AAPT Limited
Fourth Submission to
Productivity Commission
Review of Telecommunications
Competition Regulation

Table of contents

Introduction and overview

This submission is made by AAPT in response the Draft Report of the Review of Telecommunications Competition Legislation (**Draft Report**) issued by the Productivity Commission (**Commission**) in March 2001. It is AAPT's fourth to the current inquiry. AAPT has also submitted to the Commission's inquiry into Part IIIA.

The issues relevant to the Inquiry are economically and technically complex and the subject of sharply opposing viewpoints. AAPT has some concerns with particular aspects of the Report, but considers it to be a thorough, well-researched and balanced analysis of the issues.

AAPT congratulates the Commission and its staff on producing a document which (even in draft) is a valuable record of the recent development of Australian telecommunications regulation and a significant contribution to the debate on its future.

This submission consists of the following parts:

1 General comments on the Draft Report;

2 Comments on individual draft recommendations and responses to the Commission's requests for further information;

3 Annexures which discuss:

(a) US and European approaches to monopolisation and enforcement by regulatory bodies;

(b) recent cases under section 46 of the *Trade Practices Act 1974*;

(c) some possible approaches to improving the incentives to negotiation of access arrangements.

General comments

1.1 AAPT's previous submissions and research

In its first submission, AAPT made the following principal arguments:-

(a) competition in the telecommunications market generally is yet to broaden and deepen;

(b) access-based competition leads to infrastructure-based competition;

(c) the administrative costs of the regime are less than the alternatives and are more fairly distributed; and

(d) the competition protections need to be made stronger not weaker.

AAPT's second submission, developed these ideas based on the proceedings of the Commission's first public hearing, particularly in regard to mechanisms that would improve the Part XIC arbitration processes.

The second submission also presented the results of economic research into the state of competition and investment in Australia's telecommunications markets. The significant findings of that research are that the competition is yet to fully develop in the Australian telecommunications markets and that there is little evidence that the access regime is producing any disincentive to investment.

AAPT provided evidence to the Commission that Telstra's own investment in areas affected by service declarations has not, in fact, declined. AAPT acknowledges the Commission's point that increases in investment cannot themselves prove that investment would not have been higher under other conditions. However, it should be noted that, in the face of this evidence, no evidence as emerged in support of the assertion that current access pricing has hindered investment, despite two public hearings and a Draft Report. AAPT is pleased that the Commission has noted and agreed with many of the findings of the economic research.

To the contraray, concerns have been raised that the industry is suffering from over-investment.[1]

1.2 The key issues – competition, investment and process

From its reading of the Draft Report and the debate surrounding the Review, AAPT's considers that the key underlying issues which must now be addressed:

(e) the extent to which competition has developed since 1997 and whether closer alignment of the regime with the general parts of the TPA is justified as a result;

(a) the impact the regime (particularly the access regime) has had on investment in telecommunications;

[1] For example *'In the Loop'*, UBS Warburg, 9 March 2001 page 5.

(b) the extent to which the regime can be improved to deliver more timely, error-free outcomes.

Adopting the Commission's forward-looking approach to the Review, AAPT has sought to address the question:

> *How best can the efficiency of Australia's telecommunications markets and the regime itself be maintained and improved in the medium term?*

In addressing this question, AAPT notes that the Review takes place in the context of the existing legislative regime. The task which therefore faces the Commission is to assess what changes to the current regime will contribute to the efficiency of the markets and the regime. In order to do so, the Commission must ensure the benefits of proposed changes do not outweigh the costs of implementing those changes.

1.3 Improving the regime

The Draft Report rightly identifies some of the difficulties in the administration of the regime and the extent to which it may be susceptible to gaming. However, despite these limitations, it can be concluded that the regime is indeed working.

AAPT submits that the Commission should be mindful of the fact that the task which it faces is developing proposals for *change* to the existing regime, rather than buidling a regulatory regime from the ground up. Accordingly, the proposals for regulatory and legislative changes to the regime must take into account the costs and risks created by regulatory change. This is particularly important because, as the Commission notes, competition has not yet fully developed. It is insufficient for the Commission to conclude that position B may be better than position A, it needs to conclude that position B is sufficiently and demonstrably better than position A, that it is worth the potential costs and risks of changing from A to B. AAPT is concerned that the Commission does not underestimate these risks.

A particular concern is the impact regulatory change is likely to have on investment.

AAPT has concerns that the more significant reforms discussed in the Draft Report (particularly the repeal of Part XIB and the changes to Part XIC) are based on a desire to align the legislative provisions with the general parts of the TPA, rather than an empirical assessment of their effectiveness. AAPT submits that there is an onus on those seeking fundamental change to the regime to provide evidence that the markets are fundamentally different from when the Parliament introduced the regime and last considered it, and that the benefits of the changes they propose are likely to outweigh the risks and costs. With a few exceptions, this onus has not been satisfied.

Finally, AAPT remains strongly of the view that competition protections need to be made stronger rather than weaker. AAPT has alluded to the impact that new services and opportunities can result in the spill-over of market power from one market to another. These spill-over possibilities

arise because of the complex value chains inherent in the delivery of telecommunications services and the existence of multiple scale (both demand and supply side) and scope economies.

An example of the kinds of issues being referred to is the extent to which proprietary online ordering systems can be used to entrench market power. The following discussion is intended for illustration only – some of the "positions" that are ascribed to organisations are thus far only based on the reported views of one or two individuals and cannot be said to truly reflect corporate positions. As part of the settlement of the Commercial Churn Part XIB matter the ACCC received $4.5M from Telstra to be administered for the purposes of participants in the industry dealing with each other on-line. At the same time the industry had been grappling with a project known as TOLI (Telecommunications On Line Initiative), which had arisen out of combined ATUG/Telstra/SPAN workshops on the problems of Commercial Churn and similar matters.

Some of the funds being administered by the ACCC have been made available to an ACIF managed Electronic Information Exchange project that has picked up the TOLI agenda. This project is looking at industry needs for a data dictionary and electronic exchange architecture. In addition, it is looking at the operation of a generic set of transaction specifications for "simple resale" – that is, the same activity as referred to as Commercial Churn.

In the course of this work, there has been some reluctance expressed by individual Telstra personnel to provide details of Telstra's current proprietary on-line wholesale ordering process as it is their intellectual property for them to exploit. This raises the whole question of whether the dominant incumbent operator is interested in the development of generic transaction standards or not. Clearly, new entrants have no alternative but to develop the capability to resell Telstra, and as a consequence to make the IT development spend on working with the Telstra system. If a competing infrastructure based competitor wanted to also resell its network (for example, the CWO HFC network), then they will need to build an on-line ordering system. If they are unable to access the standards used by the dominant network's on-line system, then they will be looking to high implementation costs over a smaller potential customer base. In short, Telstra's proprietary on-line ordering system could become a barrier to entry into the wholesale market of local carriage service. This becomes particularly important as Telstra has argued that the availability of competing local service providers should mean the local carriage service declaration could be revoked in a number of areas. Technically, the approach that Telstra is taking is to entrench the anti-competitive consequences of a network effect in their on-line wholesale ordering system.

The Commission appears to have failed to recognise the extent to which an industry with an immature competitive structure could suffer the anti-competitive consequences of approaches such as these.

1.4 The future

The move from proscribed monopoly in telecommunications to open competition has had to deal with two significant economic factors, the monopoly in the infrastructure and the vertical integration of the incumbent firm.

The potential for monopoly in infrastructure in telecommunications is high due to the large economies of scale, scope and network effects. The combination of the infrastructure scale economies and the potential for increasing marginal returns through demand side scale effects means the potential for monopoly is always high. This potential is tempered by the potential for substitutes through new technologies. However, the scope economies also produce an advantageous position for an incumbent operator in deploying new technology.

These monopoly tendencies in telecommunications will not go away. On their own at the infrastructure level these are not necessarily long term intractable problems. Over time the owner of the infrastructure cannot continue to maximise return charging above marginal cost, while that would be a short term issue. If it were true that the infrastructure level monopoly were a true natural monopoly as for example the distribution network for electricity is the regulatory agenda would be somewhat simpler. It is the very existence of possibilities of new technologies, however, that means that the very simple approach to access has the potential to stifle innovative investment.

The issue of vertical integration of the market leader in the retail space creates its own set of issues especially where this leader has significant market power. If vertical integration is justified on transaction costs grounds then competitors need to also be vertically integrated. However, given the scale economies at the infrastructure level it is not viable for there to be active vertically integrated competitors.

AAPT sees the future market structure as being driven by one where digital networks and IT systems remove the transaction costs justification for vertical integration. In this scenario, the competitive benefits of owning infrastructure dissipate. This then results in owners of infrastructure paying more attention to returns on infrastructure through alternative channels, rather than favouring their own downstream channels.

The separation of vertically integrated firms is already occurring. We have recently seen in Australia the decisions by Cable & Wireless Optus and Vodafone to sell their mobile network towers to a specialist tower operating company, Crown Castle. We have also seen the introduction of companies focussing purely on the wholesale market for transmission, such as NextGen Networks.

As these developments occur the future will see a market comprising of a number of participants both at the infrastructure level and at the retail level. Some of these participants will own both aspects of infrastructure and of retail operations, however their own internal operations will be relatively separated, as both the infrastructure business recognises it achieves higher

returns on investment via utilisation of multiple channels to market, and as the retail operation is increasingly dependent upon purchasing infrastructure elements from multiple participants. The key question for the future, however, is the extent to which the retail market leader remains a heavily vertically integrated firm.

It is AAPT's expectation that a continued analysis of Telstra's business model by the investment community, will place increased emphasis on the extent to which Telstra maximises return from its infrastructure, rather than the extent to which Telstra retains a retail market share. Such analysis to date would not be encouraging, and would probably conclude that Telstra should be taking a far more aggressive approach to development of alternative channels through the wholesale market for utilisation of its infrastructure.

The speed with which the telecommunications market in Australia progresses to this kind of structure will be dependent upon a number of factors. These factors include how effectively the regulatory process can work. Most importantly, how quickly it can progress through issues rather than make regulatory issues a point of *stasis* in the industry. In addition, the extent to which capital markets develop a greater understanding of telecommunications industry will also effect the extent to which capital markets assess and reward telecommunications companies.

Comments on specific recommendations

1.5 Part XIB

Draft recommendation 5.1

The Commission recommends that the anti-competitive conduct provisions of Part XIB of the Trade Practices Act 1974 (TPA) be repealed. [chapter 5, page 5.42]

The Draft Report recommends the repeal of Part XIB and sets out the following arguments in support:

(a) The Government intended that the telecommunications specific regulations in the TPA would be transitional and should eventually be aligned with the general trade practices law;

(b) An effects test and a reversal of the onus of proof under the competition notice regime increases the possibility of regulatory error and overreach;

(c) It may be possible for action to be taken under Part IV or Part XIC rather than Part XIB; and

(d) Part XIB has not been speedy in application.

AAPT strongly opposes the repeal of Part XIB. In its earlier submissions, AAPT set out the reasons justifying the retention of Part XIB, which include:

(a) the provision has reduced the incidence of anti-competitive conduct which may otherwise have occurred by acting as a deterrent to such conduct;

(b) the range of mechanisms to address anti-competitive conduct available under XIB (such as the competitive notice) as well as enhancement of the powers of the ACCC;

(c) the unique technical, economic and historical features of the telecommunications sector which require more effective provisions than Part IV; and

(d) the positive effect on investment, since the competitive safeguards imposed have encouraged new entrants to invest in infrastructure.

Earlier submissions from other participants support these views and illustrate that there is a general consensus in the industry that Part XIB has been effective and should be retained. The notable and only exception is Telstra, which argues that the sector specific competition rules of Part XIB are "unnecessary".

In the course of the second public hearings, the Commission's discussion with AAPT (and other submitters) centred on the three main differences between Parts IV and XIB, namely:

(a) Part XIB includes an effects-based test rather than the purpose-based test in Part IV;

(b) Part XIB ensures a greater role for the ACCC and provides for more effective enforcement mechanisms; and

(c) there are higher penalties under Part XIB than Part IV.[2]

The Commission asked which of these, in AAPT's view, was the most important element of Part XIB that justified the preservation of the Part. Although AAPT considers all elements to be important and worth preserving, in practice the most significant is the preservation of the enforcement mechanisms.

The comments below discuss the following issues:

(a) the importance of the competition notice regime;

(b) why the effects test should be retained;

(c) the complementary roles played by Parts XIB and XIC;

(d) whether the market has developed sufficiently to justify repeal of the regime;

(e) changes in market conduct which would result from the repeal of Part XIB;

(f) Australia's international obligations.

Annexures to the submission discuss relevant issues. Annexures A and B provide overviews of equivalent European and US law respectively. Both these jurisdictions have laws which place a greater emphasis on the effects of alleged monopoly conduct than the Australian provisions and both provide for administrative enforcement of the provisions. Annexure C is a discussion of recent decisions under section 46 of the TPA. From these cases, it is clear that section 46 does not effectively address the competition issues likely to arise in the telecommunications industry, particularly in relation to the effect of anti-competitive conduct.

The importance of the competition notice regime

The administrative arrangements which support Part XIB (competition and advisory notices and exemption orders) are important for two reasons. First, they have resulted in faster resolution of anti-competitive conduct complaints. Second, they dramatically reduce the chances of regulatory error.

AAPT notes that the ACCC has issued competition notices in only two matters and both resulted in Telstra modifying its conduct, rather than fully defending the matters. Further, as noted in the Draft Report, no party has sought an exemption from section 151AJ on public benefit grounds. This

[2] The Commission also noted the reversal of the onus of proof where a Part B notice is issued and the "reason to believe" threshold as being significant differences from Part IV. These issues are discussed in the comments on the competition notice regime generally.

history suggests that the regime has not been over-used by the ACCC. AAPT finds it difficult to believe that a company with the financial and legal resources of Telstra would be "pressured" to change its conduct when it considered its conduct to be innocent.

As AAPT set out in its earlier submissions, the issuing of the first Competition Notice in relation to Telstra's non-reciprocal charging for Internet peering led to negotiated arrangements which it is likely would not otherwise have been achieved. Similarly, notices issued in relation to Telstra's commercial churn process led to a settlement.[3] In addition, the ACCC notes that as a result of Part XIB, even in instances where competition notices have not been issued there may be successful resolutions.[4]

Telstra makes the argument that Part XIB has increased the potential for regulatory error. However, in cases where competition notices were issued against Telstra, Telstra modified its behaviour rather than continue its conduct and defend any proceedings illustrates that the ACCC was correct to issue the notices. For instance, in the commercial churn matter, contrary to Telstra's assertions that the ACCC discontinued the proceedings before the Federal Court as a result of "*the extensive evidence filed by Telstra*"[5], the ACCC discontinued proceedings as a result of Telstra agreeing on a $4.5 million package for service providers using Telstra's commercial churn process.[6]

The current competition notice regime provides protection for all parties against regulatory error. The addition of Part A notices in the 1999 amendments is an important element. Rather than determine particular matters, or provide prima facie evidence of a matter, a Part A notice merely describes the alleged anti-competitive conduct. Subsequently an Advisory Notice may be issued to suggest ways of modifying the conduct to avoid contravention of the competition rules. These notices may subsequently be challenged or pursued in court in cases of disagreement.[7] This combination of enforcement tools is likely to decrease the risks of both type I and type II errors from occurring, by providing mechanisms for allegations of anti-competitive conduct to be tested prior to litigation commencing.

In essence, the investigative processes which preceed and follow the issue of a competition notice are effectively structured information gathering process. That the regime serves this role is clear from the fact that private litigants and the ACCC are generally not able to commence litigation until a competition notice has been issued.[8]

---

[3] AAPT Initial submission, p.22 and AAPT's second submission, p.9.

