
**Australian Competition and Consumer Commission**

# Supplementary Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation Part XIB

**August 2001**

# Executive Summary

The ACCC supports the retention of the anti-competitive conduct provisions of Part XIB of the *Trade Practices Act 1974*.

The ACCC maintains that competition can provide benefits to end-users including lower prices, and a better quality and range of services over time. Competition may be inhibited where the structure of the market gives rise to market power.

The telecommunications access regime under Part XIC of the Act, attempts to change the *structure* of a market, in order to *limit* or reduce the sources of market power and consequent anti-competitive *conduct*, rather than directly regulating conduct which may flow from its use, which is the role of Part XIB of the Act.

The continued presence of a robust enforcement mechanism which can be accessed quickly by the regulator will encourage a timely retreat from regulation. In determining whether to retreat from regulation, a regulator will always be cautious about the potential for market failure if it makes the wrong decision. The presence of a safety enforcement mechanism gives the regulator some comfort in its desire to move away from regulation.

The ACCC rejects a number of claims and inferences by Telstra, and, contends the Productivity Commission's Draft Report has not adequately considered a number of crucial matters as detailed below.

***1. The advantage of timeliness that Part XIB has over Part IV***

The ACCC has set its own guidelines in relation to timeliness for Part XIB investigation, or, guidelines can be specified in legislation by the Parliament. In contrast, because Part IV requires direct court action, there is no legislative mechanism to impose a timeline or time limit on the judiciary due to constitutional constraints (ie separation of powers) and potential infringement of natural justice.

***2. The deterrent effect that Part XIB has on anti-competitive conduct***

Regulatory theorists have argued across a range of industries that the more graduated or scaled the penalties are, the more effective the agency will be at securing compliance and the less likely that it will have to resort to tough enforcement. Regulatory agencies will be able to "speak more softly when they are perceived as carrying big sticks."[1]

***3. The distinctive nature of the telecommunications industry***

When considered individually, the characteristics of the telecommunications industry (eg lumpy and sunk investment; scale and scope economies; network

[1] I Ayres & J Braithwaite *Responsive regulation: Transcending the deregulation debate*, Oxford University Press, New York, 1992, page 6

externalities; bottleneck facilities; rapid structural and technological change; and vertically integrated incumbents), do not appear to be unique to the telecommunications industry, however the combination of characteristics appears to be distinctive to and idiosyncratic of the telecommunications industry at this point in time.[2]

### *4. The incumbent's strategic market position due to the highly vertically integrated nature of its business structure*

The incumbent dominates the telecommunications industry. At the end of 2000 Telstra:

- had almost exclusive control of the local loop, to which its competitors need access to connect to customers;
- supplied approximately 95 per cent of local call services;
- had approximately 60 per cent of the long-distance and international voice market;
- was the largest Internet service provider; and
- served around 50 per cent of mobile subscribers.[3]

### 5. *Investment*

The ACCC contends that the anti-competitive conduct provisions in Part XIB have not damaged investment incentives in the telecommunications industry.

According to the DCITA report "Telecommunications Carrier Industry Development Plans Progress Report: 1999-2000", carriers together reported $8.6 billion in capital expenditure during 1999-2000. Total capital expenditure between 1 July 1997 and 30 June 2000 amounted to $19.7 billion.

A recent BIS Shrapnel report commissioned by the ACCC found that the telecommunications industry in Australia generated revenues of A$26 billion pa. in 1999. The industry as a whole has been growing at a rate of 15% a year with the market size reaching A$30 billion by the year 2000.

### *6. Allegations of "regulatory overreach"*

As noted by the Productivity Commission, "there have been very few anti-competitive conduct cases under Part XIB, with none since the 1999 amendments came into effect"[4]. Since both the Productivity Commission and Telstra have failed

---

[2] Productivity Commission, *Draft Report Telecommunications Competition Regulation*, page 5.38

[3] ACCC, *Infrastructure Industries – Telecommunications*, May 2001, page 16

[4] Productivity Commission, *Op Cit*, page 5.40

to provide examples where the ACCC has engaged in "regulatory overreach", it is difficult to ascertain the basis of these conclusions. The ACCC maintains that the lack of court action is by no means an indication of effectiveness of the provisions but one of sound and fair use of the provisions by the regulator.

### *7. Claims that relevant action can be pursued under Part IV and Part XIC*

The ACCC rejects the notion that relevant regulatory action can be pursued under either Part XIC or Part IV. For a service to be subject to regulatory scrutiny under Part XIC, it must be a declared service. For relevant action to be pursued under Part IV, direct judicial intervention is required. The ACCC maintains that the intermediate administrative processes that can be utilised under Part XIB before judicial processes are invoked provide a more efficient regulatory outcome.

By way of example, the ACCC's two actions under Part XIB, Internet Peering and Churn could not have been efficiently addressed under either Part IV or Part XIC. Internet Peering (or interconnection of data networks other than over the PSTN) is not subject to declaration under Part XIC. As a result it is dubious as to whether a declaration inquiry and the associated processes would have been more timely or effective than the Part XIB anti-competitive conduct provisions, in resolving the issue, assuming an Internet Peering service could be adequately defined.

Similarly, when the issue of Churn arose in 1997, the inquiry into whether or not to declare local carriage services had not even commenced. Whilst it may have been possible to specify the terms and conditions of churn in the service description, this would have proven to be a much more resource intensive and time consuming exercise to resolve the issue. Whilst the investigation took 12 months to resolve, it was very early in the investigative experience of the ACCC. The introduction of indicative timeframes and the increasing experience of ACCC staff with these provisions mean that the time taken in current and future investigations will be reduced.

### *8. International support for an effects test*

The ACCC maintains that while the approach to prohibiting the abuse of market power does vary between jurisdictions, it cannot be said that the 'effects' test in Part XIB, section 151AJ is out of step with international norms.

### *9. ACCC's use of the media*

The ACCC rejects Telstra's claim of ACCC decisions being media driven. The ACCC notes that Telstra chose to make a series of unsubstantiated criticisms about the ACCC in the media, referencing its submission to the Productivity Commission, yet it took Telstra almost a fortnight to release the submission to the public. Further, the ACCC notes the ruling by Justice O'Loughlin for the Trade Practices Commission v Cue Design Pty Ltd and Anor which stated:

> *"I would have thought that a moderately worded, accurate news release, such as that published by the Commission in this case, serves a very useful purpose. To use the words of Smithers J it showed 'appropriate restraint in tone and content'. Without it, the media is left to make its own inquiries and compile its*

*own summaries. In doing that there is an increased risk that, by accident, inaccuracies might occur and greater harm could be done to a defendant."*[5]

[5] Australian Trade Practices Reports 1996, Volume 18, CCH Australia Limited, 1997,p 41-475

# Introduction

This submission constitutes the ACCC's response to the findings of the Draft Report in respect of Part XIB, in particular regarding anti-competitive conduct.

