Review of Telecommunications Specific Competition Regulation
Macquarie Corporate Telecommunications
Key Proposals

- Based on current and anticipated near-term (i.e. next three years) market conditions, there **is insufficient competition in Australia's telecommunication sector to consider any relaxation of the existing telecommunication specific regulatory legislation**. Conversely, Telstra's continued market domination warrants more efficient and effective administration and operation of the existing regulatory regime and minor amendments to the legislation to facilitate further and enhanced competition in the sector.
- **Improving competition and services in poorly served areas, particularly regional areas,** by introducing the following initiatives:
  - add an objective in Part XI to facilitate competition in poorly served markets;
  - establish a fast track declaration process where the Minister can declare facilities upon recommendation of the Department and/or the ACCC;
  - enable the ACCC to prescribe prices, terms and conditions for access to declared facilities in poorly served markets;
  - allow the ACCC to set absolute wholesale service levels;
  - establish a Regional Communications Commissioner within the ACCC; and,
  - review USO delivery mechanisms.
- **Improve arbitration and complaint processes** by increasing the resources of the ACCC, outsourcing arbitration to professional arbitrators, appointing external advisers to assist in the arbitration process, impose strict timeframes limiting the length or number of submissions that will be accepted, increase the use of interim determinations and remove the unnecessary right of merits-based review by the Australian Competition Tribunal.
- **Develop an incentive-based regulatory approach**, to enable the ACCC to restrict specified activity until certain key access milestones are delivered.
- **Enhanced end user power.** Resolution of the network boundary issue has the scope to improve end user outcomes by increasing the scope of competition.
- Give the ACCC unambiguous powers to **deliver transparent, non-discriminatory and fair access pricing**, so that more efficient outcomes are achieved and which will make Australia consistent with practices in the EU and US.
- **Modify Part XIB** so that it is more effective by removing ambiguities thus giving the ACCC a focussed tool to deal quickly and effectively with anti-competitive access activity.
- **Reduce the ambiguity of SAOs** so the ACCC can set absolute levels of performance, this would also improve transparency and regional outcomes.
- **Abolish the TAF**, so that fast track declarations can be effectively handled directly by the Minister on the advice of the Department and/or the ACCC/ACA.
- **Enable the Record Keeping Rules** to unblock the existing delays.
- **Provide for effective access to information** so that informed open debate about key regulatory issues can take place and regulators held to account.

Macquarie Corporate Telecommunications
Supplementary Submission – October 2000
Review of Telecommunications Specific Competition Regulation

Executive Summary

Macquarie Corporate Telecommunications (MCT) welcomes the opportunity to make this submission to the Productivity Commission's inquiry. The submission covers five main areas – regional services, the timing and nature of the review, the state of competition in telecommunications markets, the adequacy of the existing legislation and possible remedies.

Poorly Served Markets

It is generally held that Australians, regardless of their geographic location, are entitled to access at least a basic level of telecommunication services. The accessibility of telecommunication services in Australia's poorly served markets, particularly regional markets, is therefore a major public policy issue.

Regional telecommunication markets display significantly different characteristics to metropolitan markets and arguably require different regimes to engender competition. Non-metropolitan markets face high infrastructure costs and thin markets and therefore present considerable barriers to entry for potential entrants. In the medium term, technology of itself is highly unlikely to hold the entire answer.

MCT suggests that a number of actions that could address these issues. These include:

- Setting a specific legislative objective to address poorly served markets,
- Fast tracking declaration of services,
- Establishing specific powers in relation to facilities access,
- Setting absolute wholesale service levels,
- Appointing a dedicated Regional Communications Commissioner at the ACCC and
- Reviewing the USO payment and delivery system and potentially replacing it with a voucher system.

Timing & Nature of the Review

The Telecommunications market in Australia has evolved from a Government controlled monopoly less than ten years ago into its current state. The current legislative framework has been in place for around 3 years following a 5 year period of managed competition. That 5 year period granted key rights and privileges to the two full licence carriers and a further Mobile operator.

Since July 1997 the explicit restraints on competition have been removed and replaced with a regime that has specific features to deal with the issues in telecommunications markets. These needs arise from more than a century of monopoly or near monopoly

control over markets and the essential interconnectedness of telecommunications. Whilst the existing regime has as its underlying tenet pro-competitiveness, it has been slow to fully deliver. As the attached case studies show, the ability of the legislation to deliver on its original promise have been mixed and more frequently not timely.

While MCT understands the need for the Commission in its issues paper to revisit the underlying questions regarding telecommunications regulation, it should take into account the exhaustive review that led up to the 1997 legislation and how early into its effective life the regime actually is. In particular in many markets little has changed in that time. The factors underlying the need for a pro competition regime are just as compelling now and given the developments in overseas markets and Internet applications, the need for an open and competitive regime is more imperative now than ever before.

The State of Competition

There are many factors which impact on judging the state of competition and these are further complicated by the existence of different sub markets often showing different characteristics. Some key identifiers would be the barriers to entry, market shares, price performance, the level of technical and marketing innovation, and the levels of investment, efficiency of investment and operational efficiency. The weight of evidence points to the conclusion that on most, if not all, of these key performance indicators the Australian telecommunications industry still has some way to go before it achieves best practice and in many cases it is not exhibiting the characteristics of a market which is driven by competition.

It is true that there have been many new entrants in the industry since 1997, but in many fields of competitive endeavor, there has been little effective improvement since the duopoly days. Examples of improved competition include:

- STD
- international calls.

These areas depend on continuing regulatory pressure for their development. Without arbitration rights, pre-selection and scrutiny of commercial churn processes it is unlikely that continuing competitive pressure will continue to be applied.

Contrary to Telstra's submission to the Commission that sufficient competition has entered the market to allow the regime to be rolled back, the underlying market power of Telstra in many areas remains significantly unchallenged, and even with these pro-active regulatory interventions, Telstra's market shares and pricing do not appear to have been significantly impacted. Areas where insufficient competition exists include:

- Local call services
- DSL Services
- Infrastructure access
- Fixed to mobile services

A significant reason why competition has not developed in these markets is that the incumbent has such effective rights to vertical integration (Telstra provides both access to network infrastructure and retail services on the infrastructure), price discrimination, non-transparent pricing and closed access to customer and cost information. This level of incumbent rights is exceptional by world standards for a truly competitive regime and would be prohibited in the United States and the European Union.

