Macquarie Corporate Telecommunications
Addendum to the Supplementary Submission – November 2000

Macquarie Corporate Telecommunications (MCT) believes it would be of benefit to the Commission to provide additional proposals on certain issues raised in MCT's supplementary submission and also to comment on certain issues raised in the ACCC's submissions to the Commission and the findings of the recent Besley Inquiry.

Additional proposals to MCT's Supplementary Submission

Ability to refer to material from other arbitrations

In its supplementary submission under the heading "Improved Arbitration & Complaint Process," MCT propose a series of procedural and resourcing reforms which would greatly enhance the ACCC's arbitration process. An additional measure that would reduce the length and increase the effectiveness of the arbitration would be the ability for the ACCC to allow the arbitrator to refer to relevant material submitted in other arbitrations, current or past.

At present the ACCC must establish that the material is relevant and that its disclosure to the parties will not prejudice a party's commercial position, regardless of the requirement for the parties to enter into a specific confidentiality agreement and conditions. The ACCC is required to seek and consider submissions from all relevant parties prior to referring to the material. In an arbitration to which MCT was a party, this process delayed proceedings for six weeks and occupied considerable resources of both the ACCC and the parties. Ultimately the ACCC ruled that the material could be refereed to.

If this restriction were removed the ACCC would have a pool of relevant material to rely on in arbitrations which should reduce the length of the arbitration, produce a more informed result and provide a degree of consistency. Given that parties are bound by confidentiality obligations, disclosure of material should not prejudice parties. Regardless, the courts constantly hear commercial disputes in public with no restrictions on the disclosure of material. It is difficult to understand why information within the telecommunications sector is more sensitive than information in other sectors.

In the event that MCT's proposal for open arbitrations was adopted, this would no longer be an issue.

Open arbitrations and access to information

A common criticism of the current regime is the lack of information available on the cost of providing services and the prices of wholesale services. This results in an information

asymmetry in favour of Telstra which stymies commercial negotiation and leads to multiple arbitrations on wholesale pricing.

The lack of information on the cost of providing services can, in part, be addressed by imposing reporting obligations on access providers. This may be addressed by the recent Record Keeping initiatives by both the ACA and the ACCC. Costing information is imperative for pricing principles to be of use and allow parties to determine the appropriate pricing of services.

In the majority of deregulated telecommunication in developed countries, wholesale services are publicly priced on a non-discriminatory basis. There is no public pricing of wholesale services in Australia and this has, to a large degree, resulted in the commencement of thirty-four arbitrations in respect of access to wholesale service since 1997. This could be addressed by implementing one or both of the following: undertakings imposed by the ACCC and/or open arbitrations.

In its supplementary submission to the Commission, MCT suggested that public pricing could be provided by adding a provision to Part XIC empowering the ACCC to impose an access undertaking on a major supplier of declared services and to enforce pricing under that undertaking in order to ensure that the application is non-discriminatory. The provision would co-exist with the current mechanism where access providers voluntarily submit an undertaking and would provide an incentive for providers to be both proactive and reasonable in submitting undertakings.

The alternative or complementary process is to make ACCC arbitrations open, which would establish a precedent regime providing de facto posted pricing. The co-existence of the mandatory undertaking process would address bottleneck services where arbitrations were not being pursued.

The benefits of introducing these processes in conjunction with effective record keeping rules are:

- Reduce the number of arbitrations, which should reduce the call on ACCC resources. Open arbitrations would give clear guidance on the price and terms and conditions upon which the ACCC considers services should be provided thereby reducing the need to obtain an arbitrated ruling. Providing for multiple party arbitrations would further reduce the number of arbitrations and may reduce the cost of pursuing an arbitrated outcome.

- A reduction in the length of arbitration proceedings. Reducing the number of arbitrations should free up resources and reduce the delay currently experienced in the arbitration process. Open arbitrations would also facilitate more focused arbitrations, which could deal exclusively with issues upon which there is no precedent. In addition, arbitrations could freely refer to information relied upon in previous arbitrations which should expedite the process.

- Reduce the administrative costs of the Part XIC regime.

- Increase the accountability of the Commission by operating in an environment of open information and public decision making.

The potentially negative aspect of a regime based on open arbitrations is the loss of confidentiality of the issues under dispute. However the real benefit of such confidentiality must be questioned when the courts are constantly deliberating on issues of commercial significance in an open forum. In the event that an access dispute was pursued under Part III of the Trade Practices Act it would be openly adjudicated before the Federal Court. It is difficult to identify the factors that distinguish the telecommunications sector from other sectors to a degree that such confidentiality is required.

Regardless, if confidentiality is critical, parties are always at liberty to avoid arbitration and enter an agreement, which can remain confidential.

ACCC power under Part XIB to direct to cease or desist anti competitive conduct

In it's supplementary submission, MCT proposed that the Part XIB competition notice process be made more expedient and effective by removing several evidentiary ambiguities. It is important that the ACCC is able to issue competition notices expediently as anti competitive conduct distorts the market whilst continuing to benefit the perpetrator. If the conduct persists it can potentially deter or remove entrants from the market on a permanent basis.