On a number of matters, including the information-gathering powers under Part XIB, on which the Productivity Commission proposed no change, and a number of jurisdictional matters, the ACCC has no objection in principle to the Productivity Commission's proposals.

The ACCC also notes recent initiatives by the Minister for Communications, Information Technology and the Arts to explore ways of improving the speed and certainty of telecommunications arbitrations. Senator Alston has proposed a number of amendments to the current arrangements relating to speeding up the arbitrations process. Several of these pick up recommendations made by the ACCC itself in submissions to the current Productivity Commission review of the telecommunications competition regulation.

The ACCC particularly welcomes the Minister's recognition that the legislative amendments will be an important component of any reforms. The limitations of current regime are not simply procedural ones and the ACCC notes that many industry participants have already expressed strong support for the proposals.

# 1. Timeliness

As noted by the Productivity Commission, many of the steps necessary under a Part IV investigation also apply under Part XIB: ie defining markets, assessing market power and assessing whether or not an unfair advantage has been taken of that power. As stated in previous submissions, despite these similarities, court action in the Federal Court is more likely to be required under Part IV to stop alleged anti-competitive conduct than under Part XIB.[6]

As stated in its previous submissions[7], the ACCC's telecommunications Competition Notice Guidelines (revised August 1999) issued pursuant to 151AP of the Act, detail the criteria used by the ACCC to determine whether to issue a competition notice. Consistent with these Guidelines, the ACCC's information paper on anti-competitive conduct in Telecommunications Markets (August 1999) specifies the ACCC's approach when considering whether a carrier or carriage service provider has breached the competition rule and contains indicative timeframes for issuing Part A competition notices and advisory notice[8]. While Part B competition notices are not expressly

---

[6] Productivity Commission, *Op Cit*, page 5.6

[7] ACCC August 2000 Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation, p 75; ACCC November 2000 Supplementary Submission to the Productivity Commission, p 41.

[8] ACCC Information Paper, August 1999, "Anti-competitive conduct in telecommunications markets", pp14-17

included in these indicative timeframes, the ACCC will seek to issue Part B notices as quickly as possible. In summary, the procedure and indicative time frames for issuing a Part A competition notice are set out in three phases:

1. A preliminary phase. This phase covers the time from when the ACCC becomes aware of a possible contravention and ends with the ACCC deciding whether it has a reason to suspect that a contravention of the competition rule has occurred or is occurring and whether to proceed with the investigation. It may then inform the complainant and interested parties of its decision. The indicative time frame for this phase is 30 days. Where the ACCC has reason to suspect that a carrier or carriage service provider has contravened, or is contravening, the competition rule, section 151AQ(1) directs the ACCC to act promptly in deciding to issue a competition notice.

2. Investigative phase. Where the ACCC forms a reason to suspect that a contravention of the competition rule has occurred, the ACCC may then further investigate the alleged anti-competitive conduct to determine whether it has a reason to believe there is a contravention of the competition rule. During this phase, the subject of the investigation and other interested parties may be notified of the investigation by the ACCC. The indicative time frame for this phase is 3 months.

3. Decision making phase. The ACCC decides whether it has reason to believe, in good faith and in reasonable grounds, that the carrier or carriage service provider has engaged, or is engaging, in anti-competitive conduct. The indicative time frame for this phase is 30 days. Where the ACCC forms the requisite reason to believe, it then has a further 30 days to determine whether it should use its discretion to issue:

- a Part A notice in response to that contravention of the competition rule;
- one or more Part B competition notices; and
- if a Part A competition notices has been issued, whether to issue an advisory notice.

As described above, the ACCC's aim is to investigate and reach a decision on whether it has a reason to believe that there is a contravention of the competition rule within three months from having formed the relevant reason to suspect. Circumstances of the case may allow a decision to be made earlier than this. Alternatively, if the matter is particularly complex or there are other reasons for delay (for example, where the subject of investigation continually modifies its conduct thus necessitating repeated re-assessment of whether the modified conduct may breach of the Act, or a delay in receiving necessary information from industry participants,) the three-month time frame may not be achievable. If this investigation stage is likely to extend beyond three months, the ACCC would expect to inform the complainant and interested third parties, and provide regular updates on the progress of the investigation.

The ACCC acknowledges this is potentially a 5 month process. However one of the strong advantages that Part XIB has over Part IV is the "gatekeeper" based administrative model versus the direct resort to judicial redress.

As discussed in previous ACCC submissions,[9] the ACCC considers that Part XIB generally provides, subject to certain limitations, a more expeditious mechanism than Part IV for addressing anti-competitive conduct in the telecommunications industry, the main reasons being delay and substantive law.

The ACCC's recent experience is that the time between instituting proceedings and obtaining final court orders is a minimum of 12 to 18 months and up to 6 years. These time frames are reflected in the proceedings brought by the ACCC in the Safeways and Boral cases.

ACCC investigations in the Safeways case commenced in late November 1995. The ACCC filed Federal Court proceedings under Part IV of the Act against Australian Safeway Stores Pty Ltd, trading as Safeway, and George Weston Foods Limited, trading as Tip Top bakeries in December 1996.

ACCC investigations in the Boral case commenced in October 1995. In March 1998, the ACCC filed Federal court proceedings under Part IV of the Act against Boral Limited and Boral Besser Masonry Limited.

The ACCC's recommendation as detailed in previous submissions, would provide a potential solution to improve the matter of timeliness under Part XIB proceedings. The ACCC proposes the development of an administrative model where the ACCC could prescribe standards of conduct having regard to competition and public interest criteria. Essentially, this would allow the ACCC to issue a notice which would require a person to engage in specified conduct, namely, conduct that would be expected of the carrier or carriage service provider in a competitive telecommunications market.

The administrative model is likely to meet the objectives for a telecommunications-specific competition regime in that it would allow the ACCC to respond swiftly to anti-competitive conduct. Although enforcement would still depend on court action, an effective outcome is more likely to be achieved as the ACCC could clearly set out required standards of conduct that are necessary to promote competition and the Court would be in a position to order compliance with these standards.[10]

The ACCC notes the final point made by the Productivity Commission under Option 2 to amend Part XIB , in particular, that: "The penalties for failure to provide information in the required timeframe under section 155 could be substantially increased".[11] The ACCC contends that this may well be a valid modification to the regime and may also have the effect of increasing timeliness for Part XIB case resolution.

