Telecommunications Inquiry
Productivity Commission
PO Box 80
Belconnen ACT 2616

31 July 2000

Review of Telecommunications
Specific Competition Regulation

Attached is the initial submission from ATUG to the Productivity Commission.

This submission is structured to address those issues which ATUG considers to be of the highest priority when considering how the telecommunications regulatory environment can be further developed to take account of changing industry circumstances, an increasing number of participants, convergence and new technological capabilities.

The submission addresses some of the many issues and questions raised in the Commission's discussion paper.

It is, however, our intention to prepare a supplementary submission which addresses directly the questions and issues raised in the Commission's Issue paper in the structure of that paper.

Yours sincerely,

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Review of Telecommunications Specific Competition Regulations

A Submission to the Productivity Commission
by the Australian Telecommunications Users Group

A Perspective of Current Circumstances

(necessary to consider legislative developmental options)

ATUG holds the view that the concepts established by the current legislation are generally reasonable.

The competitive market place is maturing, even though at a slower rate than expected and with far too many disputes; however, the fine-tuning or enhancements undertaken since the legislation was introduced in July 1997 have helped improve market place outcomes.

The legislation was developed in an environment of two fixed network Carriers and three mobile Carriers, along with a range of Service Providers.

Telstra was dominant and was the major supplier of fixed network services.

Today, many more players operate in the market place, creating new markets as well as taking customers from other suppliers. The instances of alleged problems with gaining access to networks - for interconnection or to deliver content – and the potential for instances of anti-competitive conduct to take place do not appear to have declined, even though industry interworking has taken place for three years.

The regulatory framework, established by the legislation, of a combination of industry self-regulation complemented by light-handed, safety net or interventionist regulation by the Australian Competition and Consumer Commission, clearly has merit.

However, successful outcomes will only occur when the industry players recognise that relationships at the basic transport or networking interworking level must be undertaken in a competitively neutral working environment and with a commitment to pre-competitive cooperation.

Furthermore, full transparency of these basic level relationships must occur if reasonable and timely outcomes are to come about and the confidence level of industry participants is to rise to a reasonable and acceptable level.

Unfortunately, the open framework of the telecommunications legislation necessary to provide for the co-regulatory environment is also open to manipulation by those who seek to thwart progress or the prompt development of an effective competitive market place. The unique characteristics of the communications industry of ensuring total any to any connectivity between all end users on all networks and the interdependence of all players make the task of bringing about timely and reasonable outcomes somewhat difficult.

This level of difficulty shows no sign of abating as service convergence takes place in the industry. More and more players are entering the market place seeking access to carrier networks for direct interconnection or to deliver content services over the infrastructure of one or more carriers to their customers.

It is worth reflecting that when open competition commenced, in July of 1997, two fixed network carriers and three mobile carriers existed. A theoretical contact matrix of 5 x 5 existed; in practice the matrix was smaller, as the two fixed network carriers were also mobile carriers. A secondary matrix of perhaps 10 x 5 of service providers to carriers also existed.

Today, Australia has a potential carrier matrix of 45 x 45 for carriers. A secondary matrix of perhaps 45 to 1000 also exists between carriers and Service Providers/ Internet Service Providers.

In the circumstances, effort must be made to enhance the working arrangements of the industry to bring about reasonable outcomes in acceptable timeframes.

Underutilised Industry Processes

To assist in such a developmental process, it would be appropriate for the Commission to specifically investigate why two major processes, provided for in the current legislation, appear not to be popular or acceptable.

The voluntary use of the Access Undertaking path of establishing a terms and conditions product offering to the market place has fallen from favour – if it was ever in favour.

This process appears to have the potential of providing to a carrier the opportunity to bring a product, along with its terms and conditions, to market quickly, responding to the needs of access seekers.

The Interim Determination approach is understood to provide the ACCC with a fast track path to hand down a decision relating to an access claim or industry dispute without being subject to immediate appeal and related delay. It appears to have seldom been used.

Working Relationships

Within the industry itself time has been taken for the key people to learn how to relate to each other. The development of effective working relationships between carrier personnel and those of the regulators and between carrier personnel and industry personnel at industry fora, such as the Australian Communications Industry Forum, has taken time and even today is not fully mature. In addition, the concept of a Wholesale Business Unit within a carrier took a long time to develop. Moreover, the acceptance of such a concept by other parts of the same carrier was often a painful and long-winded process, and even today the concept is not necessarily accepted.

