November 2002 undertaking. All other terms and conditions included in the November 2002 undertaking, and carried though into the December 2003 undertaking, are not discussed. By implication, the Commission considered these to be reasonable then and, in the Commission's view, they remain reasonable.

The non-price terms and conditions of particular importance that have been varied in the proposed December 2003 undertaking relate to:

- the need for third party consents;
- various aspects of the Es and Es requirements;
- rights to terminate service modules;
- creditworthiness requirements;
- dispute resolution processes; and
- responsibilities with respect to the STUs and fly cables used by access seekers.

Third party consents

Clause 2.4 of the Agreement's General Terms and Conditions (GTC) makes TMM's obligations to provide the declared analogue and/or the transitional digital carriage service conditional on the satisfaction of certain conditions precedent set out in the relevant Service Module. For the analogue service, for example, the ASM requires, inter alia, that

> Telstra has obtained the agreement of any third party to the extent necessary for the use of Intellectual Property belonging to that third party required for the supply of the Analogue Services under this Analogue Services Module, and the Customer has fully reimbursed Telstra for any licence fees or other amounts payable by Telstra to any such third party in relation to such agreement.

A similar sub-clause applies for the supply of transitional digital carriage services.

To supply the analogue service, TMM uses the intellectual property, under licence, of NDS Asia Pacific Pty Ltd (NDS) to provide conditional access services, while Convergys Solutions Limited (Convergys) provides TMM with SMS services on a similar basis.

TMM's agreements with NDS and Convergys are such that, for TMM to supply access seekers with these services, their consents to the use of their intellectual property is required prior to those services being supplied. Also, an access seeker will be required to reimburse TMM for licence fees that TMM is required to pay to NDS and/or Convergys for the use their intellectual property.

Clause 2.4 of the GTC requires TMM to provide "reasonable assistance" to access seekers to satisfy any conditions precedent. This includes the procurement of third party consents.

In its December 2003 final report, the Commission stated that it believed that it was important that there be a strong positive obligation on TMM to obtain the consents on behalf of the access seeker, particularly since it is TMM that is proffering the undertakings and without the consents, the undertakings are of no value.

The Commission's view was that that the previous form of words imposing an obligation on TMM to provide "reasonable assistance" to the access seeker should be rephrased so that there be a positive duty on TMM to "make all reasonable endeavours" to obtain the consents.

The Commission notes that TMM's new undertaking amends clause 2.4 in the manner recommended by the Commission.

Enhancements and Extensions

As noted above, clause 2.4 of the GTC makes TMM's obligations to provide the declared and/or the digital carriage service conditional on the satisfaction of certain conditions precedent set out in the relevant Service Module. A requirement of the ASM relates to so-called Enhancements and Extensions (Es and Es). The ASM Module requires, inter alia, that

> any Enhancements and Extensions have been completed and the Customer [the access seeker] has paid Telstra the full amount of the Charges for the required Enhancements and Extensions;…[10]

A similar sub-clause applies for the supply of the transitional digital carriage service[11].

Es and Es may be defined as equipment, software, systems and facilities that TMM considers are needed to supply access seekers with the declared analogue service *in addition* to that which is already used to provide a similar carriage service to FOXTEL.

The Es and Es identified by TMM for the analogue service include:

- the acquisition of headend equipment;
- amendments to TMM's SMS (used by FOXTEL); and
- the development of a suitable interface between the new access seeker's SMS and TMM's Conditional Access Gateway (CAG).

The creation and development of a separate new SMS by the access seeker is also required but is not covered by the TMM undertaking as this is a matter for the access seeker to independently acquire and develop.

Attachment D of the ASM specifies headend equipment which TMM anticipates will be required by an access seeker[12] while the other Es and Es for modification of TMM's SMS and CAG are described in general terms in that Attachment[13].

In its December 2003 final report, the Commission stated that it considered that uncertainty over the costs and timeliness of access in relation to the provision of Es and Es could unreasonably inhibit entry and limit competition and there was a case for

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[10] clause 1.5(b) of the ASM

[11] clause 1.20(b) of the DSM

[12] clause 1, Attachment D, ASM

[13] clause 2, Attachment D, ASM

improving the TMM undertaking by requiring greater disclosure of the likely costs of access. The discussion below under "Headend Es and Es" and "CAG and SMS modifications" assesses the extent to which the new TMM undertaking addresses these concerns.

