Australian Competition and Consumer Commission

Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation

August 2000

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EXECUTIVE SUMMARY

1. The introduction in July 1997 of open competition in the Australian telecommunications market was accompanied by the application of a regulatory framework intended to create the conditions for the development of sustainable competition. It was a threshold change from earlier regulatory frameworks, which had seen a move from a closed (monopoly) market to a limited entry (duopolistic) model, and direct economic and technical regulation. The change to open competition was in accordance with National Competition Policy principles and the conviction that the interests of consumers and the economy in general are best served by effective competition which promotes efficiency, economic growth and job creation through innovation and initiative.

2. The competition provisions were entrusted to the Australian Competition and Consumer Commission, in recognition of the need to align the regulation of the telecommunications market as closely as possible with that of other markets. In contrast to the pre-1997 regime, the current regulatory approach was designed to allow all operators, including Telstra, the flexibility to engage in normal competitive conduct by removing constraints which hampered their ability to respond to market needs.

3. The regulatory framework which was introduced in 1997 had the specific objectives of promoting the long-term interests of end-users of carriage services and services supplied by means of carriage services, and the efficiency and international competitiveness of the Australian telecommunications industry. These objectives were given legislative force and, in particular, the long-term interests of end-users was set down as a legislated criterion in regulatory decisions involving service declarations, undertakings and the arbitration of terms and conditions of access.

4. The framework was an industry-specific regime which recognised the particular challenge of moving to open competition from a highly regulated duopoly dominated by a single, vertically integrated incumbent, while retaining consistency with the principles of the counterpart general provisions in the *Trade Practices Act*. At the same time, it was intended that the competition (conduct) rules for telecommunications under Part XIB would eventually be aligned to the fullest extent practicable with general trade practices law under Part IV.

5. The objectives established in 1997 have not changed. However, three years after deregulation, conditions in the market have changed, and it is appropriate that measures introduced in anticipation of those changes should be re-evaluated to ensure they are meeting their objectives. What needs to be assessed is whether those conditions have changed sufficiently to enable full dependence on general trade practices law, whether conditions remain which justify certain telecommunications-specific regulation and, if so, the most effective form of such regulation.

The Australian telecommunications market

6. Telecommunications is a network industry which has many characteristics in common with other network industries, including transport and energy. However, it also exhibits a number of unique characteristics which must be addressed in any competition regulation.

7. Those characteristics are:

   - The overwhelming dominance in the national market, and almost every segment of that market, of a single, vertically integrated incumbent. This dominance creates the potential and the fact of extensive market power in most basic carriage services as well as a range of enhanced services. Telstra's ubiquitous network and integrated nature ensure that even when other firms operate in competition with it in the delivery of retail services, they rely on interconnection to its network in almost every circumstance.[1] These circumstances are not matched to anywhere near the same extent in any other network industry.[2]

   - The need for any individual connected to any network to be able to initiate contact with and receive contact from any individual connected to any other network (any-to-any connectivity). This requires competing carriers to interconnect to each other's networks in order to offer any-to-any connectivity for their services.

   - The speed of structural and technological change and service development in the market. This increases the costs and risks to potential new entrants of any delays associated with the usual Trade Practices processes, as delays have more serious implications for the viability of competitors in such circumstances. Speedy responses to any anti-competitive conduct or access issues are therefore particularly critical.

8. It is the ACCC's view that this combination of factors confers on Telstra extensive and continuing market power for the foreseeable future. That market power derives from the fact that Telstra controls critical inputs for almost all providers of almost all services to almost all of their customers. Despite the emergence of facilities-based and other competition for an increasing number of services, and the subsequent reduction in Telstra's market share for many services, few of Telstra's competitors have any real alternative to the extensive use of Telstra's network services. All require the use of Telstra's services to some extent as an input to providing their own services.

9. Continuing investment in telecommunications facilities, particularly wireless networks, and the deployment of non-telecommunications specific networks for telecommunications services, may be expected to establish a broader basis for the

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1 This reliance complicates the interpretation of statistics concerning Telstra's share of market revenues. Telstra's market power derives not from its market share, but from its control of inputs essential to the provision of downstream services.

2 Unlike telecommunications, significant parts of other network industries have been structurally separated to various degrees.

competitive supply of inputs in the future. Technological innovation, the development of networks with different cost structures and scale economies and the growth in demand for enhanced services are all increasing the feasibility of facilities-based competition. However, almost all technologies capable of delivering telecommunications services are characterised by high fixed costs. In areas which are costly to service on a per unit basis (because of low population density or topographical considerations) or where demand is small or fragmented, large-scale facilities-based competition is unlikely to emerge, or will emerge only very slowly. Inevitably, some facilities will never be duplicated. As a result, the extent of facilities-based competition is likely to be limited for some time and its timing uncertain. Telstra will retain control over critical inputs for many services and most areas for the foreseeable future.

10. The existence of such extensive market power is a major risk to competitive outcomes in a market which is developing rapidly and which has become increasingly important to Australia's social and economic welfare and international competitiveness.

11. Current developments in the telecommunications market, while encouraging the entry of new operators in some areas and for some services, may also be creating new market power issues. Some markets are now served by a small number of competing service providers (oligopolies), where the opportunity and the incentive may exist for the aggregation and exploitation of market power. For example, there appears to be scope for individual mobile carriers to have market power in termination services, as they control access to their own mobile customers. Many operators are also bundling telecommunications services in ways designed to increase their longer-term attractiveness to consumers, and broadcasting, data and other content services are increasingly likely to be incorporated into such bundles. The convergence of technologies and services is also widely expected to generate new economies of scale and scope and so produce potential new sources of market power, including through merger and acquisitions activity.

12. The pace of change in the telecommunications industry has not abated since 1997. Indeed, the deployment of convergent technologies and services, the expansion of broadband networks and related merger and acquisition activity are likely to raise it to unprecedented levels over the next few years. In these circumstances, constant monitoring will be required to ensure that the type and extent of regulation reflects changing market conditions, and that over-regulation is avoided.

The regulatory framework and its operation since 1997

13. The anti-competitive conduct powers and the telecommunications-specific access regime contained in Parts XIB and XIC of the *Trade Practices Act* are intended to ensure that behaviour which threatens competition can be dealt with speedily and effectively. Part XIB, in particular, is intended to act as a deterrent to such behaviour. Both the Part XIB and Part XIC provisions are designed to enable competition to develop in the expectation that it will not be obstructed by an overwhelmingly dominant incumbent and that access to input services will be available on non-discriminatory terms and conditions.

14. Due to the state of competition in the telecommunications industry and the fast pace of change in the industry, Part IV of the *Trade Practices Act* was considered in 1997 to be insufficient to constrain anti-competitive conduct. The ACCC believes that those circumstances remain. Part XIB was intended to increase the ability of the ACCC to respond swiftly where anti-competitive conduct is evident, including by the issue of competition notices, and evaluating the effects rather than the purpose of conduct. In response to concerns expressed by industry that the competition notice regime was not providing the expeditious mechanism that was envisaged, the Government amended Part XIB in 1999 to strengthen the regime.

15. The access regime is intended to ensure that competition in the delivery of retail services can develop despite lack of competition in the provision of essential input services. It operates in two phases: identification of the services to be regulated, and determination, where necessary, of the terms and conditions of access to regulated services. There is no general right of access to services.

16. Services are declared when the ACCC finds, on the basis of explicit criteria specified in the legislation, that it would be in the long-term interests of end-users to do so. The focus on the long term is interpreted by the ACCC as encompassing both consumer and producer interests, as consumer welfare is dependent in the long term on the existence of sustainable production conditions. The criteria also include explicit reference to the economically efficient use of, and economically efficient investment in, the infrastructure. Those criteria are more appropriate to telecommunications than the more general access provisions of the *Trade Practices Act* (Part IIIA).

17. A range of services already being provided by Telstra to Optus and Vodafone were deemed to be declared in 1997, when the deeming provisions in the Transitional Act resulted in a relatively low regulatory threshold. Since 1997, all decisions concerning regulation have been the subject of public inquiries. Contrary to some perceptions, the ACCC has declared only a small number of services since 1997 and on a number of occasions has decided against the declaration of services proposed by sections of the industry. Indeed, its first declaration inquiry (digital mobile roaming services) resulted in a decision not to declare the service. The predominant trend is now clearly to remove regulation by reviewing the continuing need to regulate some services.

18. Once a service is declared, the provider is required to comply with standard access obligations including an obligation to provide access when requested to do so by an access seeker. Part XIC allows the provider to give an undertaking to the ACCC. The terms and conditions on which the provider complies with the standard access obligations are determined by negotiation between the parties or, failing agreement, by any relevant undertaking submitted by the provider and accepted by the ACCC, or, in the absence of an undertaking, by the ACCC acting as arbitrator.

19. This negotiate-arbitrate model with provision for undertakings was intended to provide maximum flexibility and reliance on commercial processes for

participants. However, it has proved problematic in practice. Commercial negotiations on the pricing of important declared services have not succeeded (and perhaps should not have been expected to succeed) because of market power and information imbalances among the parties and because of incentives for both parties, but particularly access providers, not to conclude agreements or otherwise to delay access to services. Such problems are, after all, among the reasons for declaring services in the first place. With no undertakings yet in force, this has resulted in a large number of disputes being brought to the ACCC for arbitration.

20. This has had a number of consequences which were not foreshadowed in the design of the original regime. First, it has meant that the pricing decisions which will ultimately affect the build-buy decisions of competing service providers and investors have been made by the ACCC rather than negotiated among access seekers and access providers. Second, it has resulted in pricing decisions for essentially non-differentiated services and of general importance to the industry being determined in private, bilateral arbitration settings rather than in public, multilateral processes.

21. The ACCC is aware that price determinations made in the course of arbitrations are critical signals for investment. Indeed, determinations that services should be regulated will themselves impact on efficient build-or-buy decisions. The ACCC has sought to ensure that those signals generate incentives for efficient investment and do not distort investment decisions. It has approached this by attempting to estimate the costs which would be incurred by an efficient operator using an efficient network configuration. Such a forward-looking approach generates price signals consistent with those which would be generated in a contestable market, and is also consistent with international regulatory practice. The ACCC's pricing principles are now well understood in the industry, and their application has resulted in both investment in new facilities and competition through interconnection. For services where other approaches may be warranted, including local carriage (resale) service and services supplied by non-dominant PSTN and GSM networks, the ACCC is considering alternative pricing models.

22. The ACCC believes that its pricing determinations have resulted in efficient investment incentives. In services and regions where network duplication is most likely to be efficient, major network rollouts and enhancements have occurred. While a number of operators are nearing completion of major investment programs, others are only now embarking on major infrastructure expansions. The takeup of recent spectrum allocations signals optimism concerning the prospects for new wireless networks. Where network duplication is more likely to be inefficient (in high-cost or low-demand areas), interconnection rather than new investment has been observed. This pattern of investment and entry is consistent with that which would be expected to emerge in a more competitive market over time.

Possible amendments to the telecommunications-specific competition regulation

23. The experience of the last three years has shown that the current regulatory framework is both robust and flexible. The declaration processes of the access

regime permit access to input services necessary for the provision of services, either while facilities-based competition is developing, or indefinitely where facilities-based competition is considered unlikely to occur. At the same time, and just as importantly, they allow withdrawal from regulation as conditions warrant, following a public inquiry initiated either by the ACCC itself, or at the request of any other individual or group. The ability to vary, amend or revoke declarations, either in whole or in part, or in particular geographic areas, together with the ability to exempt particular carriers from some or all of their standard access obligations, implies great flexibility to deal with increasingly competitive situations as they arise.

24. Consequently, it is the ACCC's view that changing market conditions do not warrant the removal of the access regime. Instead, regulation can and should be reduced by selective withdrawal of services from the provisions of the regime in circumstances where continuing regulation is judged in a public process to be no longer in the long-term interests of end-users.

25. The ACCC has already moved strongly in this direction. No new services have been declared for almost 12 months, and the two inquiries current at the time of this submission relate to the limitation, rather than the extension, of existing regulation. Both those inquiries were initiated by the ACCC itself, rather than following a request to the ACCC.[3]

26. However, where facilities-based competition has not developed, and particularly where it is unlikely to develop for some time, a strong access regime will still be required. Some new services may well come into the regime if new sources of bottleneck power emerge as a result of convergence or other structural forces. The ACCC recognises the importance of ensuring that the development of facilities-based competition is not itself hindered by the access regime, but, as explained above, it considers that the flexibility inherent in the present regime meets this test.

27. The ACCC does not believe that the replacement of the telecommunications-specific access regime with the general access provisions of Part IIIA of the Trade Practices Act would be in the long-term interests of end-users. At the very least, it would involve the re-declaration of some telecommunications services under Part IIIA and possibly an associated regulatory hiatus. It would impose new uncertainties on an industry still in transition from the 1997 changes. At worst, it would risk loss of the very outcomes which Part XIC was designed to deliver: lower prices, better, more innovative services and expanded choice for consumers.

28. The market power of Telstra, combined with the development of oligopolistic features in some markets, warrants the retention of strong anti-competitive conduct provisions specifically directed to the particular needs of the telecommunications market for swift sanctions in order to provide effective deterrents to conduct threatening the development of effective and sustainable competition.

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[3] One of those inquiries was, however, initiated in the context of an exemption sought by an access provider from certain of its standard access obligations.

29. This does not mean, however, that the arrangements themselves cannot be made to work more effectively. Operational experience has indicated a number of areas in which the effectiveness of the provisions could be improved by amendment. The ACCC suggests a number of these in its submission. One example includes the ability to speed processes and improve certainty by including in the access regime an ability, in certain limited circumstances, to require and/or amend undertakings from access providers concerning the price and/or non-price terms and conditions of access to declared services. This would overcome the problem, inherent in a negotiate-arbitrate model, that disputes relating to pricing (and indeed other matters) are currently required to be solved in private and bilaterally, although the issues are of public significance and multilateral in implication. Once accepted, undertakings establish prices which, if charged, can no longer be notified for arbitration. The existence of such an undertaking would add considerably to certainty and efficiency in the industry. This should reduce disputes and the subsequent need for time-consuming arbitration by establishing reference tariffs against which access providers and seekers can negotiate their own terms and conditions.

30. On anti-competitive behaviour, the ACCC notes that processes initiated under the Competition Notice regime have not been able to be concluded as speedily as was initially envisaged. Amendments introduced in 1999 have improved this situation, but have resulted in a complex judicial enforcement regime where general rules cannot be enforced in the courts until the ACCC has issued a competition notice. Again, speed and certainty are likely to be improved under an administrative model where the regulator could prescribe standards of conduct having regard to competition and public interest criteria. Such arrangements would, in the ACCC's view, produce better and quicker outcomes, and reduce incentives for regulatory gaming by participants.

Conclusion

31. The telecommunications market in Australia remains a market in transition. But while major structural changes have occurred in the three years since 1997, Telstra remains overwhelmingly dominant in most services and most regions. In addition, the industry is on the edge of further transformation, with the digitisation of telecommunications, broadcasting and data services and the extension of broadband communications facilities to many parts of Australia. This will bring new challenges, as traditional economies of scale and scope change with the introduction of new technologies and the entry of new integrated businesses from traditionally separate sectors.

32. The current regime is, in the ACCC's view, sufficiently robust to accommodate these new challenges, while allowing scope for withdrawal from regulation of any service or activity when and to the extent appropriate. While Telstra retains a high degree of vertical integration, strong access arrangements will continue to be required for those services in which facilities-based competition does not emerge. Consistent with the intentions of the Parliament, the regime is fully consistent with the objects, criteria and general principles underlying the more general access and anti-competitive conduct provisions of the *Trade Practices Act*. It is also

consistent with the approaches of other major developed economies with recently-liberalised telecommunications markets.

33. Competitive markets are generally recognised as a powerful means of ensuring that productive effort and resources are allocated in ways which will maximise community welfare. This regulation aims to ensure that competition can develop efficiently in the special circumstances of the telecommunications industry in Australia. The ACCC believes that, with some amendment to improve its effectiveness, it should continue to underpin efficient growth and expansion in infrastructure and services in a consumer-responsive way. Without it, the great benefits already apparent from competition and technological change risk diminution or reversion to incumbent infrastructure owners. This is not in the long-term interests of end-users, and will not promote the efficiency and competitiveness of the industry or the economy.

PART A

REGULATING COMPETITION IN THE AUSTRALIAN TELECOMMUNICATIONS MARKET

The telecommunications-specific competition provisions have operated since 1 July 1997. In this part of the submission, the ACCC summarises the provisions and their operation, and considers the changing market environment in which they are applied.

1 THE TELECOMMUNICATIONS-SPECIFIC COMPETITION PROVISIONS

1.1 Introduction

Until July 1997, Telstra, Optus and Vodafone were the only licensed telecommunications carriers in Australia. The industry was regulated by the dedicated telecommunications regulator, the Australian Telecommunications Authority (AUSTEL). The general competition regulator, the Australian Competition and Consumer Commission, had no direct oversight of the industry's structure, conduct or consumer protection.

The package of legislation which took effect on 1 July 1997 fundamentally altered those arrangements. In this section of the submission, the objectives and the characteristics of the telecommunications-specific competition provisions are outlined.

1.2 Competition objectives for telecommunications

The objective of the Government, in introducing its 1997 telecommunications reform package, was to provide a framework within which the Australian telecommunications sector can develop into an industry based on:[4]

- world class infrastructure using the latest market driven technology mix;
- a multitude of service providers offering diverse and innovative carriage and content services; and
- contestable market strategies which drive prices down and the quality of service up.

These objectives are reflected in subsection 3(1) of the *Telecommunications Act 1997* which provides:[5]

The main object of this Act, when read together with Parts XIB and XIC of the *Trade Practices Act 1974*, is to provide a regulatory framework that promotes:

(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and

(b) the efficiency and international competitiveness of the Australian telecommunications industry.

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4 Commonwealth, *Parliamentary Debates (Telecommunications Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 890 (Senator Campbell, Parliamentary Secretary to the Treasurer).

5 Subsection 3(2) of the *Telecommunications Act 1997* sets out other objects covering matters such as ensuring various social imperatives and performance standards are achieved, in addition to an efficient, competitive and responsive telecommunications industry.

Consistent with the Hilmer Report,[6] the promotion of a more competitive telecommunications industry was seen as critical to achieving these objectives.[7] The provisions in Parts XIB and XIC of the *Trade Practices Act* are intended to:[8]

> assist in creating more vigorous competition at all levels of the telecommunications market with benefits to the Australian community through lower prices and better quality.

1.3 The rationale for telecommunications-specific provisions

The *Telecommunications Act 1991* allowed the creation of a general carrier duopoly (Telstra and Optus) to end on 30 June 1997 and the granting of three public mobile operator licences (Telstra, Optus and Vodafone). The post-1997 regime removed the regulatory barriers to market entry and brought the regulation of competition in the telecommunications industry more closely into line with general trade practices law.

However, the Government considered that total reliance on the general provisions in Parts IIIA and IV of the *Trade Practices Act* would not achieve its objectives as:[9]

- telecommunications is a complex, horizontally and vertically integrated industry;
- the industry is developing from a monopoly structure to greater competition, with relatively small entrants compared to the incumbent;
- the Government's objective of not imposing undue administrative burdens on industry participants[10] may require effective enforcement backstops to provide a strong disincentive for the dominant incumbent to use its market power to stifle competition;
- anti-competitive cross-subsidies by the incumbent from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment;
- due to the fast pace of change in the industry and the volatile state of the industry, anti-competitive behaviour can cause particularly rapid damage to competition; and
- there is considerable scope for the incumbent to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbent. The access regime is intended to facilitate 'any-to-any connectivity' and the Government's commitment to promote the diversity of carriage and content services available to end-users.

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6 The Hilmer Report identified the role of competition policy as the facilitation of effective competition in the interests of achieving economic efficiency and thus community welfare: Aust, Independent Committee of Inquiry, *National Competition Policy* (August 1993) p 6.

7 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 894 (Senator Campbell, Parliamentary Secretary to the Treasurer).

8 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, House of Representatives, 5 December 1996, 7805 (Warwick Smith, Minister for Sport, Territories and Local Government and Minister Assisting the Prime Minister for the Sydney 2000 Games).

9 See eg Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* p 6.

10 Section 4 of the *Telecommunications Act 1997*.

The legislation provided for a review of Part XIB before 1 July 2000.[11]

1.4 Provisions contained in the *Trade Practices Act 1974*

1.4.1 Part XIB - Anti-competitive conduct (Part XIB)

Due to Telstra's market power and scope to engage in anti-competitive conduct and the fast pace of change in the industry, Part IV of the *Trade Practices Act* was regarded as insufficient to constrain anti-competitive conduct.[12] Part XIB was intended to supplement the judicial enforcement model in Part IV by increasing the ability of the ACCC to respond swiftly to anti-competitive conduct. The Exposure Draft, which was published in December 1995, provided that the ACCC could issue a competition direction, with which the carrier or carriage service provider was required to comply, where the ACCC was satisfied that the carrier or carriage service provider had engaged in anti-competitive conduct.[13] In response to subsequent legal advice on the constitutionality of the provision, the competition direction was replaced by the current competition notice regime.

