27 May 1999

Mike Woods

Commissioner

Productivity Commission

PO Box 80

BELCONNEN ACT 2616

Dear Mr Woods

Thank you for the opportunity to provide a submission to Productivity Commission's inquiry into International Telecommunications Market Regulation. Following is the Australian Competition and Consumer Commission's (ACCC's) submission to the inquiry. I apologise for the delay in providing this submission.

The submission primarily outlines the ACCC's functions and responsibilities as competition regulator for telecommunications in Australia. The submission complements previous communication between staff of the ACCC and Productivity Commission. The ACCC has already forwarded to Productivity Commission staff a draft version of a speech that Mr Rod Shogren, ACCC Commissioner, gave in Melbourne on 13 May 1999. In addition to the submission, I also enclose, for your information, a final version of this speech and the speech Mr Shogren gave at the NOW99 Conference on 20 May 1999. While both concern domestic

telecommunications regulation, they may facilitate the Productivity Commission's analysis of telecommunications in the context of the International Telecommunications Market Regulation inquiry.

In the international context, the ACCC has some concerns about, in particular, the imbalance of international Internet traffic settlement arrangements that currently exists in favour of the United States. The ACCC has chosen not to comment on this matter in its submission to the Productivity Commission at this time, but has had informal discussions with the Department of Communications, Information Technology and the Arts. The ACCC will consider copying to the Productivity Commission any relevant correspondence it sends to the Department.

If you have any questions about the ACCC's submission or other telecommunications matters, please do not hesitate to contact Mr Ken Walliss on (02) 6240 1114.

Yours sincerely

Michael Cosgrave

Senior Assistant Commissioner

Telecommunications Unit

Australian Competition and Consumer Commission

Submission to the Productivity Commission's Inquiry into International Telecommunications Market Regulation

1 Introduction

One of the main elements of the 1997 telecommunications reforms, which saw the introduction of the new *Telecommunications Act 1997* and the new Parts XIB and XIC

in the *Trade Practices Act 1974*, was facilitate competition in the domestic telecommunications industry. Increased competition between domestic telecommunications firms drives improvements in productivity, lower prices and increased levels of innovation.

The Australian Competition and Consumer Commission (ACCC) has responsibility for competition regulation in the domestic telecommunications industry. It has responsibilities under both the *Telecommunications Act 1997* and *Trade Practices Act 1974* in relation to:

- **competition safeguards**: the competitive conduct of domestic telecommunications carriers and carriage service providers;
- **unacceptable international conduct**: unacceptable conduct by international telecommunications operators; and
- **access provisions**: the regulation of access to telecommunications infrastructure services.

This submission is the result of the ACCC's experience in undertaking its telecommunications regulatory responsibilities and, where relevant, its other regulation and competition enforcement experience. The submission seeks to assist the Productivity Commission in addressing the many issues raised in its *International Telecommunications Market Regulation – Issues Paper*.

The submission is structured as follows. Part 2 of the submission outlines the competitive safeguard provisions in the Trade Practices Act. Part 3 outlines the unacceptable international conduct provisions in the Telecommunications Act. Part 4 outlines the access provisions of the Trade Practices Act, including a discussion of industry self-regulatory processes and the relationship between the access and the competitive conduct provisions. Finally, Part 5 discusses the ACCC's approach to market definition in the context of Trade Practices Act investigations and declaration inquiries.

The ACCC publications referred to in this submission are available on the ACCC's website <www.accc.gov.au>.

2 Competitive safeguard provisions

The ACCC is responsible for administering Part XIB of the Trade Practices Act (and Part IV of the Act – the general competitive conduct provisions – which are also relevant to the telecommunications sector).

The Part XIB competitive safeguard provisions prohibit carriers or carriage service providers with market power using that market power with the effect of substantially lessening competition in a telecommunications market (known as the competition rule), or contraventions of relevant Part IV competitive conduct provisions where the conduct relates to a telecommunications market.[1]

The ACCC can issue a 'competition notice', which is *prima facie* evidence that the carrier or carriage service provider has breached the provisions of Part XIB. If the carrier or carriage service provider continues with the conduct that is the subject of the notice, the ACCC can seek, before the Federal Court, penalties of up to $1 million per day in addition to a penalty of up to $10 million for contravention of the competition provisions.[2]

The competition notice scheme is intended to provide the ACCC with a relatively swift mechanism to respond to anti-competitive conduct. However, it has become clear the scheme has some practical shortcomings which inhibit the ACCC's ability to issue competition notices expeditiously. The ACCC has raised these with the Government and the Government has recently announced it will be making amendments to the competition notice provisions to provide for more expeditious action.

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1 Section 151AJ of the *Trade Practices Act 1974*.

2 *Ibid*, section 151BX.

2.1 Examples of anti-competitive conduct

The ACCC's draft Information Paper *Anti-competitive conduct in telecommunications markets (19 May 1997)* sets-out examples of conduct which may contravene the competition rule. As noted in the draft Information Paper, in assessing whether such conduct contravenes the Trade Practices Act, the ACCC will undertake an assessment of the particular facts involved, and consider situational variables such as market structure and technological factors.

These examples of conduct are:

- **Predatory pricing**: where a carrier or carriage service provider sacrifices short term profit by setting prices below the cost of production, with the effect of eliminating or reducing competition;

- **Foreclosure (mobility restraints)**: pricing arrangements which inhibit a customer from moving to an alternative supplier or attempt to lock a customer into a long term supply arrangement. These may have the effect of discouraging or stopping entry by a competitor into a telecommunications market, thereby substantially lessening competition in that market;

- **Refusal to supply goods or services**: where a good or service is an important input to a competitor's product, a refusal to supply that input may have the effect of preventing a person from engaging in competitive conduct. Refusal to supply could be an outright refusal or constructive refusal (for example, pricing the input at rates that make the competitor's product commercially non-viable);

- **Bundling (vertical restraints)**: bundling of goods or services or other forms of vertical constraints (such as tying of a service) may be anti-competitive, as it may allow a firm to leverage market power from goods or services it has market power over to goods and services that are in competitive markets; and

- **Parallel pricing**: parallel pricing occurs when two or more carriers or carriage service providers vary their price for a good or service by essentially the same

amount and essentially at the same time. It is not always clear whether such pricing indicates competitive behaviour or is the result of collusion between a group of suppliers to avoid effective price competition.

Further detail of these examples of anti-competitive conduct is in the Information Paper.[3] The ACCC will be shortly releasing an updated Information Paper that draws on its experience in administering the competitive safeguards regime.

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[3] *Anti-competitive conduct in telecommunications markets (19 May 1997)*, at pages 27-31.