The end result is that in the key areas where competition is needed - like data services and underlying local call services - effective competition has been slow to develop and the overriding performance drivers are statutory price controls and mandatory minimum performance standards rather than competition.

Adequacy of the Existing Legislation

The existing legislation provides a solid and robust framework for access and great flexibility for the ACCC to focus in on important access issues and to make determinations that seek to resolve those access issues for the long-term interests of end users. Indeed there are many instances of other industries like transport and energy where comparable powers would lead to improved national outcomes.

Sometimes this flexibility has been at the expense of the time and cost to effect changes. For example the obvious local loop bottleneck, singled out for specific legislative attention in the US as early as 1996, has still not been completely addressed with some resolution for larger industry players perhaps to come later this year.

However, it would be a significant mistake to think that the main tasks have already been addressed by the ACCC and there could be some relaxation of access rules. It is becoming apparent that as technology develops, new bottlenecks will emerge and not necessarily restricted to that technology. For example, the whole range of issues related to the convergence of broadcasting, datacasting and telecommunications remains open, as does the question of access to and continued operation of Internet peering cartels and potentially access to satellite services.

While the access features of the legislation have been quite effective, the legislation does not fully address of transparency of decision making and the management of industry information. These restrictions on information flows can have significant impacts on the ability of new entrants to compete effectively and fairly. For example, the legislation envisages a wide range of negotiated outcomes in instances where there is a clear imbalance of negotiating power and appears to rely on market mechanisms where there is no effective market place and wide information asymmetry - i.e. the incumbent is in possession of all relevant commercial and operational information by dint of its market position (including the conduct of all other commercial disputes and negotiations), versus an information-poor competitor.

Remedies

MCT believes that there are a number of key areas of the operation of the legislation that should be examined in order that it better achieves its original objectives.

The key proposals are:

- **Improve arbitration and complaint processes.** Increase the resources of the ACCC (and possibly also the ACA) outsource arbitration to professional arbitrators, the appointment of external advisers by the Commission to assist in the arbitration process and impose strict timeframes limiting the length or number of submissions and replies that will be accepted, increased and less tardy use of interim determinations and removal of the right of review of arbitration determinations by the Australian Competition Tribunal.
- **Develop an incentive based regulatory approach**, that clarifies the ACCC's powers so that it can restrict specified activity (for example bundling of ADSL and long-distance retail services) until certain key access milestones are delivered.
- **Enhanced end user power.** Resolution of the network boundary issue has the scope to improve end user outcomes by increasing the scope of competition.
- Give the ACCC unambiguous powers to **deliver transparent, non-discriminatory and fair access pricing**, which would reduce arbitration and reduce delays. This would also provide consistency between Australia and practices in the EU and US.
- **Modify part XIB** so that it is more effective in dealing with access issues by removing ambiguities thus giving the ACCC a focussed tool to deal quickly and effectively with anti-competitive access activity.
- **Reduce the ambiguity of SAOs** so the ACCC can set absolute levels of performance, this would also improve transparency and regional outcomes.
- **Abolish the TAF**, so that fast track declarations can be effectively handled directly by the Minister on the advice of the Department and/or the ACCC/ACA.
- **Enable effective Record Keeping Rules** to unblock the existing delays.
- **Provide for effective access to information** so that informed open debate about key regulatory issues can take place and regulators held to account.

Review of Telecommunications Specific Competition Regulation
Macquarie Corporate Telecommunications
Supplementary Submission – October 2000

Macquarie Corporate Telecommunications (MCT) welcomes the opportunity to make this submission to the Productivity Commission's inquiry. This submission reiterates many of the issues raised in MCT's initial submission to the Inquiry in August 2000, and responds to a number of issues raised by Commissioners with MCT at the public hearings. The submission covers five main areas – poorly served markets, the timing and nature of the review, the state of competition in telecommunications markets, the adequacy of the existing legislation and possible remedies.

Macquarie Corporate Telecommunications (MCT) is an Australian-owned and ASX-listed telecommunications company that focuses on the provision of telecommunications services and solutions to small, medium and large businesses. Formed in 1992, MCT offers a total communications package to its corporate customers, including voice service (purchased from third party major carriers), data services (increasingly through MCT's own recently installed carrier grade ATM based infrastructure), facilities and project management, and telecommunications consultancy.

Poorly served Markets

The accessibility, quality, range and pricing of telecommunications services in Australia's poorly served markets, particularly regional and rural areas, is a major public policy challenge for the nation. It is generally held that Australians, regardless of their geographic location, are entitled to access to at least a basic level of telecommunications services (voice and data).

The Telecommunications Service Inquiry (TSI) has recently presented a report to the Government on the adequacy of customer service levels. While this report has not yet been publicly released, it is clear from the submissions to, and public hearings of, the TSI that there is very substantial concern in many areas of Australia relating to service levels. Equally, input to the TSI makes it clear that both services and facilities-based competition has been to slow to penetrate into these areas, with resultant inferior performance in terms of price, quality of services, range of services etc.

Many non-metropolitan telecommunication markets display significantly different characteristics to metropolitan markets and arguably require different regimes to engender competition. Non-metropolitan markets face high infrastructure costs and thin markets and therefore present considerable barriers to entry for potential entrants. In Macquarie's own recent experience (which involves the expansion of its data network into regional areas), the commercial risks associated with establishing facilities and

services in non-metropolitan areas are almost inevitably compounded by infrastructure access difficulties which an incumbent will actively exploit to discourage new entrants.

In the medium term, technology of itself is highly unlikely to hold the entire answer – the facilitation of robust service-based competition should be seen as an important component in the overall amelioration of service levels in these areas. While the market characteristics of poorly served areas are partially offset by subsidy payments (USO), distribution of the subsidy is flawed with a very large component of the subsidy available exclusively to Telstra thereby entrenching the incumbent's position and further deterring new entrants and potential competitors.

As a consequence of these factors, there is limited competition in regional areas resulting in higher prices and a limited range of services. All of the general remedies proposed by Macquarie would assist in the development of competition in regional markets.

Accepting the importance of increased services-based competition to improved service levels in presently poorly served areas, we believe that the Commission and the Government should be considering potential enhancements to the industry competition framework specifically aimed at accelerating the penetration of competition into these areas. Macquarie's recommendations in this regard follow.

Legislative Objective to Promote Competition in Poorly served Markets
At the very least, Macquarie believes that an overarching additional objective should be inserted in Part XI of the TPA requiring the facilitation of competition within poorly served telecommunications market.