Competition rule

Part XIB prohibits carriers[14] and carriage service providers[15] from engaging in anti-competitive conduct (the competition rule).[16] Section 151AJ defines two circumstances in which a carrier or carriage service provider (CSP) engages in 'anti-competitive conduct':

- The first instance is where the carrier/CSP has a substantial degree of power in a telecommunications market and uses that power with the effect or likely effect (or when combined with other conduct, the effect or likely effect) of substantially lessening competition in a telecommunications market.[17]

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11 Section 151CN. See Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

12 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 894 (Senator Campbell, Parliamentary Secretary to the Treasurer).

13 *Telecommunications Bill 1996, Trade Practices Amendment (Telecommunications) Bill 1996: Exposure Drafts and Commentary* (December 1995) page 81.

14 A 'carrier' is defined as the holder of a carrier license granted under s 56 of the *Telecommunications Act 1997*: *Trade Practices Act 1974* s 151AB and *Telecommunications Act 1997* s 7.

15 A 'carriage service provider' is a person who supplies (or proposes to supply) a listed carriage service using a network unit owned by one or more carriers or a network unit in relation to which a nominated carrier declaration is in force. A listed carriage service is essentially the carrying of communications by means of guided and/or unguided electromagnetic energy between particular points where at least one point is in Australia: *Trade Practices Act 1974* s 151AB and *Telecommunications Act 1997* s 7.

16 Section 151AK.

17 Section 151AJ(2) (as amended by the *Telecommunications Legislation Amendment Act 1999*).

- The second instance is where a carrier/CSP contravenes section 45, 45B, 46, 47 or 48 of the *Trade Practices Act* and the conduct relates to a telecommunications market.[18]

Exemption

A carrier/CSP may apply to the ACCC for an order to exempt specified conduct from the operation of the competition rule.[19] The ACCC must not make the order unless it is satisfied that either the conduct will result in a net benefit to the public or the conduct is not anti-competitive.[20] A decision to refuse to make an exemption order can be reviewed by the Australian Competition Tribunal.[21]

Enforcement

If the Federal Court is satisfied that a person has contravened the competition rule, it may order:

- pecuniary penalties up to $10 m for each contravention and $1 m for each day that the contravention continued;[22]
- injunctions;[23]
- information disclosure and/or advertisements;[24]
- recovery of loss or damage;[25] and
- other compensation orders.[26]

However, other than for an injunction, proceedings can only be instituted where the ACCC has issued a Part A competition notice and the conduct that is the subject of the proceedings occurred when the Part A notice was in force and is of a kind dealt with in the notice.

Competition notice

If the ACCC has reason to believe a carrier/CSP has engaged in anti-competitive conduct, it may issue the following notices:

- A Part A competition notice stating that the carrier/CSP has engaged in either (i) a specified instance of anti-competitive conduct; or (ii) at least one instance of anti-competitive conduct of a kind described in the notice.[27] As discussed above, a Part A notice acts as a 'gate keeper' to the commencement of proceedings.

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18 Section 151AJ(3).
19 Section 151AS.
20 Section 151BC.
21 Section 151CI.
22 Section 151BX.
23 Section 151CA.
24 Section 151CB.
25 Section 151CC.
26 Section 151CE.
27 Section 151AKA.

- A Part B competition notice stating that the carrier/CSP has contravened the competition rule and setting out the particulars of the contravention.[28] A Part B notice is prima facie evidence of the matters in the notice and may be issued in relation to the conduct that is the subject of the proceedings.[29]

- An advisory notice (if a Part A competition notice is in force) advising the carrier/CSP of the action it should take to ensure that it does not engage in the kind of conduct dealt with in the Part A competition notice.[30] An advisory notice has no legal force.

If the ACCC has reason to suspect a contravention, it must act expeditiously in deciding whether to issue a competition notice.[31] In deciding whether to issue a competition notice, the ACCC must have regard to the guidelines it issued.[32] The Federal Court cannot stay the operation of a competition notice where judicial review is sought under the *Administrative Decisions (Judicial Review) Act* or *Judiciary Act* (although enforcement proceedings can be stayed).[33]

1.4.2 Part XIB - Information provisions

Part XIB introduced a number of telecommunications-specific information provisions and reporting requirements:

- General tariff filing directions:[34] The ACCC may, if it is satisfied that a carrier/CSP has a substantial degree of power in a telecommunications market, require the carrier/CSP to give the ACCC certain information in relation to charges for specified goods and services.

- Tariff filing by Telstra:[35] Telstra is required to give the ACCC certain information in relation to charges for basic carriage services.

- Record-keeping rules:[36] The ACCC may require a carrier/CSP to keep certain records and provide reports to the ACCC of the information contained in those records where the information is relevant to Part XIB or XIC (or certain other provisions).

- The ACCC must report each year on competitive safeguards within the telecommunications industry.[37]

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28 Section 151AL.
29 Section 151AN.
30 Section 151AQB.
31 Section 151AQ.
32 Section 151AP. See ACCC, *Competition Notice Guideline Issued Pursuant to Section 151AP of the Trade Practices Act 1974* (27 June 1997); ACCC, *Anti-Competitive Conduct in Telecommunications Markets: An Information Paper* (19 May 1997 revised August 1999).
33 Section 151AQA.
34 Section 151BK.
35 Section 151BTA.
36 Section 151BU.
37 Section 151CL.

- The ACCC must report each year on telecommunications charges paid by consumers.[38]

- The Minister may require the ACCC to report on certain matters relating to competition in the telecommunications industry.[39]

Information powers, in addition to section 155 of the *Trade Practices Act*, were considered necessary for the effective administration of competition regulation in the telecommunications industry.[40] Additional review and reporting requirements were introduced to ensure that the regulatory regime was appropriate to the Government's policy of establishing a fully competitive telecommunications industry.[41]

1.4.3 Part XIC – Telecommunications access regime

In addition to the state of competition and pace of change, the Government considered that an important feature of the telecommunications industry was the need for any-to-any connectivity so that competitors, inevitably, are required to use each others' networks.[42] The Government also recognised the need for continuity with the access arrangements in the 1991 *Telecommunications Act*.[43] Part XIC of the *Trade Practices Act* was introduced to ensure that the access regime worked effectively for the telecommunications industry. The object of the regime is to promote the 'long-term interests of end-users of carriage services or services provided by means of carriage services' (LTIE).[44]

Declaration

The ACCC may declare an eligible service (a carriage service or service that facilitates the supply of a carriage service) to be a declared service.[45] Under the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, the ACCC was required to prepare a written statement, before 1 July 1997, specifying:

- each eligible service that was covered by a registered access agreement as at 13 September 1996 unless the ACCC was satisfied that the service would not promote the LTIE;[46] and

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38 Section 151CM.

39 Sections 151CMA and 151CMB.

40 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

41 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

42 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 894 (Senator Campbell, Parliamentary Secretary to the Treasurer).

43 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

44 Section 152AB.

45 Section 152AL.

46 Services supplied using an AMPS network were subject to further criteria.

- an eligible service for the supply of a broadcasting service by means of line links.[47]

The specified services were deemed to be declared services for the purposes of Part XIC.

Under Part XIC, the ACCC can declare services in one of two ways:

- in accordance with a recommendation from the Telecommunications Access Forum; or
- after holding a public inquiry, if the ACCC is satisfied that making the declaration will promote the LTIE.

In determining whether declaration will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to achieve the objective of:[48]

- promoting competition in markets for listed services;
- achieving any-to-any connectivity; and
- encouraging the economically efficient use of, and investment in, infrastructure (which is further defined so that the ACCC must have regard to technical feasibility, suppliers' commercial interests and investment incentives).

The ACCC can, after conducting a public inquiry, vary or revoke the declaration.[49]

Standard access obligations

Providers of a declared service are required to comply with 'standard access obligations' (SAOs)[50] including:

- an obligation to supply the service to an access seeker on request[51] and permit interconnection;[52]
- certain non-discriminatory obligations in relation to the 'technical and operational quality' of the service;[53] 'technical and operational quality and timing' of the interconnection;[54] and 'fault detection, handling and rectification' arrangements for the service and interconnection;[55] and
- an obligation to provide billing information[56] and conditional-access customer equipment.[57]

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47 Section 39.
48 Section 152AB.
49 Section 152AO. A public inquiry is not required where the variation is minor and the declaration was made after a public inquiry.
50 Section 152AR.
51 Para 152AR(3)(a).
52 Para 152AR(5)(c).
53 Para 152AR(3)(b).
54 Para 152AR(5)(d)(i).
55 Para 152AR(3)(c) & 152AR(5)(e).
56 Subs 152AR(6).
57 Subs 152AR(8).

However, the obligation to supply the service is subject to certain limitations which protect the access provider and other users of the service.[58] Further, the ACCC may exempt carriers/CSPs from the SAOs if the ACCC is satisfied that the exemption will promote the LTIE.[59]

Access codes and undertakings

Part XIC sets out a process by which the ACCC can accept an access code submitted by the Telecommunications Access Forum[60] or make an access code[61] where the ACCC is satisfied that the terms and conditions are 'reasonable'. In order to determine whether particular terms and conditions are 'reasonable', the ACCC must have regard to the:[62]

- LTIE;
- business interests of the carrier/CSP including investment;
- interests of users;
- cost of providing access;
- operational and technical requirements; and
- economically efficient operation of the service, network or facility.

A carrier/CSP may propose an access undertaking adopting the terms of the access code.[63] If a carrier/CSP submits an access undertaking that does not adopt the terms of an access code, the ACCC must not accept the undertaking unless it is satisfied that the terms and conditions are 'reasonable'. An undertaking decision may be reviewed by the Australian Competition Tribunal.[64]

Terms and conditions of access

The terms and conditions on which the standard access obligations are complied are determined by:[65]

- agreement between the provider and access seeker; or

- failing agreement, any relevant access undertaking submitted by the provider and accepted by the ACCC; or

- in the absence of an undertaking, by the ACCC acting as arbitrator.

In addition, the Minister may make a written determination dealing with price-related terms and conditions.[66]

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58 Paragraph 152AR(4) and (9).
59 Sections 152AS and 152AT. The decision can be reviewed by the Australian Competition Tribunal: s 152AV.
60 Section 152BC.
61 Section 152BJ.
62 Section 152AH. Subs 152AH(1) does not limit the matters to which regard may be had.
63 Section 152BS.
64 Section 152CE.
65 Section 152AY.
66 Section 152CH.

The ACCC, in making a final arbitration determination, must have regard to the same matters that it would in determining whether terms and conditions are 'reasonable' and, in addition, must have regard to the value of any extensions or enhancement of capability.[67] A final arbitration determination may be reviewed by the Australian Competition Tribunal.[68]

Enforcement

Compliance with the SAOs[69] or an arbitration determination[70] may be enforced by the Federal Court. In addition, Part XIC prohibits a person from engaging in conduct for the purpose of preventing or hindering access by a service provider to a declared service in accordance with the SAOs or an arbitration determination.[71]

1.4.4 Amendments

In March 1998, the Government introduced the *Telstra (Transition to Full Private Ownership) Bill*. The Bill was referred the Senate Environment, Recreation, Communications and the Arts Legislation Committee which reported in May 1998. In response to that report, the *Telecommunications Legislation Amendment Bill* was introduced in November 1998, as a package of five bills, in order to enhance 'the existing pro-competitive regulatory regime for telecommunications'.[72] In June 1999, the Government significantly amended the Bill as a result of on-going consultation with industry and the ACCC about the operation of Parts XIB and XIC.[73] The *Telecommunications Legislation Amendment Act 1999* commenced in July 1999.

Part XIB Competition notice

Section 2 of the submission sets out the matters where the ACCC has issued competition notices (internet peering and commercial churn). The operation of the regime highlighted the limitations of Part XIB. The Government was concerned that the regime was not providing the expeditious mechanism for addressing anti-competitive conduct that was envisaged and made a number of amendments to the regime (Table 1). (The operation of Part XIB is considered in more detail in section 5 of the submission.)

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67 Section 152CR.

68 Section 152DO.

69 Section 152BB.

70 Section 152DU.

71 Section 152EH.

72 Commonwealth, *Parliamentary Debates (Telecommunications Legislation Amendment Bill 1998 Second Reading Speech)*, House of Representatives, 12 November 1998, 248 (Mr Fahey, Minister for Finance and Administration).

73 *Telecommunications Legislation Amendment Bill 1998* Supplementary Explanatory Memorandum p 1.

Table 1
Amendments to the competition notice regime

Prior to July 1999	1999 amendments
• required to prove that a use of market power, by itself, had the effect of substantially lessening competition • ACCC required to be satisfied that there was a contravention and provide procedural fairness before issuing a notice, and set out detailed particulars of the contravention in the notice • recipient could delay court proceedings by seeking judicial review of the notice and partially modifying conduct so that the subsequent conduct was not of a kind described in the notice • the notice did not particularise the conduct that was the subject of the court proceedings so was of limited evidentiary relevance	• use of market power can be combined with other conduct of the carrier/CPS • reduced the standard of proof for issuing a notice to a 'reason to believe' • separated the gate-keeper and evidentiary role of the notices (Part A and Part B notices) • reduced the level of detail required in a Part A notice so that the subsequent conduct is more likely to be of a kind described in the Part A notice • allowed Part B notices to be issued in relation to the conduct that is the subject of the proceedings • prevented the notice from being stayed if judicial review is sought • enabled the ACCC to issue an advisory notice • allowed private parties to seek an injunction without the need for a competition notice

Part XIC Negotiate-arbitrate model

Part XIC requires the ACCC to act as speedily as a proper consideration of the dispute allows.[74] The Government recognised that in some cases an arbitration may be a lengthy process due to the issues involved and that an access provider may have an incentive to delay the resolution of the dispute contrary to the public interest.[75] Under the 1999 amendments:

- the ACCC can make an interim arbitration determination[76] and backdate a final arbitration determination;[77]
- if a party applies to the Australian Competition Tribunal for review of a final determination and the final determination is stayed, an interim determination can remain in force;[78] and
- the ACCC can give directions in relation to negotiations[79] and attend negotiations.[80]

The operation of Part XIC is further discussed in sections 2 and 3 of the submission.

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74 Paragraph 152DB(1)(b).

75 *Telecommunications Legislation Amendment Bill 1998* Supplementary Explanatory Memorandum p 24.

76 Section 152CPA.

77 Section 152DNA.

78 Sections 152DN and 152DO. See also section 152DNB (stay of a determination in judicial review proceedings).

79 Section 152BBA.

80 Section 152BBC. See also section 152CV(2).

1.5 Relationship of Parts XIB and XIC to counterpart general provisions in the *Trade Practices Act*

1.5.1 Part IV and Part XIB

The post-1997 regime removed the exemption from Part IV of the *Trade Practices Act* given to carriers under the *Telecommunications Act 1991* for the supply of basic carriage services[81] so that all members of the telecommunications industry are subject to the general trade practices provisions in Part IV.[82] As outlined above, Part XIB was intended to supplement Part IV due to particular features of the telecommunications industry.

Part XIB is similar to Part IV of the *Trade Practices Act*. Like Part IV, Part XIB is a judicial enforcement model in that it prescribes general rules of conduct which are enforced by the courts. However, unlike Part IV:

- Part XIB prohibits a use of market power that has an anti-competitive effect rather than purpose;
- proceedings (other than for an injunction) cannot be instituted under Part XIB unless the ACCC has issued a competition notice and the alleged conduct is of a kind dealt with in the notice;
- the evidentiary burden is reversed;
- a competition notice places public pressure on the recipient to modify their conduct; and
- the pecuniary penalty is potentially greater.

Proceedings may be instituted under both Part VI (for a contravention of Part IV) and Part XIB in relation to the same conduct. However, a person is not liable for more than one pecuniary penalty.[83] In addition, section 151AK sets out a process for coordinating authorisation applications under Part VII and exemption applications under Part XIB.[84]

1.5.2 Part IIIA and Part XIC

Part IIIA of the *Trade Practices Act* was inserted in 1995 by the *Competition Policy Reform Act* in response to the Hilmer Report. The Commonwealth was required to introduce a regime for third party access that was consistent with the principles agreed to by the Commonwealth and the States and Territories in the *Competition Principles Agreement* (April 1995). Part IIIA is intended to provide an 'umbrella' to cover other access regimes[85] including the *National Electricity Code*[86] and *National Third Party Access Code for Natural Gas Pipeline Systems*.[87]

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81 Telecommunications Act 1991 ss 236 and 237.

82 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 894 (Senator Campbell, Parliamentary Secretary to the Treasurer).

83 Subsection 151BX(6).

84 See also section 151AY in relation to section 93 notifications.

85 Aust' National Competition Council, *The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act* (August 1996) p 9.

The Government's philosophy in preparing Part XIC was to follow an approach based on Part IIIA of the *Trade Practices Act* as far as practicable but to introduce additional refinements due to the particular features of the telecommunications industry.[88] The differences between Part IIIA and Part XIC are further discussed in section 7 of the submission but can be summarised as shown in Table 2.

Table 2
Comparison of Part IIIA and Part XIC access provisions

	Part IIIA	Part XIC
Declaration	• State or Cth Minister declares the service on NCC recommendation • NCC and Minister must be satisfied that certain criteria are met • Australian Competition Tribunal can review decision	• ACCC declares service on recommendation of TAF or after conducting a public inquiry • ACCC must be satisfied the declaration is in the LTIE and must have regard to certain criteria • a provider of a declared service is subject to standard access obligations
Undertaking	• ACCC cannot accept undertaking if service is declared and service cannot be declared if ACCC accepts undertaking • undertaking can be based on an industry access code accepted by the ACCC	• undertaking can only be provided in relation to a declared service • undertaking can be based on a TAF or ACCC telecommunications access code • Australian Competition Tribunal can review decision
Arbitration	• no arbitration has yet been notified under Part IIIA	• process has been refined in light of experience to date (eg negotiation directions – including prior to the notification of a dispute, interim determinations and back-dating final determinations)
Other processes	• Cth Minister may, on NCC recommendation, decide that a State access regime is an effective access regime • state access regimes may confer functions and powers on the ACCC	

The relationship between Part IIIA and Part XIC is addressed in section 152CK. If a service is declared under both Parts, the arbitration must be conducted under Part XIC; if a service is declared under Part XIC, an access undertaking cannot be

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86 *National Electricity Market Legislation Agreement* (9 May 1996) (NSW, VIC, QLD. SA & ACT).

87 *Natural Gas Pipelines Access Agreement* (7 November 1997) (Cth, NSW, Vic, Qld, SA, WA, Tas, ACT & NT).

88 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

submitted under Part IIIA; and if an undertaking has been accepted under Part IIIA, it ceases to operate if the service is declared under Part XIC.

1.6 Provisions contained in the *Telecommunications Act 1997* imposing powers or functions on the ACCC

Consistent with the Hilmer Report recommendations,[89] the post 1997 regime established the Australian Communications Authority (by merging AUSTEL and the Spectrum Management Agency) and transferred the competition regulation functions of AUSTEL to the ACCC.[90] However, the Government also recognised that certain obligations imposed under the *Telecommunications Act 1997* have competition implications. The telecommunications regulatory regime provides for coordination between the ACA and the ACCC in areas where technical and competition regulation overlap. This is reflected in the following Parts of the *Telecommunications Act 1997* (which come within the Productivity Commission's terms of reference):

- Part 17: The ACA may require certain carriers/CSPs to provide pre-selection in favour of CSPs. Before making a determination, the ACA must consult the ACCC. The ACCC can also arbitrate a dispute on the terms and conditions of access to a preselection, if the parties cannot agree on an alternative arbitrator.

- Part 21 Division 5: The ACCC may direct the ACA to make a technical standard relating to the interconnection of facilities.

- Part 22: The ACA, in making the numbering plan, cannot include rules about number portability unless directed to do so by the ACCC. Under the *Telecommunications (Arbitration) Regulations 1997*, the ACCC may arbitrate a dispute in relation to the terms and conditions for complying with a requirement in the numbering plan to provide number portability.

- Part 25 Division 3: Sets out the process that the ACCC must follow when conducting public inquiries.

- Schedule 1 Parts 3 to 5 (license conditions): Part 3 requires carriers to provide other carriers with access to facilities. Part 4 requires carriers to provide other carriers with access to certain information relating to the operation of telecommunications networks. Part 5 requires carriers to provide other carriers with access to telecommunications transmission towers, the sites of such towers and underground facilities that are designed to hold lines. In relation to each Part, the ACCC may arbitrate a dispute in relation to the terms and conditions of access. In addition, under Part 5, the ACCC may make a Code setting out conditions that are to be complied with.

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89 Aust, Independent Committee of Inquiry, *National Competition Policy* (August 1993) p 327.

90 Commonwealth, *Parliamentary Debates (Australian Communications Authority Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 897 (Senator Campbell, Parliamentary Secretary to the Treasurer).

A detailed description of the ACCC's functions under the *Telecommunications Act 1997* (and other legislation) is set out in ACCC, *Telecommunications Industry – ACCC Role* (October 1997).[91]

[91] http://www.accc.gov.au/telco/fs-telecom.htm.

2 THE OPERATION OF THE PROVISIONS

2.1 Introduction

In this section of the submission, the ACCC summarises the operation of the provisions since their introduction in 1997.

2.2 Part XIB – Anti-competitive conduct

2.2.1 Competition notices

Since the introduction of Part XIB in 1997, the ACCC has issued competition notices in relation to two matters: internet peering agreements and commercial churn. Both were the result of investigations which were initiated by the ACCC following complaints. Both were, in the view of the ACCC, cases of abuse of market power.