3 Unacceptable international conduct provisions

In introducing the 1997 reforms to the telecommunications industry, the Government recognised the potential for telecommunications firms based overseas to take unfair advantage of the liberal market in Australia. The two key concerns are the abuse of market power by overseas telecommunications operator and the unfair advantage that international service providers operating in Australia might derive through affiliation with an overseas partner.[4]

Division 3 of Part 20 of the *Telecommunication Act 1997* provides that international telecommunications operators[5] can not engage in unacceptable conduct. Unacceptable conduct is the use of market power or of any legal rights or legal status, or engaging in any other conduct, in a manner that is, or is likely to be, contrary to Australia's national interest.[6]

To prevent, mitigate or remedy unacceptable conduct engaged in by international telecommunications operators, the Minister may make Rules of Conduct:[7]

- regulating carriers and/or carriage service providers in their dealings with international telecommunications operators;

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4 *Explanatory Memorandum, Telecommunications Bill 1997*, Division 3 of Part 20.

5 International telecommunications are operators that provide carriage services from overseas that may originate, terminate or pass through Australia, the supply of goods or services for use in connection with the provision of such carriage services or the installation, maintenance, operation or provision of access to a telecommunications network or facility where the network or facility is used to provide such a carriage service: sub-section 367(6) of the *Telecommunications Act 1997*.

6 *Ibid*, sub-section 367(1).

7 *Ibid*, sub-section 367(2)

- authorising the ACCC to make determinations of a legislative nature regulating carriers or carriage service providers;

- authorising the ACCC to give directions of an administrative nature regulating carriers or carriage service providers;

- requiring carriers or carriage service providers to comply with ACCC determinations and administrative directions; and

- authorising the ACCC to make information available to the public, a specified class of persons or a specified person if, in the opinion of the ACCC, the disclosure of the information would promote the fair and efficient operation of a market or otherwise be in the public interest.

The ACCC is the general administrator of the Rules of Conduct in force.[8] It is required to review and report each financial year to the Minister on the operation of Division 3 of Part 20.[9]

On 18 June 1997, the Minister made the *Rules of Conduct about dealings with international telecommunications operators No. 1 of 1997*, which took effect on 1 July 1997. The Rules of Conduct provide that:

- in dealings with an international telecommunications operator, a carrier or carriage service provider must use all reasonable endeavours to prevent, mitigate or remedy unacceptable conduct engaged in by the operator;[10]

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8 *Ibid*, section 368.

9 *Ibid*, sub-section 372(1). In 1997-98, this was done in the ACCC's *Competitive Safeguards 1997-98* report (at page 49).

10 Clause 5 of the *Rules of Conduct about dealings with international telecommunications operators No. 1 of 1997*.

- the ACCC can request information from a carrier or international telecommunications operator about agreements in relation to charges or telecommunications traffic, if the request relates to an investigation by the ACCC of a contravention of the Rules of Conduct;[11]

- the ACCC may, after investigating a contravention of the Rules of Conduct and finding that dealings between the carrier or carriage service provider and an operator will have the effect of allowing the operator to engage in unacceptable conduct, give a direction to a carrier or carriage service provider for the purpose of preventing, mitigating or remedying the unacceptable conduct.[12]

- the ACCC may make a written determination of a legislative character imposing requirements, prohibitions or restrictions on carriers or carriage service providers with a view to preventing, mitigating or remedying unacceptable conduct engaged in by international telecommunications operators.[13]

It is expected that the ACCC will administer these rules consistent with Australia's international obligations.[14] As yet, the ACCC has not undertaken any significant investigations of potential unacceptable international conduct. It would do so, however, if it was to receive substantiated complaints, or following its own monitoring of the industry.

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11 *Ibid,* clause 6.

12 *Ibid,* clause 9.

13 *Ibid,* clause 10.

14 *Explanatory Statement, Rules of Conduct about dealings with international telecommunications operators No. 1 of 1997.*

4 Telecommunications access regime

Part XIC of the Trade Practices Act establishes the access regime, which allows third parties to gain access to services that are necessary inputs in providing telecommunication services to end-users. The primary objective of Part XIC of the Trade Practices Act is to promote the long-term interests of end-users by:[15]

- promoting competition in telecommunication markets;
- 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, telecommunications infrastructure.

There is no general right of access to telecommunications infrastructure services, or for the ACCC to set wholesale access prices. Rather, particular services must be "declared" to be subject to access regulation. The ACCC is responsible for declaring services. Declaration follows an ACCC public inquiry process or the recommendation of the Telecommunications Access Forum (TAF).[16]

The main infrastructure services considered by the ACCC for declaration have been:

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[15] Sub-section 152AB(2) of the *Trade Practices Act 1974*.

[16] *Ibid*, Division 2 of Part XIC. Also, as a transitional measure at the commencement of the 1997 reforms, the ACCC specified services which were supplied to carriers by other carriers prior to 1 July 1997 and which the ACCC decided should be deemed to be declared and therefore subject to the new regime.

- Integrated Services Digital Network (ISDN) originating and terminating services; and

- Local telecommunications services.

Integrated Services Digital Network is a digital communications service that uses copper wire to carry information such as voice, data, high quality sound, text and video. The ISDN originating and terminating services were declared in November 1998.

Local telecommunications services are inputs to retail local telephony services, although some inputs can also be used for other communications services such as long distance telephony services and leased line data services. In its draft report, the ACCC has proposed that the following services should be declared:

- an unconditioned local service, involving the use of unconditioned copper wires between the network boundary (on the customer side) and a point on the access provider's network where the copper terminates;

- local PSTN originating and terminating services, which involve the carriage of communications between customer's premises equipment and a point on the trunk side of the local switch; and

- a local carriage service, which involves the supply of an end-to-end telecommunications between two points within a standard zone.

The ACCC has not considered whether to declare infrastructure facilities or cable directly relating to international telecommunications services.

Access providers are obliged to make a declared service available to access seekers on reasonable terms and conditions and according to standard access obligations, unless exempted. This requires access providers, amongst other things, to supply declared services to an access seeker and take all reasonable steps to ensure that the service is supplied at a technical and operational quality equivalent to that which the access provider provides to itself, including in relation to fault detection, handling and rectification.[17]

There are three ways in which access terms and conditions can be determined:

- by means of a privately negotiated agreement between the access provider and the access seeker regarding the price and quality of access to the declared service;
- by means of an access undertaking detailing the terms and conditions of access to declared services proposed by an access provider, which the Commission must accept or reject; or
- by means of arbitration by the Commission whenever the access provider and seeker are unable to reach agreement independently, providing there is not already an undertaking in place covering the particular matter or matters in dispute.

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[17] *Ibid*, section 152AR.

In assessing an undertaking, the ACCC must be satisfied that the terms and conditions specified are reasonable. In determining whether the terms and conditions are reasonable, the ACCC must have regard to the following matters:[18]

- whether the terms and conditions promote the long-term interests of end-users;
- the legitimate business interests of the access provider concerned, and the access provider's investment in facilities used to supply the declared service;
- the interests of 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 a facility; and
- the economically efficient operation of a carriage service, a telecommunications network or a facility.