[4] ACCC submission, August 2000, p.30.

[5] Telstra submission, 9 August 2000 p.29.

[6] ACCC submission, August 2000, p.29.

[7] AAPT Initial submission, p.24.

[8] The exception is where the remedy sought is an injunction.

As AAPT's Initial submission to the Review noted, the competition notice regime effectively performs a "gate-keeper" role which reduces the likelihood of baseless claims being litigated. This has involved AAPT and other industry participants incurring the costs of assisting the ACCC make inquiries regarding alleged anticompetitive conduct in order to determine whether a competition notice should be issued. Warren and Landrigan note that there is a trade off between administrative and error costs.[9] The introduction of an additional investigative phase of an anti-competitive conduct action introduces administrative costs, but the additional information gathering processes the ACCC must conduct before it is able to commence litigation action is likely to substantially reduce the chances of error.

The competition notice regime also increases pressure on operators with substantial market power to cease anti-competitive conduct and provides for more efficient resolution of disputes. The experience in the industry of similar matters taken under Part XIB and section 46 suggests that the settlement possibilities have been much improved. In view of the current status of the industry, AAPT submits that these mechanisms should be strengthened and improved (such as by the introduction of cease and desist orders, discussed below) rather than removed altogether.

AAPT considers that the Commission's approach in its recommendation to abolish Part XIB as a result of its slow implementation is in many respects an over-reaction. AAPT agrees that there are some drawbacks to Part XIB and that the procedural process has been slow but to remove the Part entirely and to re-build another regulatory structure would be inadvisable when the Part has to date proved successful in acting as a deterrent to anti-competitive conduct.

AAPT suggests that the correct approach is to focus on the evolution of the Part by introducing improvements to strengthen its weaknesses and reduce delays. For instance, AAPT has produced extensive arguments in its earlier submissions of the benefits relating to the introduction of 'cease and desist' orders.[10]

Reliance on a purpose test is more likely to lead to errors

AAPT disagrees with the Commission's assertion that the effects-based test is likely to lead to regulatory error and overreach. As outlined above, these provisions were introduced to address the particular requirements of the telecommunications sector. As the Commission itself points out, the Government's *Explanatory Memorandum* states that

9 M Landrigan and T Warren, "Administrative costs and error costs in market conduct regulation: two case studies." (1999) 7 Competition and Consumer Law Journal 224, 239. AAPT notes that the authors are an employee of Telstra Corporation and its consultant, NECG.

10 See p.25 of AAPT's Initial Submission and p.22-23 of AAPT's second submission.

> Reliance on a 'purpose test' alone risks a focus on the perceived morality of conduct rather than its economic effect[11]

The Commission omits to mention that the *Explanatory Memorandum* also emphasises the necessity of an effects based test by stating that

> "The effects test has been included to address the danger that competition in the telecommunications industry will, or will be likely to, be damaged by aberrant behaviour that has a demonstrable, negative effect on competition regardless of the purpose motivating that behaviour."[12]

The *Explanatory Memorandum* further indicates the inadequacy of a purpose test by stating:

> Proof of purpose is a subjective matter that requires a reason or motive for certain conduct to be established[13]

and also that:

> Proof of purpose may not assist in distinguishing predatory conduct.[14]

The Chairman of the ACCC, Prof Fels, also recently called for section 46 to be amended to include an effects test. Speaking at a media conference regarding Qantas' proposed acquisition of Impulse Airlines, the Chairman said:

> ...the limitation imposed on the misuse of market power law that the Commission has to prove an unlawful purpose is a bit of a restriction and there is quite a case for adding on an effects test so that if a big business has either the purpose, or the effect, of substantially lessening competition, there is a strong case for changing the Act to widen its application.[15]

AAPT agrees that the purpose based test is insufficient. Given the dynamic nature of the telecommunications markets, it will be virtually impossible in most circumstances to establish Telstra's purpose before the anti-competitive damage had been done.

Similarly, a purpose based test would not cover situations where Telstra may not have an anti-competitive "purpose" but where nevertheless its actions cause damage to competition. This kind of situation is addressed by the current competition notice regime. The regime identifies the effect which causes damage to competition but where Telstra is unaware or has no anticompetitive purpose, the regime provides a way to notify (and thus increase the likelihood of preventing) the conduct but without imposing penalties.

---

[11] *Trade Practices Amendment (Telecommunications) Bill 1996 – Explanatory Memorandum* p. 10, and referred to in the Productivity Commission's Report p. 5.22.

[12] *Trade Practices Amendment (Telecommunications) Bill 1996 – Explanatory Memorandum*, op cit n.11.

[13] *ibid.*

[14] *ibid.*

[15] Media Conference, 18 May 2001, Comments of Prof Allan Fels

The market has not developed sufficiently to justify repeal of the provisions

The Productivity Commission recognises that, in introducing the 1997 reforms competition rules, the Government

> "considered that total reliance on the general provisions in Part IV of the Act would not achieve its objectives for the telecommunications industry."[16]

The Commission refers to the Explanatory Memorandum of the Trade Practices Amendment (Telecommunications) Bill 1996 which emphasises the necessity for a different approach in the application of competition regulation due to the special features of the telecommunications industry and the fact that there is "considerable scope for incumbents to engage in anti-competitive conduct" which may not adequately by addressed by Part IV.[17]

AAPT considers that the considerations and features which led the Government to introduce sector-specific regulation still apply today. While some of these considerations and features may be found in other sectors, they are particularly apparent in the telecommunications industry. Such distinctive features of the industry include:

(a) telecommunications is a complex, horizontally and vertically integrated industry;

(b) the presence of a dominant, vertically integrated incumbent carrier;

(c) the high level of fixed and sunk costs and the associated economies of scale and scope which act as a barrier to entry;

(d) the fast pace of change, the volatile state of the industry and the fact that rapid damage can result from anti-competitive behaviour; and

(e) the sector has only recently been opened to competition and there is limited jurisprudence on the application of the competition rules to the sector.

In addition, it is important to note that the Government only envisaged alignment with general trade practice law *once competition is established* in telecommunications markets. However, as the Draft Report notes, it is clear that sustainable competition has not yet emerged. It is naive to suggest (as Telstra does) that effective competition is sufficiently strong to persist without regulatory intervention. Telstra is still in a dominant position on the main telecommunications markets, particularly in the fixed telephony and wholesale markets. In the economic report attached to AAPT's second submission, Dr Graeme Woodbridge's analysis of the markets provides evidence that competition is not fully established.[18] Furthermore, the

[16] See p.5.11 of the Productivity Commission's report

[17] p.10 of the *Trade Practices Amendment (Telecommunications) Bill 1996 – Explanatory Memorandum.*

[18] See p.26 onwards of the Frontier Economics Report of October 2000 attached to AAPT's second submission dated 3 November 2000.

Commission's own conclusions show that there is insufficient competition, particularly in regional areas.[19]

In addition, the report prepared by Access Economics illustrates that contrary to Telstra's claims, the regulatory regime has not had an appreciable effect on investment. This report analysed Telstra's capital expenditure and found that the figures showed "*no indication that the introduction of the 1997 competition and access regime has substantially impeded Telstra's investment program.*"[20]

The lack of a level playing field means that it is premature to consider removing the provisions protecting against anti-competitive conduct which were specifically designed to address the requirements of the telecommunications sector.

The complementarity of Parts XIB and XIC.

The Commission's conclusion that the Internet peering and commercial churn matters could have better been resolved under Part XIC appears to have been assessed against the existing Part XIC and not the Commission's proposed Part XIC. It is difficult to imagine that the commercial churn service could have been declared under the declaration criteria the Commission proposes.

Moreover, AAPT considers that it is incorrect to suggest that these matters would have better been resolved under Part XIC. For example, in the commercial churn matter, the ACCC made extensive use of the competition notice regime which ultimately led to a settlement of the matter. Furthermore, the commercial churn matter did not relate to a declared service under Part XIC. Therefore, it would have been necessary to first declare the relevant service (after a consultation process) before any action could be commenced. This would significantly add to delays and it is unlikely that the same successful solution would have been achieved.

Part XIB implements competition measures whereas Part XIC specifically targets issues relating to access. Part XIC and Part XIB are therefore two effective and complementary pillars on which the regulatory framework for the sector is based.

Changes in market conduct which would result from repeal of Part XIB

The Commission needs to consider in its recommendation regarding Part XIB the consequence of any changes made. There is the very real likelihood that participants of market power will over-react to the perceived freedom that would flow from a repeal. The original provision of Part XIB was based on an understanding that provision for damages would not effectively remedy the damage to competition that may arise.

---

[19] Draft Report, p.xxxi.

[20] See p.26-27 of the Access Economics report of October 2000 attached to AAPT's second submission.

AAPT submits that the fact that there were positive outcomes in the Internet peering and commercial churn cases is conclusive evidence that Part XIB has been effective in countering anti-competitive behaviour. Moreover, the onus is on those who support the change to establish that the provisions of Part XIB have been ineffective and none of the Commission's arguments attempt this.

Australia's international obligations

In both its earlier submissions, AAPT outlined its concern that Australia's obligations under the General Agreement on Trade in Services (**GATS**) in regard to anticompetitive conduct in telecommunications may not be met by the application of Part IV of the TPA alone.[21] In its first submission to the Review, the Department of Foreign Affairs and Trade (**DFAT**) expressed the view that:

> In summary, the Department of Foreign Affairs and Trade assesses that in general the application of Parts IV and IIIA of the TPA would be sufficient to fulfil Australia's GATS obligations, in the event that telecommunications-specific regulation were repealed. In this event, however, the Department of Foreign Affairs and Trade would need to be consulted to ensure the implementation of a GATS-consistent regime.[22]

That submission also noted that Part XIB may not fully satisfy the GATS requirement "if a firm was found not to be liable under Part IV where it was acting anti-competitively but intention could not be established." Partly on the basis of that submission, the Commission did not appear to share AAPT's concerns.

In its second submission, DFAT qualified its earlier assessment and commented on a point raised in the Draft Report. DFAT observed that one of the GATS requirements is expressed in terms of "anticompetitive results" and that the WTO agreements generally will be judged according to their practical effects.

AAPT reiterates its concerns. It also is concerned that a repeal of Part XIB would itself have implications for Australia. Such a substantial winding back of competition protections is unusual and will be noted. Due to the increasingly global nature of telecommunications and ownership in the industry, foreign governments are likely to view the Commission's recommendations with concern. In some circumstances, governments' own interests could be expected to lead to disputes in the WTO.

AAPT would recommend that the Commission obtain advice on these matters from the Attorney-General's Department's Office of International Law.

---

[21] AAPT Initial Submission, p. 15; AAPT Supplementary Submission, pp. 28ff.

[22] Department of Foreign Affairs and Trade, sub. 46, p. 1.

Conclusions

In AAPT's view, those seeking repeal of the regime have not demonstrated either that the current regime is so manifestly inferior to Part IV or that the industry would achieve superior outcomes in the absence of Part XIB. Indeed, the Commission's discussion and evaluation in the Draft Report indicates that the majority of those who have had experience of the regime – the ACCC, end-user groups and all industry participants other than Telstra – support the retention of Part XIB. Most of those submitters go further and suggest that the regime should be extended and that the ACCC should be given more powers to counter anti-competitive conduct.

Given the weight of industry opinion favouring the retention and expansion of Part XIB, it is remarkable that the Draft Report only includes two options for Part XIB's future – its repeal or substantial emasculation. Based on the material before the Commission, it is clear that it has erred in condemning Part XIB.

This is particularly concerning in light of the Commission's findings and conclusions in chapter 4 that most telecommunications markets remain highly concentrated, with Telstra being overwhelmingly dominant in the vital fixed line markets. The risk and potential costs of any anti-competitive conduct therefore remains as significant as when the legislation was introduced.

1.6 Part XIC – objects and declaration

Draft recommendation 8.1

The Commission recommends that the objects clause in s. 152AB(1) of Part XIC of the TPA be broadened from the long-term interests of end-users (LTIE) to the following:

> ***"The object of this Part is to enhance overall economic efficiency by promoting efficient use of, and investment in, telecommunications services." [chapter 8, page 8.7]***

AAPT questions whether a change to the objects clause is justified. In some legislation, a change to the objects clause may have more symbolic than practical importance but, as discussed in response to recommendation 8.2 below, the decision criteria throughout Part XIC generally refer back to the LTIE test.

The Commission's main argument for amending the clause is to broaden to scope to address "overall public benefit" rather than the interests of "a particular sub-group". The Commission indicates that this would be achieved by changing the essential element of the test from the LTIE to one based on "overall economic efficiency". However, AAPT considers that the change may actually have the result of narrowing the ACCC's inquiry.

AAPT supports retention of the LTIE test for the following reasons:

(a) it appropriately focuses on end-users as the beneficiaries of the access regime;

(b) it addresses issues of investment through reference to the long-term;

(c) it acknowledges important objectives which are vital to the effective functioning of the telecommunications industry;

(d) it is now well understood and provides a structure for the making of decisions involving regulatory discretion.

While AAPT acknowledges that end-users are a subset of the general public, the discussion in the Draft Report risks understating the economic significance of the group. Almost all Australian consumers (both residential or businesses) are end-users of telecommunications services. Further, it was the clear intention of the Parliament that the "sub-group" does not only apply to those who pay phone bills. The Explanatory Memorandum states:

> The term 'end-users' recognises that telecommunications networks and services are used both by customers with a direct contractual relationship with a carrier or service provider and other end-users of carriage or content services (such as the members of a customer's household).[23]

The assertion made in some submissions to the Review that the LTIE test is merely a "consumer criterion" is therefore clearly not based on a misunderstanding of the legislation, the explanatory material or the comments of the ACCC.[24] Business end-users will generally rely on telecommunications as an input to their other economic activities and increasingly consumer end-users employ telecommunications services to access other goods and services produced in the economy. The interests of end-users therefore has flow-on effects into the efficiency of the economy overall, which is substantially the concern the Commission expresses in the Draft Report.

By placing the emphasis on "use" rather than contractual relationships, the legislation provides that the access regime should deliver benefits for end-users which go beyond those that result from consumers having access to low cost call services.

A related point is that the test specifically requires a consideration of the *long run*, which is noted in the Draft Report. This is also a consideration often noted by the ACCC in its publications,[25] particularly where it has decided not to declare services or to make pricing decisions which would assist access-seekers. Consumers, whether residential or business, have no long-term interest in obtaining below cost services in the short term if that results in their being no supply of services in the long term. Further, where the legitimate interests of persons other than end-users (principally access providers and access seekers), are relevant to a regulatory decision, the legislation expressly requires the Commission to take those matters into account.

---

[23] Trade Practices (Telecommunications) Amendment Bill 1996, Explanatory Memoradum, page 42

[24] AAPT notes that the quotation from the Institute of Public Affairs' submission set out in the Draft Report (p. 8.6) is the concluding sentence of a paragraph which seems intended as a broad criticism of the ACCC, rather than the LTIE test. In fact, the ACCC's publication *Telecommunications services – Declaration provisions* (July 1999) expressly recognises businesses as end-users.

[25] see, eg, *Telecommunications – ACCC role* (October 1997)

AAPT therefore considers that the LTIE test addresses the issues which would be part of a consideration of public benefits. To the extent that there is a difference, AAPT considers it preferable that the regulator make an assessment based on the interests on end-users of telecommunications, rather by reference to a theoretical economic concept.