The objective would require the ACCC to apply Part XI B and C in a manner favourable to engendering competition in those markets. In relation to Part XI C, for example, a new clause (f) could be added to subsection 152AB(2) which lists relevant factors to be taken into accounts in determining the long-term interests of end-users.

In relation to this proposal and several that follow, the definitional issue arises as to what constitutes an 'poorly served area'. At this stage of its thinking, Macquarie believes that this is probably most easily defined as all of Australia excluding those areas (e.g. currently metropolitan areas and some major regional centres) which meet thresholds relating to customer service levels, number of carriers/CSPs serving the area, barriers to entry, population etc. Clearly, it could be expected that areas categorised as poorly served will change over time, and Macquarie proposes that the ACCC or ACA would make an annual evaluation against these criteria.

Fast Track Declaration
Implementation of a fast track declaration process for facilities and infrastructure in poorly served areas would assist in opening up access and reducing the inherent delays and costs currently encountered by parties seeking access. Declarations would be made by the Minister upon advice either in response to submissions from aggrieved access

seekers or end users and/or in response to the Commission's observations of market participants' behaviour.

Facilities Access

Facilities in poorly served areas need to be opened up to multiple parties to allow service-based competition to develop and avoid inefficient duplication of infrastructure. Facilities access is a particular bottleneck in poorly served areas of Australia, where the incumbent may have the only viable facility for location of a particular piece of equipment (in metropolitan areas, on the other hand, alternative facilities are more likely to be available). Failure to secure access to an existing facility or the prospect of developing a new facility act as a real disincentive for new entrants to a particular area.

It is apparent that the existing facilities access regime has some real limitations as evidenced by Macquarie's own experience with deploying its national data network, as well as the limited sharing of GSM transmission towers around Australia.

To remedy this situation, the ACCC could rely on powers to prescribe terms and conditions for access to declared facilities in poorly served markets and also to determine priority of access to those facilities. This power would be facilitated by the fast track declaration process.

Minimum Wholesale Service Levels

Part XIC requires that the technical and operational quality of declared services are provided on a non-discriminatory basis however the regime does not prescribe any clear service standards. An aggrieved party must therefore overcome the difficult evidentiary burden of establishing that it is receiving services on an inferior basis to other operators. To remove this burden the ACCC could be given power to impose absolute service standards for wholesale products in poorly served areas thereby giving the Commission power to set minimum service standards for bottlenecks on a non discriminatory basis.

Other mechanisms could operate in conjunction with prescribed service levels including extending the non-discrimination obligation to pricing/commercial terms in poorly served markets whereby the incumbent must offer access seekers services at a price no greater than it charges itself. An additional or alternative mechanism may be to reverse the evidentiary burden so that where an access seeker can establish a prima facie case that it is receiving an inferior service, the burden of proof lies with the access provider to establish that it is providing technical and operational quality in a non-discriminatory manner.

Regional Communications Commissioner

To administer the regulatory regime in respect of poorly served markets and ensure a pro-active and expedient response to Part XI B and C actions, a Commissioner for Regional Communications could be co-appointed to the ACCC and the ACA. The Commissioner would have jurisdiction under Parts XI B and C over telecommunications, electronic information and broadcast issues in poorly served areas and additional issues of relevance

to regional services as assigned to him from time to time. It may be appropriate for the Commissioner to be co-appointed to the ACA.

The potential functions of the Regional Commissioner would include:

- Declaration of telecommunication infrastructure in poorly served markets
- Overseeing XIC processes in respect of facilities in poorly served areas
- Pursuing XIB actions in these markets
- In the event the ACCC had power to impose pricing and conditions of access, formulating and enforcing pricing and conditions
- Participation in the subsidy (USO) quantification and allocation processes
- Monitoring and reporting on the performance of poorly served telecommunication markets (including the categorisation of areas in accordance with the benchmarks referred to above)

Macquarie believes that the appointment of a Regional Communications Commissioner would have the benefits of:

- Providing an expedited mechanism for dealing with Part XI B and C matters specifically relating to poorly served areas
- Ensuring that the broader administration of Parts XI B and C by the ACCC properly takes into account the amending objectives of the Parts (i.e. to encompass the facilitation of competition in poorly served areas)
- Providing a focal point to monitor and track the penetration of competition in the provision of telecommunications services to poorly served areas of Australia.

USO Delivery Mechanisms

MCT believes that the current USO arrangements are inadequate and are indirectly anti competitive. The USO regime was devised before the advent of competition within the sector and has only had very minor adjustments since then. The structure of the funding represents the entrenchment of a dominant provider, which MCT believes is not adequately addressed by the tendering system currently proposed by the Government. This is of particular concern to MCT and other carriage service providers obliged to contribute to the funding of the USO and therefore entitled to an accountable and accurate process.

The process gives the assigned USO carrier access to USO funding to provide a subsidised service irrespective of the potential alternative offerings available. Therefore, while competitors are forced to compete with Telstra using "cost" based regional interconnect charges, which may not always reflect true costs, Telstra is able to apply the USO in order to subsidise its retail prices. Tendering would only partly resolve this issue, as the process would preserve a single provider of a service. Most critically neither process actually increases choice for the USO service customer.

It is on these bases that MCT and other industry players are reluctant to participate in funding a USO which lacks visibility in its costs and benefits and which excludes competitors from segments of the market. MCT believes that a reform of the USO

beyond limited tendering trials is required if USO services are going to be improved and industry funding is to become widely accepted.

Adopting alternative delivery mechanisms, which efficiently fund and promote competitive outcomes for the various subsidy targets should ultimately reduce the level of subsidy required and improves service levels. This requires mechanisms which introduce competition, either for the market or within the market, and thereby provide an incentive to improve service levels and drive efficiency savings. At the same time, mechanisms should introduce competition in a manner that does not incur unnecessary costs and avoids duplication of infrastructure and investment.

One of the most effective means of driving competition within a subsidised market whilst leaving discretion with the end user is a voucher system. Essentially payments are made or rebates given to targeted end users to offset the cost of telecommunication services. The payments are output related, that is payments represented by the voucher or rebate compensate the purchase of end products and are not contingent upon the means or the party by which the end product is provided. At present the end product is a standard telephone service. If the Government chose this could be expanded to include additional services such as broadband. The value of the voucher would reflect the most efficient cost of providing the end product within the relevant geographical band and would be available in areas currently served by USO services. The level of subsidy may also, over time, determine the mode of delivery with lower subsidies driving lower cost options, such as satellite.