In an arbitration the ACCC must have regard to similar matters.[19]

4.1 Industry self-regulation

While the ACCC has specific regulatory powers for declaring a telecommunications service, accepting or rejecting an undertaking, and arbitrating an access dispute, the telecommunications regulatory framework has a strong industry self-regulation focus. The regulatory policy of the domestic telecommunications regime is that the

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[18] *Ibid,* section 152AH. The ACCC must also ensure that an arbitration determination, and the relevant terms and conditions in an undertaking, are consistent with any Ministerial pricing determination in place: paragraph 152BV(2)(c) and subsection 152CQ(6).

[19] *Ibid,* section 152CR.

telecommunications industry be regulated in a manner that promotes the greatest practicable use of industry self-regulation and does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry providing the effectiveness of regulation in achieving the legislative objectives in section 3 of the Telecommunications Act is not compromised.[20] The main objectives are to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services; and promote the efficiency and international competitiveness of the Australian telecommunications industry.[21]

In relation to competition issues, the relevant self-regulatory processes are:

- As mentioned above, industry via the TAF can recommend to the ACCC that a service be declared. In doing so, the Commission's main role is to check that the TAF has undertaken a suitable level of industry consultation in making the declaration recommendation.[22]

- Codes on the technical standards governing access, such as technical standards governing network performance, and call charging and billing accuracy, can be developed via the Australian Communications Industry Forum (ACIF).

    - ACIF codes can be presented to the Australian Communications Authority (ACA) for registration. Registration means that the code applies to all industry players, and provides the ACA with powers to ensure compliance with the code.

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[20] Section 4 of the *Telecommunications Act 1997*.

[21] *Ibid*, sub-section 3(1).

[22] Sub-section 152AL(2) of the *Trade Practices Act 1974*.

The ACCC recognises that the respective roles of government regulation and industry self-regulation is likely to be an ongoing issue. The ACCC sees its role as providing a regulatory safeguard and seeks to allow self-regulatory outcomes (when relevant) a suitable opportunity to occur before becoming involved in a particular matter. Further, the ACCC considers that some particular matters, such as standards dealing with interference and many of the related operational and provisioning issues, can be more effectively dealt with by self-regulatory processes, where possible.[23] An important reason for this is the information and expertise limitations on regulators.

4.2 Relationship between infrastructure access and competitive conduct provisions

The infrastructure access and competitive conduct provisions are importantly related. The access provisions provide a regulatory structure for allowing competitors to access "bottleneck facilities", which diminishes or prevents the use of market power derived from owning those facilities being used to distort competition in downstream telecommunications markets.

Mandating access also reduces the barriers to entry, as new entrants will not necessarily need to build entirely new networks, and can interconnect with other networks to enable its customers to call and receive calls from people on other networks (ie, to provide any-to-any connectivity). This will lead to a more competitive industry with less scope for anti-competitive conduct by market participants.

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[23] During the course of the ACCC's inquiry into declaring the local loop, it was widely advocated, particularly by potential access seekers, that issues of network integrity and interference are best addressed through the development of rules and procedures under an industry-based approach, rather than a detailed prescriptive approach by either the regulators or Telstra in some unilateral manner.

5 Market definition

The ACCC notes the Productivity Commission's request for information on 'defining the market'.

Market definition is a critical element in:

- determining whether there has been a substantial lessening of competition in a market, which is the relevant test for determining whether there is a contravention of most of the competitive conduct rules, such as sections 46 (misuse of market power) and 151AJ (the competition rule) of the Trade Practices Act. Part XIB applies only to telecommunications markets, in which the carriage services, goods or services for use in connection with a carriage service and access to facilities are supplied or acquired;[24] and

- in declaration public inquiries. Once the relevant market or markets for carriage services and/or services supplied by means of carriage services has been identified, the ACCC will determine whether, and to what extent, declaration of the eligible service is likely to promote competition in that (those) telecommunications market(s).[25]

The ACCC's assessment of markets is in the context of a particular investigation and inquiry, and the ACCC does not attempt to define particular markets in advance.[26]

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[24] Section 151AF of the *Trade Practices Act 1974*.

[25] *Declaration of Telecommunications Services: A Draft Guide to the ACCC's Administration of the Declaration Provisions of Part XIC of the* Trade Practices Act 1974.

[26] To do so would be not only of dubious value to the Commission, but also unhelpful to industry participants, in that it may send the wrong regulatory signals. Conclusions as to how the Trade Practices Act will operate in any given circumstance can only be reached after a thorough analysis, encompassing a full appreciation of the particular economic environment in which the conduct under examination is taking place at a particular time.

Similarly, market definition is purposive, with the precision and nature of the market depending on the purpose of defining the market (eg, the degree of precision of market definition may differ between competitive safeguard investigations and declaration inquiries).

5.1 The ACCC's general approach to market definition

The ACCC has outlined its general approach to market definition in the context of Trade Practices Act investigations in its Information Paper *Anti-competitive conduct in telecommunications markets (19 May 1997)* and in its *Merger Guidelines*, and to declaration inquiries in the *Declaration of Telecommunications Services – A Draft Guide to the ACCC's Administration of the Declaration Provisions of Part XIC of the* Trade Practices Act 1974. The key aspects of the ACCC's approach to market definition are outlined below. Further information can be obtained from the Information Paper or the Merger Guidelines.

There are two mains aspects to determining market definition, as considered by the Commission in the course of Trade Practices Act investigations:

- substitutability of supply and demand; and
- the four dimensions of market definition.

5.1.1 Substitutability of supply and demand

Section 4E of the Trade Practices Act provides that substitution is a crucial element of market definition in Trade Practices Act investigations, by defining 'market' as including:

> 'a market for those goods and services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services'.

The question of price competition is considered critical to the process of market definition: if a producer or supplier does not place any effective constraint on the price the carrier or carriage service provider could charge for its product, the two products or

suppliers will not be considered to be in the same market. The market boundaries are the smallest area over which a hypothetical monopolist or oligopolist could impose a small but significant and non-transitory increase in price (SSNIP).

One way in which the ACCC may measure the power to impose a SSNIP is by examining historical price fluctuations in potentially competing products. However, where it is difficult to apply the SSNIP test, the ACCC may use formal measures of cross-elasticities of price, or empirical investigations of market conduct (such as consumer surveys or examining evidence given by market participants).

Importantly, product substitutability between different carriage services will increasingly arise through the convergence of various technologies. Use of digital systems leads to an increasing similarity in the performance and characteristics of carriage services using distinct technologies. For example, a packet-switching network such as the Internet may be used to transmit digitised voice signals, thereby mimicking 'traditional' voice telephony. Similarly, fax transmissions may be sent via either voice or data telephony systems.