However, a move to an "efficiency test" risks overlooking considerations specific to telecommunications – particularly the any-to-any criterion. The Commission recommends (recommendation 9.1) that the telecommunications-specific regime be retained, and AAPT agrees with that conclusion. Following from this recommendation, we consider the regime should address industry-specific factors where they are likely to significantly impact the operation of the industry. As noted in the Second Reading Speech to the Bill,:

> Another important feature of the telecommunications industry is that competitors inevitably must make use of each others' networks. This is because many communications services (for example, telephone calls) require 'any-to-any' connectivity – the ability for any end-user of the service to contact any other end-user, regardless of who the suppliers are or on what network they are connected. This 'any-to-any' feature – and the Government's commitment to promote the diversity of carriage and content services available to end users – requires an access regime that includes additional features to those contained in the general access regime in Part IIIA of the Trade Practices Act.[26]

Of all the characteristics which are unusual to the telecommunications industry, any-to-any connectivity is the most fundamental on an operational level and the most directly relevant to the consideration of access issues. Although it is not often determinative in regulatory decisions, AAPT is of the view that it is always an important background consideration and should be recognised in any criteria and objectives in a telecommunications-specific access regime.

Finally, AAPT submits that an important consideration is that the LTIE test is now well understood in the industry and, through its sub-objectives, reflects an appropriate balance between the competing policy objectives which Part XIC seeks to address. By establishing a structured test, section 152AB also provides greater clarity and structure to the ACCC's decision-making processes. AAPT notes that vagueness is a concern the Commission raises in the context of its recommendations on the declaration criteria. The LTIE test provides for greater certainty by including a detailed description of each of the elements relevant to the LTIE,[27] which would not be preserved if the test became a public benefits test. The practical impact of this consideration is discussed in the following section.

Draft recommendation 8.2

The Commission recommends that s. 152CR of Part XIC and s. 3, s. 389, s. 384(5) and s. 485(5) of the* Telecommunications Act 1997 *be amended so

[26] Trade Practices Amendment (Telecommunications) Bill 1996 – available at http://www.dcita.gov.au/nsapi-text/?MIval=dca_dispdoc&pathid=/legislation/l1.html

[27] TPA, sub-sections 152AB(4), (6) and (8).

that references to the LTIE test are to the broader objects clause in Part XIC of the TPA. [chapter 8, page 8.7]

AAPT is concerned that amendments to the operative provisions of Part XIC are likely to create confusion and inconsistencies in the administration of the regime and may lead to some participants "gaming the changes".

As a preliminary point, AAPT notes that the LTIE test pervades Part XIC. In addition to the declaration test in section 152AL (discussed further below) and section 152CR (which the Commission notes in its recommendation), the LTIE test is relevant to the following sections:

(a) section 152AH, which defines the "reasonableness" criterion applied in assessing terms and conditions contained in access undertakings, codes and arbitral determinations;

(b) section 152AT, which governs assessment of applications for exemption from the SAOs;

Additionally, the test applies to the revocation or variation of a declaration under section 152AO by the operation of section 33(3) of the *Acts Interpretation Act 1901*.

In regard to section 152CR, it would be undesirable that determinations made under the new version of the section may take into account considerations different to those which applied to the declaration of the services and any determinations made under the previous version of section 152CR.[28]

The change in objects would create an opportunity for access providers to game the changes. For example, a change to the test (and particularly the removal of the any-to-any connectivity criteria) would be likely to lead to applications for revocation or variation of current declarations based not on any change in material circumstances, but on the changes to the legislative tests.

Transitional provisions and grandfathering of current declarations may avoid some of these difficulties. However, implementation of the changes would create a serious policy and legislative dilemma. The provisions could exempt all decisions made against the LTIE test in relation to currently declared services from the changes. However, as most of the significant access services are already declared, this would make the proposed changes virtually irrelevant.

On the other hand, if arbitral and undertaking decisions made in relation to currently declared services were made against the new test, this would lead to two results. First, it would be likely to encourage Telstra to submit undertakings in the same terms as those previously submitted, based on a perception that the new test would more readily lead to the acceptance of undertakings, rather than any substantive change to the undertakings.

[28] This observation and the comments which follow are based on an assumption that the changes the Commission proposes would have some effect in practice. If they would not, AAPT considers the case for change is weaker still.

Second, it would cause arbitral determinations in respect of the same services to be made against different criteria depending on whether the determination was made before or after the amendments.[29] The result would cause distortions in the market.

The Commission rightly argues that consistency between Parts IIIA and XIC is an important consideration. However, AAPT considers that temporal inconsistency within the regime would lead to clear allocative inefficiency and would also be likely to distort investment decisions made by access-seekers.

Draft recommendation 8.3

The Commission recommends that for a telecommunications service to be declared it must meet all of the following criteria:

- ***(a) the telecommunications service is of significance to the national economy and***
  - ***1) for a service used for originating and terminating calls, there are substantial entry barriers to new entrants arising from network effects or large sunk costs; or***
  - ***2) for a service not used for originating and terminating calls, entry to the market of a second provider of the service would not be economically feasible;***
- ***(b) no substitute service is available under reasonable conditions that could be used by an access seeker;***
- ***(c) competition in downstream markets is insufficient to prevent the provider of the service from exercising substantial market power;***
- ***(d) addressing the denial of access, or the terms and conditions of access, to the service concerned is likely to improve economic efficiency significantly; and***
- ***(e) access (or increased access) to the service would not be contrary to the public interest. [chapter 8, page 8.24]***

Here also, AAPT questions whether the benefits the Commission sees in aligning the declaration criteria in Parts IIIA and XIC would outweigh the costs in terms of the uncertainty under Part XIC. AAPT is not convinced, from the material included in the Draft Report that the Commission's criteria meet the five "general principles" set out at pp. 8.8 to 8.9. Considering the principles in the light of the experience of the Part XIC regime, AAPT considers that the current regime meets the principles.

Specifically, it is clear that:

[29] This assumes that the section would take effect in relation to currently notified disputes. If not, the same problem of inconsistency would arise based on the dates of notifications.

(a) both on theoretical grounds and in light of the data discussed in chapters 3 and 4 of the Draft Report, declaration under the current regime has, on balance, contributed to economic efficiency;

(b) any ambiguity which may have existed in the regime at the time it was introduced has long since been resolved through the ACCC's published guidelines, decisions and reasons for previous declarations;

(c) the sub-tests of the LTIE are based on the Government's policy objectives in relation to telecommunications regulation and are therefore consistent with them;

(d) both the requirements of Part XIC and experience of the regime indicate that there is currently a "relatively high burden of proof" for declaration;

(e) the unusual economic characteristics of telecommunications, the patchy development of competition and Telstra's strategic anti-competitive conduct justify the continuation of a telecommunications-specific regime.

The Commission provides an extensive critique of the current declaration criteria and refers submitters to its Position Paper on Part IIIA for discussion of the new criteria. There is some difficulty in proposing alignment of the criteria under Part XIC with the Part IIIA criteria, given the early stage of the Commission's consideration of changes to Part IIIA.

However, it is unclear to AAPT how the new and old criteria would affect the ACCC's decision-making under Part XIC. Presumably there would be some (perhaps a majority of) currently declared services which would not be declared under the new tests. AAPT would welcome some examples of how the proposed criteteria would be applied.

AAPT also notes that the proposals for new declaration criteria appear based not on a careful consideration of the available evidence and opposing arguments, but a set of assumptions set out on pages 8.7 to 8.9[30]

In its previous submissions, AAPT has identified the need for the telecommunications regime to address regional, as well as national issues. The amendments to the declaration criteria raised in the Draft Report are likely to undermine the achievement of uniform standard of telecommunications access services because of the reference to national significance.

Draft recommendation 8.4

In addition to the existing revocation mechanism under s. 152AO, the Commission recommends that Part XIC of the TPA should include an explicit

[30] AAPT notes that the discussion in this section of the Draft Report contrasts strongly with the general tone of the report and is essentially a series of presumptions expressed colourfully but with little precision ("...the uncertainty, imperfections and biases of any regulatory decision-making process...", "...a whole raft of subsequent regulatory behaviour..." "...gratuitous differences...").

provision for sunsetting declarations, with a reasonable sunset period to be set at the time of declaration. [chapter 8, page 8.31]

Draft recommendation 8.5

The Commission recommends that where a service has expired or is of residual importance, declaration may be revoked by the ACCC without a full public inquiry. [chapter 8, page 8.31]

AAPT agrees with the Commission's recommendation for a sunsetting provision. AAPT understands that the sunsetting proposal would trigger a review of a declaration, rather than its automatic expiry.

AAPT agrees with the Commission's recommendation for revocation without a public inquiry where the service has expired or is of residual importance.

An advantage of sunset provisions is that they provide certainty to industry participants, allowing them to plan build/buy decisions. For the same reasons, AAPT submits that the sunset provision should by symmetrical in providing a period in which the ACCC will not revoke the declaration.

Draft recommendation 9.1

The Commission recommends the retention of provisions for a telecommunications-specific access regime. However, it should be governed by objectives and principles convergent with those of Part IIIA. [chapter 9, page 9.10]

As outlined in response to other recommendations, AAPT agrees with the Commission's recommendation. AAPT has argued for the retention of Part XIC for the following reasons:

(a) it is essential for providing operators the ability to enter and compete in new markets, such as the retail market for local call services;

(b) it provides a dispute resolution regime that avoids the rigidity and cost of litigation and gives carriers a structured forum for resolving disputes;

(c) it is free from political intervention;

(d) it fulfils the Government's obligations under GATS;

(e) the legislative requirement to review the telecommunications-specific competition regime in section 151CN is limited to Part XIB, indicating that Part XIC is intended to be long term;

(f) in 1999, when Parliament made amendments, it elected to strengthen the provisions in the access regime rather than diminish them;

(g) there have been no material changes since the introduction of Part XIC that justify a reversal of Parliament's intention at the time; and

considerable use has been made of the declaration and arbitration provisions under Part XIC. As discussed in relation to recommendations 8.1 to 8.3, the differences which justify the telecommunications-specific regime also

justify the inclusion of telecommunications-specific objectives and declaration criteria. These relate to the unique characteristics of the telecommunications industry which create barriers to entry such as:

(a) large lumpy investments (new entrants do not possess the same internal financing options open to large incumbents);

(b) network externalities (leading to competitive advantage for incumbent networks);

(c) differences in value of interconnection;

(d) economies of scale and scope;

(e) the presence of a dominant vertically integrated incumbent; and

(f) speed of development of the industry which can magnify anti-competitive conduct.[31]

The Commission itself recognises these unique, sector-specific features[32] and yet it expresses a preference for moving away from a specific regime to the more general approach of Part IIIA. In addition, the Commission has highlighted the weaknesses of Part IIIA which include:

(a) the additional regulator (NCC) adding to complexity;

(b) there is political intervention as the relevant minister determines whether a recommendation by the NCC for declaration is accepted;

(c) the Commission has found in its parallel inquiry into Part IIIA that there are deficiencies such as slow administration procedures, limitations in declaration criteria and the absence of pricing principles.[33]

It is clear therefore that the particular characteristics of the telecommunications sector require a different emphasis in access regulation. Access on reasonable terms and conditions is essential for the promotion of competition and for the prevention of anti-competitive conduct. Without access regulation, access providers are reluctant to provide access to services. Therefore sector specific access regulation is critical for allowing operators to enter and compete in new markets since it places pressure on access providers to provide access on reasonable terms and at reasonable prices.

The Commission rejects AAPT's concerns regarding Australia's obligations under GATS. The Department of Foreign Affairs stated that Australia's obligations could be met under Part IIIA. The Commission may wish to consider obtaining independent advice regarding GATS obligations, such as from the Office of International Law.

[31] AAPT, Initial submission, p.9 – 15.

[32] See Draft Report, p. 9.6.

[33] Draft Report, p.9.9.

The Commission also disregards the fact that many other countries have a telecommunications-specific access regime, dismissing this as 'incidental'.[34] AAPT considers that it is imprudent to ignore the fact that the importance of access is internationally recognised and the Commission's approach fails to take into account the voluminous works devoted to the crucial role that a sector-specific access regime plays within the telecommunications industry. AAPT submits that the fact that other countries have detailed regulatory frameworks in operation is prima facie evidence that a sector-specific regime is essential.

Improvements to Part XIC

In its earlier submissions, AAPT recommended some reforms to the access regime be considered. In particular the introduction of incentives to commercial negotiation of access arrangements.[35] AAPT noted that such proposals could include:

(a) introducing mandatory undertakings (perhaps with certain criteria, such as the requirement of "reasonableness") for all providers (or alternatively the dominant provider) of an active declared service, the terms and conditions of which would be available to all access seekers;

(b) increasing the efficiency of the arbitration process by consolidating arbitrations which relate to similar matters into a single process;

(c) introducing an incentive for an access provider to disclose information it possesses to resolve uncertain factual matters and thus reduce delays (for example, a "regulatory presumption" against the interests of the access provider);

(d) introducing reference prices; and

(e) imposing timeframes for the conclusion of various processes (with provision for extensions where necessary).

AAPT submits that consideration of reforms to the processes supporting the current regime is the way forward. AAPT is pleased to note that the Commission has taken into account many of these suggested improvements.

Draft recommendation 9.2

The Commission recommends that the ACCC remains the appropriate body to oversee telecommunications-specific competition regulation. [chapter 9, page 9.12]

As AAPT has noted in its earlier submissions,[36] AAPT agrees that the ACCC should remain the regulator for telecommunications-specific competition issues as it has developed an effective working relationship

[34] Draft Report, p.9.5.

[35] AAPT, Second Submission, p.16 – p.21.

[36] AAPT, Initial submission, p.37.

with the ACA and there appears to be no reason for any change which would delay processes further.

The functioning of the regime would be improved if additional resources were made available to the ACCC and the regulator took a more aggressive approach to exercising its powers under the legislation.

There has been some overlap between the functions of the two agencies which has contributed to delays. AAPT has suggested that this could perhaps be minimised by creating the responsibility for decisions in only one agency rather than the current sequential process (but this will require one agency gaining expertise in the field of the other and so may not be the most beneficial solution).

AAPT has also drawn attention to concerns relating to the dual role of the ACCC as arbitrator and regulator which has in practice caused delays in the determination of arbitrations.[37] AAPT considers that more resources are required for the ACCC to function efficiently.

In addition, AAPT has highlighted a concern that the ACCC has not been assertive enough in its use of its powers under the legislation, particularly those provided as part of the 1999 Amendments, such as, for example, its interim determinations power or its power to issue procedural negotiation directions.[38]

Draft recommendation 9.3

The Commission recommends the removal of the discretion for Ministerial pricing determinations under Division 6 of Part XIC of the TPA. If this is not accepted, published reasons for any Ministerial pricing decisions should be required. [chapter 9, page 9.16]

Pricing principles and related issues are discussed in commentary on recommendation 10.1.

Draft recommendation 9.4

The Commission is inclined to recommend the abolition of the Telecommunications Access Forum, but invites comments on its possible future value. [chapter 9, page 9.18]

On balance, AAPT considers that the TAF should be retained but with amended functions.

Under Part XIC, the TAF has two statutory functions. The first is to recommend services that should be declared and the second is to submit codes of "model terms and conditions". In relation to both of these, AAPT considers, and experience shows, that it is unrealistic to expect industry

[37] AAPT, Initial submission, p.34.

[38] AAPT, Initial submission, p.33 and p.53.

participants unanimously to agree on access recommendations which will substantially affect the competitive balance between them. While AAPT fully supports the self-regulatory philosophy which underlies the telecommunications regulation, the policy may encourage gaming in relation to issues where the parties interests are directly opposed and the results of the self-regulatory processes are not binding.

For example, although the TAF developed the Telecommunications Access Code, and this was accepted by the ACCC, no access provider has yet submitted undertakings under section 152BW. It is inevitable that where there are non-binding measures, operators will depart from these where it is in their commercial interest. To be able to perform these functions effectively, TAF would need to be based firmly within a legal framework which gives operators a means of ensuring that the solutions agreed by the industry and endorsed by the ACCC are implemented.