---

[9] ACCC Submission to the Productivity Commission, August 20001, page 75; ACCC November 2000 Submission to the Productivity Commission, p41.

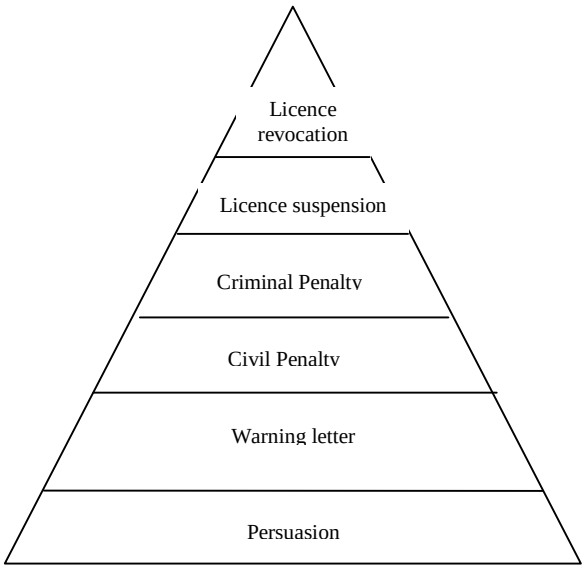
[10] ACCC August 2000 Submission to the Productivity Commission, pp 77-78

[11] Productivity Commission, *Op Cit*, page 5.42

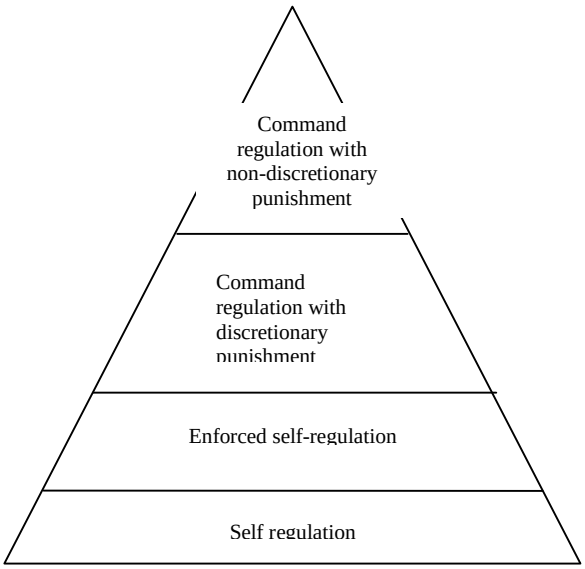
## 2. Deterrent effect on anti-competitive conduct

> *"…it is contended that the achievement of regulatory objectives is more likely when agencies display both a hierarchy of sanctions and a hierarchy of regulatory strategies of varying degree of interventionism…the greater the heights of tough enforcement to which the agency can escalate… the more effective the agency will be at securing compliance and the less likely that it will have to resort to tough enforcement. Regulatory agencies will be able to speak more softly when they are perceived as carrying big sticks."*[12]

Ayres and Braithwaite's study on *Responsive Regulation*, detailed a two pyramid system of enforcement and enforcement strategy.[13]




*Ayres & Braithwaite's enforcement pyramid*




*Ayres & Braithwaite's enforcement strategies pyramid*

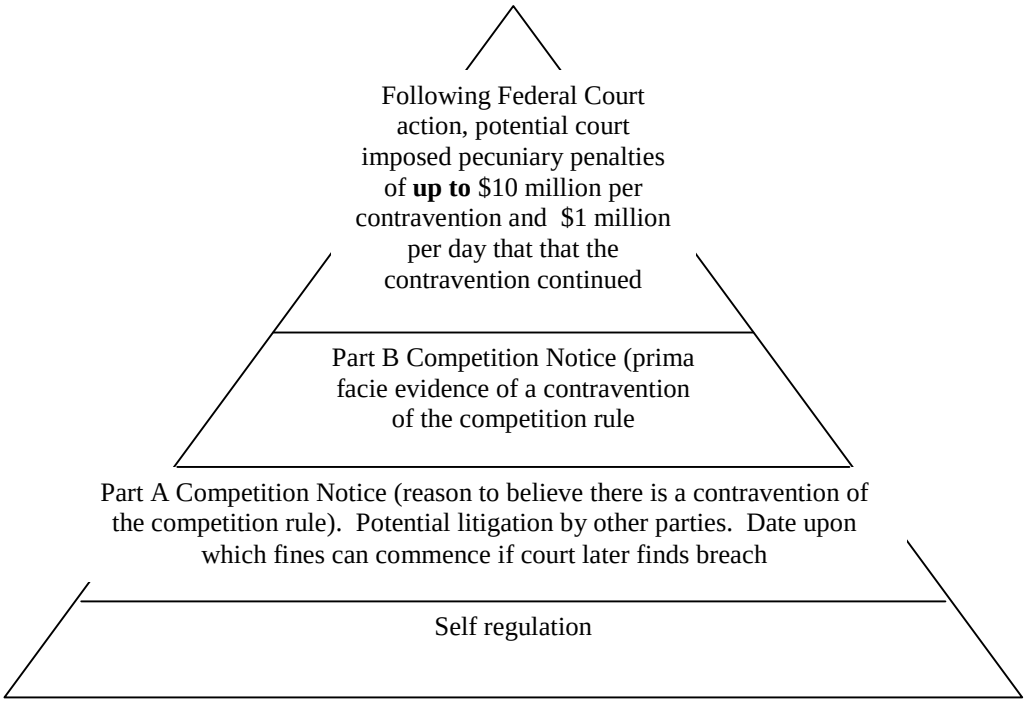
Part XIB provides a comprehensive step-by-step regulatory process – in effect a slightly modified and moderate version of a pyramid of enforcement, see diagram below. The key contention of this regulatory theory is that the existence of the gradients and peaks of the enforcement pyramid channel most of the regulatory action to the base of the pyramid – in the realms of persuasion and self regulation.[14]

---

[12] I Ayres & J Braithwaite *Responsive regulation: Transcending the deregulation debate*, Oxford University Press, New York, 1992, page 6

[13] *Ibid*, pp 35-39

[14] Ibid, *pp 35-39*




*Diagrammatical representation of Part XIB*

# 3. The distinctive nature of the telecommunications industry

The ACCC acknowledges that the Productivity Commission's Draft Report has dealt in part with the distinguishing characteristics of the telecommunications industry. The Productivity Commission has cited a number of characteristics that typify the telecommunications industry including:

- Lumpy and sunk investment;
- Scale and scope economies;
- Network externalities;
- Bottleneck facilities;
- Rapid structural and technological change; and
- Vertically integrated incumbents.