Headend Es and Es

In its December 2003 final report, the Commission stated that it considered that the TMM undertaking should disclose information about the costs of headend Es and Es. Such disclosure would provide an indication to access seekers of the charges it would face for headend Es and Es and thereby reduce some of the uncertainty surrounding access costs. It would also provide greater certainty for access seekers in terms of the necessary supporting arrangements for supply of the 10 analogue channels to access seekers.

TMM's new submission discloses indicative costs that access seekers would face for the provision of headend equipment. Attachment D of the ASM now includes high level aggregated costs of headend equipment, as well as other costs in relation to upgrading the CAG and modifying TMM's SMS (discussed below). Also, to reflect the so-called Gold Coast Option[14] arrangement, the Commission notes that the estimated overall cost of headend equipment has been revised downward and the locations included in the definition of "Headend" in Annexe One have been amended.

The Commission is satisfied that the disclosure of costs in relation to headend Es and Es in the new TMM undertaking reduces some of the uncertainty facing access seekers about the costs of Es and Es needed to support the provision of the analogue service.

CAG and SMS modifications

Clause 2 of Attachment D of the ASM specifies, in general terms, that the Es and Es needed to support carriage of the declared service would include modifications to TMM's CAG and its SMS. As an improvement on the undertaking rejected in December 2003, the Commission notes that the new undertaking provides an estimate of the anticipated costs of this work.

The Commission understands that costs for SMS and CAG modifications would depend on a particular access seeker's expected usage and business requirements and that this could not be known in advance of access being provided. However, it is important that prospective access seekers be provided with some information about the likely costs of this aspect of access.

The Commission is satisfied that the disclosure of information about CAG and SMS modifications reduces some of the uncertainty facing access seekers about the costs of Es and Es needed to support the provision of the analogue service.

Timeliness of Es and Es

The Commission considers that timely access is important for the development of competition and the LTIE. The ordering and installation of necessary Es and Es has the

[14] This arrangement was discussed at length in the December 2003 final report (see chapter 6.2). Briefly, it involves making the scramblers currently used by TMM to broadcast to the Gold Coast area available for access seekers.

potential to be time consuming and this process could unreasonably delay access unless protections are in place to ensure that the potential for delays is minimised.

In its December 2003 final report, the Commission expressed a concern with clause 1.10(c) of the ASM and clause 1.25(c) of the DSM which both require access seekers to acknowledge that "TMM is not responsible for any delay in the supply of Es and Es". These clauses could, potentially, cause unnecessary delays because TMM has no incentive to ensure there are no delays.

The Commission considers that the amendments to the aforementioned clauses in the new undertaking addresses its concern.

Consultative and dispute resolution arrangements

Clauses 1.6-1.12 of the ASM and clauses 1.21-1.27 of the DSM set out the process under which TMM will provide Es and Es needed to support access to the declared analogue and transitional digital service respectively.

In its December 2003 final report, the Commission noted that various provisions operated to provide for consultation and dispute resolution to assist access seekers and TMM to develop access arrangements, including Es and Es. However, it remained concerned that there was no explicit obligation on TMM to consult with access seekers over Es and Es. The Commission notes that TMM has amended clause 1.6 of the ASM (and clause 1.21 of the DSM) to provide for such an obligation.

Ownership of E and E equipment by access seekers in certain circumstances

Clause 1.9 of the ASM and clause 1.24 of the DSM provide for TMM to own all Es and Es.

In its December 2003 final report, the Commission stated that it considered the TMM undertaking should be amended to qualify the right of TMM to own all Es and Es. This would allow access seekers to own E and Es in certain limited circumstances, such as where Es and Es were a discrete addition to the analogue service and where removal of such equipment would not affect the provision of the service to Foxtel and/or other access seekers.

In responding to its concern, TMM's new undertaking includes new clauses 1.9A-1.9D of the ASM and clauses 1.24A-1.24D of the DSM which provide for Es and Es to be owned by access seekers in certain prescribed circumstances. The Commission is satisfied that these amendments meet its concerns in relation to the ownership of Es and Es.