5.1.2 The four dimensions of market definition

The Commission will have regard to the following four dimensions when defining a market:

- **Product**: delineation of the relevant product dimension of a market requires identification of the bundle of goods and services supplied by the firm and sources, or potential sources, of substitute products. Starting with the product (or products) supplied by the firm, the product dimension is gradually expanded to incorporate those firms which supply, or would supply, a closely substitutable product in the event of a significant price rise, or equivalent exercise of market power, by the firm.

- **Geographic**: delineation of the relevant geographic market (or markets) involves the identification of the area or areas over which the carrier or carriage service provider and its rivals currently supply, or could supply, the relevant product and

to which consumers can practically turn.

- **Functional**: delineation of the relevant functional dimension of a market primarily involves consideration of the extent to which vertically integrated suppliers constrain the price and output decisions of non-integrated suppliers. If a carrier or carriage service provider supplies an input A to downstream producers of B, and competition between those producers of B and integrated producers of A and B is sufficient to constrain the price and output decisions of the carrier or carriage service provider in relation to product A, the integrated suppliers will be included in the relevant market; either by defining the market to include both A and B, or by including the output of both integrated and non-integrated firms in a market for A.

- **Time**: the time dimension of the market refers to the period over which substitution possibilities should be considered. The telecommunications industry is characterised both by products which have a very short time frame for product modification or development (ie, in offering lower cost versions of existing services or particular pricing strategies) and by significant infrastructure and establishment costs. The ACCC will examine each relevant telecommunications market at the time of the conduct, and consider substitution possibilities over the longer term, but still in the foreseeable future, that will effectively constrain the exercise of significant market power. The decision to engage in long and short term analysis of the time aspect of a market must be made with reference to the character of the relevant products.

Melbourne University

Centre for Media, Communications and Information

Technology Law

Third Annual Telecommunications Conference

13 May 1999

How well is competition regulation working in telecommunications?

by

Rod Shogren

Commissioner

Australian Competition and Consumer Commission

Facilitating a more competitive telecommunications industry was one of the main elements of the 1997 telecommunications reform in Australia, as it has been overseas. The reform program is directed towards using competition to drive improvements in productivity, lower prices, faster innovation, and greater user choice.

The two key principles on which competition regulation of telecommunications are based are:

- telecommunications-specific access provisions and competitive conduct rules that are largely derived from the general infrastructure access and competitive conduct provisions in the *Trade Practices Act 1974* (TP Act); and
- an emphasis on industry self-regulation to determine access conditions, with the Australian Competition and Consumer Commission (ACCC) providing a safety net function.

Access provisions

There is no general right of access to telecommunications infrastructure. Rather, particular services must be declared which are then subject to access regulation.

The ACCC is responsible for declaring services. Declaration follows an ACCC public inquiry process or the recommendation of the Telecommunications Access Forum (TAF), an industry self-regulatory body.

Mandating access allows competitors to access bottleneck facilities to prevent the use of market power derived from owning those facilities being used to distort competition in downstream telecommunications markets.

Mandating access also reduces the barriers to entry, as a new entrant will not necessarily have to build a comprehensive new network, and can interconnect with other networks to enable its customers to call and receive calls from people on other networks.

Supply of declared services

Access providers are obliged to make a declared service available to access seekers on reasonable terms and conditions and according to standard access obligations, unless exempted. This requires an access provider, among other things, to supply declared services to an access seeker and take all reasonable steps to ensure that the service is supplied at a technical and operational quality equivalent to that which the access provider supplies to itself, including in relation to fault detection, handling and rectification.

There are three ways in which access terms and conditions can be determined:

- by means of a privately negotiated agreement between the access provider and the access seeker regarding the price and other conditions of access to the declared service;

- by means of an access undertaking detailing the terms and conditions of access to declared telecommunications services proposed by an access provider, which the ACCC must accept or reject; or

- by means of arbitration by the ACCC whenever the access provider and seeker are unable to reach agreement independently, providing there is not already an undertaking in place covering the particular matter or matters in dispute.

Further, the industry self-regulatory body, the Australian Communications Industry Forum (ACIF), can develop codes on technical standards governing access and more generally. These include technical standards governing network performance, and call charging and billing accuracy.

ACIF codes can be presented to the Australian Communications Authority (ACA) for registration, which ensures the code applies to all industry players, and provides the ACA with powers to ensure compliance with the code.

Speedy decision-making

Some sectors of the telecommunications industry have been arguing for extremely quick resolution of certain matters. This is somewhat ironic given that one of the main reasons why some matters have taken longer than initially envisaged is the tardiness of market participants providing suitable information to the ACCC.

It would also concern me if multi-million dollar telecommunications enterprises were to have privileged call on the ACCC's resources, ahead of victims of anti-competitive conduct in other industry sectors – for that is what special treatment for telecommunications industry complainants would amount to. This should be seen for what it is: special pleading and rent-seeking.

That said, no regulator can object to being expected to deal with complaints and carry out its other functions efficiently and as speedily as is consistent with good decision-making. The ACCC certainly accepts that responsibility and expects to be held accountable for its performance.

The ACCC's access regulatory work, as well as its competitive conduct investigations, is fact-intensive and requires input from industry. Timely industry submissions facilitate the ACCC's decisions. The converse is also true. If industry does not provide sufficient information, or are late in providing submissions, the process is drawn out. At times it seems industry has not fully appreciated the importance of the information in submissions, and of the timeliness with which they are submitted.

In addition, some information takes considerable time to collect and analyse. For example, assessing Telstra's PSTN undertaking has been a major task, as it required the ACCC to determine the cost structure of Telstra's network. To do so, in addition to its own work the ACCC commissioned two consultants' reports which were significant in their own right: one to model Telstra's network costs, which took about nine months from start to finish, and the other to provide international comparisons, which took about six months.

After a declaration has been made, new interconnection systems development and in some cases development of industry standards must occur. There is no avoiding the time taken in these processes – it is a necessary pre-condition for infrastructure access.

The ACCC strongly supports the ACIF processes and considers ACIF to be the most appropriate forum within which to address many of the industry standard issues, such as matters of network interference. Attempts by regulators to replace these processes would often be problematic. Therefore, such processes must be given sufficient opportunity to operate effectively.

ACCC's arbitration powers

Which brings me to the ACCC's arbitration powers over access terms and conditions. These are a crucial safety net where industry self-regulatory processes or commercial negotiation breaks down.

However, the ACCC recognises that arbitrations can be time-consuming and are essentially focused on the parties to the arbitration. It also recognises that arbitrations may arise after considerable time has already elapsed from an access seeker's point of view. The benefits of declaration may therefore be delayed.