The benefit of the system is that it leaves the choice of service and provider in the hands of end users allowing market forces to ensure service delivery. There are also important equity advantages from this type of approach that allow it to be targeted at areas most in need of services such as remote schooling, health services and commerce with limited risk of cross subsidisation. Services would remain subject to current legislative price caps to reduce the risk of collusion and effective administration of the Part XIC access regime would assist providers that could attract sufficient market support to provide services via pre existing infrastructure. The voucher/rebate system currently operates effectively in Scandinavia and in the Victorian power and gas markets.

Timing and Nature of the Review

In 1997, when the Government implemented the policy of deregulating the Australian telecommunications market, it recognised the dominant (and in some cases, exclusive) market position occupied by Telstra in the provision of the various categories of telecommunications services. Moreover, the impact of this market position on competitors and consumers was compounded by the fundamentally 'inter-connected' nature of the telecommunications industry (i.e. it is not possible to provide a basic range of services without utilising Telstra's network infrastructure). For these reasons, the parliament enacted the industry-specific telecommunications competition framework in contrast to relying on the non specific framework contained in Part IV of the TPA. This framework was further strengthened in mid-1999 by the parliament on the basis of

industry concerns of an overwhelming pattern of behaviour by Telstra characterised by non-cooperation and delay (including through expensive litigation).

The decisions relating to the structure and substance of the current legislation (1997) were developed by an extensive and lengthy consultation and investigation process conducted through the offices of the then Department of Communications and the Arts. The existing legislation was the result of that review and based of the experience of managed competition, which had been in place for five years, which had in turn evolved from a Government controlled monopoly. At the time it was passed the legislation had bi-partisan support. That current legislative framework has been in place for 3 years.

It is probably instructive to look at the actual record of hard achievements of the existing legislation and the extent to which they have facilitated open competition in a variety of telecommunication markets. They include:

- The deeming provision,
- A small number of new declarations,
- No access undertakings,
- Only two final access arbitrations and a small number of interim decisions after three years, and
- A large number of unresolved arbitrations.

As the attached case studies for Data Service, Local Loop Unbundling, Number Portability, Commercial Churn and PSTN Undertaking demonstrate, the actual impact of the legislation on the operation of the market in the timeframe between the enactment of the legislation and this review has been somewhat limited. (See Attachment A)

The key factors that motivated the adoption of an industry specific framework have not diminished and are likely to remain material for the medium term. Telstra has expressed the view to the Productivity Commission that Part XIB and, to a lesser extent, Part XIC are transitional measures to be repealed once the market matures and a sufficient level of competition has evolved within the sector. Whilst MCT does not dispute this, it believes the level of competition within the sector is far from sufficient to repeal the provisions whilst Telstra remains the dominant provider in all telecommunications markets with minimal reduction in market share since 1997.

The other key factor, the interconnected nature of the sector, has not diminished as the sector is inherently network based, being reliant on the interconnection between operators networks and, in particular, the ubiquitous Telstra network. The ability of telecommunication networks to interconnect fairly and efficiently with other networks is critical to the development of competition. Reliance on network interconnect is of particular relevance to the growing Internet sector where network peering underwrites the scope and currency of the sector.

The factors underlying the need for a pro competition regime are just as compelling now as they were 3 years ago and, given the developments in overseas markets and Internet

applications, the need for an open competitive regime is more imperative now than ever before.

MCT submits that, given the delays in actually driving market-place outcomes from this legislation, the emphasis of this review should be on seeking ways to develop a legislative framework that enhances and protects competition and that the burden of proof must rest with those parties seeking any relaxation of the current regime.

The State of Competition in the Telecommunications Sector

MCT strongly believes that the level of competition in the provision of certain key telecommunication services is likely to remain inadequate over the next three to five years for commercial discipline to restrict market manipulation by dominant provider(s). This is particularly apparent at the wholesale level in the local call market and data and voice access in non-metropolitan markets.

Some key identifiers of competition would be the barriers to entry, market shares, price performance, the level of technical and marketing innovation, the levels of investment, efficiency of investment and operational efficiency. The evidence points to the conclusion that on most, if not all, of these key performance indicators the Australian telecommunications industry is lagging behind best practice and is certainly not exhibiting the characteristics of a market driven by competition and delivering benefits to consumers.

Contrary to Telstra's submission to the Commission that sufficient competition has entered the market to allow the regime to be rolled back, the underlying market power of Telstra remains significantly unchallenged and even with these pro-active regulatory interventions Telstra's market shares and pricing appear not to have not been significantly impacted. Telstra is vertically integrated service provider. As owner of the majority of telecommunications infrastructure Telstra is an access provider to retail service providers whilst at the same time using its infrastructure to compete directly with those retail providers in the retail market. As a vertically integrated access and service provider, Telstra continues to be motivated to restrict access where access may result in competition in downstream markets.

Telstra still holds significant market dominance and as of July 2000 Telstra retained 95% of the local call market, 77% of the long distance market, 85% of data and text and 95% of the telecommunication infrastructure access market.*(source: Telstra Private Client Investor Presentation, July 2000)* In the event that the current regulatory regime remains unchanged, there is no reason to believe that Telstra's market shares will dramatically change in the next three to five years. This dominance gives Telstra considerable market power which is reflected in market share, access to resources, substantial expertise, relationships with suppliers, and control of critical information and knowledge. Telstra also has the scale to influence or direct non – telecommunication goods and services through its discretionary spending power. The ability of Telstra to use its position poses

a considerable risk to competitors and potential entrants and warrants specific regulation that firmly safeguards against anti-competitive conduct.

Evidence of a lack of effective competition exists in Government's implementation of the Customer Service Guarantee that reinforces evidence of a lack of competition for users with less than five lines (all residential and most small businesses). In the presence of effective competition, the need to retain or obtain customers would maintained service levels and service level regulation would not be required.

Evidence of a lack of pricing efficiency can be found in the Productivity Commission's own research into Australian prices compared with Scandinavia and in particular how Australia's geographic dispersion does not explain the price differences between retail prices in Finland and Australia. Further evidence in relation to wholesale pricing inefficiency can be found in the ACCC's comparison of unbundled local loop prices which shows Australia has the most expensive prices (up to 3 times the price for Germany).