Termination of service modules

The amendment to clause 1.22(c) of the ASM gives TMM the right to terminate the provision of the analogue service if arrangements for provision of the service cannot be completed within 2 years, subject to clause 1.24. This latter clause has been introduced into the TMM undertaking to give access seekers the right to extend this period for a further 12 months, providing reasonable grounds can be established for such an extension.

Clause 1.24 is a response to the view expressed by the Commission in its December 2003 final report that an access seeker should have a right to extend the 2 year period, providing it can demonstrate that there are reasonable grounds for requiring an extension of time and that substantial progress has been made toward

accomplishing access. The new clause would be subject to the dispute resolution provisions relating to Technical Disputes.

An identical arrangement has been instituted for the transitional digital services in the form of an amended clause 1.41(c) and a new clause 1.42A for the DSM.

The Commission considers the amendments and inclusions to be reasonable.

Creditworthiness

Clause 5.1(i) of Attachment B of Annex 5

Clause 5.1(i) of Attachment B of Annex 5 gives TMM the right to reject an application for participation in the analogue channel allocation process if

> there are reasonable grounds to believe that the Customer would fail to a material extent, to comply with the Agreement (examples of reasonable grounds for such a belief include evidence that the Customer is not creditworthy and repeated failures by the Customer to comply with the terms and conditions on which the same or similar access has been provided (whether or not by Telstra).

The Commission notes that TMM's new undertaking includes an amendment to this clause which would prevent TMM from using the mere absence of a credit record as a reasonable ground upon which TMM could reject an application. This amendment responds to a Commission's recommendation in its December 2003 final report that such an amendment be made.

Dispute resolution processes

Clause 12.10 establishes the rules under which an Expert Committee (EC) may be formed to resolve disputes under the Agreement.

In essence, an EC can be formed comprising equal representatives of the parties to the access agreement plus an independent chairperson. Sub-clause 12.10(e) provides for an EC to make determinations in relation to disputes by

> …unanimous or majority decision with each appointee having one vote and the chairperson having a casting vote.

In its December 2003 final report, the Commission outlined its concerns with the then proposed EC arrangements, including that its powers could be unduly circumscribed by excessive rights to terminate its application. However, it also stated that it was satisfied with a varied form of this clause, as proposed by TMM for its digital agreement, for the analogue undertaking.

Clause 12.10 has now been varied to conform to the equivalent clause in the digital agreement, as supported by the Commission in its December 2003 report. A deadlock over the terms of reference of an EC can now be resolved by the independent chairperson (rather than the EC process being terminated) and the EC process can now be extended (rather than being prematurely terminated). The Commission is therefore now satisfied that the dispute resolution arrangements are reasonable.

Supply of STUs and fly cables

The Commission, in its December 2003 final report, drew attention to clauses 6.7(a) and 6.5(a)(i) relating to an access seeker's responsibilities in relation to fly cables and STUs (Customer Equipment) as they impact on the Telstra network.

In short, the Commission held that, in circumstances where Customer Equipment and the interface between such equipment and the HFC network solely involves the use of FOXTEL equipment, then it, rather than the access seeker, should be held accountable for the effects of such equipment on the Telstra network rather than the access seeker.

The Commission considers the amendments proposed by TMM for these clauses have addressed this concern.

Other terms and conditions

As foreshadowed in the December 2003 final report, TMM has made a number of changes to other terms and conditions[15], as supported by the Commission in its December 2003 final report.

Clauses in the DSM have also been amended as a consequence of the exemption granted by the Commission under s152ATA of the Act on 12 December 2003. TMM's submission in support of its undertaking makes specific reference to these amendments.

6.3 Conclusion as to reasonableness

The Commission considers that the deficiencies with the non-price terms and conditions of access in the November 2002 undertaking have been remedied by the amendments included in the new December 2003 undertaking.

The Commission is, therefore, satisfied that the proposed terms and conditions of access covered by the TMM undertaking are, overall, reasonable.

[15] clauses 7.1(a) and 10.13.

6. Commission's decision on the undertaking

The Commission is of the view that the TMM undertaking is consistent with the SAOs applicable to TMM and that the HFC access price is reasonable. These views were formed by the Commission in its assessment of the November 2002 undertaking and there have been no changes to the new December 2003 undertaking which would provide reason to change this view.