Exacerbating this is the number of arbitrations that are being notified to the ACCC. Each dispute requires two ACCC Commissioners as well as staff resources. The ACCC has not been provided resources that will enable it to handle many more disputes than it has before it. It only has four Commissioners in total at present, and only around 30 staff dedicated to telecommunications – who are also involved in many other enforcement and regulatory functions.

Access state of play

Now let's look at the actual state of access availability in Australian telecommunications.

Setting aside for a moment the price and some other terms of access, my judgement is that we have generally satisfactory access arrangements in place for the origination and termination of long distance calls on Telstra's fixed network, for the origination and termination of calls on the three GSM networks, for local call resale and GSM resale, and for transmission.

By generally satisfactory access arrangements I mean that the standard access obligations are being adhered to for declared services; that the price – if not as low as access seekers would like – is certainly not prohibitive; and that the other terms of access are at least allowing access seekers to provide effective competition. That is the bottom line: we do have a healthily competitive market for international and domestic long distance calls; and Telstra's competitors are also able to provide comprehensive services including local calls by reselling Telstra's local call network.

The terms and conditions of access for both the PSTN and GSM services, and for transmission, are currently still under examination in the assessment of undertakings from Telstra and in arbitration proceedings by the Commission.

It is worth asking why access is pretty satisfactory in these areas, because in a moment I will outline some areas where access is less than satisfactory.

In the case of PSTN and GSM access services, access arrangements already existed prior to the opening up of telecommunications to full competition with the commencement of the new telecommunications access regime in July 1997. Transitional provisions in the legislation carried those existing arrangements over into the new regime, which means they were extended to all competitors rather than just Optus and Vodafone. Moreover, other transitional provisions gave the Commission powers to set an interconnection price. Together, those transitional provisions ensured the rapid development of competition in the long distance market.

Similarly in the case of transmission, existing services continued to be provided.

It is interesting that local call resale and GSM resale are also quite vigorous markets, despite the fact that to date they are largely unregulated. The terms and conditions of local call resale are highly contentious –—with customer transfer being the subject of four competition notices, as I shall discuss later, and the wholesale price of local calls being claimed to be too high by resellers – but it remains the case that resale does take place in substantial volumes. I put this down to the fact, again, that resale was an established service prior to the commencement of the new regulatory regime in July 1997.

Now let's look at services where access arrangements are not so good.

ISDN was declared by the ACCC last November. When last I heard, Telstra still did not have a wholesale, ie access, ISDN service on the market.

In two other decisions the ACCC varied services declared under the transitional provisions: the DDAS and the transmission service. Despite the fact that these decisions were finalised last November, access seekers are still wrangling with Telstra over what the DDAS consists of and that is a matter being dealt with in arbitration. As mentioned, transmission is currently also the subject of arbitration, although clearly many players have negotiated transmission agreements.

So of those three declared services, only transmission, in my view, could be said to be currently supplied in a satisfactory manner as the Commission intended when it made its declaration decisions.

By contrast, a service we declined to declare, digital mobile roaming, has been, according to reports, successfully negotiated between access seekers and the GSM and CDMA operators. I hope this is indicative of our having made the right decision not to declare the service on the grounds that competitive conditions would ensure it was provided without compulsion.

The broadband cable service, which was declared under transitional provisions, is in a different category. There are complex questions of legal interpretation involved, but for the present the situation is that Telstra and Optus claim there is no spare capacity and consequently no programs other than Foxtel and other existing content providers are able to be carried. Inquiries into possible new broadband declarations are currently under way.

Other declaration inquiries are also in train. In the local call inquiry the Commission has made a draft determination unbundling the local loop, ie declaring an unconditional local access service, providing access to Telstra's copper customer access network. The draft decision would also declare local call resale and provide for interconnection at some hundreds of local switches; currently it is generally only available at 66 switches designated by Telstra.

While local call resale is already available to Telstra's competitors, neither the unbundled local loop nor local switch access is currently being provided except in a limited manner where, again, there is a continuation of pre-July 1997 arrangements.

The Commission is also inquiring into the long-distance component of calls from mobile phones.

Prerequisites for satisfactory access

Having examined the state of play on access, let us consider what is necessary for access arrangements to be said to be satisfactory.

Generally speaking, the first prerequisite is a declaration with certainty over the description of the declared service. Without declaration (unbundled local loop, local switch access) or where there has been uncertainty (DDAS, broadband), the service is simply not provided or is provided in a manner access seekers consider unsatisfactory, not only in terms of price.

On the other hand, some undeclared services (local and GSM resale) are being provided, but only where they were already being provided prior to July 1997.

Declaration should be seen as merely the first step.

The second prerequisite – and this is an absolute – is that Telstra must develop a commercial offering of an access product. This step has not generally been completed for undeclared services – naturally enough but with some exceptions – but nor has it been completed for ISDN, a declared service. More worryingly still, indications are that Telstra may take some considerable time to develop a commercial offering for the unbundled local loop, should the draft decision to declare it be confirmed.

This is not to underestimate the complexities involved in developing a wholesale offering for the unbundled local loop, nor, indeed, in developing other wholesale products. Self-regulatory processes are a key ingredient in some cases, with industry standards and interoperability procedures needing to be sorted out between carriers.

The third prerequisite for satisfactory access arrangements is in the area of terms and conditions of access. This is largely in Telstra's hands in the first instance and is part and parcel of developing a wholesale product.

But given the imbalance between Telstra and its wholesale customers, who are also its competitors, it must be expected that terms and conditions of access will not always be

successfully negotiated. Consequently, the ACCC is going to be called upon to arbitrate. As mentioned earlier, this is now happening – in spades!

The Commission considers it desirable to bed down terms and conditions of declared services, including prices where possible, through undertakings. Undertakings obviate the need for arbitration. If Telstra does not get undertakings in place – and remember the ACCC must accept or reject any undertaking – then the Commission will be striving to arbitrate expeditiously whenever it is asked to.

Competitive conduct provisions

So much for progress on access, and the ACCC's regulatory functions. The other area we need to consider is anti-competitive conduct prohibitions in the Trade Practices Act, where the Commission's role is that of a law enforcement agency.

ACCC's experience with the competition notice scheme

The ACCC has issued competition notices in response to two investigations: Telstra's Internet peering agreements and Telstra's local call resale customer transfer terms and conditions. While my focus is on these two investigations, it should be noted that the ACCC has also dealt with other telecommunications matters that have been resolved before the ACCC has issued a competition notice, or where the ACCC has otherwise considered it not appropriate to issue a competition notice. Instead, the ACCC may seek to resolve an anti-competitive problem by notifying the concerned party or parties of its concerns, by negotiating with the concerned party or parties or by initiating legal action against the person in contravention of the TP Act.

Internet peering agreement

In the Internet peering matter, the ACCC investigated complaints that Telstra was charging competing Internet Access Providers for carrying their traffic on the Big Pond Internet backbone but was unwilling to pay these competitors for carrying its traffic. The competing Internet Access Providers were OzEmail, Connect.com and Optus.

