

Australian Telecommunications Regulation



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Edited by
Alasdair Grant
David Howarth

4th Edition



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COMMUNICATIONS LAW CENTRE, UTS

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Foreword

The Communications Law Centre, UTS, is an independent, not for profit, public interest centre, specialising in communications and media law and policy.

Since our foundation in 1988, throughout a period of intensive change, the Communications Law Centre (CLC) has been doing research, education, and advocating communications law and policy reforms for the benefit of all Australians.

Telecommunications have long played a key role in the social fabric of our liberal democracy and the economy. Today telecommunications have become a fundamental element of the infrastructure on which we are building the emerging national information society and the global knowledge economy. Everyone now considers a range of communications services to be a basic utility of everyday life and commerce. Fair and equitable access to reliable communications is necessary to citizens, consumers and business' ability to function in a network digital communications environment. It is also a basis of good government. Access to telecommunications has become so important to citizens' capacity to participate actively in society that access has come to be regarded by some as a human right. The way in which Australia manages and regulates information and communications technology and services is playing a decisive role in our social advancement, our capacity for innovation and the growth of new services that will drive our future prosperity.

The fourth edition of Australian Telecommunications Regulation will be a valuable and reliable resource for policy makers, lawyers and industry, as well as interested people who are looking for an overview of this key sector. It is remarkable that while we are living in a time of revolutionary change in telecommunications, nonetheless many of the policy, structural and regulatory issues which confront us today are very similar to the concerns which our forebears have faced throughout the history of telecommunications in Australia.

My thanks and appreciation go to authors and editors, Alasdair Grant and David Howarth and to the contributing authors and reviewers. This book offers readers information and perspectives that will contribute to informed discussion and policy debate about communications reform and the development of telecommunications in Australia.

Professor Michael Fraser AM
Director
Communications Law Centre
University of Technology, Sydney
December 2011

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CCH Acknowledgements

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Alasdair Grant and David Howarth
Editors
December 2011

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Introduction

It has been almost two decades since the introduction of facilities-based competition in Australia, and nearly fifteen years since the commencement of a fully liberalised environment. As this edition is published, the ACCC is assessing regulatory filings that underpin arguably the most radical, large-scale government intervention yet witnessed in a fully liberalised telecommunications market.

The NBN initiative – the deployment of a government owned and funded national broadband network that will become the near-monopoly supplier of wholesale access services – and the attendant structural regulation of Telstra dominates the current policy regulatory landscape. In introducing the previous edition of this book, we commented that the liberalised regulatory environment had largely failed to effect a transformation from a traditional monopoly model to one characterised by significant levels of facilities-based competition. It is ironic and perplexing that the response to this failure is to revert to this former model by effectively re-nationalising the national fixed network.

To date, public debate about this issue has focussed primarily on the extent to which the NBN initiative and the benefits it will deliver represent value for the citizenry and consumers. Outside limited industry circles, there has been little discussion about the potentially negative effects arising from the abandonment of the policy commitment to facilities-based fixed network competition. These concerns arise not only from the reversion to the NBN's monopoly supply conditions, but to the broader, symbiotic compact between the triumvirate of the government, Telstra and NBN Co required to give effect to these arrangements. Although newly introduced regulations are designed to enforce a level playing field in the supply of wholesale access services, the regulatory environment remains, as always, subject to government policy measures. The government's investment in the NBN Co and in the overall success of the initiative will inevitably, over time, create pressures to leverage the NBN Co's monopoly power. Arguably, these pressures are already being felt, including in relation to the "level playing field" provisions restricting the retail supply of new competitive broadband services.

2011 also heralds the introduction of reforms signalling a shift towards more regulated and streamlined competition and consumer regulatory environments. In regard to the access regime, the limited reforms introduced in 2002 and 2005, which modified but retained the "negotiate-arbitrate" model (whereby only access providers were able to take the initiative in setting unilateral terms and conditions, with the ACCC being forced into a purely reactive role), are now superseded by the 2010 reforms abandoning this model in favour of new regulatory powers and

obligations to set up-front regulated terms and conditions of access. The ACCC must now determine terms and conditions for declared services and has been granted supplementary powers both to set interim terms and, in urgent situations, to impose targeted, temporary rules without being subject to procedural fairness.