Nevertheless, it is important to have a forum in which the industry has input into the regulation of access issues and to address issues such as interoperability. AAPT submits that TAF should be retained as an industry forum but references to it should be removed from Part XIC. TAF's power to recommend services for declarations under section 152AL(2) may be carried out without regulatory support.

A preferable approach, in AAPT's submission, would be similar to the processes for development of codes set out in Part 6 of the Telecommunications Act. Such a provision should also allow for the registration of multiple, service-specific codes, which would be more useful than the current requirement for there to be only one code under section 152BE(4).

Draft recommendation 9.5

The Commission recommends that s. 152CPA(3) of Part XIC of the TPA — which does not permit the ACCC to make an interim determination if an access seeker objects to it — be repealed. [chapter 9, page 9.20]

AAPT understands the Commission's concerns on this point, set out on pages 9.19-20, and acknowledges that section 152CPA(3) is "asymmetric" in the sense that it provides access seekers with a right which does not also apply to access providers. That is, while it acknowledges that there is some possibility of the provision being used to strategically to undermine the arbitration process, there is no evidence that this has ocurred and only a remote possibility of it occurring in the future. Nor does the limited use made of the interim determination power by the ACCC suggest that its decisions are "predisposed... in favour of access seekers".

Further, AAPT does not share the Commission's assessment that the provision creates an asymmetric risk between the parties. Rather, the provision reduces the impact of the information asymmetry between parties to an arbitration. In most arbitrations, access providers are in the best position to assess whether there is a difference between a price set out in an

interim determination and the "real" price, based on an application of the relevant pricing principles to the provider's information.

The access provider is able to provide this information to the ACCC at any time during the arbitration if it considers that an interim price is based on an error. The ACCC's practice is to issue a draft interim determination to the parties prior to making it and, if the access provider considers an interim determination will expose it to the risk of having to make a large payment at the time of the final determination, it can provide information to support a revision of the interim determination. Conversely, if it considers the interim determination will result in under compensation it can provide information to the ACCC to support an increase in the interim price.

The access seeker does not have that option. Instead, the access seeker's entitlement to refuse an interim determination provides it with scope for avoiding undue risk, where it considers the interim determination underestimates the likely final price. Conversely, if the interim price is considerably in excess of what the access seeker believes is likely to be the final price, the only tool it has available is to refuse the interim determination.

Nevertheless, AAPT would support the removal of the power if the information disclosure provisions were improved or if information presumptions of the kind discussed in Annexure D were introduced so that the asymmetric information risks which sub-section 152CPA(3) seeks to correct are reduced.

Draft recommendation 9.6

The Commission recommends that s. 152CN(1) of Part XIC of the TPA be modified to allow notifications by an access provider or seeker to be withdrawn only with the joint consent of the access provider and seeker. [chapter 9, page 9.22]

AAPT's views on this recommendation is similar to those in regard to draft recommendation 9.5. The draft recommendation removes the capacity for strategic behaviour by the party wishing to withdraw the notification but grants strategic power to the other party, which may refuse to consent and tie the other into an arbitration.[39]

The principle that the initiating party can withdraw proceedings is common in court rules, often subject to conditions depending on the stage to which the litigation has progressed. For example, the Federal Court rules allow the party initiating proceedings to discontinue without consent prior to the pleadings being closed. Where the pleadings are closed, the plaintiff may discontinue either with the consent of the other party or leave of the Court.[40]

[39] The hypothetical example provided in the Draft Report is of an access-seeker withdrawing a notification after an interim determination but before a final, with the aim of avoiding backpayments. However, for the strategy to be successful, the access seeker would have to negotiate a commercial agreement with the access seeker which allows the debt to be avoided by applying the interim price, rather than the draft final price. AAPT's experience suggests this would be very unlikely.

[40] *Federal Court Rules,* Order 22, Rules 1 and 2.

The Court's practice is generally to grant leave unless to do so would cause prejudice to the defendant.[41]

On balance, AAPT's view is that the ACCC's proposal to allow it a discretion as to whether accept a withdrawal is preferable. The ACCC's practice in matters similar to this is to consult with both parties so, in most cases, the effect would be the same as draft recommendation. However, where either the attempt to withdraw or a refusal to consent is clearly strategic, it would allow the ACCC to stop the arbitration. This result would remove the incentive for either party to game and would be more likely to reduce the number of arbitrations before the ACCC.

AAPT therefore suggests the Commission reconsider the proposals put forward by the ACCC.

> ***Draft recommendation 9.7***
>
> ***The Commission recommends that there should be the capacity for a group of access seekers to lodge a joint notification of dispute and proceed to class arbitration rather than a series of bilateral negotiations. [chapter 9, page 9.29]***

AAPT fully supports the recommendation to consolidate similar arbitrations into a single process. In its second submission, AAPT addressed this issue at some length and does not repeat the detail here. In summary, those arguments are:

(a) it significantly reduces costs both for the ACCC and for market participants as access issues of significance could be resolved more quickly and there would be no need to 'reinvent the wheel' during arbitrations involving the same service;

(b) it ensures consistency in the results of arbitrations relating to similar services;

(c) competition in downstream markets is not distorted by the superior negotiating power of one access seeker over another; and

(d) differences in bargaining power would be substantially lessened leading to incentives for access providers to negotiate agreements with access providers.[42]

[41] *SCI Operations Pty Ltd v Trade Practices Commission* (1984) 53 ALR 283 at 311 per Sweeney J, at 331-2 per Lockhart J, at 335-6 per Sheppard J

[42] AAPT, Second submission p.19.

Draft recommendation 9.8

The Commission recommends that the ACCC should exercise its discretion in allowing the arbitrator to use and disseminate to contesting parties in an arbitration relevant material submitted in other telecommunications access arbitrations subject to the requirement that it have regard to the material's potential commercial sensitivity. [chapter 9, page 9.33]

AAPT supports the draft recommendation.

As AAPT has previously emphasised,[43] a key problem faced in arbitrations is the delay experienced in achieving resolutions and this is heightened by factors such as access providers being reluctant to disclose information they possess. To create an incentive for information to be disclosed, AAPT has proposed that the Commission be empowered to make a "regulatory presumption" against the interests of the access provider where a factual matter is uncertain but the access provider is in the best position to obtain the information. Such presumption would be capable of rebuttal on the production of independently verified data.[44] This remains AAPT's preferred approach.

The Commission's draft recommendation goes some way to achieving a similar result by exposing information to greater scrutiny by parties to similar arbitrations. It is therefore likely to somewhat reduce the imbalance between the resources generally available to access providers and those available to access seekers.

Draft recommendation 9.9

The Commission recommends that merit appeals not be extended to declarations or interim determinations, with the exception of the case where the ACCC rejects a declaration and a party wishes to contest that rejection. [chapter 9, page 9.39]

AAPT agrees that merit appeals should not be permitted for declarations or interim determinations.

At present, declarations may be appealed in the Federal Court on administrative grounds but not on merit and AAPT does not see any reason to change this. As AAPT pointed out in its earlier submissions,[45] there is scope for parties to submit their views during the inquiry process leading to declaration and in addition there is provision for a service to be "undeclared" should this be necessary. To introduce merit appeals would result in delays in implementation of declarations and this could be detrimental to new entrants and end-users.

In AAPT's view the ACCC is the most appropriate body to make the ulitimate determination on a declaration because of the highly specialised

[43] ibid.

[44] ibid.

[45] AAPT, Second submission, p.12.

nature of the issues and the complex relationship between individual declarations and general conditions in the telecommunications markets. The time required to "train" an appeal body on these issues is unlikely to justify any improvement in the accuracy of outcomes.

In relation to interim determinations, this mechanism was introduced to simplify and expedite the process of resolving determinations and to permit appeal on the merits will defeat these objectives, adding to complexities, delays and uncertainties.

Draft recommendation 9.10

The Commission recommends that:

- ***the ACCC produce a published method for calculating any backpayment under s. 152DNA of Part XIC of the TPA, which should include the provision for payment of interest and indicate how the appropriate time period for backpayment should be gauged; and***

- ***s. 152DNA specify that an access price consistent with the published method should be backdated and that obligations to pay backpayments should not discriminate between access seekers and providers. [chapter 9, page 9.45]***

AAPT agrees with the observation that there are significant uncertainties introduced in the context of the backdating power as a result of the Act failing to specify criteria on which the ACCC's discretionary decisions should be made. These uncertainties make it difficult for operators to plan their investments and operations.

AAPT recommends that section 152DNA(2) be amended to enable the backdating to be effective from the date of supply rather than the date of notification (see discussion in Annexure D). In addition, section 152DNA (1) should be amended to state that a final determination must be expressed to have taken effect at such date as to allow its application over the entire period of the dispute as expressed in the notification. These amendments will ensure that an access provider does not obtain any benefit from setting high access prices.

AAPT also supports the proposal that the ACCC should incorporate in its pricing principles means of determining backpayments. However, AAPT is unsure of how the Commission reconciles this proposal with its desire for legislated provisions in relation to cost.

Payment of interest is also a significant issue and it is a common feature of access agreements. An additional matter the Commission may wish to raise is that the ACCC should have regard to any contractual terms between the parties for determining interest in relation to disputed amounts.

1.7 Part XIC – access pricing

Draft recommendation 10.1

The Commission recommends that the following principles be legislated for telecommunications. Access prices should:

- ***generate revenue across a facility's regulated services as a whole that is at least sufficient to meet the efficient long-run costs of providing access to these services, including a return on investment commensurate with the risks involved;***
- ***not be so far above costs as to detract significantly from efficient use of services and investment in related markets;***
- ***encourage multi-part tariffs and allow price discrimination when it aids efficiency; and***
- ***not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, unless the cost of providing access to other operators is higher. [chapter 10, pages 10.23–4]***

AAPT considers that the principles the Commission proposes represent a theoretically correct set of objectives for access pricing generally and in telecommunications. However, AAPT questions whether, as a matter of regulatory practice, the entrenching of principles in legislation is, on balance, beneficial.

First, the economics which informs pricing principles develops over time. AAPT notes that almost all of the sources which the Commission quotes in support of its views have been published since the enactment of Part XIC. At the time Part XIC was passed, and the ACCC developed the *Access Pricing Principles* (**APPs**), international best-practice was heavily based on the incremental cost approaches which had been developed in the US and UK. Had Part XIC been enacted five or ten years earlier, the pricing principles may have been based more heavily on the "incentive regulation" ideas then current, which are based on different principles. The continual advances in economic theory underlying pricing principles suggests to AAPT that it would be unwise to entrench particular principles in legislation. AAPT is concerned at the implication that the ACCC should be constrained to making judgements based upon the best expert advice at the time of drafting legislation rather than at the time of making decisions.

Second, AAPT is strongly of the view that, in the absence of guidance on the detail of the principles, they are unlikely to resolve existing differences between access seekers and access providers on key concepts. The devil is in the detail. As an obvious example, the central concept of cost is open to many interpretations and, even where a particular costing approach is applied, principles based on notions of cost are unlikely to be meaningful without context.[46]

[46] The Commission acknowledges this point on p. 10.15 of the Draft Report.

A third, but related, consideration is that the Commission's recommendation is made against a backdrop of considerable work by the ACCC over the last four years in relation to pricing. In addition to its early theoretical work on the APPs, the ACCC has conducted five major inquiries into the pricing approaches to be applied to various declared services (the assessments of Telstra's PSTN undertakings, GSM termination, non-dominant PSTN, local carriage service and the unconditioned local loop service). The one lesson from this practical experience is that any broader objectives set for Part XIC may not necessarily be achieved by the draft pricing principles.

Finally, AAPT doubts whether the benefits the Commission quotes in support of setting pricing principles are valid or will be achieved. The Commission claims that the pricing principles will:

(a) limit regulatory discretion;

(b) provide ex-ante information on which access providers can base investment decisions;

(c) increase the flexibility of the regulator ("by avoiding proscriptive pricing rules and instead specifying objectives and principles");

(d) provide a basis for ex post assessment of the regulator's pricing decisions;

(e) promote consistency between regimes.

For the reasons discussed above regarding the development of pricing theory, AAPT considers that limiting regulatory discretion is unlikely to be beneficial. Further, AAPT notes the inconsistency between this point and point (c), which makes a virtue of greater flexibility. In relation to these points AAPT also cautions that, without appropriate exemption mechanisms, the application of the principles may require the ACCC to engage in expensive investigative processes to determine efficient long-run costs, and testing efficiency claims.

For the reasons discussed above, AAPT doubts whether the existence of legislated pricing principles would provide ex-ante information to access providers and seekers.

In preference, AAPT suggests retaining current Ministerial power to make determinations under section 152CH. Such determinations are disallowable instruments and would be subject to an obligation to prepare a regulatory impact statement. A second approach, which AAPT considers preferable, would be a requirement that pricing principles be published by the ACCC as part of any future declaration so that the two step processes inherent in the current regime are avoided.

AAPT would also suggest that the ACCC should be obliged to institute record keeping rules in relation to declared services on principle providers at the time of declaration to ensure the ACCC is well informed in the exercise of future powers – including consideration of revocations.

Draft recommendation 10.2

The Commission recommends that the retail price controls that lead to the access deficit be removed. [chapter 10, page 10.37]

AAPT agrees with the recommendation.

AAPT further submits that, if the controls remain in place, their cost should be recognised as being a cost of consumer protection and funded from consolidated revenue, or alternative means, such as the USO levy.

Draft recommendation 10.3

The Commission recommends that there be public disclosure by the ACCC of the costing methodologies on which arbitrations are based and the justification for the approach adopted. This need not include publication of the prices associated with particular arbitrations or of particular commercial-in-confidence cost parameters. [chapter 10, page 10.42]

AAPT agrees with the recommendation and shares the Commission's concerns regarding certainty in setting costing methodologies.

While there have been some moves in this direction by the ACCC the processes the ACCC has used to ensure transparency have been too cumbersome in AAPT's view. More importantly, the use of public processes has resulted in individual arbitrations being deferred pending the results of those inquiries. In many cases, this sequencing approach is justified but in many cases there are arbitration issues which can be determined outside of the process.

As an example, AAPT has concerns at the delay which has surrounded the development of pricing principles for the GSM terminating service and the consequences for the resolution of arbitrations. The ACCC commenced its public inquiry on December 1999 and is yet to issue a final report. Of the disputes currently before the ACCC, the earliest was notified more than two years ago (March 1999) and no interim determinations have been issued. These observations are not a criticism of the ACCC – the length of time taken was not typical of similar inquiries and the issues raised are unusually complex. AAPT's concern is that all of the arbitrations relating to the GSM service have been stalled as the public process is completed. Four years after the service was declared, no costing methodology has been determined which could form the basis for negotiated settlements to the disputes.

For this reason, AAPT supports the approach the Commission appears to be suggesting. That is, that costing methodologies developed in early arbitration should form the basis of later determinations. The result of such an approach would be to allow individual matters to be determined quickly, with due consideration being given to the parties to the matter, while ensuring that the results of those private processes are appropriately transparent.

1.8 Telecommunications Act provisions

Draft recommendation 11.1

The Commission recommends that the legislative requirement for Industry Development Plans should be repealed. Existing plans should also cease. [chapter 11, page 11.7]

AAPT agrees with this recommendation. In its Initial submission, AAPT set out reasons for abolishing IDPs which include the following

(a) it emphasises upstream industry development, particularly in software or equipment manufacture; and

(d) (b) it fails to acknowledge other forms of industry development such as the activities of competing carriers[47].