Similarly, capital efficiency drivers and infrastructure duplication are not indicative of a competitive market. For example, intercapital transmission between Melbourne and Sydney has been subject to the lightest of all regulation and yet seems to be delivering the least efficient investment outcomes.

Wave Division Multiplexing (WDM) has the capability to enhance the capacity of a single fibre so that it would be capable of efficiently carrying the entire forecast load between Melbourne and Sydney for the next 5 years. The main cost of a fibre system is laying the fibre and whilst the deployment and upgrade of fibres is not zero cost, it is relatively low cost compared to the initial deployment cost.

However, what has happened is that because the entrenched operators are restricting access to underlying fibres new entrants are forced to commit to uneconomic duplication of infrastructure and reproduce the most expensive transmission element. It is indicative that even in a market where the ACCC is most comfortable withdrawing from regulation, the underlying market dynamics are not producing outcomes consistent with competitive outcomes.

The Adequacy of the Existing Regulation.

Macquarie believes that whilst the regulatory structure is sound in principle, there are areas where the legislation, regime structure and administration have resulted in less than fully effective operation of the regime. MCT considers that it would be dangerous to envisage any relaxation in the existing framework and that indeed there are powerful arguments for a stronger and more streamlined approach in the market context that will unfold over the next three to five years. After three years of operation the regime has had only a small impact on the level of competition in the key markets; to wind back the regime at this time would only act to crystallise the status quo.

One of the best features of the current legislation is that it is flexible and, therefore, forward-looking. The Australian framework envisages that Telecommunications should be a highly innovative and dynamic industry and legislators cannot easily determine future needs today. This is particularly relevant to the developing convergent markets where the interaction and overlap of telecommunications and broadcast services will require a regime that can adapt to the inherent complexities of regulating such a market. Additional bottlenecks are likely to appear as the demand on new technology increases. A current example of an emerging bottleneck is the delay being experienced by operators trying to access wholesale DSL services and the ULL in general. Future bottlenecks are likely to emerge in Internet access services where there is already an ACCC sanctioned cartel of four service providers operating.

As a general rule, however, the 1997 Competition Regime relies on "ex-post" regulation. That is, it operates to resolve disputes or moderate behaviour after the matter has arisen and for this reason should be seen as inherently light-handed regulation. This is evident in the access regime in Part XIC of the TPA which empowers the ACCC to intervene in the event that an access seeker and an access provider are not able to reach agreement and in the provisions of Part XIB of the TPA which entitles the ACCC to intervene by issuing a competition notice where anti-competitive conduct has taken place.

Regulation of this type has clear benefits for an incumbent operator such as Telstra. It allows Telstra to continue to engage in anti-competitive conduct and attempt to stifle competition and provides no effective incentive for Telstra to avoid this behaviour.

Telstra's interests are served by continuing to engage in anti-competitive conduct, such as refusing to provide access on reasonable terms because, in most cases, even if the matter is taken to arbitration and Telstra is ultimately unsuccessful, this process is likely to be protracted and Telstra will continue to benefit until such time as the dispute is determined. Similarly, in relation to anti-competitive conduct which is proscribed under Part XIB, Telstra is again likely to benefit from prolonging such conduct notwithstanding the threat of a competition notice from the ACCC - as the longer it is able to sustain such conduct, the greater will be its ultimate benefit.

MCT does not seek to unfairly criticise the ACCC as the main administrator of the regulatory framework (or, indeed, the ACA, which also has some significant responsibilities related to issues such as number portability). MCT believes that given the basic nature of the regulatory framework that there needs to be a full review of the resources available to these agencies and potential alternative strategies related to dispute resolution, investigation of complaints and other associated regulatory functions.

The consequences of undue delay (for the industry and consumers) are accentuated in an industry as rapidly moving as telecommunications, where new technologies and products are literally becoming available on a month-to-month basis.

An important omission from the existing legislative framework is its failure to address the important issue of information asymmetry – the substantial advantage derived by

Telstra in commercial negotiations and disputes from its unparalleled knowledge of the commercial and operational issues related to its own network (including negotiations and disputes with all other access seekers) vis a vis any particular dispute or negotiation with an access seeker. This is particularly relevant in an ex-post environment that has heavy reliance on negotiated outcomes. The current legislation fails to deliver transparency, non-discrimination, a publicly available offer or a reference offer. This failure is a significant cause of industry conflict, time delays and failed negotiations.

In summary, whilst the regulatory structure is sound in principle, there are areas where the details of the legislation, regime structure and administration have resulted in less than optimum operation of the regime. Part XIB has not been directly effective, even after the 1999 amendments, and to date there have been no successful XIB actions. Part XIC arbitrations have, and continue to experience undue delay and the declaration process remains convoluted. The record keeping provisions have not provided the transparency necessary in wholesale markets dominated by a vertically integrated operator. Finally, industry self-regulation has been an effective and equitable means of developing operational codes however, it is not effective in areas where industry members have competing commercial interests. As a result the operation of the TAF has been frustrating and demanding on resources.

Remedies

MCT believes that there are a number of key areas that should be examined in the existing legislation with a view to improving the outcomes and developing a regulatory structure that will facilitate the development of ongoing competition.

The proposals are:

- Improved arbitration & complaint process,
- Develop an incentive based regulatory approach,
- Enhanced end user power,
- Transparent, non-discriminatory and fair access pricing,
- Modify part XIB to target it more effectively,
- Reduce the ambiguity of SAOs so the ACCC can set absolute levels of performance,
- Removal of the TAF,
- Enable effective Record Keeping Rules,
- Provide for effective access to information,

Improved Arbitration & Complaint Process

MCT believes that several steps can be taken to provide a more expedient and effective administration of Part XI B and C:

a) An obvious step is to increase the resourcing of the ACCC (and possibly also the ACA) which should facilitate quicker handling of XI C (i.e. access) issues and would also allow the Commission to become more pro active in the administration and execution of Part XI B (i.e. anti-competitive conduct). This would not only serve to

allow anti competitive conduct to be identified and addressed but should act to more effectively deter such conduct.

b) The conduct of arbitrations is arguably not a key function of the Commission, which in turn is not resourced with the expertise to expediently handle arbitration (or dispute resolution at a more general level). The process could be outsourced to professional arbitrators thereby tapping expertise and also freeing up and allowing the more efficient utilisation of the Commission's resources for the investigations, inquiries etc. that may provide assistance and input to arbitration between parties.