An overbearing commitment to minimising loss of market share by many parts of a carrier also contributed to a competitive position being adopted at industry fora where an atmosphere of pre-competitive neutrality is required for activities to have successful outcomes.

Within the Wholesale Business Units the development of skills to effectively negotiate prompt and reasonable commercial outcomes continues to require development, as instanced by the most recent dispute, reported in the Sydney Morning Herald on Saturday, 29 July 2000 (copy attached).

It would be appropriate for the Commission to consider ways in which industry interworking relationships can be made more effective.

Purpose of Legislative Arrangements

In simple terms, legislative arrangements are required to bring about reasonable industry and consumer focused outcomes when market place circumstances by themselves are considered unlikely to develop consistent with public policy objectives. In the telecommunications industry the current size imbalance between industry players - a few large players and many small players - suggests that the creation of a balanced or level playing field environment, enabling meaningful and fair negotiations to take place, is unlikely to develop without further regulatory support.

Industry Specific Arrangements

To date, major players have shown little inclination to take the wholesale customers into their confidence and demonstrate the basis if the costs of a particular product. Instead, and without meaningful consultation, products are announced with terms and conditions that are far from world's best practice and are considered to be well in excess of reasonable costs. Immediately an acrimonious atmosphere is created, negotiations fail and adversarial arbitration is sought. This approach is hardly conducive to the beneficial development of the industry.

The recent Telstra announcement in relation to the terms and conditions for their Unconditioned Local Loop product is a classic example.

Access seekers have no alternative but to accept the requirement to participate in such an undesirable environment because of the industry's unique customer requirement of any to any connectivity together with the related dependence each carrier therefore has upon all other carriers.

Alternate sources of supply for access may be possible on some occasions and for some inter-carrier activities, however, ultimately all carriers will need to interwork if the crucial customer objective of any to any connectivity is to be met.

As a consequence, ATUG considers a requirement exists to maintain an appropriate level of industry specific legislation generally and in particular within the Trade Practices Act for some period of time to address anti-competitive conduct and access issues.

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As with the current parts of the Trade Practices Act addressing telecommunications issues, Parts XI B and XI C, ATUG would strongly support an enhancement of the Trade Practices Act flowing from the work of this Productivity Commission Review.

Desired Future Outcomes for the Telecommunications Industry

Tomorrow's telecommunications industry will comprise many more direct and indirect participants.

Industry interworking processes and the underpinning legislative framework will need to ensure that all participants, regardless of size, have a fair and reasonable opportunity to develop their businesses and service their customers. Furthermore, industry arrangements will need to be structured to promote the timely negotiation of commercial outcomes and, when difficulties arise, offer access to conciliation processes. The effect of such an approach will be largely to obviate the need to resort to the adversarial processes of arbitration and litigation.

A relative benefit, if an effective consultative framework and environment can be established which promotes the harmonious development of products and services together with their commercial terms and conditions, will be the removal of a substantial level of angst from the industry. The policy outcome which will flow from enabling and promoting timely negotiated outcomes will be the more rapid development of the industry, enhanced opportunities for new providers and, of most importance, the prompt delivery of real benefits to end users.

Overall, such positive changes would contribute to national efficiency and economic growth.

Specific Legislative Suggestions

1. Conciliation

   Legislative enhancement should place a requirement on carriers to use and demonstrate the use of best efforts to negotiate product and service specifications together with commercial terms and conditions.

   Should such a process not be successful, negotiating carriers must be subject to a specific requirement to participate in a conciliation process using a professional conciliator. Conciliation should be a mandatory step before any party is able to seek ACCC arbitration.

For each step of the working relationship, timeframes should be established which on the one hand provide a reasonable period to and encourage development of a mutually satisfactory outcome, but on the other hand enable a party - after a reasonable period - to raise the issue to the next level of resolution-making.

For both conciliation and arbitration processes, timeframes with some flexibility need to be established to ensure a particular party cannot frustrate the processes or the intent of the processes.