The ACCC agrees with the Productivity Commission's assessment that the above characteristics do not appear to be unique to the telecommunications industry, however

the combination of characteristics appears to be distinctive to and idiosyncratic of the telecommunications industry at this point in time.[15]

However, the Productivity Commission's suggestion that suitable amendment of Part IV may facilitate speedy action against alleged anti-competitive conduct for all industries has not been elaborated on. The ACCC therefore contends that what such "suitable amendments" would entail and what the implications of such change would be, would require greater analysis before reliance on the generic provisions could ensure that anti-competitive behaviour could be adequately addressed in this industry.

One of the other distinctive features of the telecommunications market which also warrants consideration is that of convergence. The Productivity Commission's Draft Report doesn't appear to address the matter of convergence in any great detail despite the Commission having regard to the "impact of new technologies and delivery platforms" in its terms of reference.

The ACCC contends that as the capacity of different types of infrastructure increase through digitisation and techniques such as DWDM (Dense Wave Division Multiplexing), current capacity constraints and bottlenecks may be alleviated. Increases in bandwidth capacity could have the effect of changing the focus away from an access to infrastructure and towards access to value-added services. It is however also possible that abuses of market power could result if one player owned all of the infrastructure and was not prepared to provide access to it on reasonable terms and conditions by other players.

Convergence also involves the merging of delivery platforms whereby the same service (eg email) can be delivered over a range of technologies (eg wireless to phone, text to set-top box or fixed dial-up modem). This may have the result of increasing the risk of regulatory arbitrage on existing declarations under Part XIC (which are to a large extent based upon circuit switched technology). In addition to the potential for regulatory arbitrage, convergence has the potential to skew investment incentives.

As new types of technologies emerge and applications can be delivered across a wide range of platforms, the importance of a rigorous anti-competitive regime increases. Vertical and horizontal integration between content creation, distribution of content, carriage of applications, ubiquitous infrastructure ownership and bundling of a range of retail products gives rise to potential abuses of market power. Given the specific nature of declarations under Part XIC and the desire for a technologically neutral regime, the retention of Part XIB is of increasing relevance in providing a basis for dealing with anti-competitive conduct in the communications market.

# 4. The incumbent's strategic market position

The incumbent dominates the telecommunications industry. Of the more than 70 telecommunications carriers, 130 telephony service providers and 720 internet service providers (ISPs), Telstra accounts for more than 90% of the telecommunications

[15] Productivity Commission, *Op Cit*, page 5.38

industry's profit. It has the largest market share in every industry segment: local telephony, long distance, mobile, data, ISP and pay television.[16]

Drying up of capital markets for telecommunications companies will constrain investment and make Telstra's position even stronger. This is expected to slow down investment on some facilities, making Telstra's competitors increasingly reliant upon Telstra for interconnection.

According to some market analysts, Telstra's position is more powerful today than it was five years ago. This is due to Telstra's vertical integration across the telecommunications and media sectors which increases its market power with respect to its competitors in niche markets who rely on Telstra in some upstream or downstream market and the lack of viable competitors in the value chain.[17]

# 5. Effect on investment

The ACCC contends that the anti-competitive conduct provisions in Part XIB have not damaged investment incentives in the telecommunications industry.

According to the DCITA report "Telecommunications Carrier Industry Development Plans Progress Report: 1999-2000", carriers together reported $8.6 billion in capital expenditure during 1999-2000. Total capital expenditure between 1 July 1997 and 30 June 2000 amounted to $19.7 billion.

| Telstra communications assets and capital expenditure | | | | | |
|---|---|---|---|---|---|
| | **1996 $m** | **1997 $m** | **1998 $m** | **1999 $m** | **2000 $m** |
| Communications asset value (at cost) | 20839 | 22966 | 25169 | 27302 | 29586 |
| Capital expenditure for the year | 3904 | 4248 | 3741 | 4274 | 4705 |

Source: CRU, based on Telstra Annual Reports

Telstra's level of capital expenditure has remained relatively constant in the years following deregulation.

Telstra's communications assets had a book value (at cost) of approximately $30 billion at the end of June 2000.

Since the introduction of competition, Telstra's earnings before interest, tax, depreciation and amortisation have increased from 40.5% to 50.5%.[18]

---

[16] Ferguson A, *Dial T for Tyrant, BRW,* 8 June 2001, page 46

[17] *Ibid,* page 52

[18] Ferguson A, *Op Cit* page 46

A recent BIS Shrapnel report commissioned by the ACCC found that the telecommunications industry in Australia generated revenues of A$26 billion pa in 1999. The industry as a whole has been growing at a rate of 15% a year with the market size reaching A$30 billion by the year 2000.

The cellular mobile phone market has been growing at an impressive rate of 33% for the past year, with a cellular penetration rate reaching 54% compared to fixed teledensity of 60% in the year 2000.

The data transmission component of the sector is a significant area of growth which is estimated to be growing at almost 30% per annum. An independent report by KPMG Consulting (2000) has estimated that the total accessible Australian market for fibre optic cabling in metropolitan and regional centres will be worth around A$3.8 billion in 2000/2001.[19]

Strong enforcement provisions also provide new entrants with a degree of comfort in making substantial capital investments. Further detail regarding key telecommunication indicators in terms of market size and user base in Australia can be found at **Attachment 1.**

# 6. Claim of "regulatory overreach"

The ACCC believes that regulatory overreach has not occurred under Part XIB. Regulatory overreach implies that the regulator has been over-zealous or more rigorous than is reasonably necessary. The very fact, as oft-noted by the Productivity Commission, that no court action to date has been pursued since the 1999 reforms demonstrates, arguably the reverse.

As noted by the Productivity Commission, "there have been very few anti-competitive conduct cases under Part XIB, with none since the 1999 amendments came into effect"[20]. Since both the Productivity Commission and Telstra have failed to provide examples where the ACCC has engaged in "regulatory overreach", it is difficult to ascertain the basis of these conclusions.

The ACCC maintains that the lack of court action is by no means an indication of ineffectiveness of the provisions but one of sound and fair use of the provisions by the regulator. Since 1997 there have been over 130 matters received by the ACCC alleging anti-competitive conduct. Of these matters, 15 reached the "reason to suspect" threshold. This represents less than 11% of the matters raised – hardly "regulatory overreach". A list of these investigations by type, to hide the identity of the parties concerned, is at **Attachment 2.** The lack of court action that has followed the inquiries lends additional weight to the ACCC's rejection of the Productivity Commission's assertion that Part XIB has entailed "regulatory overreach".