By its nature however, the Part XIB process is protracted. A competition notice does not provide a remedy but merely acts as evidence of anti competitive conduct that can be relied upon in any court proceedings that may ensue. If proceedings are not commenced there is no impact on the perpetrator. Alternatively, if proceedings are commenced there is considerable delay until court proceedings conclude during which time the conduct may continue and detrimentally impact participants, or potential participants, in the market.

A more effective process would provide the ACCC with power to issue a competition notice, which also required the party to cease or desist from the conduct in question until such time as the notice is withdrawn. This would provide immediate relief to parties impacted by the conduct whilst leaving open the potential for parties to seek relief through the courts in reliance on the competition notice. The additional benefit of such an immediate power is its deterrence value in respect of anti competitive conduct.

In the past constitutional objections have been raised to granting such powers to non judicial bodies however there may be value in reconsidering the potential for such powers in light of the inherent benefits it would bring.

Comments in response to the ACCC's Supplementry Submission

In general terms MCT agrees with and supports the observations and recommendations made by the ACCC in its submissions to the Commission. There are however several issues raised in the Commission's supplementry submission that MCT wish to specifically comment on.

Continued market power

MCT agrees with the ACCC's observations, analysis and conclusion that there is a need in the medium term for telecommunications specific regulation as a result of the continued market power held by Telstra in most markets. In addition, the regime is only three years old and is yet to have a full impact on the market. Many key elements of the regime, including pricing principles that will set negotiation parameters and are a corner stone of the negotiate/arbitrate regime, are still under development.

Regulation in other jurisdictions

MCT concurs with the ACCC's observation that telecommunication specific regulation is not unique to Australia and is common to most developed economies with deregulated telecommunications markets. The ACCC makes the further observation that most major markets have regulatory regimes which can be considered more onerous than the Australian regime with more power residing in the regulator. More onerous regimes apply in the more mature markets of the United States, Canada and the United Kingdom. Indeed the United Kingdom is currently expanding the regulator's power, which is also the proposed in New Zealand where the current regime is likely to be replaced with a more rigid regime overseen by a dedicated telecommunication regulator.

It is difficult to distinguish these markets from Australia's telecommunication market other than the fact that there is arguably more competition in these more mature overseas markets.

Interim determinations

MCT fully concurs with the Commission in endorsing the introduction of the interim determination provisions. Interim determinations should, theoretically, provide more immediate redress to aggrieved parties and thereby reduce the impact of the disputed conduct on the party's market share. In addition, the consequent redress of the determination is passed on to the market and, ultimately, end users more promptly.

The interim determination process has been criticised for not having an appeal mechanism. MCT agrees with the Commission that an appeal process would, potentially, obviscate the key legislative objective of the interim determination process through appeals delaying the implementation of a determination. In addition, interim determinations by their very nature are temporary and subject to variation by a final

determination in the arbitration. This in effect provides an appeal process whilst allowing the determination to apply during the "interim" period.

Dynamic sector

MCT supports the Commission's view that the fast pace of technical developments and the dynamic nature of the sector do not eliminate the need for competition regulation. To the contrary, technical and convergence developments may well create new sources of market power which need to be monitored and potentially regulated. In addition, in the medium term many technical developments will continue to rely on Telstra's network in part and accordingly access regulation will remain critical.

Undertaking process

It its initial submission, the ACCC proposed the introduction of amendments to the undertaking process which would allow the Commission to request undertakings where bottlenecks were arising within declared services. Where the initial undertaking was unsatisfactory, the Commission could amend the undertaking which would then become binding upon the service provider. This would provide a process similar to the national gas and electricity regimes however, in contrast it would only be exercised in limited circumstances where significant bottlenecks were occurring.

At present the Commission cannot request undertakings and must rely on the key service providers voluntarily making undertakings. In the event that an undertaking is made and is rejected on the grounds of being unsatisfactory, the Commission has no ability to seek amendment or request another undertaking. MCT therefore supports the proposed mechanisms which would address the current impasse, which has resulted in multiple arbitrations, and retain an element of industry self regulation.

Comments in response to the Besley Inquiry Report

The findings of the Besley Inquiry are in many cases consistent with MCT's proposals to the Commission. In particular, MCT fully concurs with and supports the following findings:

- MCT supports the Inquiry's finding that the only way service levels in regional areas can be effectively raised is by placing increased competitive pressure on Telstra rather than attempting to regulate service levels.

- The Inquiry found that greater recognition was required of the different levels of competition that exists in regional and CBD areas. This difference should be reflected in the competition regulation with more onerous objectives and mechanisms applicable in regional markets where competition is less prevalent or non-existent.

- The Inquiry suggests that a dedicated regional member of the Australian Communications Authority Board be appointed. This is in line with, and would

compliment, MCT's proposal for a regional Commissioner to be appointed to the ACCC.