2. Transparency

Full and open transparency of outcomes for declared services should be required by the legislation to ensure the industry as a whole has an understanding of the outcome of a particular carrier to carrier interaction.

Such an approach would bring into the public domain the result of such an interaction, immediately establishing a base from which others can very quickly negotiate a similar outcome rather than being forced to commence a long-winded and repetitive negotiating process.

Openness and transparency would also help build industry confidence and satisfaction levels and the frustrating world of the unknown would be eliminated.

3. Interim Decision

The processes by which the Interim provision is available for use should be enhanced to motivate and give confidence for its use by the ACCC.

This arrangement appears to have the capability of quickly examining an issue and proposing a solution which has immediate effect. Its use would remove much uncertainty from the time taken for arbitration processes and allow industry activities to proceed, even if subject to future examination.

An added advantage of such a process is that practical and real market place experience is gained, a stark contrast to the often blind and theoretical assertions offered in the environments of negotiation, conciliation and arbitration.

4. Anti-Competitive Conduct

For reported incidents of alleged anti-competitive conduct the ACCC needs powers which again allow it to quickly investigate a circumstance and promptly hand down an interim decision, a decision which should focus on requiring identified instances of anti-competitive conduct to cease immediately.

While the existing Competition Notice procedure has merit, experience has shown it to be very slow and very much dependent upon those involved in supporting the complainants' case to have detailed records of circumstances surrounding the matter in a form which could constitute court evidence.

More often than not, incident records are not kept to the level of preciseness required for court evidence and, as a consequence, extensive delays occur throughout the investigation of the case and the preparation of material suitable for submission to a court.

While these processes may be ultimately necessary in a particular circumstance, the primary objective of investigating instances of alleged anti-competitive conduct is to have the practice cease and normal competitive business practices resume.

Payments of penalties are considered to be a deterrent to anti-competitive conduct and not an end in themselves.

Enhancements to the Trade Practices Act to allow and motivate the rapid investigation of a circumstance or practice and its prompt discontinuance, if found to be anti-competitive, are considered necessary.

The Australian concept of including examination of both intent and effect in reviewing an issue of alleged anti-competitive conduct is considered essential, if industry growth and sensible competition are to develop.

THE SYDNEY MORNING HERALD
Sat 29 July 2000 Page

AAPT, Telstra clash over ULL pricing

By KEVIN MORRISON

Third-ranked fixed line telephone carrier AAPT has disputed Telstra's wholesale prices for unconditioned local loop service (ULL), which allows Telstra's competitors to access its copper telephone lines that connect customers to the local exchange.

This is the first clash over the ULL service that has gone to industry regulator the Australian Competition and Consumer Commission, which will now begin arbitration proceedings.

Telstra plans to launch its ULL services by the end of August, and this is expected to trigger increased competition for Telstra, particularly in the business market where AAPT and Cable & Wireless Optus want to offer customers high-speed Internet access using DSL (Digital Subscriber Line) technologies.

DSL technologies in effect turn Telstra's aging copper telephone lines into broadband connections, with the ability to offer voice and Internet services over the same line simultaneously. It is also understood Optus and its subsidiary, XYZed, are in dispute with Telstra on ULL pricing.

Telstra unveiled its ULL wholesale pricing earlier this month, charging $38-a-month per

The ACCC has raised concerns about Telstra's proposed wholesale ULL charges. ACCC commissioner Mr Michael Cosgrove said the commission was looking into Telstra's ULL pricing and would make a ruling on the issue in the next few weeks.

AAPT director of regulatory affairs Mr Brian Perkins said Telstra's pricing made it difficult for other carriers to make a viable business case in the residential market. Telstra had not used the pricing methodology the ACCC had outlined, he said.

Telstra spokeswoman Ms Liz Jurman said AAPT's access dispute was not surprising. "They [AAPT] have an access dispute over each declared service, so it's no surprise to see that they have done something here too."

Mr Perkins also said that the launch of the ULL at the end of August would make it difficult for other carriers to access Telstra's telephone exchanges as there would be a blackout during September and October on all new telecom infrastructure being built into telephone exchanges because of the Olympics.

Ms Jurman said there would only be 17 exchanges affected during the Olympic and Para-Olympic period, so that services in the Olympic area would not be