Telstra was able to initially refuse to make peering agreements because of its unrivalled position in the market. This raised the costs of rival Internet Access Providers, which hindered their ability to compete with Telstra. The higher costs of Telstra's competitors threatened their viability and resulted in higher prices to downstream users of the Internet service.

Telstra did not respond quickly enough to the ACCC's urging that it reach commercial arrangements – so-called peering agreements – with the other Internet Access Providers. The ACCC therefore issued a competition notice in May 1998, alleging that Telstra was contravening the competition rule.

Telstra then reached agreement with competing Internet Access Providers, which the ACCC believes was a direct result of the its decision to issue a competition notice.

Commercial churn

Customer transfer – or churn as it is known within the industry – is the process of transferring customers from one company to another.

The ACCC received complaints that Telstra was unilaterally imposing on its competitors anti-competitive terms and conditions for the customer transfer process in respect of local call resale. The ACCC investigated the matter and found that these transfer conditions made local call resale unprofitable, which impacted on competition for telephone services.

Once again Telstra refused to respond adequately to the ACCC's concerns about Telstra's conduct. Therefore, the ACCC issued a series of competition notices, alleging that Telstra was in contravention of the competition rule.

Despite the $1 million per day penalties arising from the three competition notices that have been issued, Telstra has not complied with the ACCC's concerns about the customer transfer process. In December 1998, the ACCC instituted proceedings against Telstra, which are currently on foot.

ACCC's concerns with the competition notice regime

The ACCC has had three main concerns with the competition notice regime as it previously existed:

- delay in issuing a competition notice;
- gaming by the recipient of a notice; and
- inability to specify conduct which would, in the ACCC's view, comply with the competitive conduct provisions.

Delay in issuing a competition notice

The competition notice regime is intended to provide a speedy response mechanism by the ACCC to anti-competitive conduct. The ACCC is under a statutory duty to act expeditiously in deciding whether to issue a competition notice.

However, it has proven difficult to issue a competition notice with any speed because the ACCC's legal advice was that the legislation required the ACCC to satisfy itself that there has been a contravention of the competition rule. This meant the ACCC had to obtain extensive evidence prior to issuing a competition notice, and had to draft detailed competition notices that needed to be given to the intended recipient for comment.

Gaming by the recipient of the notice

The ACCC found in the Churn matter that it is relatively easy for a notice recipient to undermine the effectiveness of a notice. A notice sets out in a precise and narrow way only past conduct which contravenes the competition rule. The carrier or carriage service provider can partially alter its conduct so that, although the altered conduct still raises anti-competitive concerns, the conduct falls outside the scope of the notice. The ACCC and third parties cannot, therefore, bring pecuniary penalty proceedings on the notice and the ACCC must issue a new notice to cover the altered conduct.

Inability to specify pro-competitive conduct

In the commercial churn matter, Telstra requested that the ACCC outline conduct which, in the ACCC's opinion, would allow Telstra to cease contravening the competitive conduct provisions. While it is not always appropriate to do so, in certain circumstances the ACCC may seek to provide such advice.

However, the initial competition notice regime did not expressly provide for this to occur, and therefore the ACCC considered it advisable to remain silent, lest it compromise future legal proceedings.

Government's amendments to the competition notice regime

The Government has introduced into Parliament amendments that will increase the ACCC's functions and responsibilities. These include:

- powers to monitor and report to the Minister on compliance with price control arrangements and competition in the telecommunications industry;
- powers to direct parties in commercial negotiations over access;
- mediation powers to facilitate access negotiations between private parties; and
- a power to make binding codes on the provision of network information.

Conclusions

There is a great deal of regulatory action under way in telecommunications, both to ensure access and to safeguard against anti-competitive conduct – so much action, indeed, that it is getting difficult to maintain a perspective on overall progress while dealing with the minutiae. With 15 access disputes currently before the Commission in nine sets of hearings, in addition to three declaration inquiries and an undertaking assessment, we cannot be said to be in an environment of light-handed regulation.

Nevertheless, I believe the industry and the regulatory regime are in a settling-down period. The framework within which we work is robust for dealing with an industry where the basic rules are set. However, at present we are trying both to set the rules

(deciding which services to declare) and administer them (conducting arbitrations) at the same time. It is inevitable that this causes some indigestion and temporary blockages. As the regulator we have been given powers to deal with the huge imbalance in market power that exists in the telecommunications industry. Some of those powers will not need to be exercised often once the rules are set. Some will be exercised almost whenever we are asked to use them, for it is at the discretion of industry players when they get called into action.

Since access issues, especially terms and conditions, are demonstrably not yet sorted out between the players, there is going to be some fairly intrusive regulatory intervention for some time as we use our powers as they were intended.

I hope, and trust, that this degree of intervention will eventually lessen as the industry matures, as Telstra and its wholesale customers become more adept at dealing with each other, as competition develops further and as imbalances in market power are redressed.

ATUG

now99 conference

20 May 1999 – Darling Harbour

A Review of the ACCC Activities of the Last Year on the Structure of Costs of Telecommunications Networks

Rod Shogren

Commissioner

Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) has been the competition regulator in the telecommunications industry since the 1997 reforms. It has two major tasks:

- **access regulation** – regulating access to certain services that are necessary for carriers and carriage service providers to supply services in telecommunications markets; and

- **competitive safeguards** – enforcing anti-competitive conduct provisions and monitoring competition in the telecommunications industry.

The ACCC has been busy in the last year continuing to lay the foundations of a more competitive and open domestic telecommunications industry. The likely effect of the ACCC's work will be lower prices, more customer choice and greater innovation in the telecommunications industry. In particular, the infrastructure access regime breaks down barriers to market entry, and therefore leads to increased competition. It also reduces the potential for vertically integrated firms such as Telstra to discriminate in favour of their own downstream products.

The major work of the ACCC over the last year has been:

- the draft declaration of the unbundled local loop;

- the declaration of data services;

- the draft assessment of Telstra's Public Switched Telephony Network (PSTN) access undertaking; and

- a series of competition notices regarding Telstra's commercial churn (customer transfer) terms and conditions.

The ACCC has been busy on many other matters as well.

Declarations

Telecommunications infrastructure access is not automatic – the ACCC must declare particular infrastructures. A declaration means that access is mandated on reasonable terms and subject to standard access obligations.

In deciding whether to declare a particular service, the ACCC must have regard to the promotion of the long-term interests of end-users.

Local loop draft declaration

The ACCC released its draft report on declaring Telstra's local loop in December last year. The draft declaration applies to three services:

- an unconditioned local service – which provides access to the copper wires connecting the customer to Telstra's network;
- a local interconnection service – which provides access to the PSTN at the local exchange level; and
- a local call resale service.

