Productivity Commission Review of Telecommunications Competition Regulation

Outline of AAPT Limited submissions to Public Hearing, 14 May 2001

1 AAPT's general comments

This submission is made to the Productivity Commission (**Commission**) Review of Telecommunications Competition Regulation Draft Report (**Draft Report**) by AAPT Limited. The submission is an outline of arguments which will be elaborated at the Commission's Public Hearing to be held on 14 May 2001.

A more detailed version of the submission will be submitted following the Hearing.

1.1 Overview of AAPT's submissions to date

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

(a) competition has to broaden and deepen;

(b) access competition leads to infrastructure 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 has argued throughout the Commission's inquiry that there is no evidence of investment being dampened by the telecommunications competition law provisions and the Draft Report supports that conclusion. Further, AAPT notes that total investment expenditure has historically declined when significant changes have been made to the regulatory regime.

The Commission in its report has rightly identified some of the difficulties in the administration of the regime, and the extent to which it may be susceptible to gaming. Despite these limitations, AAPT's view is that the regime is indeed working. AAPT notes the Commission's conclusion in the Draft Report that competition in telecommunications is not mature.

1.2 The Commission's task

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 are justified. In order to do so, the Commission must ensure the benefits of proposed changes do not outweigh the costs of implementing those changes.

Overall, AAPT is concerned that many of the fundamental reforms the Commission suggests (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 assessment of their effectiveness. In AAPT's submission, the Commission needs to have regard to whether the conditions which gave rise to the provisions are materially different such that the amendments proposed are justified.

2 Outline of AAPT submissions on Recommendations

2.1 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]

AAPT does not consider repeal of Part XIB is justified at this time for the following reasons:

(a) competition in the relevant markets is not well enough established to revert to the general competition regime in Part IV;

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

(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.

The administrative arrangements which support Part XIB (competition and advisory notices and exemption orders) are likely to reduce the chances of regulatory error by giving opportunities for carriers to modify conduct or provide information to answer ACCC's concerns.

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 the Commission notes, no party has sought an exemption from section 151AJ on public benefit grounds. This history suggests to 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.

In AAPT's view, those seeking repeal of the regime have not demonstrated either that the current regime is not working 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 regulator, end-user groups and all industry participants other than Telstra support the retention and enhancement of Part XIB.

The Commission needs to consider in its recommendation on 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.

2.2 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]***

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

AAPT questions whether there is a case for a change to the objects clause as proposed by the Commission. Merely aligning the objects clause with that in Part IIIA is not a sufficient benefit to outweigh the costs of narrowing the focus to a theoretical notion of economic efficiency and the uncertainty which will result from changing the statutory criteria the ACCC must apply in declaring services, assessing undertakings and determining access arbitrations.

In AAPT's view, the LTIE test appropriately balances the legitimate interests of access seekers, access providers and end-users. The Commission's suggestion that the test promotes the interests of a "particular sub-group" risks understating the importance of the "long-term" element of the LTIE. 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.

AAPT is also concerned that consequential amendments to the operative provisions of Part XIC which refer to the LTIE (particularly sections 152AH and 152CR) are likely to create confusion and inconsistencies in the administration of the regime.

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 uncertainty and inflexibility.

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 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 provisions and revocation without a public inquiry where the service has expired or is of residual importance.[1]

As Telstra argues in its submission, one advantage of sunset provisions is that they will provide certainty to industry participants, allowing them to plan build/buy decisions. For the same reason, AAPT submits that the sunset provision be accompanied by a provision requiring that the declaration not be revoked within a specified period.

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]

AAPT agrees with the Commission's recommendation for the retention of a telecommunications specific access regime. However, AAPT questions whether there is a point to having a sector-specific regime which does not take into account sector-specific principles, such as any-to-any connectivity.

In its earlier submissions, AAPT recommended some reforms to the access regime, in particular the introduction of incentives to commercial negotiation of access arrangements.[2] AAPT's proposals 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);

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1 AAPT understands that the sunsetting provisions require a review of the declaration, rather than require its automatic expiry.

2 See p.16 – p.21 of AAPT's second submission.

(d) introducing reference prices; and

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

At the first hearing AAPT advocated a roundtable on improving processes. A discussion paper based on submissions to the Inquiry that could be used for such a roundtable has been prepared and included as Annexure A.

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 noted in its earlier submissions,[3] AAPT agrees that the ACCC should remain the regulator for telecommunications-specific competition issues as it has developed an effective working relationship 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.

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]

This is discussed under 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]

The TAF has not performed well in creating model terms and conditions – not surprising given the conflicting economic interests of its members and the need for unanimity in its recommendations. It's role in recommending services for declaration is arguably redundant. There is still a role for industry representative bodies to provide useful guidance on interoperability issues and to make recommendations to the ACCC. This process should be aligned to that for industry codes under Part 6 of the *Telecommunications Act 1997.*

[3] See for example p.37 of AAPT's Initial submission.

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 reasoning on this point. However, in the normal course of events, AAPT considers the power to refuse an interim determination is an important protection against commercial risk, as discussed in its earlier submissions.

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 agrees that there may be situations in which section 152CN could be used strategically to undermine the arbitration process. However, the solution presented in the Draft Report may also be subject to gaming by granting one party the ability to tie the other into an arbitration. 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 earlier submissions, AAPT proposed the introduction of class arbitrations for the following reasons:

(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.[4]

[4] See p.19 of AAPT's second submission.

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 Commission's recommendation.

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 supports the Commission's recommendation.