   Arbitrators would not necessarily require telecommunications experience and/or expertise, although this may be an advantage in issues of technical complexity and could be sourced from the ACCC, ACA and independent experts. The use of arbitrators with no specific sector knowledge is common in commercial arbitrations and indeed the courts consistently and successfully consider disputes involving technical issues of considerable complexity without possessing sector specific knowledge or experience.

   Concern has been expressed that bilateral arbitrations conducted by independent arbitrators, in contrast to the ACCC, may ignore externalities that are fundamental to the telecommunications sector. The XIC regime is intended to encourage negotiation prior to arbitration, and given that parties are free to reach any agreement they choose, externalities should play a limited role in the determination of an arbitration that is attempting to, in effect, force a finalisation of the negotiations. To the extent that externalities need to be recognised by an arbitrator, the ACCC can and has produce pricing principles, SAOs and guidelines. The arbitrator could also obtain guidance from the ACCC if required.

c) The appointment of external advisers by the Commission to assist in the arbitration process and generally augment the Commission's resources would greatly benefit the operation of the Part XI B and C processes. This would be of particular assistance in technical areas.

d) To date ACCC arbitrations have suffered through parties adopting an unduly legal approach to a process that should, by its very nature, be commercially and pragmatically orientated. The consequence has been delay and prevarication by the Commission due to having to respond to overly complex and lengthy submissions. This may, in part, be remedied by imposing strict timeframes and limiting the length or number of submissions and replies that will be accepted. Timeframes and procedures could be discretionary to be agreed between the parties and the Commission with the Commission holding a veto.

e) In 1999 legislative amendments gave the ACCC power to make interim determinations in arbitration proceedings. Interim determinations are intended to provide more immediate relief and address the consequences of the lengthy arbitration process that has resulted in only three final determinations out of the thirty

plus arbitrations commenced since 1997. The delay in reaching a final determination has several consequences: delay allows the incumbent to continue to extract undue rents and consolidate its market share; delay can prolong a "first to market" advantage; delay places uncertainty on the access seeker in respect of the pricing it can offer to customers; delay restricts the ability of the access seeker to compete with the incumbent until the final determination and delays the consequential benefits of the determination reaching the market. These consequences are not ameliorated by a back dated final determination.

To date there have been few interim determinations made. Where a determination has been made there has been an excessive delay between the request for and the making of the determination, which undermines the intended benefits of an interim determination. The ACCC should operate within a framework that requires interim determinations to be made within a prescribed period after the request is made. Prompt interim determinations would not only benefit the access seeker by providing the equitable relief of a timely determination, but would also benefit the market as a whole by putting determined prices into the market at an earlier date.

f) The right to seek review of an ACCC Part XIC arbitration final determination by the Australian Competition Tribunal (ACT) should be removed. Section 152DO of the Trade Practices Act allows a party to seek re- arbitration by the ACT which is not restricted to a review on procedural grounds or on questions of law.

Review by the ACT potentially allows a party to delay the implementation of a determination and also adds an additional step in the arbitration process which increases the cost, time and uncertainty of pursuing XIC arbitration. All of these factors benefit an incumbent access provider to the detriment of an access seeker. In addition, the ACCC is best placed to determine pricing and access policy and methodology being constantly involved in dealing with disputes and monitoring developments within the telecommunications sector. In contrast the ACT only convenes when a review is requested and the members do not posses any specific telecommunications expertise and therefore will not necessarily provide a better determination than the ACCC.

Removing the right of ACT review will not prejudice the right of review on procedural grounds (e.g. denial of natural justice, unreasonableness, ultra vires) as this would be available through the Administrative Decisions Judicial Review Act.

To date the ACT has not reviewed a telecommunications determination. The ACCC made two final determinations in September 2000 and Telstra have stated that it will seek review of both determinations by the ACT.

Incentive based regulation

MCT believes that to most effectively develop full and open competition in the Australian telecommunications industry, the regulatory regime needs to establish the

correct dynamics where the interests of the incumbents, particularly Telstra, are best served by engaging in competitive, rather than anti-competitive, behaviour. In a market dominated by a vertically integrated incumbent, it is perverse for the regulatory incentive to rest with the access seeker. The potential commercial benefit of obtaining access should provide a sufficient incentive to the access seeker to pursue access. Conversely, the risk of losing market share gives the integrated incumbent a strong incentive to oppose the regulatory intent (enhanced competition) and to hinder potential retail competitors from gaining access.

Appropriately targeted incentives can be achieved by giving the ACCC unambiguous powers to lay down ex-ante guidelines and regulations that promote the regulatory intent. As has been observed above, the threat of ex post intervention by the ACCC fails to provide a strong incentive for commercially negotiated outcomes. The process of arbitration and the prospects of appeals can be exploited by dominant operators such as Telstra to slow market entry, which is to their advantage even if they ultimately lose.

An example of this type of regulation can be seen in the conditions imposed on the regional Bell Operating Companies in the US by the FCC. The Bell Operating Companies are only allowed to participate in the long distance service market where they have met with a 14 point competitive checklist. That is, the ability of the incumbent to engage in the provision of contestable services is restrained until it shows that it has met a certain benchmark for competitive behaviour.

As the FCC has observed about the need for such a competitive checklist,

> *"We … identify a minimum list of unbundled network elements that incumbent LECs must make available to new entrants upon request. We believe … pro competitive goals … will best be achieved through the adoption of such a list… we believe that negotiations and arbitrations will best promote efficient, rapid, and widespread new entry if we establish certain minimum national unbundling requirements. As the Department of Justice argues, there is "no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements to do so."… Historically, the incumbent LECs have had strong incentives to resist, and have actively resisted, efforts to open their networks to users, competitors, or new technology-driven applications of network technology."*[1]

An example of the way in which regulation of this type might be applied in Australia would be for the ACCC to publicly provide that Telstra is not able to provide a DSL end product, either on a wholesale or retail basis, until it is able to demonstrate that potential competitors are in a position to compete on a level playing field through sufficient and equitable access to the unbundled local loop service together with ancillary facilities

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[1] FCC, *First Report and Order: Implementation of the Local Competition Provisions in the Telecommunications Act 1996* (8 August 1996) para 241 <http://www.fcc.gov/ccb/local_competition/sec5.html>

access services. Regulation of this type would clearly change the dynamic for Telstra. It would be in Telstra's interest to provide access on reasonable terms to meet with the guidelines set by the ACCC in order that it may itself begin operating in the market for this new service.