---

[19] Telecommunications Infrastructures in Australia 2001, BIS Shrapnel, pages 8-9

[20] Productivity Commission, *Op Cit*, page 5.40

The Productivity Commission has outlined its concerns regarding potential "Type 1" and "Type II" errors. The ACCC maintains that the very design of Part XIB, with a 3-stage process alleviates concern about potential error.

First, the ACCC would need to err in a decision to issue a Part A competition notice following a "reason to suspect". Second, the ACCC would have to err if it issued a Part B notice. Third, if the case proceeds to litigation, the potential for error would lie with the judiciary. The ACCC's success rate in litigation has been more than 90%.

Any potential overreach in the issue of penalty and damages is a matter for the judiciary and subject to appeal. There were no penalties, fines or costs for telecommunications matters during 1999/00.

However, the ACCC also contends that the existing potential pecuniary penalties contained in the Act, in particular that if the Federal Court is satisfied that a person has contravened the competition rule, it may order:

- pecuniary penalties up to $10 m for each contravention and $1 m for each day that the contravention continued;[21]
- injunctions;[22]
- information disclosure and/or advertisements;[23]
- recovery of loss or damage;[24] and
- other compensation orders.[25]

These remedies continue to remain valid and an important deterrent for anti-competitive behaviour.

Professor Fels said in a recent speech to the Australian Law Reform Commission:

> *"Since 1992, the prescribed pecuniary penalties for a contravention of Part IV of the Trade Practices Act have been among the highest in Australian law, and courts have been willing to impose increasingly severe penalties for the most serious acts of collusion and anti-competitive conduct. Yet we must ask ourselves whether these penalties will be an effective deterrent against such behaviour into the future.*
>
> *Australia's civil penalty regime is beginning to look just a little weak in comparison with other countries. Several of our major trading partners, including Japan, the U.S., South Korea and Canada, impose criminal sanctions, including imprisonment, as a penalty for hard core cases of collusion. Other jurisdictions, including New Zealand and the E.U., provide for much higher financial penalties that are linked to the unlawful gain or turnover of the offender.*

---

[21] Section 151BX. *Trade Practices Act 1974*
[22] Section 151CA *Trade Practices Act 1974*
[23] Section 151CB *Trade Practices Act 1974*
[24] Section 151CC *Trade Practices Act 1974*
[25] Section 151CE *Trade Practices Act 1974*

> *The relative leniency of Australia's penalty regime leaves us exposed to enormous risks in the global economy. Globalisation, technological innovation, deregulation and lower barriers to trade and investment have opened our markets to increased competition from multinational firms. While the entry of such firms into Australian markets can promote the benefits of increased competition, their entry can be equally damaging if it involves cartel activity, either on a global scale or targeted at Australian markets. Because Australian markets are comparatively small by international standards and tend to be characterised by high levels of concentration, they are particularly vulnerable to the detrimental effects of hard core cartels. It is vital to the future integrity of Australian markets that these multinational firms, which operate in major foreign markets with much tougher penalties, do not come to see Australia as being soft on serious hard core collusion and anti-competitive conduct."* [26]

The pecuniary penalties that the Federal Court may order are consistent with potential fines available under some of the regulatory regimes of Australia's trading partners. For example, the Chairman of the US Federal Communications Commission, Michael Powell, recommended to Congress in May 2001 that it increase the forfeiture level imposed on common carriers violating local competition provisions of the Telecommunications Act of 1996 from the current statutory limit of US$1.2 million per violation to at least US$10 million per violation.[27] Furthermore, it is important to note that these forfeiture powers are imposed by the Agency itself and not the court.

Ayres and Braithwaite[28] noted the importance of having access to a range of sanctions. Small-scale punishment of each infringement, by fines described as "fleabites", is the least effective means of regulation since it reduces organisations' willingness to do the right thing, without the regulator having access to effective threats or sanctions. One single regulatory response cannot be assumed to be effective for all regulated entities. It is no longer assumed that large pecuniary penalties are the most effective deterrent. The Commission has been told repeatedly that the effectiveness or threat of a sanction is affected by the size of the organisation, its power and the corporate culture. Negative publicity may prove the most effective sanction, depending on the size of the entity.[29]

Evidence of the ACCC's prudence is illustrated by other activities such as mergers, for example, over the past few years the ACCC had rejected only a small fraction of those mergers it had reviewed. In 1997-98 the ACCC reviewed 176 mergers and opposed

---

[26] Professor Allan Fels, Speech to the Australian Law Reform Commission Conference, Penalties: Policy, and Principles in Government Regulation, 9 June 2001

[27] http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0116.html, accessed 25 July 2001

[28] I Ayres & J Braithwaite, *Op Cit*, page 25

[29] ALRC BACKGROUND PAPER 7 - REVIEW OF CIVIL AND ADMINISTRATIVE PENALTIES IN FEDERAL JURISDICTION, http://www.austlii.edu.au/au/other/alrc/publications/bp/7/bp7.html#Heading5, accessed 26 July 2001

five, in 1998-99 it reviewed 185 and opposed seven and in 1999-2000 it reviewed 208 and opposed four. The figures for 2000-2001 have yet to be confirmed.

A recent Australia Law Reform Commission background paper noted the following:

> *"Discretion is a useful tool mitigating the rigidity and inflexibility of legal rules, since even the `best-drafted laws cannot escape some degree of incompleteness, ambiguity, and occasional unfairness when applied to a large and diverse population.' It enables decision-makers to particularise their responses to individual or unanticipated circumstances. Some areas of enforcement arguably involve `a large core element of unavoidable discretion' to allow appropriate responses to continuously changing technical, economic and political environments."* [30]

Other statutory agencies, such as the Australian Securities and Investment Commission (ASIC) also have a degree of flexibility and discretion at their disposal when imposing sanctions. As one ASIC Commissioner commented:

> *"We will use the right tool to achieve the best outcome. This may include criminal prosecutions, civil applications and administrative banning, which are part of ASIC's set of enforcement options, but it may also include other tools which we think may be equally effective, in the right circumstances. In particular, it seems to me that a pro-active stance to prevent misconduct or breaches of legislation, by education and consumer alerts, may sometimes be more effective and reach a wider audience more cheaply and effectively, than a conviction or civil order."*[31]

# 7. Action under Part IV and Part XIC

The ACCC rejects the notion that relevant regulatory action can be pursued under either Part XIC or Part IV. For a service to be subject to regulatory scrutiny under Part XIC, it must be a declared service. For relevant action to be pursued under Part IV, direct judicial intervention is required. The ACCC maintains that the intermediate administrative processes that can be utilised under Part XIB before judicial processes are invoked provide a more efficient regulatory outcome.