In addition, AAPT considers that the IDP is not a particularly necessary or useful tool. AAPT disagrees with iiNet's submission that the IDP is an 'appropriate' barrier to entry. As the Commission points out, there are better ways of obtaining industry information.[48]

Draft recommendation 11.2

The Commission recommends that the facilities access regimes under Parts 3 and 5 of Schedule 1 of the Telecommunications Act 1997 should be consolidated into Part XIC of the TPA. [chapter 11, page 11.19]

AAPT considers that there are several difficulties with this recommendation. As AAPT pointed out in its Initial Submission,[49] Part XIC relates to services whereas Schedule 1 relates to facilities themselves. While it may be beneficial to align the procedural aspects of obtaining access with the procedural aspects of XIC, there is a danger that important access licence conditions will be removed without equivalent measures being adequately in place under Part XIC. AAPT is concerned, for example, that the current and future declaration criteria would not see the appropriate declarations in place. In addition it is important to recognise that the provisions of Schedule 1 (particularly those of Part 5) are environmental as well as competitive and are a necessary consequence of carriers' significant powers to develop facilities.

However, AAPT has highlighted the fact that there are some weaknesses with the enforcement of licence conditions (which can only be enforced by the ACA or ACCC) and AAPT has suggested that it may be appropriate to create a separate regime specific to facilities access, so that market participants have the opportunity to seek redress.

[47] AAPT's Initial submission, p.39.

[48] Draft Report, p.11.5.

[49] AAPT, Initial submission, p.40.

Draft recommendation 11.3

The Commission recommends that the procedures and obligations under the mandatory network information requirement should be aligned, regardless of the type of information being requested. [chapter 11, page 11.23]

AAPT supports measures to mandate the disclosure of network information, irrespective of the type of information requested. Mandatory network information is crucial for the following reasons:

(a) access providers hold vital information which would seriously disadvantage other market participants if it is withheld;

(b) an access seeker can only offer a service once it understands important technical and other data about the service;

(c) access providers are in a powerful position as a result of information in their possession which is unavailable to others and they are able to take advantage of that information in order to damage access seekers; and

(d) ultimately, end-users are affected by the absence of legislative requirements to provide network information since it would limit the available services offered by non-incumbents.

Furthermore, AAPT does not see any reason for the discrepancies relating to the type of information required and therefore it agrees with the Commission's recommendation.

Draft recommendation 11.4

The Commission recommends that the mandatory network information provisions under Part 4 become a standard under Division 5 of Part 21 of the* Telecommunications Act 1997*. [chapter 11, page 11.24]

AAPT agrees that it would be appropriate to place the mandatory network information provisions into a technical standard under Division 5 of Part 21 of the Telecommunications Act 1997. AAPT has emphasised the importance of mandatory network information in previous submissions. Placing those provisions in the Telecommunications Act will assist in ensuring that information requirements are adhered to.

Draft recommendation 17.1

The Commission recommends that power to determine the aggregate universal service levy lie with the ACA, rather than the Minister, with provision made for full merit review of determinations by the Australian Competition Tribunal. [chapter 17, page 17.17]

AAPT disagrees with this recommendation. The reason for this is the critical importance of timing in relation to these decisions. To change the

process to an ACA determination following a consultation period will increase delays, particularly if the possibility of merit review is included.

From a broader perspective, AAPT does not consider that the hypothetical calculation suggested by the Commission is a satisfactory solution for the universal service levy. AAPT submits that the correct solution would be for the levies to be paid into consolidated revenue and funding to be allocated as required under the tender arrangements.

Requests for further information and comment

The Commission invites comments on whether interpretations of (a)1 of draft recommendation 8.3 may widen the scope of the test excessively, and if so, appropriate ways of narrowing its application. [chapter 8, page 8.24]

AAPT believes that it is essential that the network effect test be set relatively wide. Network effects are a critical feature of telecommunications economics and it acts as a significant barrier to new entry since a potential supplier must enter on a large scale in order to be able to compete. AAPT therefore recommends that the test under (a)(1) be sufficiently wide in order to cover all possibilities where market entrants may be prevented from introducing more efficient networks as a result of the presence of network effects from larger operators' networks.

In addition, AAPT also considers that network effects exist in other industries in the new economy and therefore the test should have application which reaches beyond the scope of telecommunications.

(see also comments in relation to recommendation 8.3)

The Commission considers that there are grounds for modifying Part XIC to allow the ACCC to grant immunity from subsequent declaration to new telecommunications investments that would not occur if there was a threat of declaration (an access holiday). However, the Commission seeks feedback on how such an access holiday could be implemented, and particularly:

- ***the appropriate length of any access holiday;***
- ***how to distinguish investments that are marginal from those that would still occur if they were declared; and***
- ***any other guidelines that would simplify the implementation of access holidays. [chapter 8, page 8.27]***

AAPT considers that the existing provision for an exemption is a useful method of providing an "access holiday". It is surprised that operators such as CWO who appear to seek access holidays, have not made use of this provision and applied for them.

However, the provisions of s152AS are only reasonably applied where a new declaration affects an existing service, rather than where a provider intends to invest in a new facility where there may already be a declaration or the possibility of a declaration. Clearly, in these circumstances the Commission would not be able to undertake public consultation.

The Commission seeks feedback from participants about the advantages and disadvantages of having price monitoring as a potential alternative to declaration. [chapter 8, page 8.28]

AAPT is a strong advocate for the ACCC using its information gathering, tariff filing and record keeping powers. AAPT believes that the ACCC's

use of these powers will be the pathway by which the market power inherent in network effects can be curbed in future without need for excessive arbitration, and may lead to the revocation of a number of declarations.

However, AAPT can see no benefit in relying on generic prices surveillance mechanisms. The current arrangement enables the Commission to effectively utilise both its declaration powers and enforcement powers.

The Commission seeks feedback on any major implementation and practical risks associated with narrowing and re-defining the declaration criteria. [chapter 8, page 8.32]

The changes to the declaration criteria would relate, in theory, to all future considerations of declarations, including revocation of existing declarations. AAPT assumes that part of the reason for change is due to the concern that some services have been declared that would not have been under the new criteria.

To avoid uncertainty and gaming it would be necessary to preserve all the existing declarations, to provide each declaration legislatively with a sunset clause and specify that any review prior to the triggering of the sunset clause would need to occur under the old regime.

Clearly, the consideration of the timing of these sunset clauses is a matter for investigation and it would be appropriate for the ACCC to conduct that matter in a similar manner to the transitional arrangements on deeming in the 1997 introduction.

However, AAPT considers that this would be an inefficient use of the limited ACCC resources at the present time.

The Commission seeks feedback on whether undertakings (other than access holidays) should follow the Part IIIA protocol — or some other hybrid between the two existing approaches. [chapter 9, page 9.25]

The Commission seeks feedback on whether s 152CE of Part XIC of the TPA, relating to review of undertakings by the Australian Competition Tribunal, should be amended to provide greater clarity about the scope of the review. [chapter 9, page 9.26]

In addition to its comments in relation to the Commission's recommendations, AAPT's view is that an undertaking prior to investment as a route to avoid the standard access obligations of any current or future declaration is appropriate, but would need to allow for ACCC mediation.

The undertaking under Part XIC is different in nature and needs to be recognised as such. AAPT suggests that an undertaking in relation to a declared service cannot be lodged while there is an arbitration in progress. In addition, AAPT suggests that the rejection of an undertaking should be subject to merits review.

The Commission considers that there may be grounds for non-binding indicative time limits for arbitrations, which provide a discipline on what are otherwise open-ended arrangements. The Commission seeks feedback from

participants on whether such indicative limits would be useful and whether these should apply just to arbitration matters (or parts thereof) or also to undertakings. [chapter 9, page 9.32]

AAPT generally supports the use of indicative timeframes. The main difficulty with arbitrations is the delay experienced in reaching a conclusion. The imposition of timeframes would go some way to assist in reducing these delays. However, this should not be at the expense of the correct result being attained. Moreover, there may be limitations to the extent to which timeframes are able to be introduced due to factors such as lack of resources which prevent adherence to a particular timescale. Nevertheless, the AAPT considers that non-binding timeframes may be helpful in improving the speed of achieving decisions, particularly where a result is time-critical. It is, however, important that provision is made for these timeframes to be extended where necessary.

The Commission has floated the option of a 'glidepath' approach based on changing total factor productivity or international benchmarking for updating final determinations over time. The Commission seeks feedback on this and other easily applied mechanisms that allow the ACCC to update determinations. [chapter 9, page 9.33]

The Commission's "glidepath" approach does not differ fundamentally from the use of price monitoring. The current favoured theoretical approach is global price capping to ensure that price movements are driven down by productivity improvement.

AAPT considers in particular that the ACCC's pricing reports under Division 12 of Part XIB of the TPA should be expanded to include wholesale as well as retail prices.

The Commission seeks feedback on the publication of reference prices by the ACCC and the extent to which arbitrations could be used as a trigger for and influence on their publication. [chapter 9, page 9.36]

The Commission seeks feedback on any alternative approaches that would encourage commercial negotiations, while also yielding workably efficient outcomes. [chapter 9, page 9.48]

AAPT has addressed these matters in response to the Commission's recommendations.[50]

[50] See AAPT's second submission, p.20 for discussion of reference prices.

The Commission requests feedback on:

- ***whether the ACCC's approach to network provisioning is appropriate for lumpy investments that may need to be installed ahead of full capacity utilisation;***
- ***the proposal that the treatment of shared Telstra-owned trenches in TSLRIC should be based on the efficient cost of trenches to Telstra, less a proportion of the revenue from leasing of trench space; and***
- ***the appropriate method for calculating depreciation. Rather than asking for a re-statement of prior positions, the Commission is trying to isolate the specific assumptions that underlie disagreement and find fresh methods for testing which approach is best. [chapter 10, page 10.33]***

AAPT submits that detailed matters in relation to particular services are appropriately considered in the context of individual arbitrations, reviews or undertaking assessments.

The Commission seeks feedback on the view that:

- ***price monitoring may be the superior way of dealing with terminating charges for mobile markets; but***
- ***were there to be a need for price control, the glidepath should be decoupled from the operators' retail prices to provide better incentives for lowering prices. [chapter 10, page 10.34]***

AAPT's comments have been included under the recommendation on this matter.

The Commission seeks feedback on workable principles to deal with terminating charges in two-way access contexts. [chapter 10, page 10.35]

AAPT's general position is that pricing principles are specific to the matters covered.

The Commission seeks feedback on how to deal effectively with the uncertainty that affects estimates of efficient access prices. [chapter 10, page 10.40]

The only certainty is that prices can never be 'correct'. No price will ever be equal to the theoretical ideal since there is always a distortion of assumptions – such as, in particular, not all allocation preferences are known in markets before preferences are expressed.

However, regulation of access prices is essential for addressing bottlenecks and should be retained. It is therefore necessary to identify the costs associated with errors. The error cost of too high a price will be inefficient investment and this can never be avoided. The error cost of too low a price is under-investment. In telecommunications, this simply results in marginal GOS deterioration which can be rectified by further investment.

The worst outcome is building in risk premiums which results in over-investment.

The Commission seeks feedback on appropriate mechanisms to help resolve some of the important and repeated technical issues that have affected access pricing. [chapter 10, page 10.43]

The key issues are (1) secrecy of supposedly commercially confidential data and (2) intellectual property in models. AAPT has yet to see how any of the data for which Telstra claims confidence could assist us develop our business. There is a certain perverse logic in thinking that information about the component costs could help us – when the final outcome price is the information on which our build/buy decision is based.

AAPT believes there is benefit in the ACCC only ever developing models on the grounds that all industry participants are entitled to access the model.

The Commission seeks feedback on the desirability of implementing a system of transferable ownership of telephone numbers. [chapter 13, page 13.22]

The Commission seeks feedback on the desirability for determinations made under s. 462(2) of the Telecommunications Act 1997 to be subject to merits review. [chapter 13, page 13.22]

The Commission discussion on portability rightly reflects the fact that the mandating of number portability is a consequence of the need to address first mover advantages enjoyed by incumbent firms. The Commission then considers again the question of whether the cost of number portability is outweighed by the benefits.

There is benefit in undertaking an alternative analysis of number portability. This analysis should be based on how numbering would be administered in a mature competitive market, rather than one focussed on history. (It is worth remembering that numbering was first used when an outbreak of measles that resulted in subscribers first being identified by number rather than name.[51]) In current telecommunications, there is an increasing degree of separation between signalling and call carriage.

Were the telecommunications industry to be new and had a number of reasonably equally sized participants, would those participants choose a common numbering scheme and would they choose a scheme that supported portability of numbers? Given that the relative costs of providing a numbering scheme that was common and supportable versus a carrier specific or common but non-portable scheme would be relatively low compared to the overall investment cost, the focus would be on service provider benefit. The benefit to service providers in a market that is otherwise competitive is that the switching cost saving is probably entirely a welfare benefit gained by the consumer. However, it is often forgotten that a key driver of industry revenue overall is the ease of making phone calls.

[51] John Brooks, *Telephone: the first hundred years*, (Harper, 1976).

If customer numbers do not change then the ease of making calls increases. This constitutes a real increase in the demand for telephone calls – not just a relative position between carriers. Given that telecommunications is an industry with high scale economies, increases in the overall level of demand have significant benefit for all participants.

However, whether all the participants in the industry would recognise the benefit is less clear. The analysis above suggests that "co-operation" in numbering would have some characteristics of the prisoner's dilemma as each participant recognises they only gain the benefit of co-operation if everyone does. While this is a feature that could be expected to be eradicated over-time, if it is not eradicated in the first instance our new network developers would be inclined to have made initial investments against their own mutual best interests.

Consequently, there is benefit from regulatory intervention to ensure all participants recognise the LTIE (and of the long term interest of themselves, for that matter) of service provider number portability. The nature of telecommunications is one in which the investment in networks, especially switching platforms, is ongoing with new software loads occurring typically every six months. It is not one in which the investment is static and actually occurs only once.

The Commission has rightly identified the fact that the current approach to number portability has resulted in apparent gaming, and has resulted in potentially sub-optimal investment outcomes. It is AAPT's belief that the presumption in relation to service provider portability should change, especially now that portability has been mandated for the three biggest classes of existing numbers (geographic, inbound and mobile).

AAPT does not support the concept of creating an ownership in telephone numbers. Amongst other things it creates significant difficulties in circumstances where the overall requirements of operating numbering will require the wholesale replacement of numbers. Most importantly, it creates a distorted view of the operation of numbering. Numbering is in reality a co-operative industry scheme to share the use of one numbering scheme. It is feasible to operate separate schemes each administered by each carrier with the need to dial specific numbers to access carriers. The regulatory focus should be on migrating the management of this scheme to industry and away from the ACA[52].

AAPT supports the concept of standardising the processes involved whenever the ACCC is involved in arbitrating the terms of provision of a service between carriers. To that extent AAPT supports the proposal to subject determinations made under s.462(2) to merits review. However, AAPT believes the most effective way of achieving that outcome is to define in one place the ACCC's arbitral powers and refer to those.

[52] See AAPT submission in response to the ACA paper *A New Allocation System for Valuable Telephone Numbers?*

The Commission seeks feedback on the desirability of giving the ACCC responsibility for determining which services, if any, should be subject to pre-selection. [chapter 14, page 14.7]

The Commission seeks feedback from participants on the benefits and costs of requiring multi-basket pre-selection. [chapter 14, page 14.13]

The Commission seeks further input on the implications of restricting pre-selection requirements to Telstra alone. [chapter 14, page 14.14]

AAPT concurs with the view that mandated pre-selection is effectively a version of declaration. It clearly cannot be encompassed within the framework of the existing XIC as the service is not one a carrier provides to itself, so the service would never be an "active declared service" in the meaning of the Act.

However, AAPT believes this very issue reflects on the overall weakness of the Commission's approach to access regimes and the focus on infrastructure issues of "national significance".