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 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. 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. For the purposes of enabling payment of interest, regard should be had to any contractual terms between the parties for determining interest in relation to disputed amounts. In addition, the TPA should be amended at 152DNA or 152CR to ensure that the Commission can take into account the requirement to pay interest in determining an access dispute.

2.3 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 has an overriding concern that the economic theory and practice which supports determinations on pricing principles is dynamic and fixing a particular set of principles within the legislation is likely to undermine the ACCC's ability to adopt pricing approaches which will lead to efficient pricing outcomes.

AAPT considers that the principles the Commission proposes represent a theoretically correct set of objectives for access pricing generally and in telecommunications. The ACCC has generally applied these where appropriate. However, AAPT doubts that entrenching principles in legislation would be desirable, for the following reasons:

(a) the economic ideas which influence pricing principles are subject to change;

(b) ACCC has conducted extensive work on the appropriate principles through several public inquiries; and

(c) it is unlikely that the legislative principles could be sufficiently precise to lead to the benefits the Commission claims – in particular, they are unlikely to assist parties in negotiations.

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 supports the recommendation.

2.4 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

(b) it fails to acknowledge other forms of industry development such as the activities of competing carriers[5].

In addition, AAPT considers that the IDP is not a particularly necessary or useful tool. AAPT does not share the view of some industry participants that the IDP is an 'appropriate' barrier to entry. As the Commission points out there are other ways of obtaining industry information.[6]

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 agrees in principle with the recommendation but considers that there are several practical difficulties. As AAPT pointed out in its Initial Submission,[7] there are important social and environmental policy objectives which are sought to be obtained under the facilities access regime (such as environmental) which would not be addressed by the Commission's proposed declaration criteria.

[5] See p.39 of AAPT's Initial submission.

[6] See p.11.5 of the Productivity Commission's Report.

[7] At p.40 of AAPT's Initial submission.

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.

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 and to place provisions into 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 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. In addition, 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 to make the levy and payments both functions of the consolidated revenue**.**

3 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. (See also comments in response 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" and has been surprised that those, like CWO, who seem to seek access holidays haven't actually applied for them.

However, the provisions of s152AS ff 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 future need to excessive arbitration, and may lead to the revocation of a number of declarations.

AAPT can see no benefit however in relying on generic prices surveillance mechanisms in this regard. The current arrangement will allow the Commission to utilise both its declaration powers and enforcement powers effectively.

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. Presumably part of the reason for change is a concern that some services have been declared that wouldn't 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 similar to the manner of the transitional arrangements on deeming in the 1997 introduction.

This would be an inefficient use of the limited ACCC resource at this 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 SAOs of any current or future declaration is appropriate, but would need to allow for ACCC mediation.

The undertaking under 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 on foot. Also 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 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 fundamentally vary from the use of price monitoring. The currently favoured theoretical approach is global price capping to ensure the price movements are driven down by productivity improvement.

Certainly the Division 12 Report 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.

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 believes that the matters of detail in relation to specific disputes are matters more 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 thing that anyone can guarantee is that all prices are "wrong". No price is ever at the price that theory says it should be because there is always a distortion to the assumptions – most notably that not all allocation preferences are known in markets before preferences are expressed.

Given that regulation of access prices deals with bottlenecks, the question really is what is the error cost? The error cost of too high a price will be inefficient investment – that never goes away. The error cost of too low is under-investment that in telcos simply results in marginal GOS deterioration that can be rectified by further investment.

Building in risk premiums results in over-investment – the worst outcome.

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) secretiveness on 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 significant 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. After all, the history of numbering includes the fact that it was an outbreak of measles that resulted in subscribers first being identified by number rather than name, and the fact that there has already occurred a degree of separation between signalling and call carriage.

Were the telecommunications industry to be a brand new industry, that was to have a number of reasonably equally sized participants, would those participants chose a common numbering scheme and would they chose 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. If customer numbers don't 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 themselves) 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[8].

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 referring to those.

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

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

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.

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

A1 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.[9]

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.[10] 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.[11] 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".[12] 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 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.

[9] Section 152AB

[10] Section 152AL

[11] Section 152CM

[12] Section 152DB

A2 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[13] 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.

A3 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.

[13] See Appendix for full quotations of sections of 152BBA and 152CT.

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 has 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.

A4 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.

A4.1 AAPT Ltd (AAPT)[14]

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 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:

(a) *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.

(b) *Joint public arbitrations*

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

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

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.

(c) *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:

- it creates an incentive for information to be disclosed; and
- it places the onus on the party which is able to obtain the relevant information at least cost.

(d) *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. 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).

(e) *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.

(f) *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.[15]

A4.2 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.[16]

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.

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[15] 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

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

ACCC is too ready to declare services even if there is no market failure ie. market is competitive.[17] Part XIC should be amended to resemble Part IIIA criteria for declaration and arbitration (ie. national significance, natural monopoly etc).

A4.3 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.[18] 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.[19]

A4.4 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.[20]

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 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.[21]

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.[22]

ACCC has frequently used its procedural directions powers.

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

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[17] Ibid., p. 39

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

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

[20] ACCC, Initial Submission, p. 87

[21] Ibid., pp. 86-88

[22] Ibid., pp. 52-54

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.

A4.5 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.[23]

A4.6 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.[24] Carriers would be free to negotiate prices below this rate. The ACCC should be allowed to use information obtained for one purpose 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.

A4.7 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.

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

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

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. [25]

A5 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 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 this access seeker on the basis that the adviser is inappropriate or may have a conflict of interest.

A6 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.

(e) *Penalties*

There are potential penalties which apply to persons who fail to comply with procedural directions. In cases of serious, prolonged or deliberate non-

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

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.

(f) *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.

(g) *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.

Appendix

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?***