Internet peering agreements

The internet peering matter commenced in July 1997, when the ACCC received complaints about Telstra's conduct in relation to competing internet access providers (IAPs). It was alleged that Telstra charged IAPs for connecting to the Big Pond Internet backbone but would not pay its competitors for connecting to their backbones. This raised those IAPs' costs and, in the ACCC's view, severely impeded competition in the supply of internet access services which is fundamental to the development of the internet sector.

At the early stage of the investigation, the ACCC sought information from IAPs, international carriers and backbone providers in order to assist it in forming a view on whether Telstra was breaching the competition rule. The Commission subsequently sought extensive evidence, as it would for proceedings under Part IV of the Act, from a range of industry participants, and technical and economic experts. This evidence was required to enable the ACCC to substantiate each of the elements required to show a contravention of the competition rule under Part XIB.

In May 1998 the ACCC issued a competition notice to Telstra, which alleged that:

- there is a market for internet access services;
- Telstra has a substantial degree of power in this market;
- Telstra had taken advantage of this power by charging IAPs for access but not paying for a similar service; and
- this conduct substantially lessened competition by raising the costs of rival IAPs and thereby hindering their ability to attract end-users and content providers and to compete with Telstra.

Telstra subsequently made reciprocal agreements with two of its rival IAPs and requested the ACCC to revoke the notice. The ACCC revoked the notice and issued a revised notice to reflect the changed arrangements. Telstra had applied to the Federal

Court to have the original notice, and then the fresh notice, set aside. Telstra then made a reciprocal agreement with a third IAP. The ACCC subsequently sought submissions on whether it should revoke the notice. In June 1998, the ACCC decided to revoke the notice.

Commercial churn

This matter commenced in August 1997, when the ACCC received complaints from Telstra's competitors about Telstra's revised customer transfer process known as 'commercial churn'. Commercial churn is Telstra's process for transferring an end-user to another carriage service provider. In the ACCC's view, the efficient and expeditious transfer of customers from one supplier to another is critical for the development of effective competition in the local telephony market.

The ACCC initially sought information from service providers on the matter, and subsequently sought extensive evidence from industry participants and experts. As part of its investigation, the Commission used its powers in section 155 of the Act to obtain information from Telstra. The ACCC required a considerable amount of evidence, as it did for the internet peering matter, in order for it to establish a breach of the competition rule.

In August 1998, the ACCC issued a competition notice to Telstra. The ACCC alleged that:

- there is a market for fixed local telephony services and a market for fixed long distance telephony services;
- Telstra has a substantial degree of power in the fixed local telephony market;
- Telstra took advantage of this market power by requiring carriage service providers to either use a manual system that is slow, inefficient and costly or, alternatively, use an automated process that requires them to accept liability for the customer's debts to Telstra or pay a fee of $15 per line; and
- this has the effect of substantially lessening competition in the fixed local and fixed long distance telephony markets by raising rivals' costs.

Telstra subsequently advised that it would make changes to its transfer conditions. The ACCC considered that the revised conduct did not address the ACCC's concerns but, instead, changed the nature of the conduct, thus precluding enforcement proceedings. Accordingly, the ACCC revoked the original notice and issued a fresh notice relating to the period prior to Telstra's changes. The ACCC issued a further three competition notices relating to the period after Telstra's changes. In December 1998, the ACCC instituted Federal Court proceedings in relation to two of the notices (the third one came into effect in January 1998). In April 1999, the ACCC issued a fourth notice to Telstra, which dealt with the conduct covered by the first three notices and, in addition, further conduct. The ACCC subsequently instituted further proceedings against Telstra in respect of the third and fourth notices, and the trial was scheduled for March 2000.

In February 2000, Telstra agreed on a $4.5 million package for service providers who use Telstra's commercial churn process. Accordingly, the matter was settled.

2.2.2 Investigations under Part XIB

Since the introduction of Part XIB, the ACCC has conducted a number of investigations into alleged anti-competitive conduct that did not ultimately result in the ACCC issuing competition notices. In the main, industry participants brought such matters to the ACCC's attention.

In relation to certain matters, the ACCC formed the view that it did not have a 'reason to suspect' that a contravention of the competition rule[92] had occurred. In some instances, the ACCC discontinued the investigation once it had formed the view that there had been no contravention of the competition rule. Other matters were resolved through further commercial negotiation without the need for continued involvement by the ACCC.

A summary of the major investigations carried by the ACCC under Part XIB and the outcome in each case is set out in Table 3.

Exemptions

To date, the ACCC has not received any applications for an exemption order, under section 151AS, in relation to the anti-competitive conduct provisions.

2.2.3 Information gathering powers

Tariff filing under Division 4 of Part XIB

To date, the ACCC has not found it necessary to issue a tariff filing direction under Division 4 of Part XIB. However, the ACCC has considered whether to make such directions in relation to two matters.

In one instance, the ACCC was requested by an industry participant to make a tariff filing direction under Division 4 and the ACCC decided not to make the requested tariff filing direction at that time.

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92 The ACCC's determination of whether it has a reason to suspect that there has been a breach of the competition rule is part of the preliminary phase of its consideration of whether there has been a contravention of the Act. If the ACCC has reason to suspect that a carrier or carriage service provider has contravened, or is contravening, the competition rule, the ACCC must act expeditiously in deciding whether to issue a competition notice in relation to that contravention: section 151AQ.

Table 3
Major investigations under Part XIB

Date	Matter	Issues	Outcome
1997	***International audiotex*** (Investigation commenced by AUSTEL and continued by ACCC)	• Alleged that Telstra used its market power to make audiotex services provided by its subsidiary more attractive to content providers whilst reducing the viability for existing and potential competitors. • ACCC identified the relevant market as 'the supply of underlying carriage services in Australia to content service providers for distribution of information to overseas callers.' • Telstra submitted that the relevant market was 'the supply of international audiotex services.' In Telstra's view, this was an international market and Telstra competed with carriers in other countries.	• Telstra advised the ACCC in December 1997 that it had decided to withdraw from the Australian terminating audiotex business because the expenditure required to maintain the audiotex services was not justified in light of the decline in revenue of the services. • No evidence to sustain a breach of the competition rule or that Telstra had contravened section 46 of the TPA.
1997/98	***PhoneAway***	• Service providers alleged that Telstra was pricing the local call component of its PhoneAway tariff anti-competitively in the market for pre-paid phone card services. • Service providers claimed that, to compete with PhoneAway they had to be able to match its 40 cent local call price, and the price they paid for use of Telstra's 1800 services, which they required to provide competing phone cards, prevented them from matching that price.	• ACCC found there was no breach of the competition rule. • The pre-paid services market was found to be highly competitive, with low barriers to entry. Some of Telstra's competitors had achieved substantial market shares.

Date	Matter	Issues	Outcome
1997/98	***One.Tel / Optus GSM***	• One.Tel alleged that Optus was misusing its market power in the wholesale GSM market. • One.Tel provided GSM services to end-users, carried exclusively by the Optus network. One.Tel alleged that it was constrained by exclusivity requirements from Optus, and because the lack of number portability prevented One.Tel from moving its existing customers to different carriers.	• ACCC formed a 'reason to suspect' that Optus was contravening the competition rule. • Matter was resolved by commercial negotiation between One.Tel and Optus.
1997/98	***Telstra's confidentiality requirements***	• Macquarie alleged that Telstra was seeking to delay renegotiation of the terms and conditions of supply to Macquarie, and to deny Macquarie the right and opportunity to refer complaints to the ACCC. • Macquarie alleged Telstra was contravening the competition rule by using its market power to refuse to negotiate the terms and conditions of an agreement with Macquarie unless Macquarie agreed to be bound by an unreasonable confidentiality agreement.	• ACCC found no breach of the competition rule. • However, the ACCC raised the matter with Telstra. • ACCC noted it may use its information gathering powers if investigations are impeded by confidentiality agreements.
1997/98	***One.Tel override***	• One.Tel alleged that Optus was misusing its market power by refusing to condition its network so as to permit One.Tel to use four digit dial codes to route long distance traffic from its customers to its preferred long distance carrier. • One.Tel alleged that Optus had market power in the market for GSM services.	• ACCC found no breach of the competition rule. • Given the issues regarding the Numbering Plan, One.Tel was advised that the mater was more appropriately dealt with by the ACA.

Date	Matter	Issues	Outcome
		• Optus alleged that the proposed use of the short dial access codes was illegal under the Telecommunications Numbering Plan 1997.	
1998	***Permitted attachment private lines (PAPLs)***	• ACCC received a number of complaints that Telstra had advised its PAPL customers that their data services could be adversely affected by changes to Telstra's network. Service providers understood this to mean Telstra was withdrawing support for DC continuity. • DC continuity is required for attaching high speed data technology, called xDSL. • Service providers alleged that Telstra had taken advantage of its power in upstream markets with the effect or likely effect that service providers would be forced to discontinue providing high speed data services over PAPLs.	• In September 1998 Telstra offered a number of safeguards guaranteeing the continuity of service to existing wholesale customers, which were modified to meet the ACCC's concerns. • ACCC continues to monitor Telstra's conduct concerning the deployment of xDSL technology and upgrading its network. • ACCC requested the TAF to examine developing a code to address industry-wide network modernisation issues.
1997/98	***ISDN and OnRamp Xpress services***	• Service providers complained that Telstra was withdrawing the supply of ISDN semi-permanent circuit services to service providers before providing its alternative OnRamp Xpress service. • Service providers were also concerned that the proposed price for the replacement OnRamp Xpress service was substantially more than the semi-permanent circuit service.	• After the ACCC made Telstra aware of its concerns, Telstra invested in infrastructure to supply semi-permanent circuit services prior to the introduction of the replacement service in areas where the replacement service was not yet available.

Date	Matter	Issues	Outcome
			• Telstra also announced prices for its proposed replacement service that were considerably lower than its previous indicative prices. • In light of Telstra's changes, ACCC formed the view that there was insufficient evidence that Telstra's conduct would substantially lessen competition. • ACCC decided that consideration needed to be given to whether ISDN services should be regulated under Part XIC. ACCC announced an ISDN declaration inquiry.
1998/99	***Telstra's capped $3 STD product***	• AAPT alleged that it was providing a competing product to Telstra's $3 capped STD product at a loss because of the structure of Telstra's interconnection prices charged to AAPT. • AAPT alleged that, through the capped rate and disparities between peak and off-peak wholesale and retail charges, Telstra was imposing a price squeeze on its competitors, and prevented AAPT from competing effectively in the residential market for long distance national services.	• ACCC concluded that Telstra's conduct did not contravene the competition rule.

Date	Matter	Issues	Outcome
1999	***Payphones***	• TriTel Australia Pty Ltd, a small payphone company, alleged that Telstra had effectively refused to negotiate with it on a range of issues affecting TriTel's ability to provide private payphone services.	• ACCC's investigations were suspended after Telstra and TriTel announced they would resume commercial negotiations.
1999	***Payphones and smartcards***	• Vanguard Holdings Limited, trading as PocketMoney alleged that Telstra engaged in anti-competitive conduct in denying PocketMoney access to a commercial wholesale rate for pre-paid payphone calls.	• ACCC's investigations were suspended after Telstra and PocketMoney commenced commercial negotiations.
1998/1999	***Internet third line forcing***	• It was alleged that Ninemsn had engaged in third line forcing conduct with Telstra's Big Pond Internet service in contravention of the competition rule. • It was alleged that access to the 'members only' content of the Ninemsn website was conditional upon customers being registered Big Pond users.	• ACCC formed the view that the conduct did not breach the competition rule.

In another matter, the ACCC exercised its ability to make such directions on an informal basis by requesting Telstra to provide to the ACCC information of a kind which Telstra could otherwise have been directed to provide. The information provided by Telstra from the ACCC's informal use of the tariff filing directions power assisted in the ACCC's consideration of whether Telstra had potentially breached the competition rule in that matter.

Tariff filing under Division 5 of Part XIB

An arrangement with Telstra has been developed by the ACCC in relation to the information that Telstra is required to provide to the ACCC under Division 5 of Part XIB. A strict interpretation of Division 5 would require Telstra to provide to the ACCC complete details of all offerings, both standard and individualised (non-standard), along with all variations that are made to these offerings. The provision of all the information under the Division 5 requirements was seen as administratively burdensome for both the ACCC and Telstra. It was decided that this process should be streamlined by identifying only the tariff information that is useful for assisting the ACCC in detecting potential anti-competitive issues.

Accordingly, an arrangement was put in place whereby Telstra provides the ACCC with relevant information for certain categories of tariffs, while not causing the practical and resource difficulties associated with the strict interpretation of Division 5.[93]

The ACCC has exempted particular services from the tariff filing requirements on the basis of the potential likelihood for anti-competitive conduct, the information already available to the ACCC through the access regime and the previous tariff filing arrangement between Telstra and AUSTEL under the pre-1997 regime. Telstra must provide the ACCC with details on exempted services within seven days of the ACCC requesting such information.

The ACCC utilised the information provided by Telstra under Division 5 in order to identify potential anti-competitive issues at an early stage.

Record keeping rules

The ACCC is currently developing the framework in relation to the ACCC's power to make record keeping rules under Division 6 of Part XIB. It is expected that the record keeping rules will replace the chart of accounts and cost allocation manual arrangements

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[93] The arrangement consists of the following elements:

- Telstra is to provide its Standard Form of Agreement (SFOA) on a weekly basis, along with a list of all amendments (additions, variations and withdrawals) that have taken place during that week;
- Telstra is to provide a monthly summary report of any non-standard form of agreements (non-SFOA) that it entered into for that calendar month; and
- Telstra is to provide a briefing to the ACCC where it has introduced, varied or withdrawn a significant tariff. The ACCC may also request a briefing to obtain information about any amendments to Telstra's SFOA or where further detail is required on a non-SFOA.

developed by AUSTEL. As an early step in the development of the record keeping rules, the ACCC chaired an industry working group to develop a full vertical and horizontal financial separation model. This working group developed and agreed on a broad conceptual model that separated the wholesale and retail components of a carrier's or CSP's activities.

The ACCC subsequently engaged Arthur Anderson to develop a conceptual financial model to a point where it could be practicably applied to relevant carriers/CSPs. In April 1999, the ACCC released a draft report, based on the report prepared by Arthur Anderson, on the preparation of a comprehensive regulatory accounting regime using the record keeping rule power.

In summary, the proposed reporting regime provides:

- a comprehensive reporting architecture specifying the services that telecommunications carriers may be required to report against;
- details of the information to be provided for each service, particularly the revenues, costs and capital associated with each service. This includes a detailed description of the financial statements required for each service, as well as a number of supplementary reports;
- principles to be applied by carriers in developing detailed allocation methodologies in compliance with the record keeping requirements;
- recommendations on reporting cycles and the process for modifying the record keeping rules;
- guidelines for telecommunications carriers to develop their regulatory accounting procedures manuals;
- audit and compliance guidelines for ensuring the accuracy and appropriateness of the information provided to the ACCC; and
- an overview of the adjustments needed to convert historical costs to current costs as a further evolution of the record keeping rules.

The ACCC is currently finalising a draft instrument implementing the record keeping rules based on the regulatory accounting regime set out above. The ACCC also intends to release a discussion paper regarding the possible public disclosure of information contained in records and the future development of the record keeping rules.

Although record keeping rules are still being finalised, the ACCC has considered instances where it may potentially use its record keeping rules powers. For instance, the ACCC recently investigated complaints that Telstra has engaged in anti-competitive conduct in relation to what was claimed to be inadequate provision of services connecting Telstra's PSTN network with other networks. That is, the complaints concerned Telstra's ability to use its market power in relation to its fixed network to affect its competitors' ability to interconnect with Telstra's ubiquitous network. While the ACCC decided that it did not have a reason to suspect that Telstra had contravened the competition rule, the

ACCC found that there is a lack of transparency and clarity for wholesale customers in Telstra's forecasting, ordering and provisioning processes.[94]

Accordingly, the ACCC requested Telstra to establish a transparent, consultative process to deal with forecasting, ordering and provisioning where there is likely to be constrained capacity. If this problem is not addressed, the ACCC will consider initiating regulatory measures, such as making record keeping rules requiring Telstra to disclose forecasting, ordering and provisioning information to the ACCC on a regular basis in order to assist the ACCC in monitoring compliance with Parts XIB and XIC of the Act.

2.2.4 ACCC reporting functions

In each year financial year since 1996-97, the ACCC has published a report on competitive safeguards in accordance with Division 11 of XIB.[95] These reports have dealt with matters relating to the operation of Parts XIB and XIC and other matters such as the work carried out by the ACCC in relation to its responsibilities under the *Telecommunications Act 1997.*

The ACCC has also published two reports on telecommunications charges in Australia, as required by Division 12 of Part XIB.[96] The first report, published in December 1998, analysed the price trends for a number of telecommunications services between 1992 and 1998. The second report, published in April 2000, analysed price trends for services between 1995 and 1999. The ACCC engaged the Communications Research Unit (CRU) of the Department of Communications, Information, Technology and the Arts to prepare both reports.

To date, the ACCC has not received, under Division 12A of Part XIB, a written determination from the Minister to monitor and report on particular matters relating to competition in the telecommunications industry.

2.3 Part XIC – Telecommunications access regime

2.3.1 The long-term interests of end-users

Under Part XIC, the test for declaration is the 'long-term interests of end-users'. Section 152AB of the Act provides that the ACCC must consider the extent to which declaration is likely to result in the achievement of a number of objectives:

- The objective of promoting competition in markets for carriage services and services supplied by means of carriage services,

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94 See ACCC, *ACCC Monitoring Telstra Interconnection Processes*, press release, 7 July 2000.

95 For the year 1996/97, the ACCC published a competitive safeguards and carrier performance report under section 70 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*.

96 See ACCC, *Telecommunications Charges in Australia*, December 1998 and April 2000.

- For carriage services involving communication among end-users, the objective of achieving any-to-any connectivity, and
- The objective of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.

The ACCC assesses each service declaration on a case by case basis to form a view about the likely result of declaration on the achievement of each of these secondary objectives. In making its assessment, the ACCC considers the effects which declaration is likely to have in the market and compares this with the future without declaration. It considers the nature and extent of actual and prospective competition in the market, and the magnitude, longevity and expected distribution of the likely benefits.

For example, the decision to declare an unconditioned local loop service (ULLS) reflected the ACCC's view that there was likely to be very limited duplication of infrastructure to provide services, particularly high bandwidth services, for some time. Consequently, competition in the high bandwidth carriage services market was seen as unlikely to develop to any significant extent and in the customer access market was considered dependent on declaration. On the other hand, the decision not to declare mobile roaming services reflected the fact that three mobile networks were already in operation and others were in prospect. The ACCC considered that the competition which existed at both the retail and wholesale level offered the very real prospect of innovation in services as well as lower prices for consumers.

Where declaration is likely to have mixed effects in terms of one or more objectives, the ACCC will seek to form a view about the net impact upon end-users. For instance, in some situations, the ACCC may need to consider whether benefits to end-users through increased competition are likely to be short-lived and outweighed by losses due to reduced innovation and investment by service providers. In other situations, the ACCC may need to consider whether benefits to one group of end-users are likely to be outweighed by harm to another group of end-users.

The focus on the long term is interpreted by the ACCC as encompassing both consumer and producer interests, as consumer welfare is dependent in the long term on the existence of sustainable production conditions.

The ACCC has declared seven services following public inquiries under subsection 152AL(3) of the Act.[97]

2.3.2 Pricing principles

The ACCC has indicated that in determining access prices, it is likely to adopt a total service long-run incremental cost (TSRLIC) approach.[98] This approach attempts to estimate the incremental or additional cost – on an annual basis – incurred by a firm in

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97 Those declarations included two sets of originating and terminating services.

98 See ACCC, *Access Pricing Principles, Telecommunications – A Guide*, July 1997.

the long run in providing a particular service (or production element) as a whole, assuming all of its other production activities remain unchanged. Alternatively, it can be viewed as the total cost – on an annual basis – which the firm would avoid in the long run if it ceased to provide the service as a whole.[99] Prices which return such costs offer appropriate incentives to invest in and maintain infrastructure. Such approaches are used in most developed countries with recently liberalised telecommunications markets.

Where there are different production technologies and network configurations – either available or in use – there are alternative ways of evaluating the cost components of TSLRIC. Broadly, costs could be based on the *actual* technology in use, the *best-in-use* technology or on *forward-looking* technology (as if the most efficient technology commercially available were used). The ACCC's NERA cost model draws a distinction between the 'scorched node' (rebuilding the existing network configuration) and 'scorched earth' (building from scratch an optimised network) costing bases. In practice, the ACCC has adopted a hybrid approach, using a 'scorched node' forward-looking approach using best-in-use technology.

Despite this, the ACCC considers that it is necessary to form a view regarding the appropriate pricing approach on a case-by-case basis for particular services. Accordingly, it has conducted a number of projects in order to assist its consideration of pricing issues that have been raised in various access disputes notified under Part XIC.

In particular, in December 1999, the ACCC released separate discussion papers on pricing principles for the Domestic GSM Originating and Terminating Access services and the Domestic PSTN Originating and Terminating Access services supplied by non-dominant carriers.[100] The ACCC also engaged the services of economists Professor Stephen King and Associate Professor Joshua Gans to provide advice on the appropriate pricing methodologies for both services. In March 2000, it conducted 'roundtable' conferences to assist its consideration of these matters. Similarly, in April 2000, it released a draft pricing principles paper in relation to the pricing of the local carriage service.[101] It recently released a paper on the pricing of unconditioned local loop services.[102]

The information that the ACCC has received from comments on the discussion papers, together with the submissions provided for the arbitrations, will assist its consideration and determination of the pricing issues that have been raised in each relevant dispute. Moreover, it is expected that the pricing work that the ACCC has carried out will also

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99 See ACCC, *Pricing of Unconditioned Local Loop Services (ULLS) and Review of Telstra's Proposed ULLS Charges*, Discussion Paper, August 2000, p 14.