In relation to multi-basket pre-selection, the current position is that there are sufficient participants in the industry that individual retail offerings include elements from a range of providers. For example there are some customers preselected to a service provider for whom only their international calls are carried by that service provider but national long distance are carried under a wholesale arrangement by AAPT.

It is a perverse consequence of the ongoing potential threat of multi-basket pre-selection that were Telstra to have the technical capability to offer some kind of either multi-basket or a simple second basket (e.g. pre-selection for international calls only) they would not offer it as the technical capability may subsequently be required for a regulator constructed service.

In relation to asymmetric pre-selection regulation, AAPT shares the Commission's view that there should be no disadvantage suffered by a party that has built a competing access network as the economic benefit of that network is only the originating access charges saved that are no longer paid to Telstra. As the new network developer receives exactly that revenue for providing originating access then the provision of mandated pre-selection creates no distortion to the investment evaluation. It does, however, provide a distortion in terms of implementation and operational costs. At the very least the grounds for exemption should be made clear and aligned with the exemption criteria under XIC. If there were no pre-selection obligation owners of competing access networks may, perversely, be more inclined to encourage other service providers to utilise their network as it would be seen as commercial opportunity.

The Commission seeks feedback from participants about the degree of and motives for exclusive contracting of pay TV content. [chapter 16, page 16.15]

The Commission seeks feedback from participants about the effects of pay TV content foreclosure on different markets and the nature and timing of any efficiency costs. [chapter 16, page 16.17]

The Commission seeks views on the extent to which arrangements for the distribution of pay TV signals to regional operators are a problem, how important they are, and the impact that they may have on effective access to content for regional pay TV operators. [chapter 16, page 16.18]

Should action to promote the availability of pay TV content be considered desirable, the Commission seeks views on the options discussed in chapter 16 and how they might best be implemented. [chapter 16, page 16.32]

The Commission seeks feedback from participants on the possible advantages and disadvantages, and practicality, of a market based tendering process for encouraging competition in the provision of universal service. [chapter 17, page 17.16]

AAPT does not wish to make any further comments on these matters. However, we note recent research on the issues raised by vertical integration between cable operations and Internet/telephony service provision in the US.[53]

[53] J A Hausmann, J G Sidak and H J Singer, "Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers", available at: http://papers.ssrn.com/sol3/papers.cfm?cfid=743674&cftoken=24433251&abstract_id=268512

Annexure A

European approaches to monopolisation and the enforcement of relevant provisions

Overview

Articles 81 and 82 of the EC Treaty form the basis of competition law in the European Community.

Article 81(1) prevents agreements which may affect trade between member states and which "have as their object or effect the prevention, restriction or distortion of competition." If an agreement has beneficial effects it may be eligible for an exemption under Article 81(3).

Article 82 prevents abuse of a dominant position in so far as it may affect trade between member states and it lists particular categories of abuse which are prohibited.

These Articles apply equally across different industries and there is no industry specific competition law[54] such as in Australia where for instance, Part XIB of the *Trade Practices Act 1974* (*TPA*) applies separate competition rules directly to the telecommunications industry. However, Part XIB contains more similarities with Articles 81 and 82 than the generally applicable Part IV of the *TPA* since they are concerned with effects.[55] While Article 81 also contains an object-based test which is in some respects similar to the purpose-based test in Part IV, the importance within European law of assessing the effects of agreements or conduct is beyond doubt. For example, market analysis, which is a fundamental feature in illustrating whether or not there are anti-competitive effects, may be found throughout European jurisprudence.

Article 81

Interpretation

The object-based test and the effects-based test are applied 'disjunctively'. This entails that in making an assessment, a court will first look at whether an agreement can be said to have the object of restricting competition. If this test is satisfied, then it is not necessary for the court to go on to consider the effects, except for assessing the gravity of the infringement and thus the amount of any fine. However, if it is not clear that the object is to restrict competition, then the court will examine the effects. This requires a full analysis of the market, including identifying the relevant product and geographical markets.

[54] Although there are of course detailed sector-specific regulatory frameworks, such as for example, in the telecommunications industry where there is extensive EC regulation, including the open-network provisions and liberalisation measures.

[55] And Article 81 specifically includes an effects-based test.

Case law has continually emphasised the importance of consideration of the effects of an agreement. For example, in *European Night Services*[56] the Court of First Instance stated:

"...it must be borne in mind that in assessing an agreement under Article 81(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, [...] unless it is an agreement containing obvious restrictions of competition such as price fixing, market-sharing or the control of outlets."

Moreover, in *Brasserie de Haecht v Wilkin*[57] the court stated:

"it would be pointless to consider an agreement, decision or practice by reason of its effect if those effects were to be taken distinct from the market in which they are seen to operate [...] an agreement cannot be examined in isolation from the above context, that is, from the factual or legal circumstances causing it to prevent, restrict or distort competition."

Proposals for change

In the European Commission's *White Paper on Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty* issued in April 1999, the Commission set out some suggestions for improving the current system. In particular with regard to Article 81 (then Article 85) it suggested changing the analysis under Article 81(1) to incorporate a "rule of reason" test. This is an approach based on balancing the pro-competitive aspects of an agreement against its anti-competitive aspects in determining whether or not to prohibit it. This would among other matters lessen the use exemptions under Article 81(3).

The suggestions have not been implemented at the present time. In any event, it is clear that whatever changes there may be to Article 81, there are no plans to remove the 'effects' test which forms part of the foundation of EC competition rules.

Article 82

Interpretation

There is no definition of dominance or of "abuse"[58] within Article 82 and it has been left for the Commission and the Court to determine. The Court has defined dominance as the power to behave independently which enables a company to prevent effective competition[59]. This definition was widened in the Commission decision of *AKZO* where the Commission stated:

[56] Cases T-374/94, T-375-94, T-384/94 and T-388/94 [1998] ECR II-3141

[57] Case 23/67 [1967] ECR 407

[58] except for the provision of specific examples of abuse

[59] Case 85/76 [1979] ECR 461

> "The power to exclude effective competition is not, however, in all cases coterminous with independence from competitive factors but may also involve the ability to eliminate or seriously weaken existing competitors or to prevent competitors from entering the market."[60]

In order to establish whether a company is in a dominant position, firstly there must be an assessment of the relevant (product and geographic) market and secondly, the market share of the company within that market must be calculated[61]. In defining the relevant product market, there are various considerations such as whether or not there are demand-side or supply-side substitutes for the product.[62] The reason for this form of analysis appears to be that dominance cannot exist in a void and therefore when assessing whether there may be a dominant position it is necessary to examine the context in which a potential dominant position exists. As the court stated in *Michelin*,

> for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of other products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.[63]

With regard to the relevant geographic market, the Court has said

> The opportunities for competition under Article 86 [now 82] of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.[64]

Once the relevant market has been defined, the next step is to make an assessment of the market share of the company within that market. Various methods are used by the Court to determine this and several considerations are taken into account such as the market structure, barriers to entry, economic performance of the company and its conduct.

If a dominant position is found, the Court or Commission must then go on to consider whether or not there has been an abuse of that position. There is no definition of 'abuse' in Article 82 but it is generally considered that 'abuse' may include any conduct of a dominant company which may be seen as damaging to competition. Article 82 contains a list of such conduct which includes

(a) imposing unfair prices;

(b) limiting production, markets or technical developments;

---

[60] Commission Decision 85/609/EEC OJ [1985] L 374/1

[61] Case 6/72 [1973] ECR 215 *Continental Can*

[62] The Merger Control Regulation 4064/89/EEC OJ 1989 L395/1 defines the relevant product market as comprising "*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.*"

[63] Case 322/81 [1983] ECR 3461

[64] Case 26/76 [1978] ECR 207

(c) applying dissimilar conditions to equivalent transactions with other trading parties; and

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

Therefore, in essence, the operation of Article 82 is closely linked with a detailed examination of the markets in question and the effect that the behaviour of a dominant company has on competition in those markets. This is far removed from assessments on the basis of the purpose of a dominant company, which is largely irrelevant when considering whether there has been a breach of Article 82[65]. An examination of the classic cases on abuse of dominant position in EC law illustrates that the primary focus is the type of behaviour carried out by a dominant firm and not the purpose behind it. For example,

(a) In *United Brands*[66] the Court was concerned with the discriminatory pricing of the dominant undertaking.

(b) In *AKZO*[67] the Court was concerned with the predatory pricing of AKZO which was found to be dominant in the flour additive and polymer markets.

(c) In *Tetra Pak II*[68] the Court was concerned with discounts offered on more favourable terms where there was no objective justification and ordered that Tetra Pak had to deal with all customers on the same terms;

(d) Selective discounts were found by the Commission to be an abuse in *Irish Sugar*;[69]

(e) In *Hoffman-La Roche*[70] the Court considered loyalty rebates to be an abuse of a dominant position; and

(f) In *Commercial Solvents*[71] the Court found that a dominant undertaking's refusal to supply a raw material to an existing customer was an abuse.

Therefore, once a detailed assessment of the markets has taken place and a dominant position has been established, the Court tends to assess the behaviour of the undertaking and the effect it has had upon the market (as well as the market players) in question, in order to decide whether an abuse has been committed.

---

[65] although it may have an effect on the level of fine imposed.

[66] Case 27/76 [1978] ECR 207

[67] Case C-62/86 [1991] ECR I-3359

[68] Case T-83/91 [1994] ECR II-755

[69] Commission Decision 97/624/EEC [1997] 5 CMLR 666

[70] Case 85/76 [1979] ECR 461

[71] Case 6, 7/73 [1974] ECR 223

Proposals for change

There are currently no proposals to amend Article 82. The *White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty* (now Articles 81 and 82 respectively) does not suggest any changes to the substance of Article 82.

Penalties for infringement of competition rules

General

The Commission has significant powers to bring infringements of the competition rules to an end.

A party may make a complaint to the Commission or the Commission may take action against an undertaking on its own initiative. Under Article 3 of Regulation 17 the Commission may by decision require the undertaking concerned to bring such infringement to an end (cease and desist decision).

Article 15(2) Regulation No 17 provides for fines to be imposed where there is a intentional or negligent breach of Article 81 or 82. These fines may be up to 10% of the turnover in the preceding business year for each of the undertakings taking part in the infringement.

There are also procedural fines where an undertaking supplies incorrect information or produces books and records in an incomplete form during investigation.

There is also the possibility for periodic penalty payments to compel undertakings to put an end to the infringement, to supply complete and correct information which has been requested, or to submit to an investigation.

Interim measures

The Commission also has the power to order interim measures where infringement is likely. The Commission may take a decision requiring the termination of an infringement where at the stage of the proceeding it does not have conclusive evidence of the infringement but there is a distinct likelihood of infringement. The interim measure may be an order to perform some act or desist from some act, provided that it is restricted to the measures necessary in the given situation. In order to guarantee fulfilment by the undertaking of the obligations imposed by the interim measure, periodic penalty payments are imposed.

An example of where the Commission has used interim measures may be found in Commission Decision 83/462/EEC of 29 July 1983 ECS/AKZO.[72] In this decision, ECS made an application to the Commission to adopt interim measures requiring AKZO to refrain from the alleged unlawful pricing and commercial practices pending a decision under Article [then] 86. The basis of ECS's application was that the infringement of Article 86

[72] OJ L 252, 13/09/1983 p.13-21

had continued after the Commission's initial investigations and that unless interim relief was granted ECS might be compelled to cease trading. The Commission considered various factors which included:

(a) The likelihood of irreparable harm (there was reason to suppose that unless restrained AKZO would continue its efforts to eliminate ECS as a competitor and an eventual finding that AKZO had abused its dominant position would be ineffective if ECS had meanwhile been compelled to cease treading); and

(b) There was an urgency to the case since AKZO had continued to offer selectively low prices to ECS customers as a result of which ECS had to reduce its prices further and as a result there was a likelihood that ECS would be forced to cease trading; and

(c) AKZO had made no assurances as to its future conduct and had taken no steps to alter its discriminatory pricing policy.

The Commission therefore concluded that it was necessary to ensure compliance with competition rules by imposing obligations upon AKZO. The measures adopted were of a "temporary nature, designed to restore the status quo." The decision was to apply until the adoption of a definitive decision relating to the alleged abuse of a dominant position by AKZO. The Commission's decision included provisions to prevent AKZO from offering or supplying any of the products to any buyer in the UK at prices or on terms different from those offered or given to other comparable buyers and the Annex to the decision set out the minimum prices. In order to ensure compliance, the order contained a provision for a periodic penalty payment of 1,000 ECU for each day on which any failure to comply with any requirement of the order persisted.

The White Paper on Modernisation

The *White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty* (now Articles 81 and 82 respectively) has stated that "the 10% ceiling has proved appropriate and it is not proposed that it should be changed."[73]

However, it has suggested that procedural fines and periodic penalty payments should be increased by aligning them with the corresponding provisions of the Merger Regulation since the levels are currently not high enough to have any dissuasive effect.

In general, the *White Paper* suggests the decentralisation of the application of the competition rules so that national authorities and courts have increased responsibility for enforcement. The reason for this is that the amount of notifications under the current system has increased and the Commission has recognised that the it does not have adequate resources to thoroughly investigate all potential infringements and sustain the present system single-handedly in the future. The Commission has therefore

[73] at p.41

suggested that it works together with national competition authorities to form a network for the implementation of Articles 81 and 82.

The Commission issued a Proposal for a Council Regulation in September 2000[74] as a result of the White Paper. In particular, with regard to enforcement, it contains provisions amending Regulation 17 and in addition to increasing the Commission's powers, it permits national competition authorities and national courts to apply Articles 81 and 82 in their entirety. It aims to promote private enforcement by individuals through national courts and by increasing the decision-makers involved in the system, it will allow the Commission to concentrate on more serious infringements which it is currently unable to do. Specific provisions which increase the powers of the Commission include:

Article 7

This is the equivalent to Article 3 of the current Regulation 17. It contains two additional provisions which are:

The Commission is empowered to adopt a decision finding an infringement not only when it orders the termination of the infringement or imposes a fine but also where the infringement has already come to an end (this only applies to cases where there is a legitimate interest); and

The Commission is empowered to impose all remedies necessary to bring infringements to an end, including structural remedies (for example, divestiture of certain assets).

Article 8

This provides for the possibility for the Commission to adopt interim measures prior to a final decision only in cases where there is a risk of serious and irreparable harm to competition.

Article 22

This increases fines for breaches of procedural rules to up to 1% of total annual turnover and also introduces a new rule permitting the imposition of fines for infringements by associations of undertakings.

Article 23

Under this article, periodic penalty payments are increased to up to 5% of average daily turnover for each day's delay.

[74] COM(2000) 582 Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (27/09/2000).

Annexure B

US approaches to monopolisation and the enforcement of relevant provisions

The US has two primary statutes which deal with monopoly conduct, along the lines of section 46 of the TPA. Section 2 of the Sherman Act creates the very broad offence of "Monopolisation". In an attempt monopolise, certain other forms of conduct are prohibited under the US Clayton Act. Additionally, the prohibition in section 5 of the Federal Trade Commission Act against "unfair methods of competition" may catch certain forms of monopoly conduct.

This note focuses principally on the development of law relating to section 2 of the Sherman Act but also discusses the relevance of the other provisions.

The monopolisation offence

Because the statutory prohibition on monopolisation is so unclear, the substance of the monopolisation test has been developed by the Courts over the 100 or so years of the Sherman Act's existence. The important early cases[75] involved instances of quite clearly monopoly power and egregious predatory conduct, such the Courts could find the offence made out in situations where the defendant had "exercised" monopoly power. To the extent that a deeper description was required, the focus was principally on whether the defendant had an *intent* or *purpose* to monopolise.