Declaration will reduce the reliance on Telstra's infrastructure and minimise access costs. At present, Telstra's competitors are restricted in where they can connect to Telstra's network, which unnecessarily increases their costs of providing services.

Therefore, entry and competition in the local call market can occur through both facilities-based competition (where competitors duplicate Telstra's Customer Access Network) and access-based competition (where competitors provide local services using Telstra's Customer Access Network).

Such a declaration should lead to lower prices for all calls, including local, long-distance and international. It should also facilitate the introduction of innovative services, such as fast Internet access. This will reduce the costs of participating in the information

economy. In short, it should speed up the pace of reform in the telecommunications industry.

Digital data declarations

Throughout the first half of 1998, the ACCC undertook a public inquiry into digital data and transmission services. From this process, the ACCC declared ISDN originating and terminating services and modified its previous declarations for DDAS and transmission services in order to increase the effectiveness of the declarations in meeting access seekers needs.

ISDN services

ISDN is a data communications service that uses the standard telephone voice network. It is capable of sending both voice and data information, and is commonly used by smaller users for such applications as electronic commerce.

The declaration will enable competitors to Telstra to provide sophisticated data and other services in a more cost effective and efficient way, which will provide for lower priced data and Internet services to customers.

DDAS

DDAS is an access service for the carriage of high speed data between customers' premises and service providers' points of interconnection. The current service configuration includes a mandatory use of time division cross connect switching. Service providers argued successfully that such functionality was not required and unnecessarily added to their costs, particularly in regional and rural areas where time division cross connect equipment was not installed by Telstra. The ACCC considers that the incumbent's architecture should not constrain competitive choices.

Transmission capacity

Transmission capacity was deemed as a declared service on 30 June 1997. The main issue was in relation to inter-capital city transmission, which was not originally declared. The Commission's initial report considered that declaration was likely to have a more

direct effect on addressing current price rigidities, which is keeping prices high for service providers. However, this assessment must be balanced against the potential distortions to entry and investment.

In its final report the Commission decided that it would be in the LTIE to declare all routes except for the Sydney-Canberra-Melbourne route which the Commission considers to be competitive and will become more so over the next 18 months.

Telstra's access undertakings

Telstra has lodged three undertakings with the ACCC.

The undertakings specify the terms and conditions upon which Telstra undertakes to meet its standard access obligations to supply domestic long-distance services, and digital and analogue mobile services. If accepted by the ACCC, the terms and conditions in an undertaking will apply if parties cannot come to a commercial agreement.

In January and February this year the ACCC released draft determinations on Telstra's undertakings, rejecting all three.

With the domestic long-distance undertaking, the ACCC's draft conclusion is that the proposed interconnect charges – the charges competitors must pay to connect to Telstra's network – would need to be halved to be acceptable. Halving interconnect charges could reduce the prices of long-distance calls by up to 15 per cent. This would provide savings to customers, including rural and small business users, of around $400 million per year.

The ACCC looks forward to receiving new undertakings from Telstra that will more closely reflect Telstra's network costs.

Future regulatory work

The ACCC has now undertaken much of the significant work on declarations and on pricing Telstra's network. While this work will continue, the ACCC expects to find more of its resources allocated to work on arbitrating particular disputes between Telstra and its competitors over access terms and conditions and the price of access. We have laid a considerable proportion of the regulatory foundations – the next challenge is to consolidate the reforms, while ensuring that actual interconnection between competing telecommunications firms proceeds in a timely fashion.

Commercial churn matter

On the anti-competitive conduct side, the ACCC constantly monitors the industry for contraventions of the Trade Practices Act. The ACCC will also respond to complaints of alleged anti-competitive behaviour from industry or any other organisation or person.

Customer transfer – or commercial churn as it is known within the industry in the context of local call resale – provides for the transfer of customers from one company to another. This is an on-going enforcement matter that has been well-publicised.

The ACCC's involvement started when the ACCC received complaints that Telstra was unilaterally imposing on its competitors terms and conditions for the customer transfer process. The ACCC investigated the matter and found a contravention of the Trade Practices Act, which impacted on competition for telephone services.

Telstra refused to adequately respond to the ACCC's concerns about Telstra's conduct. Therefore the ACCC issued a series of competition notices, alleging that Telstra was in contravention of the competition rule, by:

I. charging for total debt severance;

II. using partial debt severance; and

III. requiring other carriers, wanting to transfer customers from Telstra, to use a manual process that the ACCC alleges is slow, inefficient and cumbersome.

Despite the $1 million per day penalties arising from each of the three competition notices that were issued, Telstra has not complied with the ACCC's concerns about the customer transfer process. Therefore, in December 1998, the Commission instituted proceedings against Telstra, which are currently on foot. The ACCC has recently issued a fourth competition notice that consolidates its previous concerns about Telstra's anti-competitive conduct, and also characterises the price that Telstra is currently offering the service at as anti-competitive.

ACCC's work on costing telecommunications networks

The ACCC has undertaken most of its costing work of Telstra's telecommunications networks so-far in the context of assessing Telstra's PSTN access undertaking. However, it will need to undertake similar exercises on other Telstra's services as the need arises, either when assessing undertakings or in arbitrations. Record-keeping rules established by the ACCC can also define the data and information that telecommunications carriers are required to keep and report to the ACCC on an ongoing basis.

In arriving at its draft decisions to reject the undertakings, the ACCC commissioned two major consultancies and undertook a number of studies internally in order to make an assessment of whether the terms and conditions in the undertakings were reasonable. These included:

- Construction of a model by National Economic Research Associates (NERA) to estimate the costs an efficient firm would incur in providing PSTN interconnection using modern technology and equipment.

- Estimation of the current costs of providing PSTN interconnection based on the costs Telstra incurred in the past.

- Comparison by Ovum Ltd of charges in the PSTN undertaking with the charges for the same or similar services in other countries.

- A detailed assessment of the implications of the non-price terms and conditions in the undertakings (such as conditions governing access to interconnection) for Telstra, its competitors and competition.

The NERA study suggested that the efficient costs of providing PSTN interconnection are less than half the charges in the undertaking. This was confirmed by the ACCC's estimation of the current costs of providing PSTN interconnection based on the costs incurred by Telstra in the past.

The draft decisions of the ACCC did not rely on an assessment of the price terms and conditions because most of these expired on 30 June 1998. Nevertheless, the ACCC assessed these prices in the PSTN undertaking so as to assist in the development of future undertakings.

The draft determinations were ultimately made on the basis that the non-price terms and conditions in the undertakings (which are identical in each) were not reasonable. It was determined that the non-price terms and conditions would provide Telstra with too much discretion about how, to whom and when interconnection would be provided to its competitors. This would create considerable uncertainty and advantage Telstra over its competitors.