100 Para 152AL(3)(d). The ACCC is not required to be satisfied that a declaration would be in the long-term interests of end-users if a declaration is made on recommendation of the TAF pursuant to subsection 152AL(2).

101 See ACCC, *Principles for determining access prices for Domestic GSM Terminating Access and Domestic GSM Originating Access*, December 1999 and ACCC, *Principles for determining access prices for PSTN terminating and originating access on non-dominant carriers*, December 1999.

102 See ACCC, *Pricing of Unconditioned Local Loop Services (ULLS) and Review of Telstra's Proposed ULLS Charges*, Discussion Paper, August 2000.

inform industry participants, government and other interested parties of the principles that it is likely to adopt when assessing undertakings in respect of the relevant services.

2.3.3 Declaration of services

In 1997 the ACCC declared a number of services under a deeming mechanism in accordance with the transition from the pre-1997 telecommunications regulation regime to the post-1997 regime. This was intended to ensure that access rights under the previous regime were effectively and quickly extended to new carriers and other service providers.

Since the introduction of Part XIC of the Act, the ACCC has declared four types of telecommunications access services. Although the ACCC has declared seven separate services, those services included two sets of originating and terminating access services. In two instances the ACCC decided not to conduct a public inquiry into the declaration of a particular service which was proposed by sections of industry. In a further three instances, the ACCC decided not to declare a service following public inquiry. The ACCC has also conducted public inquiries into the amendment of service declarations. The services that have been declared, and the services that the ACCC is considering modifying or revoking are set out in Table 4.

Table 4a
Deemed declared services

Service	Date declared
Domestic PSTN originating access service	June 1997
Domestic PSTN terminating access service	June 1997
Domestic GSM originating access service	June 1997
Domestic GSM terminating access service	June 1997
Domestic AMPS originating access service	June 1997
Domestic AMPS terminating access service	June 1997
Domestic Transmission Capacity service	June 1997
Digital data access service	June 1997
Conditioned local loop service	June 1997
AMPS to GSM diversion service	June 1997
Broadcasting access service	June 1997

Table 4b
Services declared after public inquiry

Service	Date declared
ISDN Originating service	November 1998
ISDN Terminating service	November 1998
Unconditioned Local Loop service	August 1999
Local PSTN Originating service	August 1999
Local PSTN Terminating service	August 1999
Local Carriage Service	August 1999
Analogue Subscription Television Broadcast Carriage service	September 1999

Table 4c
Services not declared after public inquiry

Service	Date of decision
Domestic Intercarrier Roaming	March 1998
Technology-neutral Subscription Television service	October 1999

Table 4d
Services varied after public inquiry

Service	Date modified
Domestic Transmission Capacity service	November 1998
Digital Data Access service	November 1998

Table 4e
Services currently under consideration for variation/exemption/revocation

Service	Possible actions under consideration
Domestic Transmission Capacity service	Variation or revocation
Local Carriage Service	Individual or class exemptions, particularly in CBD areas
Domestic AMPS originating access	Revocation
Domestic AMPS terminating access	Revocation
AMPS to GSM diversion service	Revocation

Deeming of services

The majority of services that have been declared by the ACCC were declared under the deeming process that was governed by section 39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*.[103] The purpose of this process was to facilitate a smooth transition between the pre 1 July 1997 restricted access regime and the post 1 July 1997 access regime. This process provided for the deeming of eligible services that were covered by registered access agreements in existence before 1 July 1997, thereby retaining existing access rights for carriers and extending those rights to service providers and providing access to the carriage of broadcasting services over cable networks.

Accordingly, on 30 June 1997, the ACCC deemed a number of services that were derived from most of the eligible services contained in registered access agreements between the three carriers that were in existence before 1 July 1997.[104] Under the transitional

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103 The ACCC also has access responsibilities under the *National Transmission Network Sale Act 1998*. These responsibilities lie outside the terms of reference of the current review and so are not referred to in this section.

104 See ACCC, *Deeming of Telecommunications Services – A statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, 30 June 1997.

arrangements, all the eligible services covered in registered access agreements were to be deemed as declared services unless the ACCC was satisfied that deeming a particular service would not have been in the long-term interests of end-users. Accordingly, there was a somewhat lower threshold requirement for deeming services as declared services than the positive requirement contained in section 152AL of the Act whereby the ACCC must be satisfied that making a new declaration would be in the long-term interests of end-users.[105]

The ACCC did not deem all of the services in pre-existing access agreements. In particular, the ACCC did not deem the resale of AMPS services as a declared service. In that case, the ACCC considered there was a risk that declaration would have unduly affected the phaseout of the AMPS network.

The ACCC is currently considering the revocation of three of the services that were declared under the deeming process: the domestic AMPS originating access and terminating access services, and the AMPS to GSM diversion service. The ACCC intends to issue a discussion paper in relation to these matters. In addition, the ACCC has already begun a revocation inquiry in relation to elements of the transmission service, which was also originally deemed in 1997 (see below).

Public inquiries into declaration of services

To date, the members of the Telecommunications Access Forum (TAF) have been unable to agree on whether declarations or amendments to declarations should be made, or members have been unable to agree on service descriptions. Accordingly, the ACCC has not declared any services on the recommendation of the TAF. Instead, the TAF has referred possible service declarations for consideration by the ACCC. Accordingly, subsequent to the deeming process, the ACCC has conducted a public inquiry in respect of each proposed declaration or variation, except in the case of minor variations. Certain inquiries regarding related services were conducted concurrently.

Data markets

In December 1997, the ACCC commenced an inquiry into competition in data markets. Following this inquiry, in November 1998, the ACCC declared originating and terminating ISDN services.[106] During this inquiry, the ACCC also considered whether to amend declarations for certain services, which is discussed further below.

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105 Subsection 152AL(3)(d). The ACCC is not required to be satisfied that a declaration would be in the long-term interests of end-users if a declaration is made on recommendation of the TAF pursuant to subsection 152AL(2).

106 See ACCC, *Competition in Data Markets*, November 1998.

Local telecommunications services

The ACCC also conducted a public inquiry into the declaration of local telecommunications services. In July 1999, the ACCC announced its decision that the declaration of the following services would promote the long-term interests of end-users:

- an unconditioned local loop service (ULLS);
- local PSTN originating and terminating services; and
- a local carriage service.

The ULLS involves the use of unconditioned cable, such as copper pairs, between end-users and a telephone exchange, where the copper terminates. The declaration of the ULLS was intended to promote the competitive provision of a range of services, including high bandwidth services. However, in order for the ULLS to be used by competing firms to provide high bandwidth services, a range of technical and operational issues needed to be resolved. Most of these issues have been dealt with by the industry through the Australian Communications Industry Forum (ACIF). The ACCC has maintained a close overview of this process. In addition, the ACCC has been working with industry participants to ensure a competitive outcome arising from the ULLS declaration, particularly in relation to pricing and service roll-out.

Access to cable networks

Of the declaration inquiries conducted by the ACCC, two separate but related inquiries arose because the ACCC considered it necessary to review one of the services which had been deemed as a declared service in June 1997. The ACCC had deemed a broadcasting access service as a declared service, consistent with the Government's intention at that time to remove the exemption of pay television carriage from regulated access.

In response to an access request by Television and Radio Broadcasting Services (TARBS), Telstra and Foxtel objected to the validity of the deemed service. The ACCC conducted a public inquiry into whether to declare an analogue-specific subscription television service and a technology-neutral subscription pay television service. In August 1999, the ACCC announced its decision to declare the analogue-specific service and, at that time, announced its decision not to declare the technology-neutral service.[107] The validity of the deemed service and the declaration is currently being considered by the Full Federal Court on appeal by Telstra and Foxtel.

Decisions not to declare services

The ACCC has also conducted inquiries that resulted in the ACCC deciding not to declare certain services. In particular, the ACCC's first declaration inquiry related to whether to declare services to enable domestic inter-carrier roaming between digital

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[107] See ACCC, *Declaration of an analogue subscription television broadcast carriage service*, October 1999 *and Declaration of a technology-neutral subscription television carriage service*, October 1999.

networks.[108] In that instance, the ACCC commenced a public inquiry in November 1997 following a request from the Minister for Communications and the Arts for the ACCC to consider the matter. The ACCC decided that it was not in the long-term interests of end-users to declare roaming in the 800MHz or 1800MHz bands.[109]

Also, the ACCC conducted an inquiry into whether to declare a long distance mobile originating service which would enable service providers to supply the long distance transmission component of long distance and international calls made from mobile phones. The commencement of this inquiry, in October 1998, followed consideration of the matter at the industry level by the TAF. In January 2000, the ACCC announced its final decision not to declare the long distance mobile originating service, as it was not satisfied that declaration would be in the long-term interests of end-users.[110]

As discussed above, the ACCC decided not to declare a technology-neutral subscription television service limited to line links.

Further, the ACCC decided not to hold a public inquiry into the declaration of certain payphone technology as well as a billing and collection service.

Modifications of declarations

Public inquiries

As part of the ACCC's public inquiry into competition in data markets, the ACCC considered whether to amend declarations for the existing deemed declared digital data access service (DDAS) and intercapital transmission capacity, which had been declared under the deeming process. In November 1998, the ACCC decided to amend the DDAS service declaration, and to declare intercapital transmission routes, except for the Melbourne – Canberra-Sydney route. In June 2000, the ACCC released a discussion paper regarding the possible variation or revocation of the service declaration for transmission capacity.[111]

Minor variations

The ACCC is not required to undertake a public inquiry process for minor variations to declared services.[112] The ACCC has made minor variations to certain declared services. In particular the ACCC has made minor variations to the service descriptions in respect

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108 See ACCC, *Public inquiry into declaration of domestic intercarrier roaming under Part XIC of the Trade Practices Act 1974*, March 1998.

109 The ACCC noted that it would monitor the market and take early action under Part XIB and/or review the declaration decision if the ACCC considered that the incumbent mobile carriers were engaging in anti-competitive conduct. Ibid, pages xiii and 33-34.

110 See ACCC, *Competition for long distance mobile services, a report about declaration of a long distance mobile originating service*, January 2000.

111 See ACCC, *Transmission Capacity Service, An ACCC Discussion Paper examining the possible variation or revocation of the service declaration for transmission capacity*, June 2000.

112 Subsection 152AO(3).

of the unconditioned local loop service and the local PSTN originating and terminating services. The ACCC is also considering minor variations in respect of a number of the deemed declared services.

Exemptions

To date, the ACCC has received one exemption application under Part XIC of the Act. Telstra recently lodged an application for an exemption, under section 152AT, from its standard access obligations in relation to the local carriage service. The application relates to the supply of the local carriage service within the central business district areas of Melbourne, Sydney, Brisbane, Adelaide and Perth. Telstra has noted that this application is to be one of several applications for exemption orders designed to phase out Telstra's obligations to supply the service.

The ACCC recently released a discussion paper setting out the issues in order to assist the ACCC's consideration of whether to make the initial exemption order. In the discussion paper, the ACCC also sets out the issues concerning the possible exemption of other carriers from their obligations to supply the service and the appropriate timing for consideration of possible variation to the local carriage service declaration.[113]

2.3.4 Telecommunications access code

In January 1998, the ACCC approved a draft telecommunications access code, under section 152BE, developed by the Telecommunications Access Form (TAF). The approved code contains arrangements for access to telecommunications services, including model terms and conditions for access to particular services. The approval of the code followed extensive development work by the TAF and consultation with industry and interested parties. The ACCC was included in the consultation process carried out by the TAF.

To date, the ACCC has not made a telecommunications access code under section 152BJ of the Act. The ACCC has referred matters relating to service migration to the TAF. At this stage, it appears unlikely that the TAF will reach consensus. In those circumstances, the matter will revert to the ACCC for use of its reserve code making functions.

2.3.5 Access undertakings

Since the introduction of Part XIC, the ACCC has received four sets of undertakings under section 152BS of the Act.[114] All of the undertakings were lodged by Telstra. Each of the undertakings specified the terms and conditions on which Telstra was prepared to comply with its standard access obligations in respect of the relevant service.[115] That is,

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113 See ACCC, *Future scope of the local carriage service declaration,* August 2000.

114 Although there were more than four separate undertakings, each set of undertakings related to the supply of complementary originating and terminating services.

115 Subsection 152BS(3).

none of the undertakings simply adopted the model terms and conditions set out in the TAF telecommunications access code.[116]

PSTN services

Telstra has lodged two separate undertakings in respect of the Domestic PSTN originating and terminating access services ('PSTN services'). Telstra lodged the first undertaking in respect of these services in November 1997, which included both price and non-price matters, and a revised undertaking, which focussed on pricing terms and conditions, in September 1999. The PSTN services supplied by Telstra are used as inputs by Telstra's competitors to supply long-distance, fixed-to-mobile and mobile-to-fixed call services to end-users. Accordingly, the ACCC considers that Telstra's charges for the PSTN services have a significant impact on the development of competition in the downstream markets where Telstra's competitors supply calls.

In order to assist the ACCC in assessing the charges contained in the first undertaking, the ACCC engaged National Economic Research Associates (NERA) to construct a model to estimate the total service long-run incremental costs (TSLRIC) of providing the PSTN services. The ACCC also engaged Ovum Pty Ltd to compare the charges in the undertaking with the charges for the same or similar services in other countries. Other projects carried out by the ACCC as part of its assessment included a historical cost study, a study comparing the charges in the undertaking with Telstra's retail national long-distance prices and a study comparing the charges in the undertaking with other charges for the same service. Also, in assessing the non-price terms and conditions in the undertaking, the ACCC considered the extent to which the terms and conditions differed from the relevant model terms and conditions contained in the approved TAF telecommunications access code.

In June 1999, the ACCC announced its final decision to reject Telstra's first PSTN undertaking. In making its decision, the ACCC formed the view that the charges in the undertaking were above the costs an efficient firm would incur in providing the PSTN services.[117] However, as many of the charges in the undertaking were no longer valid at the time of the decision, the ACCC's decision to reject the undertaking was mainly based on its assessment of the non-price terms and conditions. The ACCC concluded that the non-price terms and conditions provided Telstra with too much discretion over when, to whom and how the services would be provided, created uncertainty, and failed to impose obligations on Telstra such as Telstra required of service providers.

In assessing Telstra's revised PSTN undertaking, lodged in September 1999, the ACCC built on the pricing work that it had carried out in assessing the first undertaking. In July 2000, the ACCC announced its decision to reject the undertaking on the basis that the

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116 Subsection 152BS(4).

117 The ACCC formed the view that the usage-based charges in the undertaking were between two and two-and-a-half times the cost of providing the PSTN services. See ACCC, *Assessment of Telstra's Undertaking for Domestic PSTN Originating and Terminating Access Final Decision*, June 1999.

ACCC was not satisfied that the charges in the undertaking were reasonable and that the proposed charges were generally above the efficient costs of supplying the services.

The ACCC proposes to use the work carried out in the ACCC's assessments of Telstra's PSTN undertakings, particularly the pricing work, as an input to the arbitrations currently before the ACCC in respect of the PSTN services. This is discussed further below.

AMPS and GSM services

In November 1997, Telstra lodged separate undertakings in respect of the AMPS and GSM originating and terminating access services. Each of the undertakings contained both price and non-price terms and conditions, although the undertaking in respect of the GSM services did not specify the proposed usage charges.[118] The non-price terms and conditions specified in each undertaking were identical to each other and to the non-price terms and conditions contained in Telstra's first PSTN undertaking.

In August 1999, the ACCC announced its final decisions to reject both of the undertakings, under section 152BU, on the basis that the non-price terms and conditions were not reasonable.[119] The ACCC's assessment of the non-price terms and conditions for these undertakings closely followed the ACCC's assessment of the non-price terms and conditions for Telstra's first PSTN undertaking.

Accordingly, the ACCC rejected these undertakings for the same reasons that the ACCC rejected Telstra's first PSTN undertaking. However, unlike the PSTN undertakings, the ACCC did not carry out a detailed assessment of the charges that were included in the AMPS and GSM undertakings in arriving at its decisions to reject those undertakings.

2.3.6 Access disputes

Notification of access disputes

A large number of disputes have been notified to the ACCC. In the following table, the disputes are grouped by the service in dispute. Matters which have been finalised are grouped separately.

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118 The undertaking provided that these charges were 'to be negotiated'.

119 Section 152AH.

Table 5
Access dispute notifications

PSTN services

Access Seeker (notifier)	Access Provider	Service/s	Date notified
AAPT	Telstra	Domestic PSTN Originating Access	December 1998
AAPT	Telstra	Domestic PSTN Terminating Access	December 1998
Primus	Telstra	Domestic PSTN Originating Access	February 1999
Primus	Telstra	Domestic PSTN Terminating Access	February 1999
AAPT	Optus	Domestic PSTN Originating Access	June 1999
AAPT	Optus	Domestic PSTN Terminating Access	June 1999
Optus (Optus Networks & Optus Mobiles)	Telstra	Domestic PSTN Originating Access	November
Optus (Optus Networks & Optus Mobiles)	Telstra	Domestic PSTN Terminating Access	November
Telstra	AAPT	Domestic PSTN Terminating Access – for data calls to ISPs	November 1999
Flow Communications	Telstra	Domestic PSTN Originating Access	January 2000

Digital data access services

Access Seeker (notifier)	Access Provider	Service/s	Date notified
AAPT	Telstra	Digital Data Access service	March 1999
Macquarie Corporate	Telstra	Digital Data Access service – Price	May 1999
Macquarie Corporate	Telstra	Digital Data Access service- Non-price terms and conditions	May 1999
Macquarie Corporate	Telstra	Digital Data Access service – Means by which Telstra proposes to supply DDAS	May 1999

GSM services

Access Seeker (notifier)	Access Provider	Service/s	Date notified
AAPT	Telstra	Domestic GSM Terminating Access	March 1999
AAPT	Telstra	Domestic GSM Originating Access	March 1999
AAPT	Optus	Domestic GSM Originating Access	June 1999
AAPT	Optus	Domestic GSM Terminating Access	June 1999
Primus	Telstra	Domestic GSM Terminating Access	October 1999
Primus	Optus	Domestic GSM Originating Access	October 1999
Primus	Optus	Domestic GSM Terminating Access	October 1999
AAPT	Vodafone	Domestic GSM Originating Access	November 1999
AAPT	Vodafone	Domestic GSM Terminating Access	November 1999

Integrated services digital network (ISDN) services

Access Seeker (notifier)	Access Provider	Service/s	Date notified
Optus	Telstra	ISDN Originating service	May 1999
Optus	Telstra	ISDN Terminating service	May 1999

Local carriage service

Access Seeker (notifier)	Access Provider	Service/s	Date notified
Optus	Telstra	Local Carriage Service	August 1999
MCT	Telstra	Local Carriage Service	December 1999
Primus	Telstra	Local Carriage Service	March 2000
AAPT	Telstra	Local Carriage Service	March 2000
OneTel	Telstra	Local Carriage Service	August 2000

Broadcasting access service

Access Seeker (notifier)	Access Provider	Service/s	Date notified
TARBS	Telstra	Broadcasting Access service	September 1999

Unconditioned local loop service (ULLS)

Access Seeker (notifier)	Access Provider	Service/s	Date notified
AAPT	Telstra	ULLS	July 2000
Optus	Telstra	ULLS	July 2000
OneTel	Telstra	ULLS	August 2000

Finalised access disputes

Access Seeker (notifier)	Access Provider	Service/s	Date considered
AAPT	Telstra	Domestic PSTN Originating Access	November 1997
AAPT	Telstra	Domestic PSTN Terminating Access	November 1997
Telstra	Vodafone	Domestic GSM Terminating Capacity service	Notified June 1998 – withdrawn November 1998
Primus	Telstra	Domestic Transmission Capacity service	Feb 1999 – withdrawn April 1999.
AAPT	Telstra	Domestic Transmission Capacity	Notified March 1999 – withdrawn May 1999
Optus	Telstra	Local Number Portability Routing Option[120]	Notified April 1999 - final determination May 2000.
Primus	Vodafone	Domestic GSM Originating Access	Notified October 1999 - withdrawn April 2000
Primus	Vodafone	Domestic GSM Terminating Access	Notified October 1999 - withdrawn April 2000
Optus	Telstra	Domestic PSTN Originating & Terminating service	Notified November 1999 – withdrawn May 2000

Arbitration processes

To date, the ACCC has generally conducted the hearing of access disputes notified under Part XIC as private, bilateral processes.[121] In carrying out its arbitration functions, the ACCC has held hearings where parties present verbal submissions, and received written submissions from parties. The ACCC has extensively used its powers to give directions for the purpose of arbitrating access disputes.[122]

While the ACCC has conducted arbitration hearings in private, it has also, where relevant, considered various issues raised in the course of arbitrations with the benefit of information received from other processes. For instance, the ACCC received certain information from its assessment of Telstra's undertakings in respect of the Domestic PSTN Originating and Terminating Access services which is relevant to the access disputes in relation to the same services. The ACCC's consideration of pricing approaches in respect of other services is discussed further below.