Enhanced End User Power

The 1997 legislation, like the 1991 legislation before it envisaged a review of the Network Boundary Point (NBP). As far as Macquarie is aware neither of these reviews have been completed or reported on their findings. Macquarie believes that there are considerable potential benefits in unlocking the power of the final loop and placing that power in the hands of the end user.

For example the current NBP is sometimes defined at the building MDF or even the first socket, in principle the greater the distance that is under direct customer control (like internal wiring) the greater the level of competition will be. Macquarie suggests that the NBP should be urgently and fully reviewed as previously proposed. Appropriate amendment would give the customer the ability to choose the infrastructure provider, rather than allowing that decision to remain the preserve of carriers, giving the customer full control over the longest possible leg of the access. Ownership of existing lines would remain with Telstra, however, the installation of new lines would be non-exclusive. Access to providers other than the owners of the line could be achieved through a declaration of the final loop and development of terms and conditions of access by the ACCC.

As briefly discussed during the Inquiry's initial public hearings, this is of particular relevance in CBD and commercial zones, such as shopping centres, where there are issues of building access for competitive suppliers and the practical restrictions placed upon new entrants for plant room space and access to cables and/or ducts. The expense associated with providing a direct-to-customer cable service for small customers within a building or complex can render these customers uneconomic to access, especially when combined with the constraints of in-building cable capacity. Declaring the "final loop" would ensure that most, if not all, CBD customers have a choice of facility-based telecommunications providers. The declaration would also address the emerging practice of relationships between carriers and building proprietors that effectively stifle competition for telecommunication services within a building. There is increasing evidence of proprietors providing exclusive access to a carrier and/or charging alternative carriers prohibitive rates for facility placement. The end result is a lack of choice for the end user.

Transparent non-discriminatory pricing

Open non-discriminatory pricing for retail services by the dominant carrier was a feature of the 1991 legislative regime. This blanket approach to pricing was abolished in 1997 and the safeguard of Part XIB was introduced to curb anti-competitive activity by market participants with significant market power.

What was not fully allowed for in the 1997 regime was the pricing of "bottleneck" services, for which there were no specific non-discriminatory provisions except for a voluntary undertaking provision. Australia is virtually alone in not having some provisions, which require a supplier with significant market power to reveal its pricing of bottlenecks, and to price in a non-discriminatory fashion.

MCT suggests that this inconsistency could be remedied by adding a provision to Part XIC empowering the ACCC to impose an access undertaking on a major supplier of declared services and to enforce pricing under that undertaking in order to ensure that the application is non-discriminatory. The provision would co-exist with current mechanism where access providers voluntarily submit an undertaking and would provide an incentive for providers to be both proactive and reasonable in submitting undertakings. An alternative, or potentially co operative, mechanism is to make arbitrated prices and terms public. This may have the advantage of deterring arbitrations, however it would be reliant on parties pursuing arbitrations to a determination in relevant areas and would therefore incur both delay and costs.

These provisions would ensure non-discriminatory and transparent terms and conditions to declared bottleneck services and reduce the role of closed arbitration outcomes. In effect it would create a posted pricing regime. It would also increase the accountability of the Commission by operating in an environment of open information and public decision making.

The Commission has asked Macquarie to consider the costs and benefits of a non-discriminatory posted pricing regime. Macquarie accepts that the key cost of such a regime is that it is interventionist, removing the incentive for parties to negotiate which, theoretically, preserves the freedom of parties to pursue a commercial outcome in each parties best interests. A posted pricing regime however does not prohibit parties voluntarily entering into an agreement on any terms the parties can negotiate if that is the parties intention. In addition, most access agreements are negotiated and arbitrations held with one party, Telstra. Telstra is therefore aware of most prices, terms and conditions by which access is provided in the market where as the other party can, in most cases, only make an informed guess at what fair and reasonable prices and terms should be. This information asymmetry effectively removes the ability of the parties to negotiate on an equitable basis and deters negotiation thereby forcing parties to seek a regulatory outcome. In addition, the market power of Telstra greatly diminishes the potential for any significant gain by an access seeker through negotiations.

On balance therefore, it would be reasonable to assert that non-discriminatory posted pricing provides a greater benefit by opening up bottlenecks than the potential detriment it causes by undermining the potential for negotiation, the benefits of which may or may not be passed on to end –users.

Much has been said and written of the national benefits that arise in retaining Telstra as an integrated telecommunications operation and not breaking it down into its component parts. Without entering into the debate about the benefits, there are certainly costs

associated with a vertical integrated Telstra and the conflicts between its "retail" and "wholesale" ambitions. These costs are not borne by Telstra but by competitors and potential competitors who are denied the same transparent and unencumbered access to Telstra's underlying bottleneck services. This is not only inequitable it is also inefficient because it enables Telstra to retain much of the benefit through reduced competitive pressure. This ultimately means that there is no mechanism (other than the recently weakened price control provisions) to ensure that these benefits are passed on to end-users.

The ACCC is limited in its ability to equitably and efficiently distribute these benefits between industry players when arbitrating prices for access. MCT proposes that the ACCC should have an obligation to apply a specific vertical integration dividend to TSLRIC (long run incremental costing), costing in order to ensure that the wider benefits of vertical integration do not unduly impede competition and that the benefits are passed on to end users. This provision could easily be added to the existing access pricing criteria.

Amendment to Part XIB

It is essential that the Commission possess unambiguous jurisdiction over matters it regulates. Part XIB has been of limited direct use in curbing excesses of market power because of the absence of this jurisdictional authority. This has occurred in part because of the requirements to define "telecommunication markets" and "substantial market power" on an individual case basis. Defining markets and market power is a complex, time consuming and often inherently imprecise task that in effect limits the Commission's jurisdiction due to delay and uncertainty.

MCT suggests that a simplification for invoking a competition notice is that it applies when a carrier or carriage service provider has a dominant position or is in control of an element essential to a party seeking interconnection. This would give the ACCC more targeted and unambiguous powers to intervene in disputes.

For example under the existing rules if Telstra was placing unreasonable constraints on the availability of ULL services, and if the ACCC wanted to take action against Telstra, the ACCC would need to establish that a substantial degree of market power existed. In order to do that it would need to define the markets and then establish power in that market. Telstra may argue that because the ULL market barely exists that it does not have substantial power effectively removing the ACCC's jurisdiction. Simplification along these lines would give the ACCC greater scope to act effectively act against anti-competitive supply issues and eliminate delays and litigation.