The next milestone in the development was Judge Learned Hand's opinion in the *Alcoa* case.[76] Although the judgment focused primarily on the question of market power, Judge Hand did open the discussion of the manner in which the use of that power would constitute "monopolisation". As such, the consideration of monopolisation began to address the effects of the conduct. The decision has often been criticised on the basis that efficiency-enhancing conduct (such as increasing output) by a monopoly may be impugned. Nevertheless, it marks the start of the serious development of the "rule of reason", first enunciated in *Standard Oil*.

From the series of cases which followed *Alcoa*, it is possible to make several generalisations. First, *subjective* intent is not an element of the offence, as the difficulties of proving what a monopoly's intent was and the uncertainties surrounding whether that intent was in fact expressed, make it a poor legal test. Second, *specific* (objective) intent is definitely an element of the "attempt to monopolise" offence in section 2, but its status as an element of the monopolisation offence is questionable. Hovenkamp suggests that:

[75] For example, *Standard Oil Co. of N.J. v. United States*, (1911) 221 US1 and *United States v. America Tobacco Co.*, (1911) 221 US106.

[76] United States v. Aluminium Co. of America, 148F2(d) 416 [1945].

> ...intent has often been anti-trust's ghost in the machine. Courts use it to help them make sense of conduct that they do not fully understand. Problematically, however, the essence of competition is the intent to try and injure one's rivals. One of the most perplexing problems in anti-trust policy is discerning between illegitimate and legitimate intent – a problem that looms distressingly large if intent is the only thing we have to help us characterise ambiguous conduct. [77]

Third, the description of monopolisation has largely been based on consideration of different forms of conduct or practices, such as predatory pricing, refusal to deal, and tying. Increasingly, the analysis of these cases centre on whether the conduct is efficient, and therefore enhances consumer welfare, or whether it results in the exclusions or hindering of rivals which would otherwise contribute to industry performance.

From the cases it is difficult to extract a single, useful definition of monopolisation. Areeda and Hovenkamp suggest that a summary of the offence may be as follows:

> (1) the behavioural component is not defined by "purpose", "intent", or similar language. It can be rationally defined only in terms of conduct.
>
> (2) "monopolising" conduct consists of various abuses of monopoly power, which are mainly described as "exclusionary" conduct.
>
> (3) "exclusionary" conduct is conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power.
>
> (4) harmful "exclusionary" conduct is proved merely by establishing that a monopolist has committed business torts, [or other contravention of the anti-trust statutes].[78]

What is clear from a review of the cases on particular practices is that the "rule of reason" as applied to monopolisation issues, revolves around an assessment of the efficiency of the conduct, ie, a weighing of its competitive or anti-competitive effect.

In cases where the effect is unclear because they are not yet evident (such as in relation to predatory pricing in the pre-recoupment phase) the Court will also consider the objective purpose of the conduct, usually basing this finding on inferences regarding whether the conduct is efficient or not. Hovenkamp attempts to summarise this approach in the following paragraph:

> The law of monopolisation requires a showing that the defendant has monopoly power and has engaged in impermissible "exclusionary" practices with the design *or* effect of protecting or enhancing its monopoly position... [emphasis added]
>
> The scope of the rule of reason can vary considerably with changes in anti-trust idealogy.

[77] Hovenkamp, *Federal Anti-Trust Policy* (1999, West).

[78] P E Areeda and H Hovenkamp, *Anti-Trust Law*, Vol. III, P.82

Offences under other statutes

Under the Clayton Act particular practices (such as price discrimination and some forms of exclsive dealing) are prohibited where they have the effect of substantially lessening of competition. The test to be applied in assessing offences under this legislation is clearly based on an effects test.

Enforcement powers of US Federal agencies

Under section 5 of the Federal Trade Commission Act, the FTC and the Federal Communications Commission have administrative power to issue a "cease and desist" order. The FTC has a similar power under section 11(B) of the Clayton Act in regard to alleged contraventions of that Act. Although there are no similar provisions in regard to alleged contraventions of section 2 of the Sherman Act, in most cases the conduct complained of would be covered by both legislative provisions.

Annexure C

Recent cases on section 46 of the *Trade Practices Act 1974*

During the Public Hearings, the Commission requested further information on AAPT's views as to the relevance to the Review of two recent cases under section 46 of the TPA: *ACCC v Boral Limited*[79] and *Melway Publishing Pty Ltd v Robert Hicks Pty Limited.*[80]

Overall, AAPT is of the view that the cases do not strengthen or significantly widen section 46 such that the effects test under Part XIB is unnecessary.

Boral

The full Federal Court delivered its decision in *Boral* on 27 February 2001. The decision is significant for assessing allegations of predatory pricing under section 46. It was held that, under section 46 and in contrast to the position in the United States, a likelihood of recoupment need not be found in order for there to be a contravention. There are also important observations in the decision about market definition and the identification of barriers to entry. It is clearly an important case for the purposes of section 46.

However, the decision does not contribute significantly to the jurisprudence surrounding the purpose requirement in section 46. That issue appears to have been regarded as essentially a matter of impression for the trial judge.[81] In addition, a clear proscribed purpose was evident in contemporaneous documents.[82]

The most that can be said of *Boral* in this context, is that it is likely to widen the scope of section 46 in relation to predatory pricing. The decision does not affect the relationship between purpose and effect which the Commission identified as part of its analysis in chapter 5. In addition, the decision does not materially address the deficiencies in section 46 identified by submissions to the Commission and which the Commission recognised in chapter 5.

In any event, an application for special leave to appeal to the High Court has been filed. Accordingly, there must be a reasonable prospect of leave being granted given the significance of the decision. Assuming leave is granted, it is highly unlikely that the position will be clarified by a High Court decision before the Commission finalises its report. The uncertainty surrounding the

[79] [2001] FCA 30.

[80] [2001] HCA 13.

[81] Justice Beaumont, paragraph 181.

[82] Justice Beaumont, paragraph 181: Justice Finkelstein, paragraph 297.

decision is in contrast to the existence of clear United States law and respectable arguments to the contrary[83].

In these circumstances, it would be premature to rely on a perceived widening of section 46 in considering whether to preserve Part XIB.

Melway

The High Court decision in *Melway Publishing Pty Ltd v Robert Hicks Pty Limited*[84], delivered on 15 March 2001, also concerned section 46. The Court held by a 4:1 majority that Melway's refusal to supply an order for street directories from a distributor as part of the application of an exclusive distribution system did not involve a use of market power.

The focus of the Melway case by the Court (in line with the statutory prohibition) was to determine whether or not Melway's refusal to supply street directories to Auto Fashions amounted to a 'taking advantage of market power for a proscribed purpose'.

In its analysis of Melway's refusal to supply, the Court at one point referred to the effect the restrictions might have:

> Such restraints typically include limiting, geographically or otherwise, the customers to whom a particular distributor may sell. The overall effect on competition of such restraints is not necessarily negative, it may be positive.[85]

The Court noted decisions of United States courts where they have examined vertical restraints imposed by manufacturers on distributors. The United States courts look to the *effects* of the restraint to determine if there is a negative *effect* on the welfare of the consumer.

However, the Court did not analyse the overall effect of the refusal to supply and focused its judgment on the issue of 'taking advantage'.

Rather, it accepted the trial judge's conclusion regarding purpose.[86] However, the Court stressed that a system of distribution involving 'vertical restraints' does not 'necessarily manifest an anti-competitive purpose of the kind referred to in s46'.

Ultimately, the Court's approach in Melway followed their previous decision in *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited and another* (1989) 167 CLR 177 ("Queensland Wire").

Accordingly, the decision in *Melway*, while it contains valuable insight into the application of the test in Queensland wire and the role of efficiencies in

---

[83] See, for example, M O'Bryan, "section 46: legal and economic principles in reasoning in *Melway* and *Boral*" (2001) 8 CCLJ 203.

[84] [2001] HCA 13.

[85] Ibid.

[86] At paragraph 36 the Court stated "Melway was found to have had a number of legitimate commercial reasons for desiring to maintain its wholesale distribution system, and restricting competition between its wholesale distributors was part of that system, as the explanation of the refusal to supply acknowledged. That did not make the findings as to proscribed purpose inevitable, but having been made in the Federal Court, it is difficult to disturb them at this stage."

that analysis, does not address the deficiencies of section 46 identified in the submissions to the Commission.

Annexure D

AAPT comments on "incented" negotiation under Part XIC of the TPA

Introduction

This paper is designed to promote discussion among interested parties on the negotiation and arbitration processes contained in Part XIC of the *Trade Practices Act 1974* ("**TPA**").

Part XIC was designed to promote the long-term interests of end-users of carriage services and services provided by means of carriage services. This goal was to be achieved by the provision of guaranteed access to essential carriage services where such access would promote competition, any-to-any connectivity or economically efficient investment in, or use of, infrastructure by which carriage services are provided.[87]

The process by which services can become subject to Part XIC is through declaration. Declaration can occur once the Australian Competition and Consumer Commission ("ACCC") has held a public inquiry or when there has been a recommendation by the Telecommunications Access Forum and the ACCC believes that the TAF has given interested parties a reasonable opportunity to comment on the proposal.[88] In addition, certain services were "deemed" to be declared by the ACCC under section 39 of *Telecommunications (Transitional Provisions and Consequential Amendments) Act* 1997 ("**Amendment Act**").

Declaration merely creates a right for an access seeker to obtain access to the declared service. The terms and conditions of access are determined by individual negotiation between the parties. (The access provider is required, however, to supply services to access seekers according to the same standard that it supplies to itself. These are known as the standard access obligations ("**SAO**s").)

In the event that the access provider and access seeker cannot reach agreement on the terms and conditions of supply, either party can notify the ACCC that there is an access dispute.[89] The dispute is heard in an arbitral context. The ACCC is not bound by procedural formalities or rules of evidence, and is obliged to hear and decide the matter in a manner "as speedily as a proper consideration of the dispute allows".[90] The ACCC must make a final determination which can (among other things) require the access provider to provide access, or can require the access seeker to accept a certain price or service, or specify terms and conditions of access. This list

[87] Section 152AB

[88] Section 152AL

[89] Section 152CM

[90] Section 152DB

is non-exhaustive. The ACCC can also make an interim determination, which is intended to give the parties a short-term direction as to their rights and obligations. An interim determination can last no longer than 12 months.

Procedural Directions Powers

The ACCC has at its disposal two sources of power under Part XIC which are potentially very broad. These are the procedural directions powers. Section 152BBA allows the ACCC to make procedural directions in relation to the conduct of negotiations, ie. the ACCC can make these directions *even if* no dispute has been notified to it. Section 152CT allows the ACCC to make procedural directions in relation to the conduct of arbitrations which relate to an access dispute. It is important to remember that the procedural directions powers are available only in relation to services which are subject to the SAOs (ie. which have been declared). These powers (and other powers in Part XIC generally) do **not** apply to services that are not declared. (For example, the ACCC could not make procedural directions in relation to the GSM roaming service, because it is not declared.)

Both sections 152BBA and 152CT give examples as to the kinds of procedural directions that the ACCC can make. These include:

(a) a direction requiring a party to give relevant information to the other party;

(b) a direction requiring a party to carry out research or investigations in order to obtain relevant information;

(c) a direction requiring a party not to impose unreasonable procedural conditions on the party's participation in negotiations;

(d) a direction requiring a party to respond in writing to the other party's proposal or request in relation to the time and place of a meeting;

(e) a direction requiring a party, or a representative of a party, to attend a mediation conference;

(f) a direction requiring a party, or a representative of a party, to attend a conciliation conference.

This list is non-exhaustive.

The ACCC has exercised the procedural directions powers on fairly regular occasions during arbitrations. The author is not aware, however, of the ACCC having used these powers in relation to negotiations which are not subject to a notified access dispute.

Other Powers

The ACCC should not focus solely on its ability to use procedural directions powers to accelerate or improve the negotiation and arbitral processes.

As an agency which determines pricing principles and develops or assesses other measures with industry-wide application (eg. undertakings), the

ACCC has a powerful role to play in setting standards by which industry participants should abide.

Probably the best example of this processes is the PSTN undertaking assessment. Telstra lodged two undertakings which set out the terms and conditions on which it would provide access to its PSTN originating and terminating services. The ACCC rejected both undertakings. In doing this, however, the ACCC undertook detailed research and published comprehensive reports on the PSTN service and, most importantly, on what the price for PSTN services should be. These prices subsequently formed the basis of final determinations in arbitrations and guided the industry generally on what the appropriate price should be. Although the process was too lengthy and costly, the ACCC was able to provide important benchmarks which were beneficial to industry.

Similar comments could be made in relation to pricing principles to govern GSM termination services and non-dominant PSTNs. The research and draft reports prepared by the ACCC have been useful in informing industry participants of what the likely prices would be in arbitrations concerning those services. This in turn has assisted parties in negotiations and arbitrations. On the other hand, there have been extended and avoidable delays in the development and finalisation of these pricing principles. This has created uncertainty for industry and thus increased risks and costs for the industry.

The ACCC plays an important role in developing pricing principles and other standards. The delay and uncertainty surrounding the development of these measures has, however, been problematic. A speedier and more thorough approach to these issues would be more beneficial to the regulatory process generally, and the negotiate and arbitrate processes arising under Part XIC in particular.

Views of Submitters to Productivity Commission Review

It is clear from submissions which have been made to the Productivity Commission's Review of Telecommunications-specific Competition Regulation ("**Review**") that there are difficulties surrounding the negotiate/arbitrate model found in Part XIC.

Most submitters which had any experience of the arbitral process complained that the arbitral process was too slow, too cumbersome and did not address the information asymmetry which exists between access providers and access seekers. These problems which were encountered in the arbitral process were a reflection of the more general problems which exist in negotiations between industry participants in regard to access provision.

A number of submitters suggested additional powers be given to the ACCC to address the problems associated with negotiation and arbitration in the telecommunications industry. AAPT, for example, suggested a range of statutory rules and presumptions which could be used to give access providers an incentive to provide relevant information and to negotiate more promptly and in good faith.

It is recognised that, aside from any proposals to change Part XIC, the ACCC already has available to it considerable powers under Part XIC in sections 152BBA and 152CT (and perhaps other sections as well).

This is a summary of major industry participants' comments on incentive or "incented" regulation and the arbitral processes under Part XIC. Comments were made in recent written and oral submissions to the Productivity Commission as part of the Review.

AAPT Ltd (AAPT)[91]

AAPT argued that "line of business" version of incentive regulation used in US is **not** relevant to Australia, because there are no geographical restrictions on carriers (as there are for long-distance carriers and ILECs in US). RPI-X price caps are **not** usually appropriate in current regime (at least at retail level) because they would not promote competition. RPI-X may be useful in future for interconnect prices once cost-based standards are implemented.

"Incented" regulation is more limited than US-style incentive regulation, and better suited to Australia. Incented regulation gives incentives to providers with market power to negotiate and sign fair and reasonable agreements with access seekers. On other hand, incented regulation can make it costly for a provider to fail to negotiate fairly.

Some of the major problems facing access seekers in negotiations are: market power of a vertically integrated incumbent, asymmetry of information access, and incentives for access-providers to delay arbitrations and the provision of access generally. Incented regulation seeks to redress these problems by giving providers more incentive to negotiate/arbitrate more quickly and reasonably, rather than by just relying on strict procedural rules.

Approaches suggested by AAPT to promote access providers to negotiate fairly, under the incented regulation approach, are summarised below:

Mandatory undertakings

All providers (or at least the dominant provider) of active declared service should be required to lodge an undertaking with the ACCC. This would disclose the terms and conditions to all access-seekers.