By way of example, the ACCC's two actions under Part XIB, Internet Peering and Churn could not have been efficiently addressed under either Part IV or Part XIC. Internet Peering (or interconnection of data networks other than over the PSTN) is not subject to declaration under Part XIC. As a result it is dubious as to whether a declaration inquiry and the associated processes would have been more timely or effective than the Part XIB anti-competitive conduct provisions, in resolving the issue, assuming an Internet Peering service could be adequately defined.

---

[30] ALRC, *Ibid*, pp 9 –11.

[31] *Ibid*, page 18

Similarly, when the issue of Churn arose in 1997, the inquiry into whether or not to declare local carriage services had not even commenced. Whilst it may have been possible to specify the terms and conditions of churn in the service description, this would have proven to be a much more resource intensive and time consuming exercise to resolve the issue. Whilst the investigation took 12 months to resolve, it was very early in the investigative experience of the ACCC. The introduction of indicative timeframes and the increasing experience of ACCC staff with these provisions mean that the time taken in current and future investigations will be reduced.

Part XIC relies on an administrative model. The ALRC argues where the agency uses a conciliatory style, relying heavily on negotiation, these processes are private and, although they may be more efficient and less costly, there is less accountability built in to the process.[32] Part IV relies on judicial consideration of any alleged breach of the Act. The ALRC argues that certain regulatory responses are transparent, whether by publicity on their website or their public adjudications before a court or tribunal. These processes will often cost more but lend themselves to greater accountability.[33]

Following the 1999 amendments, Part XIB is a mixture of both Part XIC and Part IV, with the issue of a Part A notice reliant on administrative action and Part B relying on judicial consideration.

Telstra allege in its submission that "the cases which have arisen are very few, appear minor and would arguably have been more appropriately dealt with under Part XIC". The ACCC contends that many of the complainants would disagree that their grievances could be dismissed as minor, particularly where considerable investment in infrastructure has taken place. For example, one former complainant in a Part XIB investigation had vendor financing of amounts upwards of $300 million, and had substantial backing to establish a nation wide voice and data network to provide a wholesale services to a range of ISPs and voice resellers, and was seeking to offer a wholesale data product that would directly compete with Telstra's offerings. Similarly, another complainant has invested over of $10 million, during the course of its negotiations with Telstra. These investments can hardly be dismissed as "minor".

# 8. An effects test is out of step with international practice

The ACCC disagrees with the proposition that:

> *"Australia alone explicitly incorporates an effects test, including likely effect, devoid of purpose, into its approach to anti-competitive conduct regulation of telecommunications markets."*

Any violation of ss 45, 45B, 46, 47 or 48 in a telecommunications market will amount to a breach of the Competition Rule under s 151AK (s 151AJ(3)). Section 45 prohibits contracts, arrangements or understandings which have the purpose, effect or likely

---

[32] ALRC, *Op Cit*, page 18

[33] *Ibid*, page 18

effect of substantially lessening competition. Corresponding laws in other jurisdictions also generally target purpose as well as effect.

The more pertinent issue raised by the Productivity Commission is the form of anti-competitive conduct described in s 151AJ(2), namely, where a carrier or carriage service provider with a substantial degree of power in a telecommunications market takes advantage of that power with the effect or likely effect of substantially lessening competition in a telecommunications market. This can be contrasted with s 46, which prohibits a corporation with a substantial degree of market power taking advantage of that power for one of three proscribed purposes.

At p 5.12-13 the Productivity Commission, referring to laws in New Zealand, Canada, Europe and the U.S. relating the abuse of a dominant position and monopolisation, noted that most of these laws involve a purpose test, suggesting that the test in s 151AJ(2) was inconsistent with international antitrust laws. However, closer examination of the way in which many of these provisions have been interpreted demonstrates that this is not the case.

In Canada, s 79(1) of the Competition Act provides that:

> *"where, on application by the Director, the Tribunal finds that*
>
> *(a) one or more persons substantially or completely controls, throughout Canada or any area thereof, a class or species of business,*
>
> *(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and*
>
> *(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,*
>
> *the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice."*

Section 78 sets out a non-exhaustive list of acts that can amount to "anti-competitive acts" for the purpose of paragraph (b). While it has been held that an anti-competitive act is one that involves an anti-competitive purpose,[34] in subsequent decisions, the Competition Tribunal:

> *"appeared to turn the purpose test into an effects test by stating that corporations are deemed to have intended the effects of their conduct:*
>
> *Proof of the subjective intention on the part of a respondent is not necessary in order to find that a practice of anticompetitive acts has occurred ... [in the*

[34] *Director of Investigation and Research v. NutraSweet Co* (1990) 32 C.P.R. 1 (Comp. Trib.) at 34.

*context of section 79] corporate actors and individuals are deemed to intend the effects of their actions."*[35]

In the European Union, Article 82 of the EC Treaty[36] provides (in part) that:

> *"Any abuse[37] by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."*

In deciding what amounts to abuse or abusive exploitation of a dominant position, the European Court has held that:

> *"Article 86 covers practises which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance,* ***have the effect of hindering the maintenance or development of the level of competition still existing on the market****".*[38] ***(emphasis added)***

In the United States, s 2 of the Sherman Act, which prohibits monopolisation, has, in prior cases, been interpreted as requiring an element of wilfulness or intent. However, there is also a substantial line of authority which suggests that, in deciding whether a company has abused its monopoly power, the issue is not the intent of the defendant, but rather whether the defendant has used its monopoly power to exclude competition without a legitimate justification. This has been explained as follows:

> *"in defining the behavioural component of the monopolization offence, one must concentrate on conduct and define the characteristics of conduct that are undesirable. Despite loose language this is in fact what the courts have attempted to do. They have focussed on conduct while talking about intent."*[39]

By way of example in relation to telecommunications specific regulation, s 7.2 of the Telecom Competition Code of Singapore provides (in part) that:

---

[35] Davies, Ward & Beck "Competition Law of Canada" Vol 1, 2000, p 9-38, citing *Director of Investigation and Research v. Laidlaw Waste Systems Ltd* (1992) 40 C.P.R. (3d) 289 (Comp. Trib.) at 342-343.

[36] Formerly Article 86 of the Treaty of Rome.

[37] Several of the versions of this text in languages other than English use the term "abusive exploitation" rather than "abuse".

[38] *Nederlandsche Banden-Industrie Michelin v. Commission* (322/81) [1983] E.C.R. 3461, paragraph 70.