The Commission rejected the November 2002 undertaking on the basis that the Commission was not satisfied that the terms and conditions of the undertaking were, overall, reasonable. However, the Commission stated that, if suitable amendments were made to the non-price terms and conditions, it would reconsider the matter and could form a different view and accept a TMM undertaking.

The Commission considers that the deficiencies with the non-price terms and conditions of access in the November 2002 undertaking have been remedied by the amendments included in the new December 2003 undertaking.

The Commission is, therefore, satisfied that the proposed terms and conditions of access covered by the TMM undertaking are, overall, reasonable. Hence, pursuant to s152BU(3) of the Act, the Commission gives notice that it accepts the TMM undertaking, as submitted by TMM on 23 December 2003.

Appendix A: Section 152AR - Standard Access Obligations

(1) This section sets out the "standard access obligations".

Access provider and active declared services

(2) For the purposes of this section, if a carrier or a carriage service provider supplies declared services, whether to itself or to other persons:

(a) the carrier or provider is an access provider; and

(b) the declared services are active declared services.

Supply of active declared service to service provider

(3) An access provider must, if requested to do so by a service provider:

(a) supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and

(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and

(c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

Limit on paragraph (3)(a) obligation

(4) Paragraph (3)(a) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have any of the following effects:

(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the request was made;

(b) preventing the access provider from obtaining a sufficient amount of the service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made;

(c) preventing a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person's actual requirements;

(d) depriving any person of a protected contractual right.

Ordering and provisioning—paragraph (3)(b)

(4A) To avoid doubt, ordering and provisioning are taken to be aspects of technical and operational quality referred to in paragraph (3)(b).

(4B) The regulations may provide that, for the purposes of subsection (4A), a specified act or thing is taken to be ordering.

Note: For specification by class, see subsection 46(2) of the Acts Interpretation Act 1901.

(4C) The regulations may provide that, for the purposes of subsection (4A), a specified act or thing is taken to be provisioning.

Note: For specification by class, see subsection 46(2) of the Acts Interpretation Act 1901.

Interconnection of facilities

(5) If an access provider:

(a) owns or controls one or more facilities; or

(b) is a nominated carrier in relation to one or more facilities;

the access provider must, if requested to do so by a service provider:

(c) permit interconnection of those facilities with the facilities of the service provider for the purpose of enabling the service provider to be supplied with active declared services in order that the service provider can provide carriage services and/or content services; and

(d) take all reasonable steps to ensure that:

(i) the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself; and

(ii) if a standard is in force under section 384 of the Telecommunications Act 1997—the interconnection complies with the standard; and

(e) take all reasonable steps to ensure that the service provider receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

Provision of billing information

(6) If a service provider uses active declared services supplied by an access provider in accordance with subsection (3), the access provider must, if requested to do so by the service provider, give the service provider billing information in connection with matters associated with, or incidental to, the supply of those active declared services.

Timing and content of billing information

(7) The billing information referred to in subsection (6) must:

(a) be given at such times or intervals as are ascertained in accordance with the regulations; and

(b) be given in a manner and form ascertained in accordance with the regulations; and

(c) set out such particulars as are ascertained in accordance with the regulations.

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.

Exceptions

(9) This section does not impose an obligation on an access provider if there are reasonable grounds to believe that:

(a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or

(b) the access seeker would fail, in connection with that obligation, to protect:

(i) the integrity of a telecommunications network; or

(ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

Examples—paragraph (9)(a) grounds

(10) Examples of grounds for believing as mentioned in paragraph (9)(a) include:

(a) evidence that the access seeker is not creditworthy; and

(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the access provider).

Starting date for obligations

(11) An obligation imposed by this section does not arise before 1 July 1997.

Definitions

(12) In this section:

"pre-request right", in relation to a request made for the purposes of paragraph (3)(a), means a right under a contract, or under a determination (within the meaning of Division 8), that was in force at the time when the request was made.

"protected contractual right" means a right under a contract that was in force at the beginning of 13 September 1996.

Appendix B: The Declared Service

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:

(i) an end-user's television set;

(ii) conditional-access customer equipment of an end-user, or potential end-user, of a subscription television service;

(iii) a wall socket at the premises of an end-user, or potential end-user, of a subscription television service;

(iv) 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.