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120 This dispute was notified under the *Telecommunications Act 1997*.

121 An arbitration hearing for an access dispute is to be in private: subsection 152CZ(1). If the parties agree, an arbitration hearing or part of an arbitration hearing may be conducted in public: subsection 152CZ(2).

122 Section 152DC.

Interim determinations

Since the ACCC was given the power to make interim determinations for access disputes under Part XIC, the ACCC has made interim determinations in respect of six disputes, and issued revised interim determinations in respect of two of those disputes.

Section 152CPA, which provides that the ACCC may make interim determinations, came into effect on 1 July 1999. The ACCC issued its first draft interim determination soon after, in August 1999,[123] and issued its first interim determination in respect of the same matter in September 1999. The dispute related to the Domestic PSTN Originating and Terminating Access Services. The ACCC has made interim determinations in two other disputes relating to PSTN services.

In December 1999, the ACCC made interim determinations in two disputes relating to the Digital Data Access Service. In June 2000, the ACCC made an interim determination for a dispute in relation to the Local Carriage Service. The ACCC is considering whether to make interim determinations in respect of a number of other access disputes currently being arbitrated. Once an interim determination is made, parties will generally recommence negotiations in light of the determination.

Alternative dispute resolution processes

The ACCC has conducted a number of alternative dispute resolution processes, both in the context of arbitrating access disputes notified under Part XIC and prior to the formal notification of disputes. Such processes have been carried out with senior ACCC staff facilitating bilateral negotiations between the parties concerned. The ACCC has also ordered parties to seek private mediation after it has assisted the parties to identify and narrow the issues.

The ACCC has utilised such facilitation processes for the purposes of identifying or narrowing the scope of the issues in dispute. The ACCC has carried out facilitation meetings either at the early stages of considering a dispute, or in order to progress the resolution of discrete issues in dispute. For instance, facilitation processes have been used in relation to particular non-price issues that have been raised in the context of arbitrations. In some instances, the parties have subsequently resumed commercial negotiations, and hence the ACCC did not proceed to make a determination in respect of the relevant issues. The ACCC expects that there will be a continuing trend towards settlement of disputes without the need for final determination.

The ACCC has made one direction in relation to negotiations for access to a declared service under section 152BBA of the Act outside the arbitration process. In another instance, the ACCC was requested to give a direction to an access provider to make a revised offer to supply a declared service to an access seeker. In that matter, the ACCC

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[123] Before making a determination, the ACCC must give a draft determination to the parties: subsection 152CP(4).

decided not to make the direction sought as the access provider stated that it would be providing a revised offer by a certain date.

2.4 Matters under the *Telecommunications Act*

The ACCC has considered a range of matters relating to its functions and powers under the *Telecommunications Act 1997* (Telecommunications Act). Where appropriate, the ACCC has maintained close consultative links with the ACA in regard to those matters. However, to date, the ACCC has not been required to exercise all of the powers available to it under the Telecommunications Act.

2.4.1 Disputes under the *Telecommunications Act*

To date, the ACCC has not been notified of any disputes regarding matters arising in relation to the following parts of the Telecommunications Act:

- Part 3 of Schedule 1 – access to supplementary facilities;
- Part 4 of Schedule 1 – access to network information; and
- Part 5 of Schedule 1 – access to transmission towers and underground facilities.

The ACCC has arbitrated one dispute regarding the Local Number Portability Routing Option under section 462 of Part 22 of the Telecommunications Act. In May 2000, the ACCC issued a final determination in relation to that matter.

2.4.2 Facilities access code

In June 1999, the ACCC issued a revised Facilities Access Code setting out the terms and conditions that are to be complied with in relation to the provision of access to eligible telecommunications facilities under Part 5 of Schedule 1 of the Telecommunications Act.[124] In preparing the code, the ACCC consulted widely with industry, the ACA and community representatives.

2.4.3 Pre-selection

While there is no formal requirement, under Part 17 of the Telecommunications Act, for the ACA to consult with the ACCC at an early stage in relation to pre-selection issues, the ACCC and the ACA have maintained an informal consultation process on such matters. For instance, the ACA has consulted the ACCC on pre-selection issues regarding local calls and the exemption processes in relation to ISDN and virtual private network services.

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124 ACCC, *A Code of Access to Telecommunications Transmisssion Towers, Sites of Towers and Underground Facilities*, October 1999.

2.4.4 Number portability

The ACCC has issued directions to the ACA in relation to number portability under Part 22 of the Telecommunications Act. In particular, in September 1997, the ACCC made directions to the ACA to mandate the provision of local number portability and freephone and local rate number portability in the Numbering Plan. Subsequently, local number portability was introduced on 1 January 2000.

In June 1999, the ACCC published a guide to inform interested parties of the pricing principles that the ACCC is likely to apply in determining disputes regarding the terms and conditions for the provision of local number portability.[125] In September 1997, the ACCC also requested the ACA to investigate and report on the options available for mobile number portability. Following further work undertaken by the ACCC and the ACA, the ACCC directed the ACA in October 1999 to set out rules about mobile number portability in the numbering plan. In February 2000, the ACCC released a draft guide on pricing principles for mobile number portability.

Further, in July 2000, the ACCC issued a discussion paper on number portability for National Rate and Premium Rate services. The ACCC intends to make a decision on number portability for these services later in the year.

2.4.5 Interconnection standards

To date, the ACCC has not directed the ACA to make a technical standard about the interconnection of facilities under Division 5 of Part 21 of the Telecommunications Act.

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125 ACCC, *Pricing Principles for Local Number Portability – a Guide,* June 1999.

3 CHANGING CONDITIONS IN THE AUSTRALIAN TELECOMMUNICATIONS MARKET AND THE CONTINUING NEED FOR REGULATION

3.1 Introduction

Since the introduction of the current competition regulation in 1997, competition has increased in telecommunications markets and changes in technology and services are altering the underlying cost and revenue characteristics of the industry. As a result, the circumstances in which regulatory intervention will be sought and/or imposed can be expected to change. The impact of regulation can also be expected to change. This will be so even if the regulatory framework itself remains unchanged.

In this section of the submission, the ACCC examines the changes now emerging in the telecommunications market and expected to persist over the medium term. Their regulatory implications are also considered.

3.2 Changing competitive conditions in the telecommunications market

3.2.1 Number of operators

The number of operators competing in the Australian telecommunications market has increased rapidly and continually in the period since the introduction of open competition.

In June 1997, only Telstra, Optus and Vodafone held carrier licences, and a small number of service providers were also operating. By July 2000, the ACA had issued 45 carrier licences (one of which had been surrendered),[126] and around 100 carriage service providers and over 900 internet service providers were registered with the Telecommunications Industry Ombudsman[127].

These operators now provide services in competition with Telstra and other incumbents. Between them, they provide alternatives to the offerings of Telstra and other incumbents in almost every area of the telecommunications market. The licensed carriers supply, in addition, carriage services to the public, both through integrated competing networks (such as the GSM mobile networks) and by using their own network functionality in conjunction with that of Telstra or other carriers.

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126 Australian Communications Authority (http://www.aca.gov.au, accessed July 2000)

127 Telecommunications Industry Ombudsman (http://www.tio.com.au, accessed July 2000)

Much of this competition is concentrated in metropolitan areas and on inter-metropolitan routes, where telecommunications traffic is 'thickest' and unit costs of operation are more likely to be low. These are also the areas where the demand for services (including enhanced services) is high and value adding for niche markets is feasible. However, customers in suburban and regional areas are also increasingly benefiting from competition in a range of services, as facilities-based competition begins to extend beyond the CBDs and as more operators compete aggressively through interconnection.

This competition has resulted in:

- Increased telecommunications carriage infrastructure (fibre cable, satellite, wireless and mobile networks),

- More competition in service provision for business applications (including bundled services or whole-of-business service to businesses),

- More competition in service provision for residential applications (including basic telephony, originally with mobile, long distance and international services, whether through interconnection of own network to Telstra's CAN, or through resale),

- The development of intermediary services, including the brokering of services and capacity,

- A shift from simple price-based competition to more complex approaches based on product and service differentiation and performance.

This in turn has been associated with price falls for many basic carriage services, and new service development in others.

The effect of this competition has been an estimated continuing reduction in Telstra's market share in all contestable service areas (see Table 6). It has also contributed to reduced margins and slower rates of revenue growth in key areas of traditional service.[128] This in turn has prompted operators to find new ways of bundling and customising services to secure sources of revenue growth in the faster-growing sectors of the market (mobile, data and wholesale services).

Nevertheless, Telstra remains the only operator with a ubiquitous customer access network. Every other provider must interconnect to Telstra's network at some point in order to supply public carriage services and ensure any-to-any connectivity. Despite substantial inroads into Telstra's share of industry revenue, Telstra's market power remains extensive.

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[128] This is suggested by (among other things) the slower rates of growth reported by Telstra and Optus for traffic in traditional (fixed) voice services than for revenue for those services.

Table 6
Estimates of Telstra's market share

Service	*1996*	*1997*	*1998*	*1999(e)*	*2000(f)*
Voice services (incl mobile)					
Retail	77	74	72	70	64
Wholesale	85	83	81	78	73
Contestable voice services					
Retail	na	61	57	53	47
Wholesale	na	73	68	66	60
Long distance voice (excl mobile)					
Retail	71	na	61	60	50
Enhanced voice and data	na	66	57	51	45
Contestable voice and data					
Retail	na	62	58	53	47
Wholesale	na	68	63	58	52
Total equipment and services	65	63	61	58	54

na not available, e estimate, f forecast
Source: Paul Budde Communication, *Telecommunications Strategies 1998/99*

3.2.2 Technology and services

Technologies

A number of different technologies are now capable of providing telephone services to customers. While the ubiquity of Telstra's fixed copper network makes it the dominant technology, other platforms are beginning to account for a steadily increasing share of telephone services:

- Three mobile networks are now in operation and others are under construction,
- Fixed wireless technologies, including local loops, are expected to begin delivering services in some areas later this year,
- Cable and Wireless Optus delivers both telephone and pay television services to customers on a hybrid fibre optic co-axial broadband cable,
- Satellite technology is becoming both cheaper and more widely available.

The copper network itself is about to undergo a substantial upgrade. Telstra's Data Mode of Operation (DMO) program will convert it to a high-speed data network offering digital subscriber line (DSL) services to wholesale and retail customers from August 2000.

These technologies have different cost structures to copper pairs. Their costs are frequently sensitive to different variables than the copper network. The costs of establishing wireless networks, for example, are less sensitive to soil composition and land use, but more sensitive to certain topographical features, than in-ground cable-based networks. The different cost structures mean that different technologies may exhibit different scale economies, making them competitive with Telstra's customer access network (CAN) in certain small or specialised areas, or areas with concentrated demand,

even where duplication of the CAN as a whole would be uneconomic. The rollout of a number of cable and wireless networks in smaller metropolitan or provincial centres suggests that investors are already acting on such opportunities.

Software developments also enable the capability of existing infrastructure to be extended without necessarily implying significant infrastructure enhancement or duplication.

It is clear that these developments are beginning to provide alternatives to Telstra's network as a means of delivering services directly to customers. They will also increasingly provide alternative carriage facilities for service providers requiring network interconnection services. The rollout of facilities based on such technologies is expected to accelerate following recent spectrum acquisitions and the unbundling of the local loop.

However, it cannot be assumed that these developments will automatically reduce the number or significance of bottleneck facilities or that any reduction will occur quickly. This will occur only if a number of technologies compete for the provision of wholesale services in the same market. It may not occur if, for example, some technologies displace others in a particular market and so create new and different bottlenecks.

Services

Services are being transformed both by the possibilities offered by digitisation and the spread of technologies to generate and distribute them.

Basic carriage services provide the major source of revenue for incumbent service providers. However, substantial retail price falls in recent years have kept revenue growth from such services at low levels, despite considerable expansion in traffic.

Instead, mobile, data and wholesale services are accounting for an increasing proportion of telecommunications expenditure in Australia.

In data, internet services are driving residential expenditure, while e-commerce applications, which are also dependent on internet-based platforms, especially business-to-business transactions, are driving business expenditure. Both carriers and internet service providers benefit from the resulting revenue. Takeup of high-speed data services is expected to increase following the rollout of DSL services by Telstra and other providers later this year. Service offerings differentiated by price, quality, reliability and applications are now apparent in both residential and business sectors. Customisation offers individual consumers further choice in the type and quality of service best suited to their needs and budgets.

As well as changes in the demand for the services themselves, changes have occurred in the bundling and customisation of those services. Service providers are now beginning to bundle new, higher growth services such as mobile and data services with lower growth, traditional services as a means of underpinning revenue growth and retaining higher-

value business and customers. This is a trend which can be expected to accelerate as competition increases.

Service offerings which bundle services across traditional industry bounds are also emerging. Telephone, broadcasting (pay television) and/or internet services are among the bundles currently available in some markets. The entry of utility companies into the telecommunications market and the development of datacasting products are likely to result in broader service offerings. Such developments offer service providers the opportunity to develop and exploit new economies of scope.

As new technologies change the way traditional business and consumer transactions are negotiated and completed, new competition issues may also arise. Electronic and physical marketplaces simply provide different opportunities and incentives for anti-competitive behaviour. The US Department of Justice, the US Federal Trade Commission and the European Commission are already examining the potential for lock-outs and other forms of anti-competitive conduct in so-called e-hubs, which aggregate and centralise business-to-business and other transactions in particular firms or industry sectors.[129] As the providers of such services are likely to fall within the definition of carriage service providers in Australia, such issues are increasingly likely to come to the attention of regulators.

3.2.3 Convergence

The term 'convergence' has no universally accepted definition. However, it is generally used to refer to the phenomenon of traditionally separate services and markets 'converging' into multi-service offerings delivered from a variety of technological platforms. Converging technologies and services enable new services to be offered from traditional telecommunications platforms, and traditional services to be offered from non-traditional platforms. Digitisation of carriage technologies and content has driven the change, which is allowing traditionally separate service markets to blur and converge in consequence. The delivery of telephone services via the internet, or of datacasting services from broadcast networks, and the bundling of the resulting service mix, are among examples of such convergence.

The potential impact of convergence on market structures, infrastructure development and use and consumers is considerable, but still very uncertain in nature, extent and timing. The report of the Convergence Review found that 'structural convergence affects all of the knowledge and transaction-intensive service industries, including telecommunications, finance, broadcasting, education, health and retail', but that while it began 'decades ago in some industries, [it] has barely begun in others'.[130] The Productivity Commission, in its report on broadcasting, referred to the 'prospective and unpredictable' nature of convergence, but noted that 'the consequences … of cheap, ubiquitous, international broadband networks would be far reaching'.[131]

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129 Personal communication, US Federal Trade Commission, July 2000.

130 Australia, Convergence Review, *Report*, May 2000.

131 Productivity Commission, *Broadcasting*, Report 11, 2000, p 3.

Conflicting effects on competition are likely.

On the one hand, increased competition in the markets for telecommunications services may be expected as digital networks delivering services in digital form break down the market power traditionally associated with the operation of monopoly production or distribution infrastructure. In some areas, telecommunications services are already being delivered from competing, multi-service, digital platforms, rather than a single, dedicated network. Where more than one platform is available, and where those platforms are technically substitutable for the delivery of particular services, bottlenecks in input services may be expected to reduce, increasing competition in the wholesale services market and ultimately reducing the need for access regulation.

As different networks have different cost structures, they may be expected to achieve viability at different levels of use. This will alter the magnitude of the scale economies traditionally associated with telecommunications networks. In addition, combining a range of digital services into full service networks may enable new economies of scope to be developed and exploited. This will create new structural forces in affected markets. Recent increases in merger and acquisitions activity in telecommunications and data companies already suggest that such forces are considerable. Such developments are likely to make possible the development in different parts of Australia of networks with differing reach, capability and service range, reflecting regional differentials in cost and demand characteristics.

On the other hand, new competition issues may arise. If, for example, there is ultimately only one broadband connection to a home or a business providing integrated telecommunications, data and broadcasting services, then the form and source of market power may simply shift. Access issues would continue to arise at both the retail and wholesale level. As the ACCC pointed out in its submission to the Productivity Commission inquiry into broadcasting,[132] where the infrastructure provider takes on a gatekeeper role in respect of all services delivered to the customer, access to the digital distribution infrastructure (delivery paths and customer premises equipment) would then become critical to the commercial viability of a service provider.

Access issues may not be confined to the carriage technology. Content may prove a new source of bottleneck power in converged markets. The ACCC argued earlier this year that access to a range of digital services, perhaps from a range of service providers, is likely to affect the viability of new networks, particularly in regional areas.[133]

Competition issues may also arise in relation to the bundling of services. While bundling may benefit consumers by enabling common network costs to be shared across a larger number of services, businesses may price items within bundled baskets in ways which effectively cross-subsidise particular products or consumers. If sustained, this risks

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132 See ACCC, *Submission to the Productivity Commission Inquiry into Broadcasting,* August 1999.

133 See ACCC, *Submission to the Telecommunications Service Inquiry,* June 2000.

distorting consumption and investment patterns, creating new barriers to entry, and damaging efficient operators in affected markets.

3.3 Regulatory implications

It is clear that these changes are altering the nature and extent of market power imbalances in the Australian telecommunications market. They may also be expected to alter the ways those imbalances are manifested in the market.

3.3.1 Competition issues

Where facilities-based competition emerges, the provision of some services which are currently regulated under Part XIC will become more competitive. The ACCC has already begun two public inquiries intended to examine the need for continuing regulation of services where competition has increased (certain interstate transmission routes, local loop services in some metropolitan central business districts). However, the ACCC believes that the extent of facilities-based competition is likely to be limited in some areas and its timing uncertain. Facilities-based competition has developed largely in urban and some regional areas, where it is more likely to be commercially viable. Telstra will retain control over critical inputs for many services and most areas for the foreseeable future.

It is also possible that while some services are removed from regulation, others may need to be brought within the regulatory framework as new bottleneck services emerge. For example, the current regulatory regime seeks to separate the functions of carriage and content. Content is not currently regulated under the telecommunications access regime. If content were to become a new source of bottleneck power, it may be necessary to consider bringing it within the regulatory framework in the interests of achieving efficient investment and welfare outcomes. The extent to which the separate regulatory regimes which currently exist for carriage and content on broadcast and telecommunications networks may influence such decisions might also need to be considered.[134]

Changes in the type and maturity of competition in the market are also likely to have implications for regulation. For services subject to regulation, the success with which terms and conditions of access can be negotiated independently of regulatory intervention depends, among other things, on the extent of competition in the provision of those services. Experience since 1997 has shown that disputes concerning the terms and conditions of access are far less likely to occur in markets where competition exists at the wholesale level. Only one dispute has been notified by mobile carriers in relation to the originating and terminating services of other mobile carriers. In such cases, the existence of countervailing market power provides an incentive for negotiation, and better knowledge of the costs involved is likely to reduce the information asymmetries which tend to undermine other commercial negotiations.

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134 As broadcast regulation lies outside the terms of reference of this review, the ACCC does not pursue this issue in this submission.

On the other hand, as competition shifts increasingly to non-price service attributes, negotiations related to non-price terms and conditions are becoming more important and more complex. The ability of access seekers to forecast provisioning requirements, and of the access provider to meet those demands in the timeframes sought, are among these problems.

3.3.2 The role of industry

The growing maturity of industry co-regulatory arrangements suggests that industry forums should be able to resolve an increasing proportion of multilateral regulatory arrangements over time. Industry co-regulatory arrangements have been successful in developing standards and dealing with issues arising in respect of non-declared services. However, the ACCC believes that the extent to which the industry itself can be expected to replace an external regulator will be greater in some areas than others, and is likely to remain limited in the case of disputes concerning commercial or consumer matters.

In the first place, certain types of arrangements are more amenable to industry resolution than others. Where the interests of the majority of operators coincide – such as in the setting of technical codes or implementation standards - such imbalances are unlikely to be a major concern.[135] However, where those interests are essentially in conflict – such as in pricing or other commercial issues – consensual agreements are much less likely to be achieved and a veto may be effectively applied by one of the parties. Regulatory involvement in the resolution of such disputes is likely to be required for some time.

In the second place, and perhaps for the reasons just cited, the regulators themselves have had more involvement in the industry co-regulatory arrangements than was initially envisaged. Their role has included assistance to the industry forums in the form of interpretation of regulation and occasionally narrowing the gaps between parties. This has been important in achieving a number of important co-regulatory outcomes, including the work on the implementation of the unbundled local loop decision.

However, the achievements of the co-regulatory process to date have been substantial. Without it, the burden on the regulators would have been much greater, the processes potentially more intrusive and the outcomes less well-accepted.

3.3.3 The continuing need for regulation

The competition regulation is applied when an operator or group of operators has, by virtue of its market power, both the opportunity and the incentive to engage in anti-competitive conduct and/or to limit or exclude the development of competitive markets for services. In telecommunications, market power arises from the ability to control

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135 However, even in relation to technical and operational aspects, these can sometimes have an important impact on competition and will also benefit from the continuing involvement of the regulators (ACCC and ACA). It is for this reason that the focus has been on co-regulation rather than self-regulation.

access to critical network services as well as from the size and scope of an operator's activities.