[39] Areeda & Hovenkamp "Antitrust Law", Vol III (Rev. Ed.) Little Brown & Co, 1996, ¶651a

> *"A Dominant Licensee must not use its position in the Singapore telecommunication market in a manner that unreasonably restricts competition."*

Rather than being confined to purpose, this provision imports a test based on the effect on competition of an abuse by a Dominant Licensee of its position.

It is clear from the above that, while the approach to prohibiting the abuse of market power does vary between jurisdictions, it cannot be said that the "effects" test in s 151AJ is out of step with international norms.

# 9. ACCC's use of the media

Telstra allege in its most recent submission that the ACCC outcomes appear to be largely media driven. Telstra cite the example of COMindico in support of its claim. The ACCC maintains that no public comment was made directly on the matter under investigation by the ACCC - it is not a matter for the ACCC to direct companies to release, or refrain from releasing media statements.

The ACCC continues to abide by all of the confidentiality clauses in respect of arbitrations and negotiations. Telstra has failed to cite a concrete example of the ACCC's alleged conduct in the media. In addition, Telstra chose to make a series of unsubstantiated criticisms about the ACCC in the media, referencing its submission to the Productivity Commission, yet it took Telstra almost a fortnight to release the submission to the public.

Finally, the ACCC notes the ruling by Justice O'Loughlin for the Trade Practices Commission v Cue Design Pty Ltd and Anor which stated:

> *"I would have thought that a moderately worded, accurate news release, such as hat published by the Commission in this case, serves a very useful purpose. To use the words of Smithers J it showed 'appropriate restraint in tone and content'. Without it, the media is left to make its own inquiries and compile its own summaries. In doing that there is an increased risk that, by accident, inaccuracies might occur and greater harm could be done to a defendant."*[40]

[40] Australian Trade Practices Reports 1996, Volume 18, CCH Australia Limited, 1997,p 41-475

**Attachment 1**

## Key Telecommunication Indicators in Australia (1996-2000)

| | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|
| **TELECOMMUNICATION SERVICE REVENUE** | **A$18.3bn** | **A$20.0bn** | **A$22.5bn** | **A$26bn** | **A$30bn** |
| **Service Revenue (by market)** | | | | | |
| Local telephone service | A$3.3bn | A$4.0bn | A$4.5bn | A$4.7bn | A$5bn |
| Long distance telephone service | A$4.3bn | A$4.5bn | A$4.7bn | A$4.9bn | A$5.0bn to A$5.5bn |
| International call service | A$1.6bn | A$2.0bn | A$2.2bn | A$2.4bn | A$2.5bn |
| Cellular service | A$3.3bn | A$4.0bn | A$5.4bn | A$6.5bn | A$7.2bn |
| Paging service | A$0.1bn | A$0.1bn | A$0.1bn | A$0.1bn | A$0.1bn |
| Value Added service | A$3.0bn | A$3.0bn | A$5.1bn | A$6.0bn | A$7-A$7.5bn |
| **Service Revenue (by service)** | | | | | |
| Fixed voice | A$10.0bn | A$10.2bn | A$10.8bn | A$11.2bn | A$12.0bn |
| Mobile | A$3.32bn | A$4.0bn | A$5.4bn | A$6.5bn | A$7.2bn |
| Data | A$2.7bn | A$3.2bn | A$4.2bn | A$5.3bn | A$7.0bn |
| **TELECOMMUNICATION USER BASE (TELEDENSITY)*** | **51%** | **53%** | **55%** | **57%** | **59%** |
| **User Base (by service)** | | | | | |
| Telephone (fixed) | 9.3m | 9.5m | 9.9m | 10.4m | 10.7m |
| Cellular mobile phone | 4.5m | 5.2m | 5.9m | 7.7m | 9.3m |
| Pager | 0.30m | 0.27m | 0.25m | 0.22m | 0.20m |
| Internet Access (household) | 0.3m | 0.5m | 1m | 2m | 2.7m |
| **Fixed Telephone User Base (by segment)** | | | | | |
| Residential Metro | 4.1m | 4.2m | 4.4m | 4.6m | 4.8m |
| Residential Country | 2.4m | 2.4m | 2.5m | 2.6m | 2.7m |
| Business Metro | – | 1.8m | 1.9m | 2.0m | 2.1m |

| | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|
| Business Country | – | 0.9m | 1.0m | 1.05m | 1.1m |
| Business SME | – | 2.4m | 2.5m | 2.7m | 2.8m |
| Business Corporate | – | 0.36m | 0.37m | 0.39m | 0.42m |

*Source:* BIS Shrapnel, Productivity Commission, ABS and Paul Budde

*Teledensity = fixed telephone penetration per 100 population.

**ATTACHMENT 2**

**OVERVIEW OF PART XIB MATTERS DEALT WITH BY ACCC**

| Number | Summary of Trader's Alleged Conduct | Complainant |
|---|---|---|
| 1 | ADSL - provision of wholesale services/delayed access/ first mover advantage | Trader- x33 |
| 2 | Bundling of services and carrier preselection | Trader |
| 3 | Bundling of local, long distance and fixed to mobile calls | Trader- x3 |
| | " " " " | Consumers- x5 |
| 4 | Mobile phone retailer arrangements- refusal to deal | Trader |
| 5 | Internet Peering Model- interconnection | Trader |
| 6 | Barriers to entry in Internet domain name administration | Trader |
| 7 | ADSL and enforcement of acceptable user policies | Consumers- x 650 |
| 8 | Disconnection of ISPs for non-payment of disputed amounts | Traders- x7 |
| 9 | ISP network quality and damage to Traders | Ministerial |
| 10 | Monthly review of tariff filings | ACCC initiative |
| 11 | Preferential access given to certain ISPs | Trader |
| 12 | Predatory pricing- rural ISPs | Traders-x25-30 |
| 13 | Call Diversion Number Only service withdrawal- ISPs (2001) | Traders-x3 |
| 14 | Refusal to deal- PSTN Interconnect | Traders-x6 |
| 15 | Phonecards- access | Trader |
| 16 | Calling codes-third line forcing | Trader |
| 17 | Content protection for Recordable Media | Trader |
| 18 | Unreasonable delay in the supply of switchports/interconnection capacity | Trader- x2 |
| 19 | Filing of non-Standard Offerings/Tariffs | ACCC initiative |
| 20 | Call Diversion Number Only service withdrawal (2000) | Trader |
| 21 | Procedures for non-network commercial churns- local and long distance market | Trader |
| 22 | Payphones- access to payphone line | Trader |
| 23 | Differential rates charged for same services- STD calls | |
| 24 | Threatened number re-routing-ISPs | Trader |
| 25 | Refusal to provide telephone override facilities- phones | Consumer |
| 26 | Refusal to provide connection at a reasonable price and unreasonable delay in connection | Trader |
| 27 | Refusal to issue requisite numbers | Trader |
| 28 | Refusal of access to international call termination | Trader |
| 29 | Overpricing of ISDN service | Consumer |
| 30 | Refusal to enter dealership arrangement- 3rd line force | Trader |
| 31 | Refusal to deal- caller line identification | Trader |
| 32 | Overcharging- mobile calls and satellite services | Consumer |
| 33 | Inferior level of service by trader for corporate clients compared to domestic client | Consumer |
| 34 | Requiring onerous confidentiality agreement before negotiating supply terms | Trader |
| 35 | Refusing to approve use of short dial number for access to Trader's switch | Trader |
| 36 | Poaching customers and attempting to eliminate Trader | Trader |
| 37 | Unreasonable delay- line installation | Trader |
| 38 | Unreasonable delay- provisioning requests within a reasonable time frame | Trader |