In the field of consumer law, the long-standing weakness of the co-regulatory model to address ongoing areas of consumer grievance has prompted the ACCC to enforce general consumer protection laws, especially legislation covering misleading and deceptive conduct, unfair practices and unconscionable conduct. The communications regulator (ACMA) and industry have recently taken initial steps towards correcting some of the regime's shortcomings.

Market developments have also impacted regulatory activity, particularly in regard to spectrum management, where the acceleration of demand for data-intensive mobile services continues to place pressure on spectrum bands. Australia's pioneering approach to spectrum allocation, introduced following the introduction of the *Radiocommunications Act 1992*, has left it as well-placed as any market to address the so-called "capacity crunch". However, the radiocommunications regulatory regime remains ill-equipped for the impending challenges of convergence: the sooner policymakers meaningfully come to grips with this topic, the better.

Australian Telecommunications Regulation is now divided into three parts.

Section A provides an overview of the economic, technology and industry structure contexts. The technology chapter is new, and designed to assist readers with an understanding of the key services and network architectures being discussed throughout the text.

Section B covers the core regulatory provisions, addressing the access and anti-competitive conduct competition law regimes and the regulatory framework for Telstra's structural separation, spectrum management, universal service and consumer issues. The extent of regulatory reform and market developments occurring since the previous edition has required these chapters to be substantially revised. In particular, the anti-competitive conduct chapter has been updated to address the significant changes to the structure of the regime and the new competition notice cases; whereas the access chapter has effectively been rewritten and incorporates a new section addressing structural regulation. We refer readers seeking detailed historical information, especially about the operation of the access regime prior to 2011, to the third edition of this book.

Section C comprises a new section on comparative law, covering the European Union, United Kingdom, United States and New Zealand. Each country bears unique political, economic, market, geographic and demographic characteristics, necessarily responds to these challenges uniquely and therefore offers unique

insights. Comparative analysis has always been an important part of regulatory debates in Australia and we hope that these new sections will contribute to a continuation of this tradition.

Almost fifteen years have now passed since the first edition of this text. Inevitably, in an area of significant change, some older material has had to be excised to ensure the content remains relevant and accessible. Our approach in this edition (as in previous editions) has been to preserve some of the history as important context. Rather than set this in the amber of a single chapter on historical policy development, the relevant parts of this history have now been contextualised into the general text. Again, readers seeking a more detailed and narrative account of the development of the regulatory environment to 1997 should consult the third edition of this book (available through the University of New South Wales: www.unsw.edu.au).

The law is stated on the basis of materials available to the authors at 1 November 2011.

Alasdair Grant and David Howarth
Editors
December 2011

Acronyms

1999 Amendments	Amendments effected by the <i>Telecommunications Legislation Amendment Act 1999</i>
2002 Amendments	Amendments effected by the <i>Telecommunications Competition Act 2002</i>
2009 MTAS Declaration	Final Report on reviewing the declaration of the mobile terminating access service
2010 Amendments	Amendments effected by the <i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010</i>
2011 Fixed Services Discussion Paper	Public inquiry to make final access determinations for the declared fixed line services – Discussion Paper
2011 Fixed Services FAD	Inquiry to make final access determinations for the declared fixed line services – Final Report
4G	Fourth generation mobile standard
ACA	Australian Communications Authority (predecessor to ACMA)
ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACIF	Australian Communications Industry Forum (predecessor to Communications Alliance)
ACMA	Australian Communications and Media Authority
ACMA Act	<i>Australian Communications and Media Authority Act 2005</i>
ADC	Access deficit contribution
ADMA	Australian Direct Marketing Association
ADR	Alternative dispute resolution
ADSL	Asymmetric Digital Subscriber Line
ADSL2+	An advanced version of ADSL with higher capacity
AMPS	Advanced Mobile Phone System (now defunct analogue mobile network)
AMTA	Australian Mobile Telecommunications Association
APPs	Access pricing principles
APT	Asia Pacific Telecommunity
ARPANET	Advanced Research Projects Agency Network
ARPU	Average revenue per user
ATUG	Australian Telecommunications Users Group