Access regimes

The 1997 legislation introduced an access regime as the preferred means of reducing the inefficiencies associated with the control of critical inputs in a market where some facilities might never be duplicated and others would be duplicated at differing rates. In markets such as telecommunications, such inputs can frequently be provided at lower cost by a single (monopoly) provider than by competing providers, due to the high level of fixed costs in the cost mix. The inefficiencies derive from the fact that the monopoly status of the provider offers the opportunity and the incentive for access to be denied to intending access seekers, in order to protect the provider's monopoly status in downstream markets, or for the price of access to be raised above the level which would prevail in a more competitive market. Both result in higher prices for the final product than would otherwise prevail, and so lower production, consumption and community welfare.

Access regimes remove the power of infrastructure owners to deny access to declared services and so reduce barriers to entry in related markets. Where the terms and conditions of access are also subject, directly or indirectly, to regulatory control, they remove the power of infrastructure owners to charge unreasonably high prices or impose unreasonable conditions. This then permits competition in downstream markets and enables end-products to be developed and offered on competitive terms and conditions.

The Industry Commission summarised the ways in which regulated access can improve the efficient use of essential facility assets as follows:[136]

- 'in the short term, the entry, or threat of entry, of new firms in the downstream market will encourage lower cost production of services… (productive or technical efficiency),
- in the longer term, competitive pressures should encourage greater innovation to lower costs and develop new products (dynamic efficiency)
- provided the terms and conditions of access are appropriate, the efficient allocation of resources will be promoted such that all consumers who value the service more than its cost of supply will be serviced (allocative efficiency).'

Access regimes are not the only way of removing the inefficiencies associated with single-owner infrastructure arrangements. The structural separation of integrated infrastructure firms so as to isolate the potentially competitive elements from those of natural monopoly is another means. Direct control of infrastructure industries, typically through public ownership, is a further alternative. Both, however, require close management or special circumstances in order to ensure that the potential efficiency gains

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136 See Industry Commission, *Implementing the National Competition Policy – Access and Prices Regulation*, Information Paper, 1995, p 12.

are realised. Direct control replaces, rather than unleashing, competitive disciplines. Structural separation may produce its own inefficiencies.[137]

While access regimes target barriers to competition from the control of critical intermediate inputs, the anti-competitive conduct rules target abuse of market power in more general forms. The telecommunications-specific nature of the provisions recognises the vulnerability of new entrants and potential new entrants to the effects of anti-competitive conduct by incumbents in a rapidly-changing market where entry costs and associated risks are frequently high.

In Australia, a single, vertically integrated incumbent retains a dominant position in the national market and almost every segment of that market. This creates the potential and the fact of extensive market power in most basic voice services as well as a range of enhanced services. Telstra's ubiquitous network and integrated nature ensure that even when other firms operate in competition with it in the delivery of retail services, they rely on interconnection to its network in almost every circumstance. Consequently, Telstra controls critical inputs for almost all providers of almost all services to almost all of their customers. Because structural separation has not occurred in telecommunications as it has (to various degrees) in other network industries, these circumstances are not matched to anywhere near the same extent in any other network industry.

The requirement that any individual connected to any network should be able to contact any individual connected to any other network (any-to-any connectivity) ensures that competing carriers must interconnect to each other's networks. Together with the speed of change in the market, this makes new entrants vulnerable to any delay in achieving interconnection agreements on reasonable terms and conditions, and to any form of anti-competitive behaviour.

Factors such as these were judged to warrant the implementation of a telecommunications-specific competition regime in 1997. The ACCC believes that those factors are likely to remain for the foreseeable future. Despite the emergence of facilities-based and other competition for an increasing number of services, and the subsequent reduction in Telstra's market share for many services, few of Telstra's competitors have any real alternative to the extensive use of Telstra's network services. All require the use of Telstra's services to some extent as an input to providing their own services. This situation is likely to persist for some time in most services, and indefinitely in many geographic areas.

Consequently, while the extent and source of market power imbalances have changed, and their manifestation now differs somewhat from the early post-deregulation period, Telstra's extensive market power remains a major risk to competitive outcomes in the Australian telecommunications market. Current developments may also be creating new market power issues, related to the development of oligopolistic conditions in some markets, the bundling of telecommunications and related services, and the emergence of

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137 See King, Stephen and Rodney Maddock, *Unlocking the Infrastructure*, Allen and Unwin 1996, pp 90-91.

new economies of scale and scope associated with converging technologies and services. They are already giving rise to new regulatory issues and challenges. Regulatory priorities and outcomes are changing in consequence.

PART B

IMPROVING COMPETITION REGULATION FOR TELECOMMUNICATIONS

The regulatory framework which came into effect in July 1997 was intended to assist the transition of the Australian telecommunications market from a prescriptively-regulated near-monopoly to open competition. The special conditions which were then believed to warrant the operation of a telecommunications-specific regime related predominantly to the overwhelming dominance of a single, vertically integrated operator, the particular requirements of telecommunications networks to provide any-to-any connectivity and the rapid pace of change in the industry.

Developments since 1997 have changed the competitive structure of the market and the nature of the competition now occurring within it. The effectiveness of the provisions must therefore be assessed in terms of their likely performance in that changing market. Their performance to date is relevant to that assessment to the extent that it indicates areas where they work well, and areas where implementation has been more difficult or more costly than originally envisaged.

In this section of the submission, the ACCC's three-year experience in operating the regulatory regime is examined and the likely effectiveness of the provisions in meeting the demands of the changing telecommunications market is assessed. Part XIB and Part XIC of the *Trade Practices Act* and the relevant provisions of the *Telecommunications Act* are considered in turn. The likely effect of abandoning the provisions in favour of reversion to the general provisions of the *Trade Practices Act* is also considered. Finally, a number of amendments are proposed which the ACCC believes would improve the operation of the current regime in the circumstances likely to confront the market in the short to medium term.

The section begins, however, with some introductory comments on the assessment of regulation in general.

4 ASSESSING THE EFFECTIVENESS OF THE PROVISIONS

4.1 Introduction

The effectiveness of the provisions must ultimately be judged by the extent to which they achieve their objectives and the efficiency with which they do so. As discussed in section 1 of this submission, the objectives related primarily to the establishment of the conditions within which sustainable competition could develop, and the prevention of conduct which would threaten that competition. Those objectives serve the ultimate purpose of improving economic and consumer welfare through more efficient resource use, resulting in lower prices, greater choice and innovative services for consumers. The objectives have not changed.

The extent to which the provisions achieve their objectives can be difficult to assess. Whether and how competition develops in a market and delivers benefits to consumers depends not only on the operation of the regulatory framework, but also on the decisions of individual operators, structural changes in the market (including mergers and acquisitions), technological developments, consumer demand and general economic conditions. The appropriate test is not 'Has competition increased in the market, to the benefit of consumers?' but rather 'To what extent has the regulation contributed to the development of competition and consumer benefit?' or even 'How would competition and consumer outcomes have differed in the absence of the regulation?' Simple 'before and after' measurement of indicators of competition and consumer outcomes does not necessarily provide the answer to such a test.

In a changing market, the appropriate question is more complex still: 'To what extent is the regulation likely to contribute to the development of competition and consumer benefit *in changed and frequently unpredictable market conditions*?'

The efficiency with which the objectives are achieved is more readily assessed, as it is largely a product of the processes by which the regulatory framework is implemented. Processes which are timely, cost-effective, transparent, consultatively-implemented and flexible in their ability to handle changing conditions and demands are also likely to be efficient.

An explicit benefit-cost approach could take the question further. Rather than taking the objectives of the regime as given, such an approach focuses on the net outcome of the regulation. If an objective is so costly to achieve that the benefits it generates are outweighed by its costs, then the objective itself may be called into question. Quantitative benefit-cost analyses are, however, themselves difficult and costly to undertake, particularly over the totality of the regime. Indeed, a relative dearth of empirical data on which to base quantitative assessments is a necessary result of a regime that does not impose comprehensive reporting requirements on industry participants.

The competition principles articulated by the Hilmer Committee establish a presumption that the promotion of competition will create incentives for efficiency improvements and, to the extent that these are attained, will advance community welfare.[138] Promotion of competition in related markets is consequently one of the criteria against which declarations are assessed under the telecommunications access regime. Other things being equal, a substantial increase in the competitiveness or contestability of a market may therefore be assumed to generate benefits to consumers and to the community generally, with the extent of those benefits depending (among other things) on the volume and value of trade and the number of consumers in the market.

4.2 The integrity of the current regulatory regime

Competition policy principles require that competition regulation should facilitate, rather than prescriptively determine, the operation of competitive markets. This requires setting the pre-conditions within which competition can develop and flourish, and where outcomes are determined to the maximum possible extent by industry participants themselves in response to consumer demand and competitive pressures.

The ACCC considers that the current regulatory arrangements satisfy a number of criteria generally associated with good regulation.

- **Compatibility with general competition law and policy**

  The common terminology and the fact that the current provisions are administered by the general competition regulator, provides maximum opportunity for ensuring that the telecommunications-specific provisions are compatible with general competition law and policy. Such compatibility reduces the likelihood that production, investment and consumption decisions will be influenced and distorted by incentives or disincentives which differ from those operating in the remainder of the economy. It also ensures that when reversion to the general competition provisions is considered desirable, the market will not be required to make a further transition to a fundamentally different regulatory regime.

- **Accommodating the particular characteristics of telecommunications markets**

  The dominance of the Australian telecommunications market by Telstra, and the extensive market power this implies, remain the major factor militating against the development of sustainable competition. Substantial barriers to entry are implied by the large (sunk) infrastructure investment required to enter most market segments and the economies of scale inherent in such infrastructure. These are exacerbated by the incentive for any incumbent network operator with market power actively to deny access to network services required to compete in downstream markets and by the need for new entrants to achieve any-to-any connectivity for their services.

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138 See Independent Committee of Inquiry (Hilmer Committee), *National Competition Policy*, August 1993, pp 2-6.

- **Delivering appropriate incentives**

  The regulation establishes mechanisms for replicating, as far as possible, the production, consumption and investment incentives which would apply in a competitive market. The declaration and arbitration provisions under Part XIC and the competition notice provisions under Part XIB counter some of the incentives for an operator with substantial market power to exploit that power to the detriment of actual and potential competitors and consumers. The implementation of the Part XIC provisions has been designed to foster the setting of retail and wholesale charges which are cost-reflective and do not distort build-or-buy investment decisions.

- **Industry involvement**

  The regulation provides for industry involvement in, and resolution of, a number of major areas of multilateral concern. As mentioned earlier, such involvement is proving particularly effective in the areas of technical codes and standards. Consensual resolution of such matters by industry operators themselves is generally preferable to a regulatory solution. However, the provision for a regulated solution to be imposed in the event of forum members being unable to reach consensus provides a necessary safeguard against stalemates.

- **'Last resort' elements in regulatory role**

  The regulation is designed to provide a framework within which market participants face incentives to avoid anti-competitive behaviour, negotiate the terms and conditions of access to necessary input services and compete in wholesale and retail markets by responding to customer requirements and the opportunities offered by new developments in technologies and services. In such a model, the regulator makes a small number of decisions which are critical to the achievement of those incentives (such as service declaration and the identification and sanctioning of anti-competitive conduct), and then acts in a 'last resort' or 'safety net' capacity to resolve areas of dispute which cannot be settled consensually. Strong 'last resort' powers to investigate and arbitrate disputes are likely to improve the incentives for parties to reach resolution themselves, unless those incentives are themselves biased in favour of one party or category of parties. Such biases appear to afflict the negotiate-arbitrate model in its present form.

- **Interaction with other telecommunications-specific regulation**

  The telecommunications-specific competition provisions operate in tandem with a range of other telecommunications-specific regulation, including the *Telstra Corporation Act,* the *Telecommunications Act* and the *Radiocommunications Act.* The various regulatory arrangements have different, and occasionally conflicting, objectives and effects. While the ACCC believes that the current separation of regulatory responsibilities across a number of agencies is generally appropriate and

desirable, greater integration of the regulatory arrangements themselves would reduce some of the constraints currently affecting important technical and economic parameters within the Australian telecommunications market.

- **Adaptability to changing market conditions**

  The current regulatory arrangements were developed against the background of the introduction of open competition in the Australian telecommunications market.

  The ACCC believes that the regulatory framework itself is robust and will accommodate the changes which will inevitably occur over the medium term, including the impact of convergence. As Telstra's market power is reduced in particular input markets by the emergence of facilities-based competition, and in retail markets by the advent of more competitors, normal competitive disciplines are likely to overtake the need for specific regulatory intervention. As this occurs, the regulation will either fall into redundancy or, in the case of Part XIC service declarations, will be actively reassessed for withdrawal. At the same time, retention of the framework itself is likely to act in both a protective and a deterrent capacity, and will ensure that any new competition issues which arise as a result of internet or other convergent trends can be approached speedily and effectively.

Nevertheless, the effectiveness of any regime is ultimately determined by its operation in practice. In the following sections of the submission, the ACCC assesses each of the main provisions in turn against the criteria of ability to achieve the required objectives and the efficiency with which they do so.

5 PART XIB - ANTI-COMPETITIVE CONDUCT PROVISIONS

5.1 Introduction

As outlined earlier in this submission, Part XIB was introduced in recognition of Telstra's market power and was intended to increase the ability of the ACCC to respond swiftly to anti-competitive conduct. Like Part IV, Part XIB is based on a judicial enforcement model. However, unlike Part IV, Part XIB prescribes an effects test (in relation to a use of market power), requires a competition notice to be issued before proceedings can be commenced, reverses the evidentiary burden and provides for escalating penalties.

5.2 Outcomes

Section 2 of the submission summarised the two matters in which the ACCC has issued competition notices (internet peering and commercial churn). In both cases, the matters were concluded successfully.

In the internet peering matter, Telstra signed reciprocal agreements with the three internet access providers named in the ACCC's competition notice (Connect.com, OzEmail and Optus).

In the commercial churn matter, Telstra's churn processes improved significantly:

- Telstra developed a new wholesale billing platform which offers carriage service providers an on-line churn service;

- Telstra established a $4.5 million fund, to be administered by the ACCC, to assist telecommunications service providers who use Telstra's commercial churn process (Cable & Wireless Optus, Macquarie Corporate Telecommunications, Primus, AAPT and PowerTel) to upgrade their on-line systems and to fund an ACIF referral panel to examine on-line initiatives; and

- Telstra reduced churn fees from $7 to $6 per partial debt severance service and from $15 to $13.50 per total debt severance service.

The evidence available to the ACCC indicates that this would not have occurred in the absence of the competition notices.

In addition, as outlined in section 2 of the submission, the ACCC has conducted a number of investigations under Part XIB which have been resolved without the need to issue a competition notice (as occurred in the payphone, PAPL and OneTel/Optus GSM investigations where commercial negotiations resumed).

5.3 Timeliness and cost-effectiveness

Although successful outcomes have been achieved, the internet peering and commercial churn matters demonstrated the limitations of the competition notice regime prior to the 1999 amendments. Contrary to industry and public expectations, the competition notice regime did not provide an expeditious mechanism for responding to conduct that hindered the development of a competitive telecommunications market.

Part XIB is a mixed judicial-enforcement and administrative model. The ACCC must comply with administrative law requirements to issue a competition notice. However, the notice only acts as a 'gatekeeper' to the enforcement of the competition rule in a court. This gave rise to the following problems:

- the process of issuing a competition notice was resource intensive and time consuming due to:
  - the need for the ACCC to be affirmatively satisfied that there had been a contravention of the competition rule before issuing a notice (so that the ACCC was required to obtain extensive evidence prior to issuing a notice as it would in order to initiate proceedings for a breach of Part IV);[139]
  - the level of detail required in the notice was similar to that of a statement of claim[140] (the notices issued to date vary from between 10 and 20 pages in length); and
  - the need to provide procedural fairness;
- the gate-keeper role of the notice delayed court proceedings as there was an opportunity to engage in regulatory gaming by:
  - partially modifying conduct so that the subsequent conduct was not of a kind described in the notice;[141] and
  - seeking judicial review of the notice; and
- the reversal of the evidentiary burden was of very limited use as the conduct that was the subject of the proceedings was not the subject of the notice.[142]

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139 The ACCC obtained legal advice that, as the ACCC could only issue a competition notice where it had determined that there was a contravention, the failure to obtain sufficient evidence would be of critical importance to the validity of the competition notice in judicial review proceedings. The ACCC was also required to prepare a full competition case prior to the issue of a competition notice due to industry and public expectations that if a notice is not complied with, it would be swiftly enforced. To do this, the ACCC must prove a breach in the Federal Court.

140 A statement of claim, which is filed with an application commencing proceedings, sets out the nature of the applicant's claim and the material facts on which it is based. If the statement is inadequate, the application may be struck out.

141 In addition, the ACCC obtained legal advice that, as the competition notice must 'state' that certain facts exist, a change in these facts would affect the validity of the notice.

In both the internet peering and commercial churn matters, the ACCC was able, at a relatively early stage, to identify the conduct that Telstra would have engaged in had the market been competitive (reciprocal internet compensation agreements are provided in most competitive overseas markets and Telstra's churn terms and conditions did not meet established benchmark standards). However, it took considerably longer to obtain an outcome.

In the internet peering matter, for example, Telstra offered a settlement credit plan (essentially a volume discount). The plan failed to address the key issue of reciprocal compensation and was rejected by other IAPs but changed the nature of Telstra's conduct. The ACCC had to reflect this changed conduct in its assessment of whether there was a contravention of the competition rule.

In the commercial churn matter, the ACCC considered that it was the cumulative effect of Telstra's conduct (eg debt severance, the complexity of the transfer forms, the delay, the rejection of transfer forms and the cost) that constituted a taking advantage of market power and had the effect of substantially lessening competition. Each time Telstra partially modified its conduct, it was necessary for the ACCC to issue another notice which in turn required further evidence from industry participants (such as Optus, Macquarie Corporate Telecommunications, AAPT, Switch, Primus and PowerTel).

5.4 July 1999 amendments

In 1998 and 1999, the Government affirmed the need for an expeditious mechanism to address anti-competitive conduct in the telecommunications industry and strengthened the competition notice regime.[143] The amendments address some (but not all) of the problems discussed above and should reduce the time and resources required to issue a competition notice and improve the robustness of the regime by:

- reducing the threshold for the ACCC to issue a competition notice to a 'reason to believe';
- separating the gate-keeper and evidentiary role of the notices (Part A and Part B notices);
- reducing the level of detail required in a Part A notice so that the subsequent conduct is more likely to be of a kind described in the Part A notice;
- allowing Part B notices to be issued in relation to the conduct that is the subject of the proceedings; and
- preventing the notice from being stayed if judicial review is sought.

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142 Proceedings for a contravention of the competition rule can only be issued in relation to conduct that occurred when a competition notice was in force.

143 Regulation Impact Statement in *Telecommunications Legislation Amendment Bill 1998* Supplementary Explanatory Memorandum p 7.

5.5 Comparison with Part IV of the *Trade Practices Act*

Following the 1999 amendments and the ACCC's development of time frames for investigations under Part XIB,[144] the ACCC considers that Part XIB generally provides, subject to certain limitations, a more expeditious mechanism than Part IV for addressing anti-competitive conduct in the telecommunications industry. There are two main reasons for this:

- **Delay**

  Only the courts have the power to determine whether Part IV has been breached.[145] The demands of bringing a case are such that there is a considerable delay in enforcing a breach of Part IV. The ACCC's recent experience is that the time between instituting proceedings and obtaining final court orders is a minimum of 12 to 18 months and up to 6 years. This delay invariably benefits the incumbent (see *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385).

  Part XIB, like Part IV, is based on a judicial-enforcement model. However, the act of issuing a competition notice places additional pressure on the recipient to stop the conduct identified in the notice. This is reinforced by the reversal of the evidentiary burden and escalation of the potential pecuniary penalty for each day that the conduct continues after the competition notice comes into force.

- **Substantive law**

  Section 46 prohibits a person with substantial market power from taking advantage of that power for a particular purpose. Section 151AJ adopts section 46 but extends it by incorporating an effects test (which requires a court to look at the relevant market and determine 'to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been, is … a substantial lessening of competition').[146] The effects test is particularly required where the use of market power alleged to have substantially lessened competition is in fact a failure to do a positive act.[147] In the commercial churn case, for example, the conduct in question was, amongst other things, a failure to replace an inefficient manual customer transfer process with an efficient automated process. The action taken by the ACCC in the internet peering and commercial churn matters would not have occurred under Part IV.

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144 ACCC, *Anti-Competitive Conduct in Telecommunications Markets: An Information Paper* (19 May 1997 revised August 1999) p 21.

145 The Court may impose a pecuniary penalty (s 76); grant an injunction (s 80); order divesture for a breach of s 50 (s 81); allow a person to recover loss or damage (s 82); and make ancillary orders (s 87).

146 *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) ATPR 40-315, 43,888.

147 In this case, a court is unlikely to infer purpose.

5.6 Effect on investment in infrastructure

An argument against Part XIB at the time it was introduced was that the effects test would deter competitive conduct. Part IV incorporates an effects test[148] but not in relation to a use of market power. It was argued that an effects test would capture producers who eliminate competitors not by misuse of market power but by operating more efficiently (producing the 'best mouse trap').

The ACCC's experience in the internet peering and commercial churn matters indicates that this overlooks the substantial similarities between the drafting of section 46 and subsection 151AJ(2). Under para. 151AJ(2)(b), it is still necessary to prove that the carrier or carriage service provider concerned has taken advantage of its market power. If conduct is not dependent on the absence of conditions of competition, then the firm cannot be 'taking advantage' of its market power. Further, the exemption order process in Part XIB was intended to ensure that an effects test would not deter efficient conduct and operate against the public interest. The ACCC has not yet received an application for exemption which suggests that Part XIB is not perceived as a hindrance to efficient investment.