| | | |
|---|---|---|
| 39 | Refusing access to preselection function | Trader |
| 40 | Trader refused to provide modem link- PABX, mobile connections | Trader |
| 41 | Refusing to provide override capacity for long distance calls | Consumer |
| 42 | Threatened withdrawal of supply of Permitted Attachment Private Lines service used to provide network services | Trader |
| 43 | Unreasonable delay- supply of provisioning services | Trader |
| 44 | Unreasonable delay- supply of services to the complainant's nominated carrier | Consumer |
| 45 | Router AS numbers used to eliminate a Trader | Trader |
| 46 | Delaying the provision of a macrolink for internet data | Trader |
| 47 | Offering flat rate internet access only to Melb, Brisbane and Sydney but not SA or WA. | Trader |
| 48 | Unlawful changing of terms of pricing agreement | Trader |
| 49 | Differential and discriminatory pricing for mobile calls made from payphones | Consumer |
| 50 | Unreasonable delay- provision of ISP connections | Trader |
| 51 | Refusing to negotiate reciprocal interconnection agreement | Trader |
| 52 | Refusing access to services necessary for competition in GSM messaging market | Trader |
| 53 | Unlawfully changing the terms of PAPLs | Trader |
| 54 | Churning phones illegally to disrupt a Trader's business | Trader |
| 55 | Cross subsidising trials of free emails (only charging for local call) and discriminating against complainant | Trader |
| 56 | Forcing complainant to use a specified browser- tying | Consumer |
| 57 | Hindering installation of payphones at shopping centres to diminish competition | Trader |
| 58 | Refusing complainant access to Integrated Public Number Database without justification | Trader |
| 59 | Directing clients not to use another Trader's service | Trader |
| 60 | Restricting complainant from accessing services from competing suppliers of network connections and small office telephone systems | Trader |
| 61 | Unlawful locking of access to an ISP | Trader |
| 62 | Preselection of number and prefixes for mobiles | Trader |
| 63 | Restricting complainant from using other carriers for an unreasonably long time as part of contractual conditions | Consumer |
| 64 | Unreasonable delay- provision of OnRamp ISDN connection | Trader |
| 65 | Unreasonable delay- negotiation of a dispute resolution procedure which is affecting Trader's business | Trader |
| 66 | Charging a Trader retail rates for supposed wholesale calls and obstructing installation of its phones | Trader |
| 67 | Offering discounts on a discriminatory basis | Consumer |
| 68 | Reducing the volume discounts of a particular product to onsellers and simultaneously reducing the price of Trader's own in-house competing product | Trader |
| 69 | Barring STD and long distance services once a churn occurs | Trader |
| 70 | Dispute about the provisioning of ISP equipment | Trader |
| 71 | Unreasonable delay- installation of new lines for internet access | Trader |
| 72 | Charging a wholesale rate higher than retail rate for international calling card services | Trader |
| 73 | Unreasonable delay- installation of cabling equipment | Trader |
| 74 | Threatening to disconnect lines and refusing to provide connection | Trader |
| 75 | Barring call override facilities | Consumer |
| 76 | ISP unlawfully decreasing call costs | Trader |
| 77 | Offering retail instead of wholesale rates and unreasonably long contracts | Trader |
| 78 | Refusing to allow Traders' Point of Presence | Trader |
| 79 | Hindering Trader's use of lines whilst promoting own competing product | Trader |

| | | |
|---|---|---|
| 80 | Tying the provision of an internet credit card validation service with the services of a specified ISP | Consumer |
| 81 | Charging unreasonably high rates for establishing a server | Trader |
| 82 | Agreement between pay TV providers to divide up the pay TV market | Consumer |
| 83 | Discriminating activation of telephone services | Consumer |
| 84 | Threatening to increase local call charges if consumer refused to accept all services from trader- tying | Consumer |
| 85 | Refusing to provide sufficient numbers of ports | Consumer |
| 86 | Unlawfully charging for back channel data- peering | Trader |
| 87 | Stopping roll out of cable and lack of broadband choice | Consumers-x30-40 |
| 88 | ADSL pricing- uncompetitive | Consumers-X20 |
| 89 | Unreasonable delay- ADSL provisioning | Trader |
| 90 | Refusing to offer static IP addresses for ADSL product | Trader |
| 91 | Prevent complainant from acquiring services from other carriers | Trader |
| 92 | Unreasonable delay- ADSL connection | Consumer |
| 93 | Unreasonable delay in provision ADSL product to Traders | Consumer-x2 |
| 94 | Pricing of wholesale ADSL | Consumers- x2 |
| 95 | Bundling of ADSL with long distance calls | Consumers- x4 |
| 96 | Bundling of services | Consumer- x2 |
| 97 | Refusal to provide unrestricted roaming access to CDMA network | Trader |
| 98 | Preventing access to pay phone line and SmartCard technology | Trader |
| 99 | Nominating particular providers as having ‘privileged’ status | Trader |
| 100 | Unreasonable delay in provision of services | Potential Trader |
| 101 | Unlimited internet service offerings in the rural regions | Traders – x3 |
| 102 | Pricing difference between wholesale and retail prices | Potential Trader |
| 103 | ISP price discrimination between wholesale and retail rates | Trader - x2 |
| 104 | Refusing to provide interconnect arrangements to potential Trader | Potential Trader |
| 105 | Lack of competition in the provision of internet connection | Member of Parliament |
| 106 | Anticompetitive conduct by incorrectly charging customers of competing ISP | Trader |