The undertaking could either be a general undertaking or the carrier could be required to comply with certain criteria (eg. SAOs, or "reasonableness" criterion already in Part XIC.) The ACCC could have an active assessment role or a more supervisory role in relation to this undertaking.

Joint public arbitrations

[91] AAPT, Supplementary Submission by AAPT Ltd to the Productivity Commission Review of Telecommunications-Specific Competition Regulation, pp. 16-21

Bilateral private arbitrations are often inefficient, and do not address the superior bargaining power of the dominant carrier. The conduct of bilateral private arbitrations is also an inefficient use of industry and regulatory resources as the same issues arise in access disputes for a particular service between each access seeker and the provider. Joint public arbitrations for access disputes in relation to a particular service would be a more efficient use of industry and regulatory resources. Access seekers would be better informed of options which would this would help overcome information asymmetry.

If the ACCC believes that differential negotiated/arbitrated outcomes are desirable, there could be a two-stage arbitration process. Two possible models are a public forum followed by bilateral private arbitrations, or a return to negotiations once major terms resolved at public forum. (Other variations are also possible.)

While it may be difficult to establish shared interests of access seekers, the process would be no slower than current process, and would be more efficient.

While multi-party arbitrations are currently theoretically possible the ability of one party to stop them has thus far resulted in the course not being pursued.

Information presumptions

Information asymmetry is major cause for arbitral delays. Access-providers are usually reluctant to disclose data to access-seekers or the ACCC. Possible solution: create an incentive for incumbent carriers and access-providers to disclose information where a factual matter is uncertain, but known to the carrier.

The ACCC can compel an access-provider to disclose information under the current regime. AAPT proposes that the ACCC be empowered to make a "regulatory presumption" against the interests of the access-provider where a factual matter is uncertain, but the access provider is in the best position to obtain the information. The presumption would be rebuttable by the provision of independently verified data. Such an approach has two advantages over the current approach. First, it creates an incentive for information to be disclosed and, second, it places the onus on the party which is able to obtain the relevant information at least cost.

Reference prices

The need for a reference price and a mechanism to enforce decisions was shown in the ACCC assessment of the PSTN undertakings by Telstra. Lengthy delay was caused by assessment of Telstra's undertakings – even when independent experts and ACCC arrived at TSLRIC of PSTN service, there was no legislative mechanism to enforce it.

A solution is that a regime could be implemented that provided a power for the Commission to make a binding determination of a reference price, following a public inquiry and based on the regulatory presumptions

indicated above. If an interconnection service were involved (eg. PSTN services) this could be done as part of the declaration process (or a re-declaration process). It may be advisable for the ACCC to set prices only in relation to dominant networks - use of a less interventionist approach (such as pricing principles) may be preferable for non-dominant networks.

A reference price would be available to access-seekers, subject to a "payback" condition that required them to remit to the access-provider the difference between the reference price and a price finally determined in an arbitration or assessment of an access undertaking if the latter were high. This would provide access-providers with protection against prices being set too low in the interim. (It would appear to be possible for the ACCC to set reference prices by the use of the provisions in Sections 152BJ and 152BK).

Regulatory timeframes

AAPT generally supports mandatory timeframes, but there are some limitations to this approach. Strict adherence to time frame will not necessary produce correct outcomes.

Timeframes will only assist in the resolution of arbitrations if they facilitate the participation of parties to the arbitration. For example, if the access provider has to provide service in accordance with a reference price then rapid resolution of the issue may be in the access provider's interest.

Notification and Withdrawal of Access Disputes

AAPT has previously commented on the difficulties imposed by section 152DNA of the TPA and item 74 of the Amendment Act. These sections were introduced in 1999 and confirmed that final determinations could be backdated; at the same time, restrictions were imposed on the ACCC's backdating powers. The fact that section 152DNA prevents the ACCC from expressing a final determination to have any effect prior to 5 July 1999 gives access seekers an incentive to notify disputes at an early stage, even if negotiation for the disputed service has not been finalised. This incentive exists because the access seeker does not have any protection under Part XIC for the pre-notification period.

An similar difficulty arises in relation to the withdrawal of access disputes. AAPT (and presumably other access seekers) will often agree to a settlement with the access provider that provides (among other things) for the notification to be withdrawn and for no further disputes to be notified in relation to the service. This kind of provision is problematic under the current Part XIC because if a further dispute is ultimately notified in relation to the service, any final determination can only be backdated to the date of notification. No reference can be made to the previous dispute that was withdrawn.

In order to alleviate both of the problems identified above, AAPT proposes that Part XIC be amended to allow backdating to the date of **first supply** of the service, not the date that the dispute was notified. This would remove the incentive to prematurely notify a dispute, and would also ensure that an

access seeker would not be disadvantaged if a further dispute arose in relation to a service for which a notification had been withdrawn.[92]

Telstra Corporation Limited (Telstra)

ACCC intervention involves regulatory error, and slows down arbitrations. Access seekers have too much incentive to notify disputes because it is a "no lose" game for them.[93]

ACCC needs to finalise and clarify pricing principles more quickly to reduce need to notify disputes. ACCC needs to recognise need to promote efficient investment as well as competition.

ACCC is too ready to declare services even if there is no market failure ie. market is competitive.[94] Part XIC should be amended to resemble Part IIIA criteria for declaration and arbitration (ie. national significance, natural monopoly etc).

Cable and Wireless Optus Limited (CWO)

ACCC is too slow in determining access disputes, but arbitration is an important function. Public and multilateral arbitrations would be preferable, with the result being published if necessary.[95] CWO welcomes the 1999 amendments (including the power to issue interim determinations) but believes that these have not been exercised well enough (eg. interim determinations have been issued too late in arbitrations).

However, CWO believes services should only be declared if provider has substantial market power in the market for the service. Part XIC should *not* apply to non-dominant or new entrant networks. The effect of this view, if it were to be implemented, would be that services provided by non-dominant carriers would not be subject to declaration (and thus arbitration) in the first place.[96]

Australian Competition and Consumer Commission

Delays in arbitrations were not expected when regime introduced. Private bilateral negotiations are complex and time-consuming – public multilateral negotiations would accelerate the process.[97]

Three major problems with arbitration process: lack of incentive for access providers and seekers to conclude commercial agreements, especially where access seeker has no countervailing power; arbitrations are private and (normally) conducted on a bilateral basis, which prevents important

---

[92] Ibid., p. 15. The ACCC supports this recommendation in its Initial Submission to Productivity Commission Review of Telecommunications-Specific Competition Regulation (August 2000), p. 98

[93] Telstra Corporation Ltd, Public Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation, (30 August 2000), p. 45

[94] Ibid., p. 39

[95] Productivity Commission, Transcript of Public Hearing, 14 August 2000, p. 89 – Paul Fletcher for CWO

[96] CWO, Submission to Productivity Commission Review of Telecommunications Regulatory Regime (August 2000), pp. 106-108

[97] ACCC, Initial Submission, p. 87

information being diffused to other industry participants; and the undertaking process, which allows the undertaking provider to further delay the granting of access, especially as arbitrations are conducted in parallel to the undertaking assessment process.[98]

ACCC has used its interim determination powers frequently and has resorted to alternative dispute resolution procedures where that has facilitated discussions. The ACCC has used its procedural directions power (under section 152BBA) in at least one instance to direct private mediation.[99]

ACCC has frequently used its procedural directions powers.

ACCC should be able to require an undertaking to be provided.

ACCC should be allowed to seek public consultation where issue raised in a private arbitration has broader significance. Should be able to publish final determinations in arbitrations.

Vodafone Pacific Limited (Vodafone)

No comment specifically on arbitrations and how they are conducted. Vodafone's approach, though, is that regulatory intervention is only justified where there is sustained market failure. (Vodafone has a general policy of trying to avoid the arbitral process when it is an access seeker and cannot reach agreement with the provider. Vodafone prefers commercially negotiated outcomes whenever possible.)

Access regulation should only apply where the service sought is a natural monopoly AND it is needed to promote upstream or downstream competition.

Presumably, Vodafone would want arbitrations to remain private and to be conducted only as a last resort. Would believe also that there is too much incentive to notify disputes and notify them early.[100]

PowerTel Ltd (PowerTel)

The declaration and arbitration processes are inefficient and duplicate the resources and efforts of carriers and the regulator when disputes are being arbitrated. PowerTel do not necessarily support multi-lateral arbitrations, but would favour a "benchmark" approach (especially in regard to price). This would operate as follows: after the first arbitration concerning a particular "class" of carrier or "category" of issue has been finalised, the ACCC would be empowered to set a "benchmark ceiling" rate, which would be the maximum charge that any access provider would be able to charge for the service. [101] Carriers would be free to negotiate prices below this rate. The ACCC should be allowed to use information obtained for one purpose

[98] Ibid., pp. 86-88

[99] Ibid., pp. 52-54

[100] Vodafone, Submission to Productivity Commission Review of Telecommunications-Specific Competition Regulation, 11 August 2000, p. 35

[101] PowerTel, Initial Submission by PowerTel Ltd, 11 August 2000, pp. 7-9

under Part XIC to be used for another (e.g. information obtained in one arbitration should be able to be used in another.)

Alternatively, the ACCC could publish a report once an arbitration has been completed, with the intention that the report impose a price ceiling for negotiations concerning that service.

Macquarie Corporate Telecommunications Limited (Macquarie)

Part XIC regime has been fairly effective but there needs to be improvement. Approaches to reform the arbitral process include: increase the resources available to the ACCC (and perhaps the ACA); outsource more of the arbitral process to professional (independent) arbitrators who have more expertise in this process (and thus free up more ACCC resources for other activities eg. investigations under Part XIB and declarations); adoption of more strict timelines and procedures by the ACCC during arbitrations, and a less legalistic or formal approach to hearing arbitrations; allow multi-party or public arbitrations; allow information obtained in one arbitration to be used in another arbitration.

Telstra and other dominant carriers can exploit the arbitration process through delay and the prospect of appeals, which slows down access to services for new entrants. The ACCC should be given powers to impose guidelines that impose incentive regulation, where appropriate. This could be modeled on the approach adopted in the US, where the Bell companies are not allowed to compete in the long-distance market unless they fulfil a detailed checklist. In Australia, Telstra could be prevented from selling its DSL service at a wholesale or a retail level until it could demonstrate that competitors are able to compete by gaining access on fair and equitable terms to the unconditioned local loop ("ULL") service.

The guarantees of transparent and non-discriminatory pricing that existed under the Telecommunications Act 1991 should be re-introduced. The ACCC should be able to prescribe a price by imposing a mandatory undertaking on a major supplier of declared services, where that is necessary.[102]

Delays in the current negotiation/arbitration process

The industry experience appears to be that a number of access providers have apparently engaged in "regulatory gaming" in both the negotiation and the arbitration process. The problem is far more acute during arbitrations. This is characterised by unnecessary and avoidable delays in providing information to access seekers or the ACCC, making claims or lodging objections to proposed courses of action when there are not reasonable grounds for doing so, and the use of broad and unnecessary confidentiality claims when providing information in the context of an arbitration.

The ACCC has not always been assertive enough in responding to instances of regulatory gaming and has not sufficiently challenged broad claims of confidentiality in the course of arbitrations. (There are other instances

[102] Macquarie Corporate Telecommunications, Initial Submission, pp. 12-16

where the ACCC has not perhaps made full use of the powers available to it).

Another strategy used by access providers is to seek to exclude certain external advisers of the access seeker on the basis that the adviser is inappropriate or may have a conflict of interest.

Options Available to ACCC Under Current Legislation

(a) *Use of procedural directions powers*

Sections 152BBA and 152CT give the ACCC the power to make broad procedural directions during the course of negotiations and arbitrations. Those sections list a non-exhaustive range of examples of the kinds of procedural directions which the ACCC can issue. The ACCC could be more assertive in using these powers to counteract the failure of access providers to provide appropriate information in a timely manner.

(b) *Penalties*

There are potential penalties which apply to persons who fail to comply with procedural directions. In cases of serious, prolonged or deliberate non-compliance with procedural directions, the ACCC should be ready to use at least the threat of legal action. (The ACCC takes non-compliance with a section 155 order very seriously, and has occasionally instituted proceedings for non-compliance.) The ACCC should be willing to adopt a similarly stringent line in regard to procedural directions.

At the same time, it is not suggested that the ACCC should adopt a punitive attitude in regard to its responsibilities under Part XIC. An arbitration is supposed to be as informal and practical as possible, with a view to resolving a notified dispute as quickly and justly as possible. An unduly stringent enforcement of Part XIC obligations would go against this purpose.

(c) *Negotiation within arbitration*

The ACCC has expressed a preference for the resumption of negotiation *within* the context of an arbitration as this can encourage a less formal and speedier approach to resolving the dispute. For example, in one dispute the ACCC made a direction under 152CT that allowed the access seeker to use an external consultant to assess various costing information of the access provider which was then used in the course of the resumed negotiations. This was beneficial for a number of reasons.

Firstly, it assuaged the access provider's concerns about a competitor gaining access to material that the provider regarded as highly confidential. Access to this material had been a major point of contention throughout this arbitration. The external advisers were then able to assess the costing information, discuss it with provider staff and then provide the results, in aggregated form, to the access seeker. The results did not disclose the data values used but were still useful in progressing commercial negotiations.

(d) *Denial of access to relevant information*

While the use of an independent adviser to examine material has been useful, it is not uncommon for access providers to refuse to disclose material to the access seeker or even its external advisers. Not even binding confidentiality undertakings have been considered sufficient by access providers to alleviate their concerns about misuse of confidential information.

The ACCC has also not been active in challenging confidentiality claims (which are made under section 152DK). It appears that the ACCC has never challenged a party's confidentiality claim under section 152DK even when there may be reasonable grounds for doing so. In cases where not even external advisers can examine (supposedly) confidential material, there is effectively a denial of procedural fairness to the party denied the information. Such a situation is not conducive for a fair or effective arbitral process.

One approach that may help to reduce the misuse of confidentiality claims would be to create a presumption that is adversarial to an access provider should the access provider fail to provide relevant information to an access seeker during a negotiation or arbitration. Such a presumption could, for example, result in an interim (or final) determination being issued that specified a price that was considerably less than what the access provider argued for. Such a prospect would create a stronger incentive for the access provider to negotiate in good faith and provide relevant information on a timely basis.

Possible questions for public forum

1. ***What procedures (if any) should the ACCC have in place to deal with (eg.) a failure to negotiate in good faith in a pre-arbitration context? Should the ACCC publish a guideline on this point?***

2. ***Do you believe that the ACCC should be prepared (or more prepared) to make procedural directions in relation to pre-arbitration negotiations (ie. disputes that have <u>not</u> been notified under Part XIC.)?***

3. ***How could the ACCC better carry out its role in the development of regulatory tools (such as pricing principles)? What benefits would these strategies have?***

4. ***What are your views with regard to each of the above proposals?***

5. ***Does the ACCC have the power, under current legislation, to implement these proposals?***

6. ***Please provide any comments as to your own experiences of delays or other forms of "regulatory gaming" in the arbitration and/or negotiation process.***

7. ***Should a party, once it has approved a person to examine confidential material in the course of a negotiation, be able to seek to exclude that person at a later time?***

8. ***Should the ACCC adopt a more stringent approach to the failure to comply with procedural directions?***

9. ***Should the ACCC be more assertive when assessing claims for confidentiality? Does there need to be a set of administrative guidelines (or perhaps a legislative reform to Part XIC) that specifies what sort of material is confidential and when confidentiality claims will be recognised?***

10. ***Do you believe that failure to give a party (or at least designated external advisers) access to relevant material is a denial of procedural fairness? How should this problem be addressed?***

11. ***Is it feasible (and fair) for the ACCC to make presumptions against a party which fails or refuses to disclose relevant material to another party?***