5.7 Likely future application of the provisions

As outlined in section 1, strong conduct rules to address market power were considered necessary in 1997 as no line of business or technology restrictions were to be imposed on Telstra. The Government introduced amendments in 1998 and 1999 to further strengthen the regime. The ACCC considers that, as a result of open competition, technological and service innovation and convergence, the Australian telecommunications industry is more competitive at both the retail and wholesale levels. However, Telstra's ubiquitous network and integrated nature continue to provide Telstra with extensive market power in most basic voice services as well as a range of enhanced services (see section 3). In the absence of structural solutions, there remains a need for strong reserve powers, supplementing the general trade practices provisions, so that quick and effective responses to anti-competitive conduct can be achieved.

The current competition notice regime in Part XIB is likely to continue to be an important deterrent to anti-competitive conduct in the telecommunications industry by enabling a swifter response than under Part IV. However, although the amendments have strengthened the regime, Part XIB has become a complex regime to administer. Part XIB imposes additional administrative steps to Part IV and yet, ultimately, still relies upon a court to determine the required standards of competitive conduct. The ACCC has no legislative power to require a carrier or carriage service provider to take the conduct necessary to address the anti-competitive concerns. In order to obtain such an outcome, it

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148 Section 45 (contracts, arrangements and understandings); section 47 (exclusive dealing other than third line forcing); and section 50 (acquisition of shares and assets).

is necessary to institute proceedings in the Federal Court for a contravention of the competition rule.[149]

Consequently, Part XIB is less effective where the preferred outcome is an order requiring some positive act (as distinct from a court order requiring a person to refrain from committing a particular act). This is the primary reason why pricing issues that may constitute a constructive refusal to supply have been solely addressed under Part XIC rather than the competition notice regime in Part XIB.

The ACCC expects that the competition notice regime will be used to address matters that cannot be addressed under Part XIC (such as anti-competitive activity in relation to electronic transaction hubbing services (e-hubs) and the bundling of wireless application protocol (WAP) services with other applications). The ACCC also expects that Part XIB will have a significant role in maintaining the status quo until action can be taken under Part XIC (in the same way that commercial churn was dealt with under Part XIB as the unconditioned local loop service had not been declared). Part XIB will thus be an important reserve power for dealing with non-declared services and issues that cannot be dealt with under Part XIC.

5.8 Improving the effectiveness of the provisions

The 1999 amendments to the competition regime have not yet been tested but are likely to have addressed certain limitations of Part XIB in providing an expeditious mechanism for addressing anti-competitive conduct. However, as discussed above, Part XIB is essentially based on section 46 with the addition of an effects test and administrative pre-conditions for commencing proceedings. Courts will restrain a person from committing or repeating a particular act but are reluctant to order a person to do a positive act such as replacing inefficient technology. Part XIB is thus more likely to result in a court prohibiting the conduct that was the subject of the proceedings as opposed to setting a clear standard of required conduct.

These limitations could be addressed under an administrative model where the ACCC could prescribe standards of conduct having regard to competition and public interest criteria. Essentially, this would allow the ACCC to issue a notice which would require a person to engage in specified conduct, namely, conduct that would be expected of the carrier or carriage service provider in a competitive telecommunications market.[150] The circumstances where the ACCC could issue such a notice would be limited and would depend on matters such as the degree of market power of the carrier/CSP, the carrier/CSP's use of that power and the public interest in prescribing the conduct. Where

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149 Under section 151AQB, the ACCC can issue an advisory notice. However, the notice is unenforceable.

150 This is the current test for a use of market power: *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177; *Telecom Corporation of New Zealand Ltd v Clear Communications Limited* [1995] 1 NZLR 385.

technical issues arise, consultation with the ACA may be necessary. For example, a notice could be issued which required a carrier/CSP to:

- discontinue tying the supply of one good or service with another good or service;
- enhance or replace technology;
- introduce a compliance program; or
- alter the terms and conditions on which a specified good or service is supplied or acquired.

Under such a regime, the ACCC could have specified minimum standards for commercial churn (eg the implementation of an automated churn process within a specified time frame); or required Telstra to enter into reciprocal access arrangements with other internet access providers and thus avoided the delay and cost in achieving an outcome under the competition notice regime.

The administrative model is likely to meet the objectives for a telecommunications-specific competition regime in that it would allow the ACCC to respond swiftly to anti-competitive conduct. Although enforcement would still depend on court action, an effective outcome is more likely to be achieved as the ACCC could clearly set out required standards of conduct that are necessary to promote competition and the Court would be in a position to order compliance with these standards.

The regime would operate in a similar way to provisions in the *Telecommunications Act 1997* that allow the ACA to specify performance standards (s 234); industry standards (ss 123, 124 &125); customer equipment and cabling technical standards (s 376); disability standards (s 380); interconnection technical standards (s 384); connection rules (s 404); cabling provider rules (s 421); and record keeping rules (s 529).

6 INFORMATION PROVISIONS AND REPORTING REQUIREMENTS

6.1 Introduction

The type, quality and timeliness of information available to regulators and industry participants affects the quality of decisions which can be made, both on issues affecting the industry as a whole and in the context of individual dispute arbitrations. The information-gathering provisions are the main instrument available to the ACCC to ensure that such information can be obtained.

6.2 Information provisions

6.2.1 Record-keeping rules

The *Telecommunications Act 1991* required AUSTEL to develop a Chart of Accounts (COA) and a Cost Allocation Manual (CAM) detailing carriers' financial reporting obligations to AUSTEL. The key feature of the COA/CAM architecture was a horizontal accounting separation regime, requiring each carrier to provide financial data for each of its major retail services. The ACCC has been developing financial reporting requirements to replace the current COA/CAM accounts to make it easier to compare a carrier's costs of providing services to access seekers against its cost of providing similar services to its own retail operations. While the ACCC expects to make a formal rule, a number of carriers have implemented accounting separation rules as a consequence of the industry consultation process.

The replacement RKRs are intended to 'ring fence' the upstream network activities of a vertically integrated firm from activity from downstream competitive retail service activity. Increasing reliance is likely to be placed on the record-keeping rules in Part XIB to provide information necessary for the performance of the ACCC's functions under Parts XIB and XIC. The ACCC's experience in certain arbitrations has highlighted the need for regulatory obligations that require carriers to keep separate accounts for their wholesale and retail businesses in order to identify transfer pricing. In particular, the new RKRs are necessary to apply the TSLRIC-based access prices when arbitrating access disputes and assessing access undertakings.[151] In addition, the ACCC has used the RKR provisions as a reserve power or threat where information would be tailored to a specific problem (as occurred in the switchports case).

As outlined in section 2 of the submission, the ACCC is currently considering the issue of information disclosure and is conscious of limiting the burden of the RKRs in terms of implementation and ongoing administration costs. The RKRs are being developed in

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[151] ACCC, *Access Pricing Principles: Telecommunications - A Guide*, July 1997.

consultation with the industry.[152] In particular, the ACCC is seeking to ensure that the framework developed will generate high-quality, comparable data for different operators and services at the least possible cost to operators and the ACCC itself, and complements, rather than duplicates, information sought for regulatory purposes by other agencies

6.2.2 Tariff-filing

The Telstra-specific tariff-filing provisions (Division 5 of Part XIB) are a useful source of information for the ACCC's performance of its functions under both Part XIB and Part XIC as it enables the price levels and patterns of particular services to be monitored in real time, so that trends and potential concerns can be identified quickly. The information has also been used by the ACCC to identify non-standard forms of agreement that may raise competition issues. The information has been tailored to reduce the administrative burden on both Telstra and the ACCC and to ensure that the information is relevant and provided in a useful format.

On the other hand, the general tariff-filing provision in Division 4 of Part XIB has not been used by the ACCC. The provision requires a fairly detailed analysis of market power to be undertaken before it is invoked, and the information can readily be obtained under section 155 of the *Trade Practices Act.*

The effectiveness of the information-gathering provisions cannot be judged solely by the history of their use. Their existence provides some insurance that information required for the efficient exercise of the ACCC's functions can be obtained quickly and efficiently. In a number of recent matters, the ACCC used the provision concerning record-keeping rules as a reserve power or threat where information tailored to a specific problem was required.

6.3 Reporting requirements

The ACCC has issued two reports under Division 12 of Part XIB on telecommunications charges paid by consumers. The reports are prepared for the Minister for Communications and tabled in Parliament. They provide an overview of changes in the retail prices and price structures of basic telecommunications services and as such are an indication of the level of price competition in the market for those services. However, the reports do not yet cover all carriers and all telecommunications services, and methodologies for monitoring the prices of services in bundled packages (such as mobile phone services) are still being developed.

The ministerial report provision in Division 12A of Part XIB has not been used. The ACCC has issued two competitive safeguards reports under Division 11 of Part XIB. However, the information contained in the reports is generally a duplication of the material contained in the ACCC's annual reports and press releases.

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[152] In 1998, the ACCC established the RKR Working Group, comprising representatives from Telstra, Optus, Vodafone, AAPT, BT and Primus under the auspices of the TAF.

6.4 Comparison with section 155 of the *Trade Practices Act*

Section 155 of the *Trade Practices Act* provides an effective mechanism for obtaining information, documents or evidence that is relevant to a particular investigation or matter that has arisen under Part XIB or XIC of the Act. However, in contrast to the record-keeping rules and Telstra-specific tariff-filing directions in Part XIB, section 155 is not appropriate for on-going reports (particularly where it is necessary for information to be collected over time in a certain format) and so cannot be used for accounting separation or monitoring.[153]

6.5 Improving the effectiveness of the provisions

The ACCC suggests no particular amendments to the information provisions and reporting requirements. The Telstra-specific tariff filing provisions, the record-keeping rules and the telecommunications charges report have operated effectively. The general tariff-filing and ministerial report provisions have not been used. The competitive safeguards report duplicates material contained in other ACCC publications.

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153 The National Gas Code (section 4) and National Electricity Code (Chapter 6) contain specific ring-fencing provisions.

7 PART XIC – TELECOMMUNICATIONS ACCESS REGIME

7.1 Introduction

The telecommunications-specific access regime was intended, like any access regime, to overcome the barrier to competition in downstream markets which arises when upstream input services are controlled by a single infrastructure operator who also provides services in the downstream market. As explained in section 1 of this submission, the telecommunications-specific regime operates by requiring operators of 'declared' services to make the service available to access seekers on terms and conditions which are either negotiated, provided for in an undertaking or arbitrated by the ACCC.

The effectiveness of the two separate functions of the ACCC under the regime (decisions to regulate and/or deregulate services, and determinations made under its arbitral powers) are considered in turn below.

7.2 Decisions concerning the regulation of services

The access regime is intended to capture services which, because of the market power of the provider and/or the interest of the provider in avoiding competition in downstream markets, would not otherwise be provided to potential competitors on reasonable terms and conditions and so constitute a barrier to entry to the downstream market. It also recognises the particular requirement in the telecommunications market for any-to-any connectivity.

7.2.1 Decision criteria

The decision to regulate a particular service rests on the ACCC's assessment of whether declaration would be in the long-term interests of end-users (LTIE).[154]

The LTIE criterion addresses the fundamental rationale for regulatory intervention in any market:

- It focuses squarely on the outcome of the regulation (sustained consumer benefit), rather than the means by which it is to be obtained (the promotion of competition in related markets),
- It requires the regulator to look beyond the potential short-term gains which may accrue from particular activities and consider the conditions under which the long-

[154] Early decisions which 'deemed' services to be declared were made under the provisions of the Transitional Act. As those provisions no longer apply, the criteria under which they operated are not further considered. The consequences of those 'deemed' declarations are, however, considered in this section.

term efficiency and sustainability of production, consumption and investment decisions will be maximised,
- It requires the regulator to consider a number of factors and, where they potentially conflict, to exercise judgement about where the balance lies.

The LTIE criterion is also applied in the same way to decisions to deregulate services, whether through variation, exemption or revocation of declarations.

In applying this criterion, the ACCC has chosen to undertake case-by-case analysis of the conditions in individual markets, rather than set formal, inflexible rules or thresholds. In particular, the likelihood that declaration will promote competition in downstream markets is assessed by close examination of the number of current and prospective competitors in the market and of the form the competition takes or is expected to develop.

When considering services for declaration, the ACCC focuses on the net or overall benefit to end-users of any declaration decision. This requires it to identify and balance the level and distribution of the likely costs, as well as the benefits, of any declaration. For example, in the unconditioned local loop service (ULLS) case, the ACCC was aware that technical aspects of supplying the service (such as the need for Telstra to provide access to remote switching points of the network, such as RIM boxes and/or local exchanges and deal with potential interference to signals) were likely to impose costs on Telstra and inter-connectors alike. Technical advice on these issues was sought in order to identify the extent and nature of those costs. However, the ACCC determined that the service was unlikely to be made available in the absence of declaration and that the expected benefits exceeded the expected costs, ensuring that the long-term interests of end-users were advanced.

The ACCC believes that this criterion is, in principle and in practice, capable of identifying services for regulation and deregulation in a way which is likely to avoid abuses of market power and improve the efficiency with which Australia's telecommunications infrastructure is used. The ACCC's experience is that the criterion is readily applicable to new services, as well as traditional ones, and that it provides the flexibility to consider declaration decisions at levels of regional and service disaggregation which reflect appropriate market definitions. It is the ACCC's view that the LTIE criterion is robust, flexible and consistent with standard economic welfare criteria.

7.2.2 Outcomes

Decisions to declare services generally have an immediate effect in the market. While for the reasons given earlier the effectiveness of the declaration provisions cannot readily be assessed from direct observation of the market, it is clear that decisions to declare services have generally resulted in an increase in the use of the service and consequent competition in downstream markets. These changes have been accompanied by falls in

the retail charges of almost all basic voice telecommunications services for almost all customers.[155]

For example, the decision to declare a range of local telecommunications services in July 1999, including the unconditioned local loop service and local PSTN originating and terminating services, was followed by the entry of a number of operators into the local call market, price falls of up to 40 per cent for local calls, and announcements by a range of carriers of planned infrastructure rollouts expected to result in greater competition in local telephony services and high bandwidth carriage services. The certainty of access to network facilities which follows a declaration decision clearly reduces the risk associated with infrastructure investment by new entrants as well as eliminating an obvious barrier to entry. These effects are pre-conditions for the emergence of sustainable competition in downstream markets and so for the achievement of the resulting benefits for end-users.

In addition, the provisions may operate as 'stepping stones' into the market for new entrants wishing to test the market before rolling out infrastructure of their own. The declaration of the local carriage service (LCS), which allows resale of local call services, is expected to operate in this way. Such a facility tends to break down barriers to entry associated with the risk of making large investments of a 'sunk' nature prior to entering the market.

Of course, as declaration removes the access provider's exclusive right to determine whether and on what terms access is provided to access seekers, it also eliminates returns related to that exclusivity (rents). The ACCC is aware that this may be regarded by some as a disincentive to invest in new infrastructure, particularly infrastructure characterised as risky.

Incentives to invest are related to the expected return on investment. Other things being equal, risky investments will be undertaken if they are expected to yield a return commensurate with that risk.

The declaration criteria applied by the ACCC include explicit consideration of the likely effect of declaration on the economically efficient use of, and investment in, infrastructure. Where the ACCC considers that declaration would adversely affect investment incentives, it is unlikely to find that declaration would be in the long-term interests of end-users.

In addition, the pricing principles applied by the ACCC in pricing determinations in respect of declared services include provision for the risk associated with capital investment and infrastructure operation to be incorporated in cost calculations via the amount and method of depreciation allowed.[156] Higher risk levels are then reflected in higher cost estimates, and so in higher prices. Explicit recognition of risk as an element

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155 See, for example, ACCC, *Telecommunications Charges In Australia*, 2000.

156 A discussion of different approaches to accounting for risk in cost estimation is contained in ACCC, *A Report on the Assessment of Telstra's Undertaking for the Domestic PSTN Originating and Terminating Access Services*, July 2000.

which should be reflected in prices is an appropriate means of ensuring that declaration does not distort investment incentives.

'Holidays' from declaration are an alternative approach on which the Productivity Commission has sought comment in its Issues Paper. Like a patent, such a 'holiday' would enable operators to benefit from exclusive control over the infrastructure in question for a given period of time, after which the service it provides could be considered for regulation under the access regime in the usual way. The duration of the 'holiday' would presumably reflect the estimated risk of the project.

Such 'holidays' could be granted under current arrangements if access providers subject to standard access obligations sought and received an individual exemption from those standard access obligations.

The ACCC does not believe that such an arrangement would, in principle, substantially improve investment incentives for risky or innovative projects. It may, however, improve perceptions concerning the expected return from investment in infrastructure producing eligible services, by removing uncertainty associated with the possibility of declaration and loss of direct control over the returns from declared services. However, the preferred approach is to reward risk directly through the return to investors. As the ACCC's pricing principles are further developed and better understood within the industry, and as precedents for risky infrastructure investments are established, the ACCC believes that the current arrangements will be viewed as protective of, rather than damaging to, investment incentives.

7.2.3 Processes

The transparency of declaration decisions is high. Since July 1997, all decisions concerning the possible declaration of services have been made following a public inquiry, during which the ACCC has sought and obtained the views of interested groups and individuals. Each decision, together with the reasoning behind it, has been the subject of a published report. Draft reports, public submissions and technical and economic reports commissioned by the ACCC are all publicly available.

A trade-off between the speed, comprehensiveness and transparency of decision processes is inevitable. The ACCC is aware of some criticism in relation to the timing of declaration processes. However, the ACCC believes that declaration decisions have significant consequences and that it is important to take the time to ensure that high quality decisions can be made.

Inquiries follow a number of stages, intended to enable the issues to be identified, information to be gathered and assessed and consultation undertaken. The stages include:

- The public release of a discussion paper,
- Consideration of relevant technical, economic and other issues (including the commissioning of independent advice, which is separately circulated for comment), including those related to service definition and pricing,
- Public hearings (where relevant),
- Competition analysis and information gathering,
- The public release of a draft report,
- Further public consultation,
- Preparation of the declaration instrument,
- The public release of a final report.

Current declaration decisions are not required by the legislation to be time-limited (for example, by the inclusion of review provisions or mandatory sunset arrangements). However, variations, exemptions or revocations can be sought by any interested party or initiated by the ACCC itself at any time. This provision adds considerable flexibility to the regime, by ensuring that declaration decisions can be reviewed as conditions warrant. In addition, the ACCC will typically suggest a timeframe for when the declaration should be reviewed as part of its initial decision.

7.3 Terms and conditions of access

Declaration of a service ensures that it will be made available to access seekers if requested. The terms and conditions of access ultimately determine how much, and for what purposes, the service will be used, and hence how successful the access regime will be in achieving its objectives.

7.3.1 The negotiate-arbitrate model

The negotiate-arbitrate model, which includes a provision for undertakings to be provided by the access provider, has proved problematic in practice. As noted in section 2 above, a large number of disputes have been notified to the ACCC for arbitration, indicating that access providers and access seekers have been unable to negotiate mutually satisfactory conditions.

There appear to be three fundamental problems with the negotiate-arbitrate model.

In the first place, there are limited incentives for access providers and access seekers to conclude effective agreements concerning the terms and conditions of access where there is a market power imbalance between the access provider and the access seeker and where information asymmetries may be expected. Anecdotal evidence suggests that a ‘take it or leave it’ approach is common when the access seeker has no countervailing market power. In such circumstances, access seekers are likely to be negotiating in a vacuum, and may seek arbitration in an attempt to identify the parameters likely to be

used by the regulator.[157] As no undertakings are in place to provide 'reference tariffs' against which to conduct negotiations, and if mediation and other processes are inappropriate or unsuccessful in resolving the dispute, arbitration is the necessary consequence.

The ACCC has devoted considerable effort to the development of external and internal alternative dispute resolution processes in an attempt to identify or narrow the scope of the issues in dispute in particular cases. These processes have enabled commercial negotiations to resume in a number of cases. The ACCC will continue to apply alternative dispute resolution processes where it believes it is appropriate. This is likely to lead to a continuing trend in the resolution of matters prior to a final determination.

Price terms and conditions tend to exceed non-price terms and conditions as sources of dispute, perhaps reflecting the importance of price as a 'first order' competitive issue and the greater difficulty of access seekers in evaluating the offers of access providers with no or limited access to cost information. Where a number of access providers exist, and where the networks involved use similar technologies, disputes are much less likely to arise. Such conditions occur in the case of digital mobile networks, where only one dispute among the mobile operators has been notified to the ACCC (and the notice was subsequently withdrawn).

As competition becomes more established, and the basis of competition shifts from price alone to performance-based factors such as service speed and quality, disputes concerning non-price terms and conditions are likely to become more common. The speed and quality of provisioning processes for interconnection have recently been investigated by the ACCC.[158]

Second, the negotiate-arbitrate model requires arbitrations to be resolved bilaterally and in private. However, any particular input service is likely to be largely homogeneous and undifferentiated in both cost and quality, so that a similar price should be appropriate for all access seekers except where quantity discounts or other special circumstances exist. Multilateral, public processes would seem likely to provide faster, more effective and more transparent price determinations than the current arrangement.