A final decision will be made in the next month or so.

Access deficit

In assessing the undertakings, a major issue concerns the existence of an access deficit. The access deficit is the difference between non-call related costs and non-call related revenues. It is caused by retail price controls which limit the amount Telstra can recover from non-call services such as line rentals and connection charges.

On the principle that the access deficit should be recovered in a competitively neutral manner, the ACCC has made a decision that interconnection calls should contribute to

the deficit. However, it would be preferable that retail price controls were the minimum possible to achieve the Government's equity goals. This is because access seekers, by having to contribute to the access deficit, will have biased build-or-buy decisions, and will concentrate competition in high usage areas such as urban areas, rather than rural areas.

Difference in Telstra's peak/off-peak structure and access and retail charges

The ACCC is assessing the structure of Telstra's network pricing charges for interconnection by CSPs. Telstra's timed charges for interconnection raise some competition concerns, given that Telstra offers capped retail call charges of $3 for off-peak STD calls. Currently there is overlap between Telstra's peak interconnection charges and some off peak retail charges, and this also raises some concerns.

The Commission assessed the correlation between Telstra's wholesale and retail pricing structures as part of its draft report on the Assessment of Telstra's Undertaking for Domestic PSTN Originating and Terminating Access. The Commission formed the view that the difference between access and retail peak periods, and the absence of a cap on access charges when Telstra offers capped retail prices, is not likely to promote competition in the provision of national long distance services. This is particularly true in those markets where end-users make most of their long distance calls outside business hours.

The Commission has also been asked to investigate these issues under Part XIB – the 'competition rule' provisions. Those investigations are continuing and the Commission is discussing the matter with representatives of Telstra and other long distance service providers.

The issue will be further addressed in the final report on Telstra's undertaking.

ACCC's timeliness in undertaking enforcement investigations and declaration inquiries

The ACCC is aware of perceptions that it has been in some way tardy in undertaking enforcement investigations and public inquiries into declaring various services.

No regulator can object to being expected to deal with complaints and carry out its other functions efficiently and as speedily as is consistent with good decision-making. The ACCC accepts that responsibility and expects to be held accountable for its performance.

There is some irony in such comments, given that one of the reasons why deadlines have had to been extended is because industry is not providing adequate information in a timely manner. It also notes that meeting the statutory tests in the legislation requires detailed and proper assessment – which takes time. It is not possible to cut corners.

On a similar matter, there is an issue of self-regulatory processes carrying their full weight. We are asking a lot of self-regulation. However, the regime has been established in a way where such processes can and should operate efficiently.

If they do not, increased reliance is placed on the ACCC. However, the ACCC is not resourced for such heavy reliance, and there will inevitably be some delay if too many arbitrations are notified to it. As I have previously noted, the ACCC's resourcing is sufficient for what we are supposed to do under the regulatory regime as it is designed, but it is not sufficient for what some want us to do, and it is not enough if self-regulation does not play its full role.

In this light, the ACCC welcomes the Minister for Communication's announcement this week about introducing amendments to the competition notice regime and to the ACCC's arbitration powers. The ACCC was consulted extensively on the amendments and believes they will facilitate more expeditious outcomes by the ACCC, by providing a more rigorous competition notice model, and by altering the incentives for parties to delay arbitration hearings. This should benefit the end-users of telecommunications by

allowing the ACCC to respond potentially more quickly to anti-competitive problems and interconnection disputes.

The ACCC will be releasing a number of documents outlining its approach to the many proposed amendments.

With the ACCC and industry becoming increasingly familiar with the telecommunications competition provisions, the ACCC is now in a position to release indicative timeframes for its telecommunications competitive conduct investigations and declaration inquiries.

The ACCC will make every attempt to meet these timeframes, and will be providing an annual report to the Minister on our performance against these benchmarks. However, the ACCC does recognise that there are reasons why some matters are delayed or will take longer than the indicative timeframes that have been decided upon. These include the complexity of the matter, tardiness by industry providing necessary information and diversionary tactics by market participants.

The ACCC will also expect stricter adherence to the due dates for submissions by interested parties and for information on competitive conduct investigations.

Turning attention to the actual indicative timeframes:

With Part XIB investigations, the ACCC's aim will be to determine whether it has a reason to suspect there is a contravention of the competition rule, and a decision on whether to proceed with the complaint according to the ACCC's normal criteria, within 30 days of the initial complaint. It will then aim to have reached a decision on whether it has a 'reason to believe' there is a contravention within a further three months.

If the 'reason to believe' test has been satisfied, the ACCC will then aim to decide whether to issue a competition notice within a further 30 days.

If any indicative timeframe is not met, the ACCC will inform the complainant, and then keep complainants advised of the progress of the matter on a periodic basis.

The ‘reason to believe’ test is one reform to the competition notice regime the Government has now announced it will be introducing into Parliament. Therefore, the indicative timeframe for determining whether the ACCC has a ‘reason to believe’ there is a contravention of the Act cannot be applied until this amendment becomes law. The ACCC will be implementing all other indicative timeframes with immediate effect.

Although the indicative timeframes for declaration public inquiries largely formalise existing internal arrangements, the Commission is conscious of the benefits of increasing the transparency of its regulatory processes.

Within 30 days of receiving a written request for an inquiry, the ACCC will determine whether it will hold an inquiry. At that stage, and in accordance with existing statutory requirements, it will outline the period within which the inquiry is to be held, including the time frames for issuing a discussion paper, the period being set aside for comments from interested parties, dates for any public hearings that are held and indicative time frames for the release of the draft report and final report as well as other relevant information. As to the timeframes themselves, in the case of major or complex inquiries, the ACCC will endeavour to release a discussion paper, hold any hearings and issue a draft report within 6 months; it would expect that a final report would be issued within a further three months, making the declaration instrument, if relevant, as soon as possible after publication of the final report.

In the case of other inquiries, the ACCC would endeavour to complete its work and issue a final report within six months of commencing the inquiry. In such inquiries, the Commission may choose not to hold a public hearing and would also need to consider whether a draft report would be needed, having regard to the nature of the issues. In either case, the process that is seen as appropriate would be announced at the outset as noted above.

If any extension is required, the ACCC will publicly announce the extension required beyond the indicative timeframes, and continue to keep industry informed as required.

The indicative timeframes will be explained in more depth in the forth-coming release of the ACCC’s final Information Paper on Anti-Competitive Conduct in

Telecommunications Markets and the ACCC's revised Information Paper on Declaration of Telecommunications Services: The Public Inquiry Process.

I would also wish to re-iterate our concern that we receive quality and timely information from industry. Without this, not only would our deliberations take longer, but we may not even be able to form a view about whether declaration meets the statutory criteria of being in the long-term interests of end users. In setting deadlines for industry comments, the Commission will in future take a firmer view of submissions that are well outside the set time-frames.