AUSTEL	Australian Telecommunications Authority (predecessor to ACCC/SMA)
AWS	Advanced Wireless Services
BBM	Building block model
BEREC	Body of European Regulators for Electronic Communications
BPL	Broadband over powerline
BROC	Binding rules of conduct
BSA	<i>Broadcasting Services Act 1992</i>
CA	Comms Alliance
CAC	Communications Access Co-ordinator
CAC Scheme	CA Code Administration and Compliance Scheme
CAF	Connect America Fund (US)
CALEA	Communications Assistance for Law Enforcement Act of 1994 (US)
CAN	Customer access network
CAT	Competition Appeal Tribunal (UK)
CCA	<i>Competition and Consumer Act 2010</i>
CDMA	Code Division Multiple Access (a digital mobile phone system)
CDN	Content delivery network
CLI	Calling line identification
CMRS	Commercial mobile radio service (US)
COA/CAM	Chart of Accounts/Cost Allocation Manual
CODEC	COder-DECoder
CPNI	Customer proprietary network information
CPP	Calling party pays (UK)
CPRs	Telecommunications Cabling Provider Rules 2000
CSER	Communications Security and Enforcement Roundtable
CSG	Customer Service Guarantee
CSG Scheme	Customer Service Guarantee Scheme
CSP	Carriage service provider
CTN	Consumers' Telecommunications Network (predecessor to ACCAN)
DARPA	Defense Advanced Research Projects Agency
DBCDE	Department of Broadband, Communications and the Digital Economy
DDA	<i>Disability Discrimination Act 1992</i> (Consumer only)
DDAS	Digital Data Access Service

DFAT	Department of Foreign Affairs and Trade
DNS	Domain name system
DOCSIS	Data Over Cable System Interface Specification
DSL	Digital Subscriber Line
DSLAM	DSL access multiplexer
DTCS	Domestic transmission capacity service
EBITDA	Earnings before interest, tax, depreciation and amortisation
ECPR	Efficient Component Pricing Rule
EMC	Electromagnetic compatibility
EME	Electromagnetic energy
EMR	Electromagnetic radiation
EOI	Equivalence of inputs (UK)
ESA	Exchange service area
F2M	Fixed to mobile calls
FAD	Final access determination
FAN	Fibre access node
FDH	Fibre Distribution Hub
FIP	Facility installation permit
FLRN	Freephone and Local Rate Number Portability
FLSM	Fixed line services model
FMC (or F2M)	Fixed-to-mobile convergence
FPP	Fixed principles provision
FPTC	Fixed principles term or condition
FSA	Fibre serving area
FSRD	Functional Separation Requirements Determination
FSU	Functional separation undertaking
FTC	Federal Trade Commission (US)
FTM	Fixed-to-mobile
FTTC	Fibre-To-The-Curb
FTTH	Fibre to the Home
FTTN	Fibre-To-The-Node
FTTP	Fibre-To-The-Premises
Gbps	Gigabits per second
GPON	Gigabit Passive Optical Network
GPRS	Global packet radio system
GSM	Global System for Mobile Communications (orig. Fr: Groupe Spécial Mobile)
GST	Goods and services tax

HFC	Hybrid Fibre-Coaxial
HSPA	High-speed packet access
IAD	Interim access determination
IAP	Internet access provider
ICANN	Internet Corporation for Assigned Numbers and Names
ICC	Interstate Commerce Commission
ICT	Information and communications technology
IETF	Internet Engineering Taskforce
IIA	Internet Industry Association
ILEC	Incumbent Local Exchange Carrier
IM	Instant messaging
IOG	Independent Oversight Group (NZ)
IP	Internet Protocol
ISDN	Integrated Services Digital Network
ISPs	Internet service providers
ITU	International Telecommunications Union
ITU-R	International TelecommunicationS Union Radiocommunications Sector
ITU-T	International Telecommunications Union Standardization Sector
ITU-T E164	ITU standard on international telephone numbering
kbps	Kilobits per second
kHz	Kilohertz
L2BS	Layer 2 bitstream service
LAN	Local Area Network
LCS	Local call service
LEC	Local exchange carrier (US)
LFC	Local Fibre Company
LLU	Local loop unbundling (NZ)
LNP	Local number portability
LRIC	Long run incremental cost
LSS	Line sharing service
LTE	Long Term Evolution
LTIE	Long-term interests of end-users
Mbps	Megabits per second
MCA	Ministry of Consumer Affairs (NZ)
MDF	Main distribution frame
MDS	Multipoint distribution system
MED	Ministry of Economic Development (NZ)