The ACCC has gone some way towards increasing the multilateral, public aspect of price determinations within the constraints of the current arrangements by developing and publishing pricing principles. These are intended to explain the ACCC's approach to pricing issues and so indicate to access providers and access seekers alike the regulatory parameters which will be applied in arbitrations. Knowledge of such parameters is likely, over time, to inform the private negotiations of access providers and access seekers and so reduce the uncertainties and/or gaming which currently result in so many disputes being notified.

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157 While the ACCC has powers which could be used to reduce information asymmetries without recourse to arbitration, those processes, too, are time-consuming and do not necessarily eliminate such incentives.

158 See ACCC, *ACCC monitoring Telstra's interconnection processes*, press release, 7 July 2000.

However, this resort to public processes has not been without its costs as it can have the effect of delaying the finalisation of bilateral processes.

Arbitrations are also time-consuming to conduct and so impose costs and delays on participants, at an inevitable cost to the efficiency of the market and the certainty with which new entrants can establish their own operations.

Finally, undertakings, while intended to provide more flexibility to access seekers and reduce their exposure to pre-emptory arbitral determinations, have in practice provided access providers with a further ability to delay access to services. This results from the optional nature of the undertaking, which encourages access providers to submit unreasonable undertakings. This has the effect of delaying other regulatory processes, including arbitrations which may be conducted in parallel.

These problems have transformed a model originally intended as a 'light touch' safety net into a slow and costly device which is ill-suited to the current conditions in the Australian telecommunications market and whose very existence appears to reduce the incentives for commercial negotiation and encourage regulatory dependence.

7.3.2 Price determination

Because so many disputes have been notified to the ACCC, the regulator has acquired, by default, the status of price-setter for a range of input services. This was clearly not intended when the regulatory framework was developed, but has become an inevitable consequence of the shortcomings of the negotiate-arbitrate model in the presence of an integrated operator. It is a critical role, as the effects of service declaration on the incentives for new entry into downstream markets, infrastructure investment and service innovation depend ultimately on the return which infrastructure owners receive from the provision of input services.

The ACCC has devoted considerable effort to its pricing work because of these sensitivities. Low prices imply low returns. They may discourage new infrastructure investment while encouraging entry into the industry by keeping the costs of critical inputs low. (They do, however, provide an incentive for investment in related services and facilities.) High prices do the reverse. Neither results in efficient outcomes nor serves the long-term interests of end-users.

The ACCC's approach to pricing is consistent with approaches adopted in most other economies with liberalised telecommunications markets. In developing its approach, the ACCC has attempted to ensure that the prices it sets are cost-based and as close as possible to those which would be observed in a contestable market. Its cost models include forward-looking elements which are intended to identify the costs which would be incurred by an efficient operator to provide the service in question. Such models avoid the perpetuation of inefficiencies which would result from rewarding actual costs, where those costs reflect inefficient processes or practices.

The ACCC has defended the use of this approach rather than an actual cost approach on the following grounds:

- By penalising bad decisions and rewarding good ones, it provides stronger incentives for efficient investment decisions,
- It discourages the practice of the access provider cost-shifting from competitive areas to less competitive ones,
- Excessive access charges based on historic costs encourage access seekers to make inefficient 'build-buy' decisions.[159]

The model also ensures that current consumers do not subsidise future consumers by incorporating allowances for network expansion beyond the period in question. In many cases, such as in the case of capital costs, it results in higher charges than actual (historical) costs. In practice, however, efficient costs are difficult to identify and critical parameters of the ACCC's PSTN cost model are derived from the actual configuration of Telstra's network.

The ACCC also considers the appropriate structure of prices, as well as the appropriate level. A two-tier charging regime has been recommended in the report on Telstra's PSTN undertaking, reflecting both the fixed (flagfall) and variable (per minute) charges associated with call establishment and maintenance. Local carriage service charges, however, are charged as a single per-call amount, and ULL charges appear likely to be estimated on a per-line basis. Price structures which reflect the structure of underlying costs are more likely to deliver efficient consumption and investment incentives than those which do not.

The ACCC's determination of wholesale charges is also influenced by the existence of retail price controls on Telstra and a range of other constraints on retail charges and differentials. Because the price controls enable retail charges to diverge from costs, and because of marketing developments such as loss-leading and service bundling, cost-based wholesale charges occasionally imply anomalous wholesale-retail differentials, even when they are geographically averaged. Current wholesale charges for PSTN-based services incorporate a component in recognition of the access deficit incurred by Telstra, partly as a result of traditional (and legislated) retail charging patterns.

Nevertheless, the ACCC considers that the approaches it has adopted have resulted in the determination of charges which produce generally efficient production and investment signals for both access providers and access seekers.

Following its recent decision on the undertaking submitted by Telstra in respect of PSTN originating and terminating charges, and the near-final state of further pricing principles, the ACCC expects to be able to move quickly to finalisation of a number of arbitrations relating to PSTN-based services.

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159 ACCC, *Pricing of unconditioned local loop services (ULLS) and review of Telstra's proposed ULLS charges*, Discussion Paper, 2000, p 15.

Declared services are, by definition, critical inputs to competitors and prospective competitors in downstream markets. The ACCC believes that the effectiveness of the access regime has been reduced by the difficulty of achieving timely commercial solutions to the critical question of terms and conditions of access to many of those services.

7.4 Comparison with Part IIIA of the *Trade Practices Act*

As outlined in section 1 of the submission, Part XIC is based on Part IIIA but contains additional refinements to ensure that the arrangements work effectively for the telecommunications industry.[160] In particular, the Government introduced:

- different criteria for the declaration of services and determining terms and conditions of access under Part XIC; and
- standard access obligations which become operative once a service is declared under Part XIC.[161]

7.4.1 LTIE test

Unlike Part IIIA, Part XIC sets out the object of the regime (the long-term interests of end-users) which then forms the test to be applied in determining which services should be subject to access regulation and the terms and conditions of access. Part XIC is thus more focussed on the Government's objectives for the telecommunications industry than the general regime in Part IIIA.

In determining whether the LTIE will be promoted, the ACCC is required to have regard to certain criteria (promotion of competition, any-to-any connectivity and efficiency). In contrast, Part IIIA requires each criterion to be satisfied before a service can be declared. The flexibility is required due to the 'any-to-any connectivity'[162] feature of the telecommunications industry.[163] As the Explanatory Memorandum notes, the any-to-any connectivity criterion will only be relevant where the service involves communication between end-users. When considering other services, the criterion is of little, if any, relevance.[164]

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160 Commonwealth, *Parliamentary Debates (Telecommunications Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 895 (Senator Campbell, Parliamentary Secretary to the Treasurer).

161 In 1999, amendments were also made to the arbitration provisions in Part XIC which have not been made to Part IIIA. No arbitration has been notified under Part IIIA.

162 Any-to-any connectivity requires an end-user of a service or similar service to be able to communicate with other end-users regardless of the network to which the other end-users are connected.

163 Commonwealth, *Parliamentary Debates (Trade Practices Amendment (Telecommunications) Bill 1996 Second Reading Speech)*, Senate, 25 February 1997, 894 (Senator Campbell, Parliamentary Secretary to the Treasurer).

164 Page 42.

In addition, the LTIE test requires the ACCC to consider the extent to which access will encourage the economically efficient use of, and investment in, infrastructure[165] and thus the incentives for investment in infrastructure.[166] Part IIIA includes an 'uneconomic to develop another facility' and 'public interest' test but does not expressly contain an efficiency test. As noted in the Hilmer Report, efficiency is a fundamental objective of competition policy because of the role it plays in enhancing community welfare.[167] An access regime will impact on maintenance, improvement and expansion decisions and may lead to inefficient investment that harms the long-term interests of end-users (see the ACCC's *Declaration Guide*[168] and *Pricing Principles*[169]).

7.4.2 Declaration

In contrast to Part IIIA, Part XIC is not required to address Federal-State co-regulation issues as telecommunications is a Commonwealth responsibility. This is reflected in the fact that Part XIC provides for the ACCC to determine whether to declare a service in addition to the terms and conditions of access. A similar approach has been used for access to airports[170] and the proposed postal services access regime.[171]

7.4.3 Standard access obligations

Under Part IIIA the right of access depends on the access seeker's ability to negotiate an access agreement or, in default of an agreement, to have an arbitrated outcome.[172] Part XIC imposes an obligation to supply a declared service on request although, in practice, it is still necessary to finalise the terms and conditions of access. Other aspects of section 152AR (the non-discrimination obligations, billing information and conditional-access equipment) reflect the particular features of the telecommunications industry and provide an effective mechanism for facilitating access that is not available under Part IIIA.

The ACCC considers that the outcomes achieved under Part XIC are consistent with Part IIIA but Part XIC provides a more efficient process for dealing with access issues in the telecommunications industry. Reversion to Part IIIA would not be appropriate. The current regime commenced in July 1997 and all of the arbitrations except for three[173] were notified over the last eighteen months. As outlined in section 2 of the submission, most of the ACCC's work to date has focused on the initial step of developing pricing

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165 Para 152AB(2)(e).

166 Para 152AB(6)(c).

167 Aust, Independent Committee of Inquiry, *National Competition Policy*, August 1993 p 3.

168 ACCC, *Telecommunications Services: Declaration Provisions* (July 1999) p 63.

169 ACCC, *Access Pricing Principles: Telecommunications – A Guide* (July 1997) pp 7-8.

170 Under section 192 of the *Airports Act 1996*, the Minister is required to make a determination in relation to certain airports (primarily airports that have been leased by the Commonwealth). The ACCC may make a written determination that a service at an airport is an 'airport service' and therefore a declared service for the purposes of Part IIIA of the *Trade Practices Act*.

171 *Postal Services Legislation Amendment Bill 2000*.

172 *Sydney International Airport* [2000] Australian Competition Tribunal (1 March 2000) para 7.

173 AAPT- Telstra Domestic PSTN Originating and Terminating Access Services (12 November 1997 and 14 December 1998); Telstra-Vodafone Domestic GSM Terminating Access Service (16 June 1998).

principles for the declared services. To repeal Part XIC and revert to Part IIIA would be unnecessarily complicated and would impose new uncertainties on the telecommunications industry.

7.5 Improving the effectiveness of the provisions

The ACCC considers that a relatively small number of amendments to Part XIC would significantly improve the effectiveness of the telecommunications access regime. The amendments need to address the three most fundamental problems of the current arrangements: the limited incentives for access providers and access seekers to conclude effective agreements concerning the terms and conditions of access without regulatory intervention, the difficulty under current arrangements of resolving issues of industry-wide significance in industry-wide, transparent processes, and the delays and costs inherent in the current arbitration arrangements.

7.5.1 Access undertakings

A possible amendment would be to allow the ACCC, in limited cases, to require a carrier or carriage service provider to submit an access undertaking in relation to a declared service where it is in the long-term interests of end-users. In the event that the carrier or carriage service provider fails to comply with the direction or the ACCC rejects the access undertaking proposed by the carrier or carriage service provider, the ACCC may, after conducting a public consultation process, draft and accept an access undertaking with which the carrier or carriage service provider must comply provided that the conditions in subsection 152BV(2) are satisfied.

The advantage of this approach is that it promotes industry self-regulation and ensures that issues that are of general concern to industry are dealt with on a multilateral basis rather than ACCC being required to conduct a number of bilateral private arbitrations relating to the same declared service (as is currently occurring).

The amendment would operate in a similar way to the *National Third Party Access Code for Natural Gas Pipeline Systems* where the owner or operator of a covered transmission pipeline is required to submit an access arrangement to the ACCC. If the access arrangement does not satisfy the principles set out in the Code, the ACCC may draft and approve its own access arrangement.[174] However, unlike the National Electricity and Gas Codes which require the ACCC to set a revenue cap or assess the reference tariffs for each access provider, a telecommunications carrier or carriage service provider would only be required to provide a compulsory undertaking in limited situations.

Such a provision would have provided an efficient mechanism for settling the access price for the Domestic PSTN Originating and Terminating Services where the ACCC has performed an extensive assessment of two undertakings proposed by Telstra and is

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174 National Gas Code section 2.23.

currently conducting a number of bilateral arbitrations in relation to the Services. It would also provide a means of expediting issues that are of particular importance to the industry. In relation to the Unconditioned Local Loop Service, for example, a number of service providers (One.Tel, AAPT and Optus) have been unable to agree with Telstra on an access price. The service providers are seeking to obtain access in time to be able to roll out xDSL services to compete with Telstra's proposed launch of ADSL services from late August.

7.5.2 Review of arbitration determinations

Guidelines issued by the Administrative Review Council indicate that a decision that affects the interests of a person should generally be subject to external merits review but that this may not be appropriate where the decision involves an extensive inquiry process (as it would be difficult, having regard to the time and cost involved, to justify repeating the review).[175]

It is unusual for an arbitration to be subject to a complete re-hearing.[176] The ACCC has found that an arbitration under Part XIC is an unavoidably resource intensive and time consuming process due to the complex nature of the issues and the need to conduct the hearing fairly. This is particularly the case where the ACCC conducts a public consultation process to determine the appropriate pricing principles in relation to a declared service that is the subject of a particular bilateral arbitration. Merits review by the Australian Competition Tribunal in addition to appeals to the Federal Court on questions of law,[177] further delays the resolution of the dispute and reduces the potential advantage of Part XIC. An incumbent is more likely to reach an agreement with the access seeker where there is an early and certain outcome.

7.5.3 Other amendments

The Attachment sets out further proposed amendments that arise from the operation of Part XIC to date.

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175 Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (July 1999)

176 For example, awards by the Australian Industrial Relations Commission are not subject to merits review.

177 *Trade Practices Act* s 152DQ.

8 TELECOMMUNICATIONS ACT PROVISIONS

8.1 Introduction

Technical, service, environmental and other standards developed by, or imposed on, telecommunications operators have the potential to influence competition. They may impose or raise barriers to entry, favour the infrastructure or procedures of a particular or operator or group of operators, or affect the terms on which operators may compete. For this reason the ACCC has been given specific regulatory responsibilities, including arbitration, direction and consultation requirements in relation to the ACA, under the *Telecommunications Act 1997*.

8.2 Effectiveness of the provisions to date

The ACCC considers that the requirement that it have an involvement in decisions on matters with a competition dimension which come within the jurisdiction of the Australian Communications Authority (ACA) is consistent with its obligation under the *Trade Practices Act* provisions and assists in ensuring that competition matters are consistently treated. In the absence of such arrangements, the competition implications of particular regulatory arrangements are less likely to be explicitly considered and solutions might increase, rather than reduce, barriers to entry.

Where a particular regulatory arrangement is required to satisfy multiple objectives, the regulator(s) may be forced to make trade-offs among those objectives. Solutions which simultaneously satisfy objectives of technical efficiency, speed of implementation, simplicity of operation and promotion of competition may not always be available. Such concerns are inherent in regimes with multiple objectives, and are attributable to the multiplicity of objectives rather than to the nature of the institutional arrangements under which they are implemented.

Nevertheless, the requirement for two agencies to coordinate their decision-making and associated processes implies close liaison if delays and other operational problems are to be avoided. Formal consultation between the ACCC and the ACA occurs regularly, including through cross-board membership, and ensures that impending matters of joint concern can be identified and work programs adjusted to accommodate them. Informal consultation arrangements are also strong and primarily occur on an as required basis. While resourcing particular matters can be difficult as the workflows of both organisations are strongly influenced by events in the industry, the ACCC believes that the arrangements generally work well and are producing outcomes which effectively balance competition and other regulatory objectives.

8.3 Improving the effectiveness of the provisions

The ACCC is generally satisfied that the arrangements relating to the implementation of the *Telecommunications Act* provisions are sound both in principle and in practice, and does not specifically propose particular amendments of the provisions.

The ACCC notes, however, that there are a number of limitations in the ACA's power to approve technical codes (developed by industry) which deal with specifying network design features. Such codes may be necessary to implement certain declaration decisions made by the ACCC and a recent example has arisen in relation to the ULL service. The ACCC understands that the ACA is proposing some amendment to the provisions to deal with these issues and, without commenting on the particular proposal concerned, would agree that the relevant legislation needs to be improved to enable the ACCC's declaration decisions to be implemented effectively and in a way which maximises industry participation.

POSTSCRIPT

In this submission, the ACCC has focussed on the experience of the telecommunications-specific competition regulation to date, and on the process issues which arise from this.

The ACCC intends to make a further submission, or series of submissions, to the Productivity Commission review. These will address broader issues associated with the regulatory regime and present the results of a number of research projects currently in progress.

ATTACHMENT

Proposed Amendments to Part XIC of the Trade Practices Act

Negotiate/Arbitrate Model

1. In addition to the compulsory undertaking mechanism proposed by the ACCC, the following amendments would assist in the resolution of access issues that are of industry-wide concern:

    a) Provide for public consultation on issues that arise in the context of a particular arbitration (as the ACCC is currently doing in relation to access pricing principles).

    b) Provide for the use of information obtained under Part XIC for one purpose (eg undertaking) for other purposes (eg arbitration).

    c) Clarify that arbitration determinations can be published. (This would assist other access seekers in negotiations with the access provider).

Declaration

2. Process

    The following procedural amendments would address areas of uncertainty and provide a more efficient process for declaration:

    a) Clarify that the ACCC may declare a service that differs from the service description proposed at the commencement of the public inquiry. (As the service description will be refined in response to submissions).

    b) Clarify that declarations can overlap.

    c) Allow the ACCC to combine inquires for the declaration of a service and revocation/variation of previous declared services.

    d) Clarify the threshold for the ACCC to vary a declared service without holding a public inquiry (which is currently limited to where the variation is of a ‘minor nature’).

    e) The ACCC considers that a provision requiring declarations to be reviewed at certain intervals (or some other similar provision) would be appropriate and would reflect the ACCC’s current practice.

Standard Access Obligations

3. Operational support services

   Operational support services (pre-ordering, ordering, fault handling and billing) are essential to enable effective access. Section 152AR currently imposes only limited obligations in relation to such services.

4. Access seeker interconnection obligations

   Section 152AR should be amended to require access seekers to do all that is necessary to interconnect their facilities with those of an access provider so that there is no impediment to the access provider providing the declared service or to any-to-any connectivity.

   This would ensure that the service provider cannot refuse to provision, or limit the provision of, its network with the effect that its own customers have difficulty connecting to customers of the access provider. Such conduct will hinder the access provider's ability to attract customers (and therefore restrict its ability to compete with the service provider).

   The need for this amendment is illustrated by a number of recent complaints from small network operators (the access providers) who provide a terminating service to Telstra (the access seeker). The providers consider that Telstra has failed to provision its network sufficiently to allow persons connected to its network to reliably call internet service providers connected to the smaller network.

Undertakings

5. Variations

   Clarify that an access provider can vary a proposed access undertaking before the ACCC makes a final decision on whether to accept or reject the undertaking. This would allow the access provider to respond to issues raised in submissions and the ACCC's draft decision.

Arbitration

Determinations

6. Final arbitration determination

   Amend section 152DNA to enable the ACCC to backdate a final determination to the date of an access seeker's request for access to a service. This would reduce the incentive to notify early. (Some refinement would be required where the dispute arises in relation to the operation of an existing access arrangement).

7. Interim determinations

   Amend section 152CPA to clarify that the ACCC can make more than one interim determination in relation to a particular arbitration.

Procedural Provisions

8. Procedural powers

   Amend Part XIC so that the arbitration powers of the ACCC (other than the power to make interim and final determinations under ss 152CP and 152CPA) can also be exercised by the member who is presiding.

   In the course of an arbitration, it is often the case that one of the nominated members will be unavailable. This does not require the ACCC to be reconstituted under s 152CX. However, it results in delay in issuing procedural directions (eg a direction under subs 152DC(1) requiring parties to provide submissions by a certain date).

   Similar provisions are contained in Part IX of the *Trade Practices Act* (review by the Australian Competition Tribunal). In particular, the presidential member can:

   - exercise the procedural powers of the Tribunal (s 103(2));
   - issue a summons and administer an oath or affirmation (this applies to all Tribunal members) (s 105) (see s 152DD(2));
   - issue confidentiality directions (s 106(3)); and
   - take evidence as authorised by the Tribunal (s 108).

9. Summons

   Amend section 152DD (power to issue a summons) so that (i) the ACCC can require a person to furnish information in addition to producing documents and giving evidence at a hearing; and (ii) information or documents can be returnable at the offices of the ACCC and not just before a hearing of the ACCC.

10. Constitution of the ACCC

    Amend section 152CX (reconstitution of ACCC) to clarify that the power to reconstitute the ACCC for the purpose of a particular arbitration can be exercised on more than one occasion. The requirement in subsection 152CX(3) that the ACCC, as reconstituted, must 'continue and finish' the arbitration creates some uncertainty as to whether the ACCC can be reconstituted more than once.

11. Negotiation direction

Subsections 152BBA(3) and 152CT(3) list examples of procedural directions/ directions to negotiate. Although the list is not exhaustive, it should be amended to clarify that the sections cover a direction requiring a party to respond in writing to another party's proposal/offer.

12. Cost recovery

    Amend regulation 28W (costs of arbitration) of the *Trade Practices Regulations* so that the ACCC has a general power to recover costs associated with an arbitration (eg cost of appointing an expert witness).

13. Associate Commissioners

    Increase remuneration of associate commissioners for conducting arbitrations (which would increase the number of commissioners and associate commissioners that are available to conduct arbitrations).

Other

14. Similar amendments should be made to the *Telecommunications (Arbitration) Regulations 1997*.