Standard Access Obligations

The existing provisions of Part XIC provide for the application of Standard Access Obligations. The provisions require, amongst other things, that the technical and operational quality of declared services are provided on a non-discriminatory basis. The

problem with this approach is that it does not provide for an unambiguous service standard to apply which has implications both for the quality of services provided overall and competition issues.

The competition issues arise because the onus of proof is effectively on the access seeker to show that it is receiving services on a discriminatory basis when it has very little, if any, visibility of how the access provider supplies services to itself.

This issue could be simply resolved by giving the ACCC power to determine absolute quality standards where required. For example, a critical issue regarding the supply of the ULLS is the availability and timing of information regarding network modernisation plans. In that case, Telstra has asserted that it provides itself with no more than 3 months notice. There is no way to independently verify or enforce this assertion and, even if there were, it would not resolve the competition issues associated with the need for notice.

This amendment would overcome that issue and lead to application of more enforceable minimum standards where applicable.

Remove the TAF

Industry self-regulation has been, and continues to be a useful model for development of technical compatibility and interconnect regulation. It has not been effective in areas where there are divergent commercial interests. Whilst the sector is dominated by a vertically integrated provider, issues related to access will invariably give rise to divergent commercial interests and therefore the TAF has become ineffective.

The TAF has essentially been required to act on a consensus basis. The result has been deadlocked positions, delays, tying up resources of smaller operators and outcomes that represent the lowest common denominator that Telstra will agree to. The role of the TAF could be readily replaced by giving the Minister for Communications its powers to make recommendations acting in response to industry and end user submissions with the ACCC setting terms and conditions to provide the optimal competitive outcome. This power is provided for in the current legislation.

Record Keeping Rules

A further remedy to the issue of delivery of bottleneck services is to consider a model that ensures arms-length dealing for the provision of wholesale access within vertically integrated operators. This would provide transparency of pricing and ensure equal treatment for competitors, enabling a more focussed measurement of service delivery of bottleneck services.

There are a continuum of responses which can quarantine wholesale services and provide arms length dealing. The most extreme is the creation of a separate entity however this may be unduly onerous, result in organisational inefficiencies and ultimately increase

costs. Other responses are to separate the wholesale function through ring fencing of operations and accounts. An even more light handed and possibly effective measure is to rely on record keeping rules to provide transparency and the existing Part XI regulations to address or deter any anti competitive conduct that may be disclosed. To date these record keeping rules have not been enforced due to apparent legal impediments.

Open Information

It is desirable that the Commission's decisions be based on the broadest possible view of the issue at hand. Without substantial input from market participants, the Commission is ill equipped to ascertain the validity of specific factual arguments raised by any particular party. Requiring that information submitted to the Commission be made publicly available ensures that all parties are given the opportunity to provide their views on the validity of the legal and factual arguments raised by other parties. Without the views of various parties regarding the issues and facts raised by other parties, the Commission risks deciding the issues based on a one-sided view of the facts. The parties are usually in a better position than the Commission to obtain and evaluate information relevant to the issues being considered.

Furthermore, exceptions should not be made to this principle for parties claiming that information essential to the decision making process is competitively sensitive, and that opposing parties should therefore be denied access to it. While it may be necessary for the Commission to keep some information confidential, measures may be undertaken to ensure that such information remains confidential, while at the same time affording interested parties the ability to view and assess the validity of such information. For example, in the United States the FCC and other U.S. agencies make use of a legal device known as a protective order for this purpose. A party may confidentially file sensitive business information upon which it relies. To view the information, other parties must enter into a binding agreement not to share the confidential information with any other part of its organisation, or to use it for any purpose other than providing its views to the regulator regarding the specific issue at hand. Violations of such protective orders are met with severe penalties.

Attachment A
Case Studies

Data Service

The Digital Data Service, which basically consists of terminating tails for data services, was declared for access purposes as part of the transitional arrangements in July 1997. However it became apparent very early that the declared service was inadequate to the purpose of achieving true access, so in late 1997 most members of the industry urged the Telecommunications Access Forum (TAF – the industry self-regulatory body established under Part XI C and comprising most participants in the industry) to amend the service description.

Telstra (a member of TAF) vetoed the proposed amendments and the ACCC subsequently decided to conduct a public inquiry into the changes. The inquiry and other ACCC investigations took place during 1998 and the revised services were finally declared in late 1998. MCT sought delivery of those services at terms consistent with the ACCC's pricing guidelines and Telstra offered unacceptable terms, forcing MCT to seek arbitration.

In mid 2000 MCT abandoned awaiting an ACCC interim determination and sought negotiation of commercial terms of access from Telstra. However, there are still a number of open issues, particularly with regard to the delivery of services outside metropolitan areas.

During this three year process (still not concluded) consumers have been deprived of the full benefits of fully competitive provision of services (i.e. lowest cost and maximum range of services).

Local Loop Unbundling

Local loop unbundling is at the heart of service providers being able to access their own customers without the need to duplicate cable, however, it was overlooked in transitional declaration arrangements (in **mid-1997**) and so there are currently no access rights.

There was a lengthy TAF process where Telstra used its veto to block an expedited approach to the unbundling of the local loop and finally, under threat of ministerial intervention, the ACCC held a Declaration Inquiry during 1998. A decision to declare in-principle was made during 1999; however as technical arrangements have not yet been finalised there is no commercially viable access available as at **today**.

Number Portability

Portability is the ability for end users to retain the same telephone numbers when transferring between different service providers. Portability was identified as early as 1995 as being fundamental for the existence of effective competition. Significant delays and obstruction has resulted in the estimated introduction dates for number portability for free call numbers being 16 November 2000 and September 2001 for mobile numbers.

Commercial Churn

Commercial churn has been the only major test for the Part XIB anti competitive behavior provisions. The actions against Telstra were commenced in 1997 and due to the slow response of the ACCC and the unworkable evidentiary requirements of the provisions, were somewhat unsatisfactorily settled in February 2000.

PSTN Undertaking

A key element of the 1997 deregulation regime was to be the availability of standard terms and conditions for access to bottleneck infrastructure. The terms and conditions were to be established by carriers providing undertakings reflecting reasonable and fair terms of access to the ACCC. To date there have been no acceptable undertakings offered by the dominant carriers. Telstra's original undertaking for PSTN services proposed a charge of 4.73 cents per minute in contrast to the ACCC's proposed 1.5 cents per minute.